MAKING SCHOOL DISTRICTS FOLLOW THE RULES: THE ROLE OF COURTS IN REVIEWING SCHOOL CLOSING DECISIONS

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INTRODUCTION

The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life.
- Justice Stevens[1]

Mass school closings have impacted urban school districts across the nation—affecting major districts in Chicago, New York City, Philadelphia, Detroit, Milwaukee, Kansas City, and Washington, D.C.[2] In response to these expansive closings, various interest groups, including teachers, students, and parents, have filed lawsuits seeking injunctive relief, among other remedies, to prevent the closure of neighborhood schools, but the vast majority of these efforts have not been able to successfully prevent school districts from effectuating their restructuring or reorganizing plans.[3] In the spring of 2013, despite several lawsuits in opposition, Chicago Public Schools (CPS) was able to execute the largest school closing effort to date, shutting down forty-nine elementary schools across the city.[4]

This Comment will argue that courts should take an active role in reviewing the decisions of urban school districts to close neighborhood schools and in ensuring school district compliance with state statutory requirements related to school closings. Relatedly, this comment will refer primarily to Chicago and New York City school closings because both Illinois and New York have adopted specific statutory schemes to regulate school district restructuring.[5]

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[1] New Jersey v. T.L.O., 469 U.S. 325, 385–86 (1985) (Stevens, J., dissenting) (rejecting the Court's creation of a Fourth amendment exception for school searches and asserting that schools are not beyond the reach of the Constitution).

[2] *See* PHILADELPHIA RESEARCH INITIATIVE, THE PEW CHARITABLE TRUSTS, CLOSING PUBLIC SCHOOLS IN PHILADELPHIA: LESSONS FROM SIX URBAN DISTRICTS, 1 (2011) [hereinafter PEW, CLOSING PUBLIC SCHOOLS]; MARISA DE LA TORRE & JULIA GWYNNE, WHEN SCHOOLS CLOSE: EFFECTS ON DISPLACED STUDENTS IN CHICAGO PUBLIC SCHOOLS, CONSORTIUM ON CHI. SCH. RESEARCH 1, 1 (Oct. 2009) [hereinafter DE LA TORRE, WHEN SCHOOLS CLOSE]; Michelle Rhee, *What It Takes to Fix Our Schools: Lessons Learned in Washington, D.C.*, 6 HARV. L. & POL'Y REV. 39, 63–64 (2012) (discussing the implications of closing up to 23 schools in Washington, D.C. in 2007); Sharon Otterman, *Judge Blocks Closing of 19 New York City Schools,* N.Y. TIMES, March 26, 2010, at A1 (explaining the attempt of the City School District of New York to close 19 schools); Susan Saulny, *Board's Decision to Close 28 Kansas City Schools Follows Years of Inaction,* N.Y. TIMES, March 11, 2010, at A11 (detailing the implications of closing half of the schools within the Kansas City, Missouri School District in 2010); Rebecca Vevea, *Plan to Close or Restructure 21 Chicago Schools Draws Quick Reaction*, N.Y. TIMES, Dec. 4, 2011, at A37A (describing public reaction to the decision by the CEO of Chicago Public Schools (CPS) to take corrective action against 21 schools in 2011).

[3] *See e.g.*, McDaniel v. Bd. of Educ. of City of Chicago, 956 F. Supp. 2d 887, 891 (N.D. Ill. 2013) (finding that parents, who were suing based on the Americans with Disabilities Act (ADA) and Illinois Civil Rights Act (ICRA), were not entitled to injunctive relief); Swan v. Bd. of Educ. of City of Chicago, 956 F. Supp. 2d 913, 917 (dismissing the plaintiff parents' request for injunction based on ADA violations); Smith v. Henderson, 944 F. Supp. 2d 89, 93 (D.D.C. 2013) (denying plaintiffs' motion for a preliminary injunction based on constitutional, federal and state law violations).

[4] Noreen S. Ahmen-Ullah, John Chase & Bob Secter, *CPS Approves Largest School Closure in Chicago's History*, CHI. TRIB., May 23, 2013, http://articles.chicagotribune.com/2013-05-23/news/chi-chicago-school-closings-20130522_1_chicago-teachers-union-byrd-bennett-one-high-school-program.

[5] 105 ILL. COMP. STAT. 5/34-200 (2011); N.Y. EDUC. LAW § 2590-h(2-a) (McKinney 2007).

I. BACKGROUND

In the last ten years, seventy large or mid-sized city school districts have initiated reorganization or restructuring plans that involved a significant number of school closings,[6] and the two primary bases for closing schools have been (1) academic performance and (2) underutilization.[7]

A. Academic Performance

Enactment of the No Child Left Behind Act of 2001 (NCLB) dramatically changed the landscape of government and district regulation of academic performance within public schools.[8] Historically, federal legislation addressing education was based on incentivizing state and district compliance—instead of being structured around the imposition of sanctions.[9] However, the NCLB shifted away from this incentive-based tradition with its inclusion of "corrective actions"[10] or potential sanctions for schools that demonstrated consistent low academic performance.[11] School closings were included as a potential corrective action under NCLB, but this sanction is more directly effectuated through state law.[12] Pursuant to NCLB, each state was required to quantify the amount of academic progress that its students should make each year, which is also known as "adequate yearly progress" (AYP).[13] If a school did not make sufficient progress (or "make AYP"), a series of interventions would be triggered under NCLB and state law, and eventually, the school may be subjected to closing as a corrective action.[14]

As a practical matter, one of the primary arguments in support of school closings is that schools with low academic performance will be eliminated and students from those schools will be able to attend higher performing schools.[15] However, a 2009 study conducted by the Consortium on Chicago School Research (CCSR) at the University of Chicago found that the majority of CPS students who were transferred out of closing

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[6] PENNSYLVANIA CLEARINGHOUSE FOR EDUC. REFORM (PACER), ISSUE BRIEF: SCHOOL CLOSINGS POLICY, 1 (March 2013) http://www.researchforaction.org/wp-content/uploads/2013/03/RFA-PACER-School-Closing-Policy-Brief-March2013.pdf. (noting that these closures averaged eleven schools per closure and that this trend showed no sign of stopping).

[7] *See* DE LA TORRE, WHEN SCHOOLS CLOSE, *supra* note 2, at 1 (explaining how CPS has stressed that closings are necessary based on academic performance and also asserted that closings are needed to address under-enrollment); PACER, *supra* note 6, at 1–2 (describing how Pittsburgh Public Schools (PPS) considered both academic performance and under-enrollment when determining which schools to close).

[8] Benjamin Michael Superfine, *Using the Courts to Influence the Implementation of No Child Left Behind*, 28 CARDOZO L. REV. 779, 780 (2006) (asserting before NCLB the federal government had never required such specific and detailed actions from states, districts, and schools if schools were not performing at adequate academic levels).

[9] Sandy Kress, Stephanie Zechmann, & J. Matthew Schmitten, *When Performance Matters: The Past, Present, and Future of Consequential Accountability in Public Education,* 48 HARV. J. ON LEGIS. 185, 192–94 (2011) (describing the progression from pre-NCLB legislation, some of which included funding consequences for non-performing schools, to NCLB, which included the sanction of "corrective action" for low academic performance).

[10] NCLB defines "corrective action" as: "[A]ction consistent with State law, that—substantially and directly responds to—the consistent academic failure of a school . . . and is designed to increase substantially the likelihood that [students] . . . will meet or exceed the State proficient levels of achievement . . . ." 20 U.S.C. § 6316(b)(7)(A) (2002).

[11] 20 U.S.C. § 6316(b)(7)(A).

[12] *Id. See also* 105 ILL. COMP. STAT. 5/34-8.3(d) (providing that after a school has been on probation for over a year, without making adequate progress, the school may be subjected to a number of "school actions" including possible closure).

[13] 20 U.S.C. §6311(b)(2)(B).

[14] 20 U.S.C. § 6311(b). *See also* Damon T. Hewitt, *Reauthorize, Revise, & Remember: Refocusing the No Child Left Behind Act to Fulfill Brown's Promise*, 30 YALE L. & POL'Y REV. 169, 175 (2001).

[15] Gail L. Sunderman & Alexander Payne, *Does Closing Schools Cause Educational Harm? A Review of the Research*, MID-ATLANTIC EQUITY CTR. 1, 3 (2009) [hereinafter Sunderman, *Does Closing Schools Cause Educational Harm?*] http://www.eed.state.ak.us/stim/pdf/doesclosingschoolscauseeducational harm.pdf. However, the University of Chicago study also found that some of the receiving schools were eventually closed for academic reasons or underutilization. *Id.* at 16. Moreover, nearly 40% of displaced students enrolled in receiving schools that were on academic probation within CPS. *Id.*

schools were later reenrolled in schools that were also academically weak.[16] Additionally, this study found that school closings also impacted summer school enrollment and subsequent student mobility, which spawns additional academic challenges.[17] More specifically, research has demonstrated that student mobility is connected to lower student achievement, increased likelihood of student retention, and a significantly lower likelihood of high school graduation.[18]

B. Underutilization

School closures have also become a consistent remedy for changes in student population and other budgetary problems in some of our nation's largest school districts.[19] One clear example of closings in response to changes in student population occurred in the early to mid-2000s and in the wake of the Chicago Housing Authority's (CHA) efforts to transform public housing into privatized mixed-income developments.[20] The CHA's transformation efforts involved large-scale demolition of public housing, and the majority of schools closed for under-enrollment during this time period were previously located near, and serving student populations from, public housing buildings.[21]

Overall, the main argument behind closing schools based on underutilization is that schools with under-enrollment are more expensive to run as compared to other schools with higher enrollment.[22] While proponents of closures have highlighted the economic benefits of closing decisions, reports have shown the amount of money saved as the result of closing schools, at least in the short run, has been relatively low compared to the large budgets of big-city school districts.[23] Additionally, selling or leasing former school buildings tends to be challenging since many of these buildings are located in declining neighborhoods.[24] Finally, if left unoccupied for a prolonged period of time, these buildings can become venues for vandalism and other illicit activity within the community.[25]

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[16] DE LA TORRE, WHEN SCHOOLS CLOSE, *supra* note 2, at 1. A similar study was completed in 2012 focusing on New York City public schools and examining the impact of school closures on displaced students. ANNENBERG INSTIT. FOR SCH. REFORM, THE WAY FORWARD: FROM SANCTIONS TO SUPPORTS, BROWN UNIVERSITY 1, 1–3 (April 2012) [hereinafter, ANNENBERG INSTIT., THE WAY FORWARD]. This study also found that school closings affected schools with high percentages of students eligible for free and reduced lunch, high percentages of disabled students, and high percentages of English language learners. *Id.* at 4. One of the primary arguments for school closure based on poor academic performance is that students will attend higher performing schools than their current placement.

[17] DE LA TORRE, WHEN SCHOOLS CLOSE, *supra* note 2, at 16. *See also* MARISA DE LA TORRE & JULIA GWYNNE, CHANGING SCHOOLS: A LOOK AT STUDENT MOBILITY TRENDS IN CHICAGO PUBLIC SCHOOLS SINCE 1995, CONSORTIUM ON CHI. SCH. RESEARCH 1 (Jan. 2009); Laurene M. Heybach, *In the Courts: Homeless Families Respond to Chicago's "Renaissance 2010" School Plan*, 24 CHILD. LEGAL RTS. J. 81, 82 (2004) (noting that academically recovering from a school transfer may take between four to six months and that mobile students are twice as likely to be retained).

[18] DE LA TORRE, WHEN SCHOOLS CLOSE, *supra* note 2, at 5.

[19] PACER, *supra* note 6, at 1.

[20] DE LA TORRE, WHEN SCHOOLS CLOSE, *supra* note 2, at 11.

[21] *Id*. *See also* PEW, CLOSING PUBLIC SCHOOLS, *supra* note 2, at 12 (referencing a 2004 decision by CPS to close twelve schools—the majority of which had previously served public housing projects); Heybach, *supra* note 17, at 84 ("Rather than coordinate with the CHA to *minimize* disruption for [soon-to-be displaced] children . . . CPS is failing to work to avoid displacement and instead, in concert with the CHA, is simply closing existing schools of origin and, as a result, *maximizing* the educational disruption of these poor and at-risk children.").

[22] DE LA TORRE, WHEN SCHOOLS CLOSE, *supra* note 2, at 5.

[23] PEW, CLOSING PUBLIC SCHOOLS, *supra* note 2, at 1. Additionally, the largest savings associated with the school closing process occurred when closings were combined with large-scale layoffs. *Id.*

[24] *Id.*

[25] *Id. See also* Joe Robertson, *KC Public Schools' Truant Roundup has New Teeth,* KANSAS CITY STAR (Oct. 27, 2012, 1:47 A.M.) http://www.kansascity.com/2012 /10/27/3887574/kc-public-schools-truant-roundup.html (describing how a vacant

The formulas that have been used to determine underutilization have also been criticized for both their substantive components and their application.[26] During the CPS school closings in 2013, there was a lawsuit filed to halt the proposed closing of Lyman Trumbull Elementary School, and this lawsuit specifically challenged the formula used to identify schools as underutilized.[27] For the 2012–13 school year, CPS school utilization was based on a formula that rigidly required calculating the number of students and classrooms based on the assumption that approximately 76% of each elementary school's classrooms served general education students.[28] This formula was especially problematic for Trumbull because it had a significantly higher than average number of special education students—and consequently, had a higher than average number of special education classrooms, which are required by federal law to have smaller class sizes.[29] While the presiding federal judge ultimately denied the plaintiffs' request for an injunction, he did note that a utilization formula, which did not allow adjustments for schools with high percentages of students with special needs, "probably" violated the Americans with Disabilities Act.[30]

II. DISCUSSION

This section will present an overview of recent litigation challenging the decisions of Chicago Public Schools (CPS) and the New York Department of Education (DOE) to instigate mass school closings within their respective districts. Again, these are not the only major urban districts that have been formally challenged through litigation regarding the decision to close down large numbers of neighborhood schools.[31] However, Illinois and New York are unique in the fact that both states have passed legislation that provides specific procedures for effectuating district reorganizing or restructuring, and the following discussion will describe how courts have analyzed those statutes.[32]

A. Chicago Public Schools

The three cases presented in this section all challenged CPS school closing plans, first in 2011 and later in 2013. The cases incorporate different constellations of claims stemming from both federal and state law, but none of these lawsuits successfully delayed or prevented CPS's efforts to close the schools it selected. All of these lawsuits were filed after the Illinois School Code was amended through Senate Bill 630 (SB 630)

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middle school is now covered in graffiti and has become a "hot spot" or a "playground of sorts" for truant kids in the neighborhood).

[26] Adeshina Emmanuel, *Judge Backs CPS on Trumbull Closure, But Questions Special Ed Policy*, DNAINFO CHI. (Aug. 14, 2013), http://www.dnainfo.com/chicago/20130814/andersonville/judge-backs-cps-on-trumbull-closure-but-questions-special-ed-policy [hereinafter Emmanuel, *Judge Backs CPS*]

[27] *Id.*

[28] *See Guidelines for School Actions 2012–2013 School Year*, CHI. PUBLIC SCH. 1, 4 (Nov. 29, 2011), http://www.cps.edu/About_CPS/Policies_and_guidelines/Documents/2012_2013SchoolActionsGuidelines.pdf; *Chicago Public Schools Space Utilization Standards*, CHI. PUBLIC SCH. 2 (Dec. 28, 2011), http://www.cps.edu/About_CPS/Policies_and_guidelines/Documents/Space UtilizationStandards.pdf.

[29] Adeshina Emmanuel, *Trumbull Supporters Hope Lawsuit Changes How CPS Handles Disabled Students*, DNAINFO CHI. (Aug. 13, 2013), http://www.dnainfo.com/chicago/20130813/andersonville/trumbull-supporters-hope-lawsuit-changes-how-cps-handles-disabled-students.

[30] Emmanual, *Judge Backs CPS*, *supra* note 26.

[31] *See* Smith v. Henderson, 944 F. Supp. 2d 89 (D.D.C. 2013) (denying the plaintiff parents' request for a preliminary injunction against the District of Columbia Public Schools' plan to close 20 schools in a two year period).

[32] 105 ILL. COMP. STAT. 5/34-200 (2011); N.Y. EDUC. LAW § 2590-h(2-a) (McKinney 2007).

to include specific procedural requirements for the "school action"[33] process, which includes school closings.[34]

The first requirement that SB 630 imposes is that CPS must publish "guidelines" that "outline" the academic and non-academic criteria that will be used to select schools for closure.[35] These guidelines, and any revision, must be subject to public comment before approval, and the CEO of CPS must announce all proposed school actions by December 1.[36] SB 630 also explicitly demands community input through public meetings, public hearings, and notice requirements.[37] Before finalizing any school action, the CEO must convene at least one public hearing (at the Board of Education central office) and convene at least two other public hearings or meetings (which can occur within the community) for each proposed action.[38] An independent hearing officer (IHO) must conduct all public hearings and issue a written report summarizing any hearing and stating whether CPS has complied with the requirements of SB 630 and has followed the previously announced guidelines.[39] If the IHO finds that the proposed school action is permissible under SB 630 and the guidelines, then it will be approved and effected during the following academic year.[40]

1. *Brown*

In the November of 2011, the CEO of CPS, Jean Claude Brizard, announced his recommendation to close, phase-out, or turnaround 17 schools at the end of the academic year.[41] In February 2012, before the Board of Education had voted on Brizard's proposal, a group of students, parents of students, and members of Local School Councils (LSCs) from ten of the schools selected for school actions filed suit to prevent the implementation of this plan.[42] Of the schools represented, three were selected for closure or phase-out, and seven were identified to undergo a turnaround.[43]

The plaintiffs asserted two main claims against the Board: (1) that the proposed school closings disproportionately affected African Americans[44] and (2) that the Board

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[33] Under SB 630, a "school action" my include "any school closing; school consolidation; co-location; boundary change that requires reassignment of students; . . . or phase-out." 105 ILL. COMP. STAT. 5/34-200.
[34] *See* 105 ILL. COMP. STAT. 5/34-200 et al. (2011).
[35] 105 ILL. COMP. STAT. 5/34-230(a).
[36] *Id.*
[37] 105 ILL. COMP. STAT. 5/34-230(e)-(f).
[38] 105 ILL. COMP. STAT. 5/34-230(e).
[39] 105 ILL. COMP. STAT. 5/34-230(e)-(f).
[40] 105 ILL. COMP. STAT. 5/34-230(f)(4)-(5).
[41] Brown v. Bd. of Educ. of the City of Chicago, No. 12 CH 4526, slip op. at 2–3 (Ill. App. Ct. Aug. 19, 2013), http://www.state.il.us/court/R23_Orders/AppellateCourt/2013/1stDistrict/1122288_R23.pdf; *See* Vevea, *supra* note 2, at A37A (describing the initial public response to Brizard's plan).
[42] Second Amended Complaint at 1–2, Brown v. Bd. of Educ. of the City of Chicago, No. 12 CH 4526, (Ill. Dist. Ct. May 25, 2012), http://www.21csf.org/csf-home/DocUploads/DataShop/DS_322.pdf; Lindsay Abbassian, *Councils file lawsuit to stop school closings, turnarounds,* CATALYST CHI. (Feb. 9, 2012), http://www.catalystchicago.org/notebook/2012/02/09/19842/councils-file-lawsuit-stop-school-closings-turnarounds.
[43] Second Amended Complaint at 1–2, *Brown*, No. 12 CH 4526. Operating a school as a contract turnaround is an available sanction for Illinois schools that have been on probation after a year and still have not made adequate progress in correcting identified deficiencies. 105 ILL. COMP. STAT. 5/34-8.3(d)(5.5). The typical turnaround process includes: replacing the school's leadership and staff, revising the curriculum, increasing security, and bringing in more social workers and counselors. MARISA DE LA TORRE, ET AL., TURNING AROUND LOW-PERFORMING SCHOOLS IN CHICAGO, CONSORTIUM ON CHI. SCH. RESEARCH 1–2 (Feb. 2013).
[44] Regarding the disproportionate effect on African Americans, the plaintiffs alleged that the Board has a pattern of targeting schools primarily attended by African Americans for school action "to take advantage of the disruption and mobility in African American neighborhoods from the destruction of public housing and gentrification." Second Amended Complaint at 10, *Brown*, No. 12 CH 4526. *See also* DE LA TORRE, WHEN SCHOOLS CLOSE, *supra* note 2, at 11 (explaining that most schools closed for low enrollment in the mid-2000s were schools located near public housing that was demolished). The plaintiffs also

violated provisions of the Illinois School Code.[45] The complaint asserted nuanced arguments based on racial discrimination, but this Comment will primarily focus on the claims arising from the school closing statute (SB 630). Regarding potential violations of SB 630, the plaintiffs argued that the Board violated multiple statutory requirements in the 2011 school action process,[46] and to remedy these violations, the plaintiffs requested a writ of *mandamus* directing the Board to comply with the statutory requirements of SB 630 and a writ of *certiorari* to review these decisions since they were defective administrative proceedings.[47]

The plaintiffs claimed that the Board violated SB 630 because: (1) the school action guidelines (Guidelines) generated by the Board did not provide clear criteria for how they decided to take a school action; (2) the Board failed to make the school action process transparent; and (3) the Guidelines did not significantly involve LSCs, parents, educators, and the community in the school action process.[48] The Board moved to dismiss the plaintiffs' complaint, and in May 2012, a judge in the Circuit Court of Cook County dismissed the plaintiffs' second amended complaint and denied the plaintiff's motion for injunctive relief.[49]

The presiding judge's memorandum opinion opened by acknowledging the "frustration" of the affected students, parents, LSCs, and neighborhoods regarding the "manifest failure" of the ten schools involved in this lawsuit.[50] The judge stated:

> Whatever action [CPS] might have taken would have likely stirred up a virtual hornet's nest of controversy . . . This court has neither the discretion to second-guess nor the authority to prevent the Board of Education from moving ahead . . . The power to make decisions on dysfunctional schools is squarely placed on the Board, with minimum interference permitted after these immensely consequential decisions are made. [51]

Ultimately, in refusing the plaintiffs' request for a writ of mandamus, the court concluded that the plaintiffs did not offer any facts showing that the Board's actions abused its "vast" discretion available under section 34-230.[52]

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argued that impacted African American students would be subjected to: attending schools that were academically the same or worse than the schools undergoing school action; suffering educational setbacks and decline in educational success; and facing increased violence. Second Amended Complaint at 10–12, *Brown*, No. 12 CH 4526.

[45] Second Amended Complaint at 1–2, *Brown*, No. 12 CH 4526. Based on those allegations, the plaintiffs requested a variety of relief including: a declaratory judgment that these school actions were *ultra vires* of the Board's authority; a writ of *mandamus* directing the Board to comply with the statutory requirements of the school code; a writ of *certiorari* to review these decisions as they were defective administrative proceedings; nominal damages under the Illinois Civil Rights Act, based on the disparate impact of school closings on African Americans.

[46] *Brown*, slip op. at 4. More specifically, the plaintiffs argued that CPS not only conducted probation in a way that violated the statutory requirements of 105 ILL. COMP. STAT. 5/34-8.3(c)-(d), but that the way CPS actually conducted probation aimed to disempower LSCs, the statutorily-preferred means of school governance—and the only means of democratic school governance. Plaintiff's SAC, *supra* note 45 ¶ 15.

[47] Second Amended Complaint at 27–28, *Brown*, No. 12 CH 4526.

[48] *Id.* at 12–15. *See also* 105 ILL. COMP. STAT. 5/34-18.3(5) (included as an amended portion of the School Code under SB 630 and stating that: "In order to minimize the negative impact of school facility decisions on the community, these decisions [school actions] should be implemented according to a clear system-wide criteria and with the significant involvement of local school councils, parents, educators, and the community in decision-making.").

[49] Brown v. Bd. of Educ. of the City of Chicago, No. 12 CH 4526, slip op. at 3 (Ill. App. Ct. Aug. 19, 2013), http://www.state.il.us/court/R23_Orders/AppellateCourt/2013/1stDistrict/1122288_R23.pdf.

[50] Brown v. Bd. of Educ. of the City of Chicago, No. 12 CH 4526, (Ill. Dist. Ct. May 25, 2012) (on file with author). *See also* DE LA TORRE, WHEN SCHOOLS CLOSE, *supra* note 2, at 11 (explaining that the affected communities have become more discontented with the closings of schools and have become increasingly unhappy with the limited community input incorporated into the process).

[51] *Brown*, slip op. at 1–2. *See also Tyska*, 453 N.E.2d at 1353 (holding that the decision to close a school is with the discretionary powers granted to the school board and that courts will not interfere with the board's decision unless it is arbitrary, unreasonable, or capricious).

[52] *Brown*, No. 12 CH 4526, slip op. at 13–14 (Ill. Dist. Ct. May 25, 2012).

The plaintiffs also sought a writ of *certiorari* to review the school action decisions for compliance with sections 34-230 and other school code provisions.[53] The Board argued that its decisions were quasi-legislative, and therefore, not reviewable by a writ of *certiorari*, and further, that the plaintiffs did not have standing to seek *certiorari* because they were not parties to the proceedings below.[54] Conversely, the plaintiffs argued that these school action decisions were quasi-judicial—emphasizing that the hearing process for each selected school under SB 630 required independent hearing officers and the application of School Code requirements to the individualized facts presented at the hearings.[55]

The court determined that the hearings required under SB 630 were not meant to adjudicate individual rights, but instead, were solely intended to illicit public comment.[56] Further, the court stated that under a writ of *certiorari*, it could invalidate only the Board's rules and regulations—not its decisions—where they were "clearly arbitrary, unreasonable, and capricious."[57] Since the plaintiffs' pleadings only sought review of the Board's actions (not its rules or guidelines), the plaintiffs' request that the court review Board's decisions, which were based on its rules and regulations, was denied.[58] Relatedly, the plaintiffs asked the court to permit its petitions for *certiorari* to continue as claims for declaratory relief, and this request was also denied.[59] Again, the court reasoned that the plaintiffs failed to plead any facts showing that the Board's actions below were arbitrary and capricious.[60]

Ultimately, the court concluded that the plaintiffs failed to allege facts sufficient to justify furthering proceedings, but the underlying theme of the opinion appeared to reflect the court's inability to review the Board's actions and decisions.[61]

2. *McDaniel & Swan*

There were multiple lawsuits filed following CPS's announcement to close a proposed fifty-three[62] elementary schools in 2013.[63] *Swan* and *McDaniel* were both filed in federal court (as opposed to *Brown*, which was filed in state court), and both sought

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[53] *Id. See also* Second Amended Complaint at 28–29, *Brown*, No. 12 CH 4526. (requesting a writ of *certiorari* to review and reverse the school action decisions).
[54] *Brown*, No. 12 CH 4526, slip op. at 15–18 (Ill. Dist. Ct. May 25, 2012).
[55] *Id.*
[56] *Id*. at 17.
[57] *Id*. at 18 (citing to *AFSCME, Council 31 v. Dep't of Cent. Mgmt. Servs.,* 681 N.E.2d 998 (Ill. App. Ct. 1997)).
[58] *Id.*
[59] *Id.*
[60] *Id.* One interesting piece of evidence that the plaintiffs did submit was a newspaper interview of CPS's Chief Operating Officer, Tim Cawley. *Id.* at 14. In December of 2011, the Chicago Tribune interviewed Cawley regarding the recent release of the district's budget. Second Amended Complaint at 14–15, *Brown*, No. 12 CH 4526; Noreen S. Ahmed, *CPS: Poorer-Performing Schools Less Likely to Get Funds*, CHI. TRIB. (Dec. 15, 2011), http://articles.chicagotribune.com/2011-12-15/news/ct-met-cps-buildings-20111215_1_urban-school-leadership-cps-operating-officer-tim-cawley [hereinafter Ahmed, *Poorer-performing schools*]. During this interview, Cawley stated, "If we think there's a chance that a building is going to be closed in the next five to ten years, if we think it's unlikely it's going to continue to be a school, we're not going to invest in that building." This statement may not appear to be a dramatic admission; however, a published comment by CPS's highest ranking financial officer that budgeting decisions were made considering whether a school would be in operation in five to ten years strongly suggests that CPS's school action decisions were not being made using the annually-created guidelines—as required by SB 630. *See* 105 ILL. COMP. STAT. 5/34-230.
[61] *Brown*, No. 12 CH 4526, slip op. at 2 (Ill. Dist. Ct. May 25, 2012).
[62] This number was later reduced to forty-nine.
[63] McDaniel v. Bd. of Educ. of City of Chicago, 956 F. Supp. 2d 887, 891 (N.D. Ill. 2013); Swan v. Bd. of Educ. of City of Chicago, 956 F. Supp. 2d 913, 917; Chicago Teachers Union, Local 1 Amer. Fed. Of Teachers v. Bd. of Educ. of City of Chicago, 2013 WL 3337826 (N.D. Ill. 2013).

class certification and injunctive relief from the proposed closings.[64] In *McDaniel*, the plaintiffs based their claims on violations of the ADA and the Illinois Civil Rights Act (ICRA) and requested that the court enjoin the closure of all schools selected that year.[65] Similarly, the *Swan* plaintiffs also based their claims on violations of the ADA and requested that the court delay the closure of all schools selected by the Board.[66] In both cases, the court ultimately denied class certification and class-wide injunctive relief.[67]

The plaintiffs in *McDaniel* and *Swan* both attempted to satisfy the requirements for class certification by showing that all potential class members would be injured by the closures in three ways.[68] First, the plaintiffs claimed that the limited time between the approval of closures and the actual closures would result in improper revisions and implementation of individualized education programs (IEPs) for students with disabilities.[69] Second, the plaintiffs argued that the closings would cause students with disabilities to experience adverse academic and emotional outcomes.[70] Third, the plaintiffs asserted that students with disabilities would face more severe safety risks than their non-disabled peers.[71] Ultimately, the court found that the plaintiffs did not establish by a preponderance of the evidence that all potential class members would suffer these injuries with sufficient commonality—and class certification was denied.[72] Relatedly, injunctive relief (temporary and permanent) were also denied because the court found that the plaintiffs failed to show that the proposed injunctive relief would benefit the entire putative class.[73]

The *Swan* and *McDaniel* plaintiffs cast their claims in terms of federal law, but the facts presented could also have formed a valid basis for claims that the Board violated the Illinois school action statute.[74] More specifically, SB 630 requires that transition plans for closing schools specifically plan for services to support the "academic, social, and emotional needs of [all] students, supports for students with disabilities, . . . and support to address security and safety issues."[75] In both cases, the plaintiffs presented facts in support of the claims described above that could also demonstrate the Board failed to meet the requirements of SB 630.[76]

B. New York City

The following New York cases dealt with the proposed closure of the same group of schools selected based on their low academic performance.[77] New York had recently enacted a new education statute (Section 2590-h)[78] to directly address situations when the

[64] McDaniel v. Bd. of Educ. of City of Chicago, No. 13 C 3624, 2013 WL 4047989, at *1 (N.D. Ill. 2013); Swan v. Bd. of Educ. of City of Chicago, No. 13 C 3623, 2013 WL 4047734, at *1 (N.D. Ill. 2013).
[65] *McDaniel*, 2013 WL 4047989, at *1.
[66] *Swan*, 2013 WL 4047734, at *1.
[67] *McDaniel*, 2013 WL 4047989, at *1; *Swan*, 2013 WL 4047734, at *1.
[68] *McDaniel*, 2013 WL 4047989, at *6; *Swan*, 2013 WL 4047734, at *5.
[69] *McDaniel*, 2013 WL 4047989, at *6; *Swan*, 2013 WL 4047734, at *5.
[70] *McDaniel*, 2013 WL 4047989, at *6; *Swan*, 2013 WL 4047734, at *5.
[71] *McDaniel*, 2013 WL 4047989, at *6; *Swan*, 2013 WL 4047734, at *5.
[72] *McDaniel*, 2013 WL 4047989, at *13–14; *Swan*, 2013 WL 4047734, at *12.
[73] *McDaniel*, 2013 WL 4047989, at *13–14; *Swan*, 2013 WL 4047734, at *12.
[74] *See McDaniel*, 2013 WL 4047989, at *12; *Swan*, 2013 WL 4047734, at *11.
[75] 105 ILL. COMP. STAT. 5/34-225(c)(1).
[76] *See McDaniel*, 2013 WL 4047989, at *12–14; *Swan*, 2013 WL 4047734, at *11–12.
[77] *See generally* Michael Meidinger, *A Community Affair, Effectuating Meaningful Community Involvement in New York School Governance*, 31 B.D. THIRD WORLD L.J. 51 (2011) (describing the impact of *Mulgrew I* and *Mulgrew II*).
[78] N.Y. EDUC. LAW § 2590-h(2-a) (McKinney 2007).

chancellor proposed to close or significantly alter the utilization of school.[79] Section 2590-h required that the chancellor prepare an educational impact statement (EIS) for each impacted school.[80] The statute also required that EISs be made publicly available to the community at least six months before the first day of school in the next school year.[81] Lastly, the statute required that a joint public hearing with the affected community council and the school's management team be held between thirty to forty-five days after an EIS was filed.[82] The overriding purpose of this legislation was to increase meaningful community involvement in school governance.[83]

1. *Mulgrew I*

In December of 2009, the New York Department of Education (DOE) announced its plan to close or significantly change the use of twenty schools based on its determination that these schools were failing.[84] Subsequently, the president of the United Federation of Teachers, Michael Mulgrew, along with the NAACP and other impacted parties, filed suit against the DOE.[85] Initially, a New York trial court granted the plaintiffs' request for a temporary restraining order, halting the DOE's plan until the court made a determination regarding the plaintiffs' motion for a preliminary injunction.[86]

The plaintiffs identified three statutory violations in their complaint, including: (1) that the DOE did not provided hard copies of the EISs to parents or the affected schools, (2) that Community Education Councils (CECs) and School Leadership Teams (SLTs) were notified last minute and given scripts setting out their respective roles in the hearings, and (3) that the EISs did not contain all the information required by section 2590-h.[87] The DOE responded by arguing that the chancellor's decision to phase out or close schools was not a justiciable matter.[88]

At the time of this conflict, New York courts had not yet interpreted the new law pertaining to school closures or other district restructuring, and in *Mulgrew I*, the court's analysis began by comparing this new legislation to a New York environmental law, which also required agencies to submit an impact statement.[89] Case law considering the environmental statute recognized that supervisory court review of agency compliance was necessary because judicial review gave reasoned consideration to all relevant issues

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[79] Meidinger, *supra* note 77, at 51–53.
[80] N.Y. EDUC. LAW § 2590-h(2-a).
[81] *Id.*
[82] *Id.*
[83] Meidinger, *supra* note 77, at 54–56.
[84] *Id.* at 51. The New York DOE had closed nearly 140 schools since 2003, and critics of these decision argued that by identifying poor performance without providing a systemic approach to school improvement created a disruptive cycle of school closure in the district. ANNENBERG INSTIT., THE WAY FORWARD, *supra* note 16, at 3.
[85] Mulgrew v. Bd. of Educ. of City Sch. District of New York (*Mulgrew I*), 902 N.Y.S.2d 882, 884 (N.Y. Sup. Ct. 2010), *aff'd*, 906 N.Y.S.2d 9 (N.Y. App. Div. 2010).
[86] *Id.*
[87] *Id.* at 886.
[88] *Id.* at 887. Additionally, the DOE argued that the plaintiffs lacked standing to challenge the decision since some of the plaintiffs were elected officials. *Id.* at 886. Under New York law, in a case with multiple plaintiffs, if a court concludes that at least some of the plaintiffs have standing, it need not address standing to the other plaintiffs. *Id.* at 886 (citing *Saratoga Cnty. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 813 (N.Y. 2003), *cert. denied* 540 U.S. 1017 (2003)). In this case, the court concluded that two of the plaintiffs who were parents of students in the district and officials of their respective CECS along with two other plaintiffs who were teachers and officials of SLTs at schools that would be closed possessed the requisite interest to provide standing. *Id.* at 887.
[89] *Mulgrew I*, 902 N.Y.S.2d at 887.

involved and ensured that the agencies would comply with the prescribed procedures.[90] Subsequently, if an agency failed to comply with statutory requirements, and thereby frustrating the objectives of the statute, the appropriate remedy would be a court finding that the agency's action null and void.[91]

Employing this method of analysis, the court found that the EIS failed to provide any "meaningful information" related to the impact on the affected students or the ability of the receiving schools to provide comparable educational services to those affected students.[92] More specifically, the court noted that the EISs failed to include information about whether specific programs at schools scheduled for closure or phase-out would be available to affected students elsewhere.[93] The court was also found language explaining availability programs in a "boilerplate fashion" and without meaningful detail to be unpersuasive.[94] Regarding the DOE's compliance with statutory notice requirements, the court found that the DOE's failure to distribute hard copies of its plan to close and change the utilization of school—even though it posted its plan on the DOE's website—violated the express filing requirements of the statute.[95]

Lastly, as to the required public meetings, the court decided that the meetings held by the DOE could not be considered "joint" meetings within the meaning of the statute.[96] The court reasoned that in order for the members of the CECs and SLTs to be involved in a meaningful way that they must be a part of the process of structuring these meetings and "not merely be told when and where to be . . . and be given a script of what they are to say . . ."[97]

The court held that until the DOE reissued EISs for all 19 schools that complied with section 2590-h, the DOE would be permanently enjoined from preventing enrollment at any of the schools affected by their proposed plan.[98] In conclusion, the court stated:

> The court is well aware that requiring respondents to re-issue the EISs for the 19 schools before they complete the matching process for the students at those schools . . . will create inconvenience for respondents and hardships for students who are awaiting the results of the school matching process, but the court cannot overlook what it reluctantly concludes are significant violations of the Education Law by respondents.

The court narrowed its holding to only be construed as limiting the DOE's power to close failing schools when there has been a failure to comply with the requirements of the Education Law.[99]

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[90] *Id.* at 888.
[91] *Id.*
[92] *Id.*; Meidinger, *supra* note 77, at 52, 56–58 (discussing the *Mulgrew I*'s holding and the importance of meaningful EISs).
[93] *Mulgrew I*, 902 N.Y.S.2d at 888.
[94] *Id.* As an example, the court cited the EIS for the Choir Academy of Harlem which stated: "Approximately 200 high school seats will be eliminated by the grade reconfiguration of Choir Academy. However, those seats will be recovered with the phase-in of 05M436 and other new and existing schools throughout the City." *Id.* The EIS went on to state that: "[t]hroughout the course of the phase-out of Choir Academy's high school grades, there will continue to be a sufficient number of high school seats in Manhattan and *throughout the city* to serve students who would have attended Choir Academy. . ." *Id.* (emphasis added). However, within that particular EIS, there was no mention of any specialized programs at the Choir Academy or opportunities for current Choir Academy students to participate in these programs. *Id.*
[95] *Id.* at 889. The court also considered the context in which these statutory requirements were being applied as evidenced by its statement that, "Although some parents and members of CECs and SLTs may have computer and internet access, certainly not all do." *Id.*
[96] *Id.* at 889.
[97] *Id.*
[98] *Id.* at 890.
[99] *Mulgrew I*, 902 N.Y.S.2d at 890.

2. *Mulgrew II*

In 2011, the same plaintiffs from *Mulgrew I* returned to New York state court to again challenge the DOE's imminent plans to phase-out or close the same 19 schools at issue in the prior case.[100] After the decision from *Mulgrew I*, the parties executed a "Letter Agreement" on July 24, 2010, which aimed to resolve the interpretation and implementation of the court's decision for the 2010–2011 school year.[101] Generally, in the Letter Agreement, the DOE promised not to co-locate certain charter schools in specified school buildings, and an Education Plan was outlined for the 19 schools affected by the *Mulgrew I* decision.[102] In *Mulgrew II*, the plaintiffs asserted three claims—including, one for breach of contract in relation to the Letter Agreement and one for declaratory relief related to the school closures.[103] The plaintiffs requested that the court compel specific performance of the Letter Agreement and permanently enjoin the DOE from closing the schools at issue because (1) the DOE had not attempted in good faith to comply with the Letter Agreement and (2) the proposed co-location of the charter schools would be unfair to the public school students already enduring underfunded and under-resourced schools.[104]

The court's opinion began by acknowledging that the role of a court in this type case required review of the legal elements presented—not an assertion of the court's opinion regarding education policy.[105] Subsequently, the court found that it was not possible to determine whether the DOE had complied based on the facts presented, and consequently, that preliminary relief would not be justified at that time.[106]

However, the court did analyze whether injunctive relief barring the closure of the schools at issue was ever intended to be a remedy under the Letter Agreement and found based on the affidavits submitted that the Letter Agreement did not foreclose the DOE from *ever* seeking to close those schools.[107] Further, the court determined that the plaintiffs' breach of contract claim rested on their "fervent belief" that if the 19 schools at issue had received the support that that DOE promised then the schools would have improved to an achievement level that no longer merited closure or phase-out.[108] Since there was no clear and convincing evidence that these schools could improve to that degree, the court declined to make a decision based on speculation and instead, found that the plaintiffs had not demonstrated a likelihood of success on the merits based on their breach of contract theory.[109]

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[100] Mulgrew v. Bd. of Educ. of City Sch. Dist. of City of New York (*Mulgrew II*), 927 N.Y.S.2d 855, 857–58 (N.Y. Sup. Ct. 2011).
[101] *Id.* at 858.
[102] *Id.*
[103] *Id.* at 859.
[104] *Id.* at 859–60.
[105] *Id.* at 860. The court stated:

> It is important to note at the outset that it is not the role of the judiciary to pass in a general way on the wisdom, or lack thereof, of the educational policy decisions made by the other branches of government. Rather, if as here, a specific case presents a claim for breach of contract, the court must decide first whether there is a contract, second whether there was a breach, and finally, if so, what is the remedy for such breach. *Id.*

[106] *Mulgrew II*, 927 N.Y.S.2d at 862. *See also* Meidinger, *supra* note 77, at 64–65 (stating that New York courts commonly applied the substantial compliance standard in cases involving universities and other organizations—not the DOE).
[107] *Mulgrew II*, 927 N.Y.S.2d at 862.
[108] *Id.*
[109] *Id.*

Subsequently, the court determined that the claim requesting a preliminary injunction based on an alleged breach of the DOE Commissioner's Regulations was not ripe for adjudication since the matter had not yet been decided by the Commissioner.[110] The court also found that the revised EISs now included more specific information related to the affected schools and more clearly articulated the rationale behind the DOE's decisions.[111] The court determined that remaining disagreement over this issue did not relate to the sufficiency of the EIS plans, but instead concerned different beliefs regarding the expected outcomes of the proposed co-locations.[112] Similar to the first claim for a preliminary injunction, the outcome of the DOE's decision to co-locate was undetermined, and regardless of what either side predicted the outcome would be, the court found that a disagreement over the potential outcome and the plaintiffs' disapproval of the DOE's EISs was not enough to establish the plaintiffs' likelihood of success on the merits, again preventing the plaintiffs' from obtaining a preliminary injunction.[113]

III. ANALYSIS

Courts should take an active role in reviewing the decisions of urban school districts to close neighborhood schools to ensure that school districts comply with state statutory requirements for school closings. While judicial intervention in these cases may raise concerns regarding issues related to the separation of powers, the existence of a clear statutory scheme (in both Illinois and New York) creates a legitimate opportunity for courts to not only step in, but also to compel school district compliance.[114] Furthermore, in the context of today's complex education system—which has been subjected to more and more intensive regulation at both the state and federal level—courts are particularly well-suited for ensuring statutory compliance at the district level.[115] State educational agencies (SEAs) are clearly an authority on educational policy and practice, but this expertise should not receive absolute deference.[116] Moreover, the potential complexity of these determinations is not a valid reason to avoid judicial involvement, especially when there are extensive standards articulated by the legislature.[117]

Additionally, court intervention can allow for more thorough consideration of the underlying legislative purpose of the school closings statutes. In Illinois, the school closing statute was enacted in response to years of public outcry regarding the unfairness

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[110] *Mulgrew II,* 927 N.Y.S.2d at 863–64.

[111] *Id.* at 865. *See also Mulgrew I*, 902 N.Y.S.2d at 890 (stating that nothing in the court's opinion should be construed in a way that limits the DOE's overall power to close failing schools, but that in order to carry out that power, the DOE must comply with New York education law).

[112] *Mulgrew II,* 927 N.Y.S.2d at 865.

[113] *Id.* at 866.

[114] *See* William S. Koski, *Educational Opportunity & Accountability in an Era of Standards-Based School Reform*, 12 STAN. L. & POL'Y REV. 301, 307 (2001) (describing how legislatively mandated standards coupled with legal precedent provide and legitimate and valuable roel for courts in interpreting required standards, compelling compliance, and creating an appropriate educational remedy for educational wrongs based on those standards).

[115] *See* Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and The Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1540 ("Courts have a unique capacity for ensuring that effective accountability measures are put into effect, not by micro-managing the day-to-day operations of a school system, but by making sure that legislatures, state education departments, and school districts do their jobs well.").

[116] *See Brown*, No. 12 CH 4526, slip op. at 1–2 (Ill. App. Ct. Aug. 19, 2013) ("This court has neither the discretion to second-guess nor the authority to prevent that Board of Education from moving forward.").

[117] 105 ILL. COMP. STAT. 5/34-200 (2011); N.Y. EDUC. LAW § 2590-h(2-a) (McKinney 2007). *See also* Koski, *supra* note 114, at 307 ("No doubt the liability determination is a complicated process, but complexity alone should not be a reason to shy away from determining liability when there are relatively clear yardsticks.").

of the CPS school closing process.[118] The Illinois General Assembly recognized that school closures are a hardship not only for the school's students, but also for the impacted community.[119] Consequently, the Illinois statute incorporates provisions that aim to protect impacted students and communities and to involve community stakeholders in the process.[120] Similarly, the New York statute was enacted to significantly and meaningfully involve affected communities in the school closure process.[121]

Court intervention can also allow for further consider of the context in which the school closings will take place. In Chicago, the types of communities that have been repeatedly selected to undergo the school action process have typically been located on the south or west sides of the city and have consistently been home to Hispanic or African-American families.[122] Likewise, the closings within New York City have primarily impacted low-income and minority students.[123] Ultimately, the student populations that have been affected, year after year, in both Chicago and New York, are also populations that are especially susceptible to the negative effects of school closings, such as increased student mobility.[124]

The two considerations discussed above were not addressed by Illinois courts in deciding *Brown*.[125] In analyzing each claim based on the school closing statute, the trial court consistently referenced the power of the Board and the broad discretion allocated to the Board under SB 630.[126] This approach is problematic for a number of reasons, but two primary issues stand out. First, the *Brown* decision appears firmly planted in the idea that a school board's decision regarding closures and restructuring is beyond the reach of Illinois courts.[127] However, the enactment of SB 630, which provides clear legal standards for this *particular* board action, brings this type of decision directly into the purview of Illinois courts.[128] Ensuring compliance with the requirements, such as holding necessary meetings and disseminating appropriate transition plans, set out in SB 630 would not improperly interfere with the Board's power or amount to courts substituting their judgment for that of the Boards.[129] The amount of deference given the Board's decisions in 2011 likely influenced, at least in part, the plaintiffs in *Swan* and *McDaniel* to avoid litigating the 2012–13 school closings in Illinois state court.[130]

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[118] PEW, CLOSING PUBLIC SCHOOLS, *supra* note 2, at 12.

[119] *See* 105 ILL. COMP. STAT. 5/34-18.43(a)(5) ("School openings, school closings, . . . and other related school facility decisions often have a profound impact on education in a community. In order to minimize the negative impact of school facility decisions on the community, these decisions should be implemented according to a clear system-wide criteria and with the significant involvement of local school councils, parents, educators, and the community in decision-making.").

[120] 105 ILL. COMP. STAT. 5/34-200 et al.

[121] Meidinger, *supra* note 77, at 54–57.

[122] DE LA TORRE, WHEN SCHOOLS CLOSE, *supra* note 2, at 11. *See also* Second Amended Complaint at 9–10, Brown v. Bd. of Educ. of the City of Chicago, No. 12 CH 4526, (Ill. Dist. Ct. May 25, 2012), http://www.21csf.org/csfhome/DocUploads/Data Shop/DS_322.pdf (noting that there have been fifteen schools closed in the Bronzeville neighborhood (on Chicago's near south side) in the last fifteen years).

[123] ANNENBERG INSTIT., THE WAY FORWARD, *supra* note 16, at 4.

[124] DE LA TORRE, WHEN SCHOOLS CLOSE, *supra* note 2, at 11.

[125] *Brown*, No. 12 CH 4526, (Ill. App. Ct. Aug. 19, 2013), http://www.state.il.us/court/R23_Orders/AppellateCourt /2013/1stDistrict/1122288_R23.pdf; *Brown*, No. 12 CH 4526, (Ill. Dist. Ct. May 25, 2012) (on file with author).

[126] *Id.*

[127] *See Brown*, No. 12 CH 4526, slip op. at 10 (Ill. Dist. Ct. May 25, 2012) ("Where 'the legislature has empowered a school board to perform certain acts, courts will not interfere with the exercise of those powers, or substitute their discretion for that of the school board, unless the board's action is palpably arbitrary, unreasonable, or capricious.'").

[128] 105 ILL. COMP. STAT. 5/34-200; Koski, *supra* note 114, at 307; Rebell, *supra* note 115, at 1540.

[129] 105 ILL. COMP. STAT. 5/34-225 (enumerating the components of school transition plans); 5/34-230 (describing the meetings and public hearings that must be held before school actions are approved).

[130] *See supra* note 74–76 and accompanying text.

The other primary issue with the analysis in *Brown* is the court's reliance on case law that does not appropriately address the complexity of the Board's decision to close large amounts of neighborhood schools.[131] In denying the plaintiff's request for a writ of mandamus, the trial court cited to *Peters v. Board of Education*, a 1983 opinion analyzing whether a writ of mandamus should be issued in matters regarding class scheduling and teacher assignment.[132] Similarly, the Board's pleading consistently cited to *Tyska v. Board of Education Township High School District 214*, another 1983 opinion in which the Illinois Appellate Court found that the decision to close *one* high school was "an exercise of the discretionary powers granted to the Board to act as a policy-making body."[133] In *Tyska*, the court was reviewing a school board's decision to close one high school and whether criteria, which had been generated by community member committees (not required by statute), bound the school board.[134] Both *Peters* and *Tyska* not only involve factual settings that are very different from the mass school closings of at issue in *Brown, Swan,* and *McDaniel*, but both *Peters* and *Tyska* were also considered long before the enactment of NCLB and the Illinois school closing statute—which in turn, increased the level of district regulation and imposed specific requirements on districts for school closing decisions.[135]

The approach of the New York courts in *Mulgrew I* and *Mulgrew II* effectively demonstrates how judicial intervention in these cases can be meaningful, effective, and in some cases, limited. *Mulgrew I* illustrates how a court considering a school closing case can: substantively evaluate a school district's compliance with statutory requirements, apply the law in a way that respects its intended purpose, and acknowledge the needs and context of the affected students and community.[136] Conversely, the court's decision in *Mulgrew II* to withhold judgment regarding this claim was appropriate since the proposed closures and phase-outs had not yet been approved by the Commissioner.[137] This distinction between a proposed school closing or phase-out and an approved school closing or phase-out is vital for insuring that litigation does overburden a school district's make administrative decisions that comply with state law.[138] The ability of the DOE to close schools was not at issue in this case—instead, the dispute related to the DOE's ability to close schools when it had not complied with statutory requirements before implementing a closure.[139]

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[131] *See Brown*, No. 12 CH 4526, slip op. at 10 (Ill. Dist. Ct. May 25, 2012).

[132] *Id.* (quoting Peters v. Bd. of Educ., 454 N.E.2d 310, 312–13 (1983) for the proposition that courts cannot interfere with the power of a school board).

[133] Tyska by Tyska v. Bd. of Educ. Twp. High Sch. Dist. 214, 255 N.E.2d 1344, 1353 (Ill. App. Ct. 1983).

[134] *Tyska*, 255 N.E.2d at 1349–51. *See also* Clarke v. Cmty. Unit Sch. Dist. 303, 971 N.E.2d 1163, 1172 (Ill. App. Ct. 2012) (allowing plaintiffs to proceed with a writ of mandamus compelling the district to comply with statutory provisions of state law implementing NCLB requirements after the district reconfigured two public elementary schools). In distinguishing *Tyska*, the court stated, "It is important to note that *Tyska* predates NCLB by 20 years. Therefore, the issue raised in this case, whether the provisions granting school boards certain powers govern over the provisions mandating compliance with NCLB, was not raised in *Tyska*. Thus, *Tyska* is not controlling in this case." *Id.* Similarly, there were no state statutory provisions, like SB 630, impacting the court's determination in *Tyska*—the court was more directly considering the power of the school board to effectuate this decision, not on what could possibly limit this power.

[135] *See generally Tyska*, 255 N.E.2d 1344; *Peters*, 454 N.E.2d 310.

[136] *See generally Mulgrew I*, 902 N.Y.S.2d 882 (reasoning that the DOE had not complied with the requirements of the New York statute relating to the creation of EISs and to the notification of affected communities—which resulted in injunctive relief).

[137] *Mulgrew II,* 927 N.Y.S.2d at 863–64.

[138] *Id.*

[139] *See Mulgrew II,* 927 N.Y.S.2d at 863–64 ("Both sides agree that the issue of whether DOE can phase out or close the schools under the Commissioner's Regulations is a matter which must be brought before the Commissioner.").

Unlike the refusal of Illinois state courts to consider these decisions, New York courts have shown that judicial review of school closings decisions can been accomplished in an effective and appropriately limited way.[140] Overall, state courts should take an active role in reviewing school district compliance with statutory requirements for school closings to better effectuate the legislative intent behind these requirements and to better protect the affected students and communities.

IV. PROPOSAL

The state statutes examined in this Comment both provide a clear framework for judges to use in determining whether or not a school district has sufficiently complied with the imposed requirements for school closings.[141] There are two specific components of school district compliance with statutory requirements that courts should actively review—(1) the quality of community input and (2) the adequacy of transition plans. Not only are these requirements that statutes (both Illinois and New York) have specifically imposed, but these are also issues that courts could receive probative evidence of.[142]

A. Community Input

Both Illinois and New York school closing statutes reflect legislative intent that affected communities be actively involved in the school closing process and require that input be gathered through public hearings.[143] Transcripts from these hearings and the opinions of the hearing officers who presided over these hearings can be provide reviewing courts with significant insight into how an affected community has responded to a potential closure and into any unique needs or challenges that community has identified.

Under Illinois law, public hearings must be conducted by a qualified independent hearing officer (IHO).[144] After each hearing, the IHO must issue a written report that summarizes the hearing and states whether the district CEO complied with the requirements of SB 630 and the guidelines, and this report must be published at least fifteen days before a school board can take any action.[145] While the statute requires that at least one of the hearings be held downtown at CPS headquarters, the other two meetings or hearings should be held in locations that are accessible for community members.[146] In the past, hearing officers have been able to identify situations where a

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[140] *Id.*

[141] 105 ILL. COMP. STAT. 5/34-200 (2011); N.Y. EDUC. LAW § 2590-h(2-a) (McKinney 2007).

[142] 105 ILL. COMP. STAT. 5/34-200 (2011); N.Y. EDUC. LAW § 2590-h(2-a) (McKinney 2007).

[143] *See* 105 ILL. COMP. STAT. 5/34-18.43(b) (creating a task force to "ensure that school facility-related decisions are made with the input of the community and reflect educationally sound and fiscally responsible criteria");

[144] 105 ILL. COMP. STAT. 5/34-230(f). While this section also requires that the IHO not be an employee of the Board of Education and not have previously represented the Board, the idea of this being an impartial hearing seems to conflict with the practical implications of having one party unilaterally compile a list of permissible IHOs. *Id.*

[145] 105 ILL. COMP. STAT. 5/34-230(f)(4)-(5). The style, substances, and length of the reports submitted in 2012 varied from some opinions to quoted long portions of applicable statute and included relatively small amounts of analysis, to opinions that more substantively commented on the CEO's compliance with SB 630. *Compare* John E. Morrisey, *In re: Proposal to Close Florence B. Price Elementary School*, CHI. BD. OF EDUC. (2012) [hereinafter Morrisey, *In re Price*] http://www.cps.edu/About_CPS/Policies_and_guide lines/documents/TransitionPlan/Price_PublicHearing.pdf *with* David H. Coar, *In re: Proposal to Phase-Out Richard T. Crane Technical Preparatory High School*, CHI. BD. OF EDUC. (2012) [hereinafter Coar, *In re Crane*] http://www.cps.edu/About_CPS/Policies_and_guidelines/documents/TransitionPlan/Crane_Talent Dev_PublicHearing.pdf.

[146] *Tensions Rife at School Closing Hearings*, CATALYST (Jan. 21, 2012), http://www.catalyst-chicago.org/notebook/2012/01/21/19769/tensions-rife-school-closing-hearings (reporting that none of the required hearings held on January 20, 2012, were held at the affected schools and that at least four hearings were partially full with people who were bused in, indicating that they were not community members).

community may be able to remedy the challenges that CPS has identified, without closing a neighborhood school.[147] The thoughtful opinion of an IHO based on testimony and evidence presented at a public hearing can meaningfully inform a reviewing court's analysis of whether or not a school action was conducted in compliance with state law and sufficiently incorporated community input.

Similarly, under New York law, a hearing is intended to give a community a "real, official voice" and provide various stakeholders within the community to engage in the decision-making process.[148] Public hearings ideally allow community members to express their support, frustration, and/or concerns with the DOE before the closure decision is finalized.[149] In *Mulgrew I*, the plaintiffs complained that they were given last minute notice of the hearings and provided scripts of what to say.[150] Subsequently, the court appropriately found that these hearings could not be considered "joint" meetings within the meaning of the New York statute.[151] The approach of the court in *Mulgrew I* not only respects the policy underlying the school closing statute, but also respects the valuable insight that impacted community members can offer.

In summation, to ensure that community stakeholders have a meaningful opportunity to be heard in process, a reviewing court should look to the information gathered through the hearing process and determine whether the school district complied with the related statutory requirements and the underlying policy of these provisions.

B. Transition Plans

If neighborhood schools are going to be closed, there needs to be a clear vision of what future actions will be taken to improve the educational opportunities for these impacted students.[152] Plans to facilitate the safe and efficient transition of displaced students into new receiving school are an essential component of the statutory protections afforded by both Illinois and New York law. As previously described, closing a neighborhood school has significant consequences for impacted students and communities, and without proper planning, this transition can be especially hazardous. Moreover, making proper accommodations for large influxes of new students can be a

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[147] *See* David H. Coar, *In re: Proposal to Phase-Out Richard T. Crane Technical Preparatory High School*, CHI. BD. OF EDUC. 1 (2012) [hereinafter Coar, *In re Crane*] http://www.cps.edu/About_CPS/Policies_and_guidelines/documents/TransitionPlan/ Crane_TalentDev_PublicHearing.pdf. During the 2011 school closings, CPS proposed closing Crane Technical Preparatory High School. However, at the public hearing a collaboration of parents, students, administrators, and education experts (the "Crane Coalition") presented a comprehensive plan for academic improvement at Crane—and based on the information they presented, Judge Coar recommended that the Crane Coalition Improvement Plan be evaluated before proceeding with CPS's proposed school action.

[148] Meidinger, *supra* note 77, at 60.

[149] *Id.* at 61.

[150] *Mulgrew I*, 902 N.Y.S.2d at 884.

[151] *Id.* at 889.

[152] *See* Jean Johnson, et. al, *What's Trust Got to Do With It?: A Communications and Engagement Guide for School Leaders Tackling the Problem of Persistently Failing Schools*, PUBLIC AGENDA, 1, 25 (2011) [hereinafter Johnson, *What's Trust Got to Do With It?*] http://www.publicagenda.org/files/pdf/ WHATS_TRUST_GOT_TO_DO_WITH_IT.pdf. (arguing that school administrators need to have and communicate to the affected community a strategy and purpose behind the decision to close a school). Johnson described the typical perception of a school closing as including: (1) school leaders saying that a school is bad and should be closed; (2) then public hearings about whether the school should close or not; (3) the press reports all the statistics about how ineffective the school is. *Id.* However, throughout this process, there is little or no discussion about precisely how things are going to get better. *Id.* Johnson argues that district officials need to extend their vision beyond the steps of closing the school and consider a larger strategy that will address how to improve the educational opportunities of the students affected. *Id.*

stressful challenge for receiving schools.[153] Thus, the importance of transition planning for impacted students cannot be underestimated.[154]

Under Illinois law, if a school action is approved, the CEO is required to collaborate with LSCs and the families of students attending the impacted school to facilitate a successful integration of affected students into their new academic settings through the creation of a school transition plan.[155] A school transition plan must include:

> [S]ervices to support the academic, social, and emotional needs of students; supports for students with disabilities, homeless students,[156] and English language learners; and support to address security and safety issues;[157] options to enroll in higher performing schools; informational briefings regarding the choice of schools that include all pertinent information to enable the parent or guardian and child to make an informed choice. . . and the provision of appropriate transportation where practicable.[158]

Furthermore, the CEO must identify and commit specific resources for the implementation of a school's transition plan for at least one full academic year after a school action is approved.[159] Ultimately, the information contained in a transition plan is crucial in assisting affected communities to deal with the inevitable disruption that a school action will create.[160]

The language of SB 630 states clear requirements and identifies groups of students that are particularly vulnerable to the potential harms of a school closing, but in recent years, the transition plans created for CPS closures have not fulfilled these requirements in good faith.[161] In 2013, in the face of the largest school closing effort in history, CPS created six-page transition plans that were essentially identical (except for the school address, names of receiving schools, and locations and times of public meetings or hearings).[162] The elements of the transition plans from 2013 were not tailored to address the unique educational or safety needs for any of the fifty-three

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[153] DE LA TORRE, WHEN SCHOOLS CLOSE, *supra* note 2, at 5. *See also* Melissa Mitchell, *Closings Put Community Schools in Peril*, CATALYST (June 19, 2013), http://www.catalyst-chicago.org/news/2013/06/19/21205/closings-put-community-schools-in-peril.

[154] *See* Meidinger, *supra* note 77, at 56–58.

[155] 105 ILL. COMP. STAT. 5/34-225(a).

[156] Students that are housing-displaced experience a combination of educational disadvantages—including multi-faceted challenges stemming from high student mobility rates and complications with enrollment at district schools—and are highly likely to "fall through the cracks" during school transfers after a closing and phase-outs. INST. FOR CHILDREN, POVERTY, & HOMELESSNESS, THE IMPACT OF SCHOOL CLOSURES ON HOMELESS STUDENTS IN NEW YORK CITY, 5–6, 9 (2010).

[157] The issue of students having to cross into gang territories to reach their new schools has been raised with prior CPS school closing decisions. *See* PEW, CLOSING PUBLIC SCHOOLS, *supra* note 2, at 13. Furthermore, in Chicago, parents also complained about the increases in violent incidents after school consolidations, which may require that members of rival gangs be consolidated into the same attendance center. *Id.* at 15. This issue was also heavily scrutinized after the 2009 death of Derrion Albert, a CPS student at Fenger High School, who was beaten to death in front of the school after the tension erupted between students who were consolidated into Fenger and were residents of two rival, far South Side neighborhoods (the "Ville" and Altgeld Gardens). Azam Ahmed, Kristen Mack & Annie Sweeney, *Fenger Kids Tell Why They Fight*, CHI. TRIB., Oct. 6, 20009, http://www.chicagotribune.com/news/local/chi-fenger-safe-passage06oct06,0, 2119252.story?page=1. Albert was murdered in September, and at that time school officials claimed they had a safety plan to provide busing for students traveling through gang areas en route to school, but the plan had not yet been implemented. *Id.*

[158] 105 ILL. COMP. STAT. 5/34-225(c)(1)-(4).

[159] 105 ILL. COMP. STAT. 5/34-225(b).

[160] *See* Meidinger, *supra* note 77, at 57 (explaining the significance of "impact statements," the New York equivalent of Illinois' transition plans, in addressing the practical implications of school closings—such as where displaced students will attend school, how students will get to their new schools, and whether they will have access to comparable academic programs at their new schools).

[161] *Id.*

[162] *See Draft Transition Plan for Proposed Closure of Elizabeth Peabody Elementary School*, CHI. PUBLIC SCH. (2013), http://schoolinfo.cps.edu/SchoolActions/Download.aspx?fid=1305. The transition plans that were posted before the closures were approved have since been removed from CPS's website, but additional copies of transition plans from the spring of 2013 are on file with author.

proposed closures.[163] In terms of judicial review, courts should consider whether school districts have substantively provided information to satisfy the requirements under the applicable statute.[164] Moreover, courts should also turn a critical eye to the use of boilerplate language, as the court did in *Mulgrew I*, when considering whether or not a district has really fulfilled their duties under the law—instead of demonstrating *per se* compliance without giving individualized treatment to each impacted school and community.[165]

As described earlier, the schools that have been historically chosen by the DOE and CPS for closure also served large numbers of the city's highest needs students.[166] More specifically, the schools selected for closure typically had higher percentages of students eligible for free and reduced price lunch, higher percentages of students with disabilities, and higher percentages of English language learners than the district average.[167] A thoughtful EIS or transition plan will ideally enable affected students and families to adjust to major changes that follow a school closing.[168]

CONCLUSION

The decision to close a school, especially within the context of urban education, significantly impacts affected students, educators, and communities at large.[169] State legislatures have recognized this stress and the challenges related to a school district's decision to execute school closings and in response, created statutory schemes for structuring this process.[170] Considering the wide-reaching impact of these decisions, courts should take an active role in reviewing a school district's compliance with state statutory requirements for school closings.[171] Finally, as Justice Stevens stated in *New Jersey v. T.L.O.*, public schools are the first opportunity for most citizens to experience the power of government, and our education system should not be one of the first government entities that teaches students about systemic unfairness and feigned transparency.[172]

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[163] *Id.*
[164] *See* Meidinger, *supra* note 77, at 56–59.
[165] *Id.* at 62–64.
[166] ANNENBERG INSTIT., THE WAY FORWARD, *supra* note 16, at 4.
[167] *Id.*
[168] *See* Meidinger, *supra* note 77, at 56–58.
[169] *See generally* DE LA TORRE, WHEN SCHOOLS CLOSE, *supra* note 2.
[170] *See supra* Part II (discussing the provisions of Illinois and New York law that are implicated in the school closing process).
[171] *See supra* Part III-V (arguing that Illinois courts should take an active role in reviewing a school district's compliance with state law for the school closing process).
[172] *See supra* note 1 (quoting Justice Stevens' dissent in *T.L.O*).