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# A COMMUNITY AFFAIR: EFFECTUATING MEANINGFUL COMMUNITY INVOLVEMENT IN NEW YORK SCHOOL GOVERNANCE

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**Abstract:** In 2009, the New York Legislature imposed more stringent requirements on the State's Department of Education when it amended section 2590-h of article 52-A of the Education Law. Now, as a precondition to closing or significantly changing the use of a school, the Chancellor, who heads the Department of Education, must prepare an impact statement detailing the ramifications of the proposal on students and the community. The Chancellor is also required to hold a joint public hearing where affected community members can present comments or concerns. In 2010, community members affected by proposed school closures in New York City successfully challenged the Department of Education's compliance with section 2590-h. Although the appellate court affirmed the decision, it left the applicable standard of review a question. This Comment argues that section 2590-h calls for meaningful community involvement and the court should therefore apply a strict standard in reviewing the Department of Education's compliance.

## INTRODUCTION

*Go into our neighborhoods, talk to us.*

—Devonte Escoffery<sup>1</sup>

In December 2009, the New York City Department of Education (DOE) announced a plan to close or significantly change the use of twenty schools because it determined they were failing.<sup>2</sup> In response,

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\* Staff Writer, BOSTON COLLEGE THIRD WORLD LAW JOURNAL (2010–2011).

<sup>1</sup> Dana Chivvis, *Champion Debate Team Rejects City's Verdict*, AOL NEWS (June 22, 2010), <http://www.aolnews.com/brooklyn-school/article/champion-debate-team-rejects-citys-verdict/19522422>. As of June 22, 2010, Devonte Escoffery was a junior at Metropolitan Corporate Academy, a small public high school in Brooklyn slated to be phased out as one of the schools at issue in *Mulgrew v. Board of Education*. Chivvis, *supra*; see *Mulgrew v. Bd. of Educ. (Mulgrew I)*, 902 N.Y.S.2d 882, 886 n.3 (Sup. Ct.), *aff'd*, 906 N.Y.S.2d 9 (App. Div. 2010).

<sup>2</sup> See *Mulgrew I*, 902 N.Y.S.2d at 885; Barbara Martinez, *Failing Schools Can Stay Open: Court Ruling Is Setback for Bloomberg*, WALL ST. J., July 2, 2010, at A17. The Panel for Educa-

Michael Mulgrew, president of the United Federation of Teachers (UFT), along with the NAACP and other affected parties, challenged the DOE's proposed actions.<sup>3</sup> Mulgrew argued that the DOE failed to comply with section 2590-h of article 52-A of the New York Education Law.<sup>4</sup> On March 26, 2010, the New York Supreme Court held in *Mulgrew v. Board of Education (Mulgrew I)* that the DOE failed to comply with section 2590-h and therefore could not stop enrollment in the affected schools.<sup>5</sup> Specifically, the court found the DOE failed to take the following actions: (1) adequately analyze the impact of its proposed actions on the community in an educational impact statement (EIS); (2) give the required notice to the affected community; and (3) hold a joint public hearing.<sup>6</sup> Because of the DOE's failure to meet the statutorily imposed procedural requirements prior to closing the schools, the court allowed them to remain open.<sup>7</sup> When the DOE appealed, the New York Appellate Division affirmed the lower court's decision (*Mulgrew II*).<sup>8</sup> In so do-

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tional Policy (PEP) replaced the Board of Education as the governance body of the DOE in 2002. *DOE Leadership—About Us*, N.Y.C. DEPARTMENT OF EDUC., <http://schools.nyc.gov/AboutUs/leadership/default.htm> (last visited Feb. 15, 2011). A significant change in school utilization includes "the phase-out, grade reconfiguration, re-siting, or co-location of schools, for any public school located within the city district." N.Y. EDUC. LAW § 2590-h(2-a) (a) (McKinney 2007 & Supp. 2010). The number of schools at issue changed from twenty to nineteen because the proposal to phase out Alfred E. Smith Vocational High School was changed to a proposal to phase it down in response to community demands for an automotive program. *Mulgrew I*, 902 N.Y.S.2d at 886. Additionally, PAVE Academy Charter School was not being phased out or truncated but instead was being allowed to stay longer in its current building. *Id.*; *In re Battis*, No. 16,115, 2010 N.Y. Educ. Dept. LEXIS 109, at \*2 (N.Y. State Educ. Dept. Aug. 2, 2010).

<sup>3</sup> *Mulgrew I*, 902 N.Y.S.2d at 884. The UFT is a union representing "approximately 120,000 educators working in New York City public schools, including 87,000 teachers." *Mulgrew v. Bd. of Educ. (Mulgrew II)*, 906 N.Y.S.2d 9, 11 (App. Div. 2010). The New York chapter of the NAACP joined the lawsuit, arguing that the DOE's proposals were racially discriminatory and did not allow adequate parental input. Jennifer S. Altman, *When a School Year Ends in Purgatory*, AOL NEWS (June 22, 2010), <http://www.aolnews.com/brooklyn-school/article/when-a-school-year-ends-in-purgatory/19523639>.

<sup>4</sup> *Mulgrew I*, 902 N.Y.S.2d at 884.

<sup>5</sup> *Id.* at 890. This Comment refers to the DOE and the Chancellor interchangeably because the Chancellor oversees the DOE. See *Chancellor Joel Klein—DOE Leadership*, N.Y.C. DEPARTMENT OF EDUC., <http://schools.nyc.gov/AboutUs/leadership/chancellorklein.htm> (last visited Feb. 15, 2011). On November 9, 2010, Mayor Bloomberg appointed Cathleen P. Black to succeed Joel Klein as Chancellor of New York City schools. *Mayor Bloomberg Appoints Cathie Black*, N.Y.C. DEPARTMENT OF EDUC. (Nov. 9, 2010), <http://schools.nyc.gov/Offices/mediarelations/NewsandSpeeches/2010-2011/Cathieblack110910.htm>.

<sup>6</sup> *Mulgrew I*, 902 N.Y.S.2d at 888–89.

<sup>7</sup> *Id.* at 890.

<sup>8</sup> *Mulgrew II*, 906 N.Y.S.2d at 11–12.

ing, however, it complicated the matter by leaving the standard of review undefined.<sup>9</sup>

This Comment argues that section 2590-h calls for meaningful community involvement; consequently, the court should apply a strict standard in reviewing DOE compliance.<sup>10</sup> Part I argues that section 2590-h is meant to create meaningful community involvement in school governance. It chronicles the New York Legislature's attempts to create such involvement and demonstrates that the 2009 amendment is another similar attempt. Part II outlines the contours of the new law, describing the new procedural requirements meant to effect community involvement. Finally, Part III argues that, because of the New York Legislature's demonstrated intention to involve the community in school governance, the court should apply a strict standard in reviewing DOE compliance to prevent it from circumventing legislative mandates.

## I. MEANINGFUL COMMUNITY INVOLVEMENT: A WORK IN PROGRESS

### A. *Past Attempts at Community Involvement in New York City Schools*

The New York Legislature has attempted to involve the community in school governance for decades.<sup>11</sup> In the 1960s, New York City's system of school governance was reformed because parents and community members thought it was unresponsive to their needs and concerns.<sup>12</sup> To address these concerns, the city created thirty-two Community School Boards, which held decision-making power over substantive issues such as school budgets and instruction.<sup>13</sup> The school boards, however, lost credibility in their communities and were eventually perceived as ineffective.<sup>14</sup>

In 2002, the legislature and the governor overhauled the city's school governance structure, dissolving the school boards and giving

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<sup>9</sup> *Id.*

<sup>10</sup> See N.Y. EDUC. LAW § 2590-h(2-a) (McKinney 2007 & Supp. 2010); *Mulgrew I*, 902 N.Y.S.2d at 888–90.

<sup>11</sup> See Scott M. Stringer, *A New Day for Parental Engagement: Reforming & Empowering Community Education Councils*, MANHATTAN BOROUGH PRESIDENT, 1–3 (Mar. 2009), <http://mbpo.org/uploads/NEW%20DAY-FINAL.pdf>.

<sup>12</sup> See *id.* at 1 (explaining that the system was “too centrally controlled and out of touch with parent and community needs and concerns”).

<sup>13</sup> See *id.*

<sup>14</sup> See *id.* (noting that the public's perception of the school boards' effectiveness was diminished because of changes in legislation reducing their power and various scandals involving some of the school boards).

substantial control to the mayor.<sup>15</sup> Despite the failure of the school boards, however, the legislature did not give total control to the mayor.<sup>16</sup> Instead, the legislature sought to create an improved mechanism for community involvement.<sup>17</sup>

In 2003, the legislature replaced the school boards with new bodies called Community Education Councils (CECs).<sup>18</sup> Although the legislature gave the mayor's appointed Chancellor broad authority, it also created CECs because "meaningful engagement of parents and the community is ultimately necessary for an overall system of school governance to be successful."<sup>19</sup> The legislature granted CECs several official responsibilities, clearly signaling its intent to include parents formally in school governance.<sup>20</sup> Indeed, then-Chancellor Joel Klein affirmed that they represented a shift to "a parent-based focus."<sup>21</sup>

Between 2003 and 2009, however, a "significant consensus" developed among parents, educators, and advocates that CECs were ineffective in practice.<sup>22</sup> Critics complained that, although CECs gave parents a legal place at the table, the DOE disregarded their input and gave them meaningless projects that were "dead in the water" before they even started.<sup>23</sup> CECs also failed to effectuate the meaningful community involvement the legislature had intended.<sup>24</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> See Stringer, *supra* note 11, at 1–2.

<sup>17</sup> See *id.* (explaining the creation of Community Education Councils).

<sup>18</sup> See *id.* at 2. CECs are comprised of "nine parent members elected by the . . . Parent-Teacher Association[s] . . . within [each] school district, two community members appointed by the respective Borough President, and one non-voting high school senior." *Id.*

<sup>19</sup> See *id.* (quoting Task Force on Cmty. Sch. Dist. Governance Reform, *Final Report*, COMMUNITY SCHOOL DISTRICT GOV'T REFORM, § 2 (Feb. 15, 2003), <http://assembly.state.ny.us/comm/NYCSchGov/20030219>); see also N.Y. EDUC. LAW § 2590-h(2) (McKinney 2007) (amended 2009).

<sup>20</sup> See Stringer, *supra* note 11, at 1, 2. The legislature granted to the CECs the following powers: "[T]he power to measure, track, and evaluate the academic and financial performance of school districts; the power to evaluate supervisors and superintendents; the authority to comment on the capital and educational plans for school; and the authority to approve changes to school district zoning." *Id.* at 2.

<sup>21</sup> See Elissa Gootman, *Schedule Set for Replacing School Boards*, N.Y. TIMES, Jan. 15, 2004, at B2. Cathie Black succeeded Joel Klein as Chancellor of the New York City Public Schools. See *Mayor Bloomberg Appoints Cathie Black*, *supra* note 5.

<sup>22</sup> See Stringer, *supra* note 11, at 3.

<sup>23</sup> See *Public Hearing on the Governance of the New York City School District: Hearing Before the Assemb. Standing Comm. on Educ.*, 2009 Leg., 232d Sess. 139–41 (N.Y. 2009) [hereinafter *Public Hearing*] (statement of Sam Pirozzolo, President, CEC 31) available at [http://assembly.state.ny.us/member\\_files/037/20090212/transcriptsstateniland.pdf](http://assembly.state.ny.us/member_files/037/20090212/transcriptsstateniland.pdf); Stringer, *supra* note 11, at 3–4. Mr. Pirozzolo explained that he believes the DOE does not seriously consider parental input or view parents as a resource: "[J]ust because an idea comes from a parent does not

### B. Trying Again

In 2009, the legislature again tried to involve the community; it imposed more stringent requirements on the DOE to ensure that this intent was effectuated.<sup>25</sup> Specifically, the legislature refined section 2590-h, requiring the DOE to prepare an EIS for any proposed school closure or significant change in utilization.<sup>26</sup> An EIS must provide information about not only the efficacy of a proposed school closure or significant change in use, but also about its impact on the community.<sup>27</sup> Additionally, the Chancellor must “hold a joint public hearing with the impacted community council and school based management team” so they can present comments or concerns.<sup>28</sup>

Although the legislature gave decision-making power to the Chancellor, the amended law arguably “changes the dynamic between the Chancellor and the communities” served.<sup>29</sup> The new law requires the Chancellor to go beyond merely consulting with affected community members—it requires that he or she actually involve them in decision-making.<sup>30</sup> In view of previous attempts, section 2590-h affirms that the

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make it a bad idea. . . . [W]hile the DOE seems to listen to us, we don’t know if they actually hear us.” *Public Hearing, supra*, at 139 (statement of Sam Pirozzolo, President, CEC 31).

<sup>24</sup> Stringer, *supra* note 11, at i (stating that CECs did not involve parents as promised and noting that even CEC proponents acknowledged the need for improvement in involving parents).

<sup>25</sup> See N.Y. EDUC. LAW § 2590-h(2-a) (a)–(d) (McKinney 2007 & Supp. 2010) (requiring DOE to prepare and distribute educational impact statement and hold joint public hearing); Memorandum of Law in Support of Article 78 Petition to Require Respondents to Comply with Their Obligations Under Educ. Law Article 52-A at 7–9, *Mulgrew I*, 902 N.Y.S.2d 882 (Sup. Ct. 2010) (No. 101352/10) [hereinafter Petitioners’ Brief]. See generally *Public Hearing, supra* note 23 (showing Committee on Education soliciting input on community involvement in school governance).

<sup>26</sup> Compare EDUC. § 2590-h(2-a) (a)–(d) (requiring thorough analysis of proposed action and a public hearing as part of community consultation), with EDUC. § 2590-h(2) (McKinney 2007) (amended 2009) (requiring only that the Chancellor “consult with the affected community board”).

<sup>27</sup> See EDUC. § 2590-h(2-a) (b).

<sup>28</sup> See *id.* § 2590-h(2-a) (d).

<sup>29</sup> Petitioners’ Brief, *supra* note 25, at 9 (quoting *New York State Senate Regular Session Stenographic Record*, N.Y. SENATE OPENLEG (Aug. 6, 2009), <http://open.nysenate.gov/legislation/api/1.0/html/transcript/regular-session-08-06-2009-136> [hereinafter *New York State Senate Record*] (statement of Sen. Daniel Squadron); see also *Mulgrew I*, 902 N.Y.S.2d at 890 (recognizing that the purpose of the legislative scheme was to alter the manner in which the Chancellor involves the community). Although parents’ involvement in education is generally encouraged, their involvement in school governance may be problematic. See Daniel Johnson, Comment, *Putting the Cart Before the Horse: Parent Involvement in the Improving America’s Schools Act*, 85 CALIF. L. REV. 1757, 1788–89, 1800 (1997).

<sup>30</sup> See EDUC. § 2590-h(2-a) (a)–(d); *Mulgrew I*, 902 N.Y.S.2d at 890 (noting that the revised law mandates “meaningful community involvement”). Furthermore, section 2590-g(8)(c)

legislature intends to involve the community in school governance in a significant and meaningful way.<sup>31</sup>

## II. THE CONTOURS OF THE NEW LAW

The legislature intended to make substantive changes to the mode and extent of community involvement in school governance when it amended section 2590-h.<sup>32</sup> To ensure this desired change occurs, the legislature created two new procedural requirements.<sup>33</sup> Now, before closing or significantly changing the use of a school, the DOE must prepare and distribute an EIS and hold a joint public hearing with the affected community.<sup>34</sup> These requirements not only demonstrate that the legislature desires community involvement, but they also lay out a practical plan for the DOE to follow.<sup>35</sup>

### A. *The Requirement of an Educational Impact Statement*

Unlike under the previous version of section 2590-h, the DOE must now explain its proposed actions to community stakeholders before it can act.<sup>36</sup> Before the DOE can close a school or significantly change its use, it must prepare an explanatory EIS, make it available online, and file a paper copy with several designated bodies at least six months before the next school year.<sup>37</sup> Essentially, an EIS explains how

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requires the PEP to submit a summary of issues and significant alternatives raised in the public review process and an explanation of why any such alternatives were not used. See EDUC. § 2590-g(8)(c).

<sup>31</sup> See EDUC. § 2590-h(2-a)(a)-(d) (requiring EISs and joint public hearings in amended law); Petitioners' Brief, *supra* note 25, at 7-9 (explaining that the legislature amended section 2590-h to involve parents and the community more significantly); Stringer, *supra* note 11, at 1-3 (highlighting developments in New York City school governance showing repeated recognition of the need meaningfully to involve parents and communities).

<sup>32</sup> See *Mulgrew I*, 902 N.Y.S.2d 882, 890 (Sup. Ct.), *aff'd*, 906 N.Y.S.2d 9 (App. Div. 2010); *New York State Senate Record*, *supra* note 29; Petitioners' Brief, *supra* note 25, at 8-9. Compare EDUC. § 2590-h(2-a)(a)-(d) (requiring thorough analysis of proposed action and a public hearing as part of community consultation), with EDUC. § 2590-h(2) (requiring only that the Chancellor "consult with the affected community board").

<sup>33</sup> See EDUC. § 2590-h(2-a)(a)-(d); *Mulgrew I*, 902 N.Y.S.2d at 890; Petitioners' Brief, *supra* note 25, at 8-9.

<sup>34</sup> See EDUC. § 2590-h(2-a)(a)-(d).

<sup>35</sup> See *id.*; *Mulgrew I*, 902 N.Y.S.2d at 890; *New York State Senate Record*, *supra* note 29; Petitioners' Brief, *supra* note 25, at 8-9.

<sup>36</sup> See EDUC. § 2590-h(2), (2-a)(b); *New York State Senate Record*, *supra* note 29; Petitioners' Brief, *supra* note 25, at 8-9.

<sup>37</sup> EDUC. § 2590-h(2-a)(b)-(c). Designated bodies include "the city board, the impacted community council, community boards, community superintendent, and school based management team." *Id.* § 2590-h(2-a)(c).

the proposed closure or change in use will affect students and the community.<sup>38</sup> A thorough EIS may provide details such as where displaced students will go to school, how they will get there, and whether they will have access to programs similar to those they enjoyed at their former school.<sup>39</sup> This information is crucial in helping the community cope with the inevitable disruption that closing or significantly changing the use of a school will cause.<sup>40</sup>

For example, families may need an EIS to help them plan for the possibility of increased travel time and expense to get their children to school.<sup>41</sup> Accommodating a longer commute not only affects daily routines such as the time a family gets up, has breakfast, and leaves the home, but it may also affect parents' work and child-care schedules.<sup>42</sup> Moreover, without a thorough EIS, community members may be deprived of essential services on which they rely.<sup>43</sup> An inadequate EIS such as the one at issue in *Mulgrew I* may create more work for families because they may need to find replacement services on their own.<sup>44</sup> A thorough EIS is useful because it helps affected community members

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<sup>38</sup> *Id.* § 2590-h(2-a)(b)(i)–(ii); *Mulgrew II*, 906 N.Y.S.2d 9, 12 (App. Div. 2010); *Mulgrew I*, 902 N.Y.S.2d at 888.

<sup>39</sup> See EDUC. § 2590-h(2-a)(b); *Mulgrew I*, 902 N.Y.S.2d at 888; Petitioners' Brief, *supra* note 25, at 14.

<sup>40</sup> See *Mulgrew II*, 906 N.Y.S.2d at 12; *Mulgrew I*, 902 N.Y.S.2d at 888–90; Altman, *supra* note 3.

<sup>41</sup> See Petitioners' Brief, *supra* note 25, at 14, 21. In the absence of free subway and bus passes through a subsidized program for low-income students, affected families may bear an additional financial burden related to disruption in access to a particular school. See Sharon Otterman, *Students Rally to Support Free Rides to School*, N.Y. TIMES BLOG (June 11, 2010, 5:15 PM), <http://cityroom.blogs.nytimes.com/2010/06/11/students-rally-to-support-free-rides-to-school>. Furthermore, some students must commute up to ninety minutes for programs outside their neighborhoods, so the closure of a nearby school would result in greatly increased travel time. *Id.*

<sup>42</sup> See *Mulgrew I*, 902 N.Y.S.2d at 888 (finding EISs lacked meaningful detail about impact on students and locations of replacement programs); Petitioners' Brief, *supra* note 25, at 14, 21 (explaining that seeking replacement programs requires increased travel expense and time); Otterman, *supra* note 41.

<sup>43</sup> See *Mulgrew I*, 902 N.Y.S.2d at 888; Petitioners' Brief, *supra* note 25, at 19–20. For instance, one of the schools slated for closure in *Mulgrew I* provided parenting and child-care classes. *Mulgrew I*, 902 N.Y.S.2d at 888; Petitioners' Brief, *supra* note 25, at 20. The DOE, however, failed to explain where affected community members could find replacement programs. *Mulgrew I*, 902 N.Y.S.2d at 888; Petitioners' Brief, *supra* note 25, at 20. In addition to losing access to essential services, students may be deprived of enrichment programs such as music programs, vocational programs including information technology and cosmetology training, tutoring services, and sports clubs. *Mulgrew I*, 902 N.Y.S.2d at 888–89; Petitioners' Brief, *supra* note 25, at 21–22.

<sup>44</sup> See *Mulgrew I*, 902 N.Y.S.2d at 888–89; Petitioners' Brief, *supra* note 25, at 19–22.



resume their daily lives on a basic logistical level amidst the DOE's changes.<sup>45</sup>

Perhaps most importantly, an EIS must provide information regarding a school's academic performance.<sup>46</sup> This information may help parents understand how a school is deficient and, therefore, whether supporting the DOE's proposal to close or significantly change a school is in the best interests of their children.<sup>47</sup> Without this information, families may either oppose or support the proposal to their detriment.<sup>48</sup> Similarly, an analysis of the school's performance is important for educators—key members of a school community—because it tells them why the DOE believes the school is underperforming and provides the data used to reach that conclusion.<sup>49</sup> Clearly, a thorough EIS

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<sup>45</sup> See *Mulgrew II*, 906 N.Y.S.2d at 12; *Mulgrew I*, 902 N.Y.S.2d at 888–89; Petitioners' Brief, *supra* note 25, at 19–22.

<sup>46</sup> See N.Y. EDUC. LAW § 2590-h(2-a)(b)(vii) (McKinney 2007 & Supp. 2010); see also *Educational Impact Statement: Proposal for a Significant Change in the Utilization of School Building X158: The Phase-Out and Eventual Closure of New Day Academy (12X245) and Co-Location of Dr. Izquierdo Health and Sciences Charter School with Existing Schools in X158*, N.Y.C. DEPARTMENT OF EDUC., 1–3 (Dec. 10, 2009) [hereinafter *Educational Impact Statement*], [http://schools.nyc.gov/NR/rdonlyres/F0043783-8608-433C-855E99228622A268/73714/12X245NewDayAcademy\\_EIS\\_Final3.pdf](http://schools.nyc.gov/NR/rdonlyres/F0043783-8608-433C-855E99228622A268/73714/12X245NewDayAcademy_EIS_Final3.pdf) (showing poor academic performance and citing it as a reason for school closure); *New Day Academy*, N.Y.C. DEPARTMENT OF EDUC., 6–9, 11–17, 23–28 (Dec. 10, 2009) [hereinafter *New Day Academy*], [http://schools.nyc.gov/NR/rdonlyres/F0043783-8608-433C-855E-99228622A268/75877/154541New\\_Day\\_Acad-emy\\_11410.pdf](http://schools.nyc.gov/NR/rdonlyres/F0043783-8608-433C-855E-99228622A268/75877/154541New_Day_Acad-emy_11410.pdf) (transcribing community members' responses to the DOE's assessment of New Day Academy's academic performance).

<sup>47</sup> See EDUC. § 2590-h(2-a)(b)(vii); *Educational Impact Statement*, *supra* note 46, at 1–3; *New Day Academy*, *supra* note 46, at 6–9 (transcribing statements by Deputy Chancellor of the Department for Infrastructure and Portfolio Planning explaining to community members why the school was failing).

<sup>48</sup> See EDUC. § 2590-h(2-a)(b)(vii); *Mulgrew I*, 902 N.Y.S.2d at 890; *New Day Academy*, *supra* note 46, at 6–9, 36–39 (transcribing statements by DOE official about New Day Academy's demonstrated failure as well as statements by community members such as a Parent Coordinator and student arguing that the school is doing well and should be allowed to continue serving students).

<sup>49</sup> See EDUC. § 2590-h(2-a)(b); *Mulgrew I*, 902 N.Y.S.2d at 890; *Educational Impact Statement*, *supra* note 46, at 1–3; *New Day Academy*, *supra* note 46, at 6–9, 11–17, 23–28 (showing community confusion about basis for phaseout plan because of school's "proficient" ratings in recent years). It is important to note that these school closings are taking place against the backdrop of a more fundamental debate about where and what type of change is needed. Dana Chivvis, *Was 'Failing' New York School Failed by the System?*, AOL NEWS (June 22, 2010), <http://www.aolnews.com/brooklyn-school/article/did-failing-school-get-failed-by-the-system/19522399>. One side of the debate is populated by "those who favor teacher accountability, test-based evaluations and charter schools—like Chancellor Klein, New York City Mayor Michael Bloomberg and the Obama administration." *Id.* Others think this "ignores the realities . . . on the ground" and that "closing schools merely shifts the problem somewhere else." *Id.*; see also Chris Smith, *Just Smile*, N.Y. MAG., Feb. 6, 2011, at 22 (stating that "[d]ata has become a grinding obsession, and teachers have been scapegoated for problems not of their making"). Additionally, *Mulgrew* argues that school closings are

is essential to the meaningful community involvement in school governance envisioned by the legislature because it helps community members become informed participants in the process.<sup>50</sup>

### B. *The Requirement of Joint Public Hearings*

The legislature also attempted to involve the community in school governance by requiring that the DOE hold a joint public hearing when it proposes to close or significantly change the use of a school.<sup>51</sup> The Chancellor or his designee must hold the joint hearing no sooner than thirty days after filing the EIS and must “widely and conspicuously” post notice.<sup>52</sup> This allows the maximum number of affected community members to present comments or concerns.<sup>53</sup> Demonstrably,

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largely ineffective, citing a recent study by the University of Chicago showing that the majority of students displaced by a similar approach ended up in schools that were the same or worse. See Michael Mulgrew, Op-Ed., *Fix, Don't Close Failing Schools: Union Head Says Bloomberg and Klein Have the Wrong Approach*, N.Y. DAILY NEWS (Dec. 20, 2009), [http://www.nydailynews.com/opinions/2009/12/20/2009-12-20\\_fix\\_dont\\_close\\_failing\\_schools.html](http://www.nydailynews.com/opinions/2009/12/20/2009-12-20_fix_dont_close_failing_schools.html). In contrast, Chancellor Klein argued that the UFT is being litigious merely to save teachers' jobs and is leaving students in failing schools in the process. See Sharon Otterman, *Judge Rules City Can't Close 19 Schools on Brink*, N.Y. TIMES, Mar. 26, 2010, at A1. In a continuing fight, Mayor Bloomberg appointed Chancellor Black in part because of her connections to wealthy donors whose donations may help his charter school movement continue. See Smith, *supra*, at 81. Black also supports Bloomberg's data-driven approach, and his choice to appoint her as Chancellor is indicative of his “CEO-minded view,” pursuant to which he pushes back against the strong teachers' union. See *id.* at 81–82. Notably, as of February 2011, Chancellor Black was furthering Bloomberg's call for more “managerial discretion” and seeking to change the process by which teachers can be laid off. See *id.*

<sup>50</sup> See EDUC. § 2590-h(2-a)(b); *Mulgrew I*, 902 N.Y.S.2d at 888–90 (explaining that the process includes an EIS informing the public about a proposal, thereby giving affected persons a way to respond); Petitioners' Brief, *supra* note 25, at 9 (noting that “EISs form the basis of the public's ability to evaluate and meaningfully comment upon the DOE's proposed actions”). EISs also provide information that allows community members to judge whether the proposed action is economically and organizationally wise. See EDUC. § 2590-h(2-a)(b). In terms of economic issues, EISs require the DOE to explain the costs and savings on such things as instruction, administration, and support services. *Id.* § 2590-h(2-a)(b)(i), (iv), (v). In terms of organizational issues, EISs inform the community about concerns like the ability of other schools to accommodate displaced students and the effect of a closing or change on personnel needs. *Id.* § 2590-h(2-a)(b)(iv), (vi).

<sup>51</sup> See EDUC. § 2590-h(2-a)(d); Petitioners' Brief, *supra* note 25, at 8–9; *New York State Senate Transcript*, *supra* note 29, at 6722–23.

<sup>52</sup> See EDUC. § 2590-h(2-a)(d); Petitioners' Brief, *supra* note 25, at 8–9; *New York State Senate Transcript*, *supra* note 29, at 6722–23.

<sup>53</sup> EDUC. § 2590-h(2-a)(d). Affected community members include parents, students, members of the community boards, and elected state and local officials. *Id.* The joint hearing must include the impacted community council and school-based management team, and it must be held at the school that is subject to the proposed closing or significant change. *Id.*

the legislature created the hearing requirements to ensure community members have an opportunity to speak.<sup>54</sup>

A hearing is meant to be a “robust public process” that gives the community a “real, official voice;” it provides a structured forum for stakeholders to participate in the DOE’s decision-making process.<sup>55</sup> For example, at the joint public hearing for New Day Academy, one of the schools slated for closure in *Mulgrew I*, teachers presented their own statistics regarding the school’s performance to an audience of educators, parents, and DOE officials.<sup>56</sup> Despite DOE assessments showing New Day Academy’s severe underperformance, parents, educators, and students signed up for a time slot to persuade decision-makers that the school was actually making progress.<sup>57</sup> Some speakers specifically challenged the DOE’s system of evaluation, arguing that it was misleading to give the school a proficient rating on recent Quality Reviews and then, soon after, label the school as failing.<sup>58</sup> Although the force of

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<sup>54</sup> See *id.*; Petitioners’ Brief, *supra* note 25, at 8–9; *New York State Senate Record*, *supra* note 29; Stringer, *supra* note 11, at 1–3.

<sup>55</sup> See EDUC. §§ 2590-g(8)(c), 2590-h(2-a)(d); *Mulgrew I*, 902 N.Y.S.2d at 889, 890; Petitioners’ Brief, *supra* note 25, at 8–9; *New York State Senate Record*, *supra* note 29; see also *New Day Academy*, *supra* note 46, at 5, 6–9, 11–17, 23–28, 36–39 (showing community members such as teachers and parents challenging the DOE’s findings).

<sup>56</sup> See *New Day Academy*, *supra* note 46, at 11–17, 23–28. Speakers presented data that challenged the DOE’s assessments, arguing that the school had made notable progress and was performing comparatively better than others in its peer group. See *id.*

<sup>57</sup> See *Educational Impact Statement*, *supra* note 46, at 1–3; *New Day Academy*, *supra* note 46, at 5, 6–9, 11–17, 23–28.

<sup>58</sup> *New Day Academy*, *supra* note 46, at 15–16. New York recently adopted more difficult state assessments to “correct for years of inflated results.” Sharon Otterman & Robert Gebeloff, *When 81% Passing Suddenly Becomes 18%*, N.Y. TIMES, Aug. 1, 2010, at MB1. The new assessments show a drastic reduction in the number of students passing, especially minority students. *Id.* For example, “the percentage of black elementary and middle school students proficient in math fell to 40 percent, from 75 percent. More than five times as many third through eighth graders . . . failed to reach the city’s minimum standard . . . on the English test.” *Id.* At Choir Academy in Harlem, another school at issue in *Mulgrew I*, the eighth grade passage rate on the English test fell from forty-four percent to six percent. See 902 N.Y.S.2d at 886; Otterman & Gebeloff, *supra*. The striking drop in student performance could perhaps support Bloomberg’s attempt to close underperforming schools. See Otterman & Gebeloff, *supra*. One teacher at New Day Academy argued that it is inconsistent to close the school when recent Quality Review assessments said such laudatory things as “the school routinely identifies trends in student progress” and when the “New York State and . . . No Child Left Behind Act’s accountability reports have put [it] in good standing every single year.” *New Day Academy*, *supra* note 46, at 15–16. Community members at the New Day Academy hearing also challenged the DOE’s understanding of school operations and, therefore, its decision to close the school: “[W]e want to know what the superintendent did besides visiting the schools to announce their closings. We need to know how thorough the superintendent was in the process of helping these schools to succeed over the last few years.” *Id.* at 27. Pursuant to section 2590-g(8)(c), the DOE replied to community members after the hearing for New Day

some arguments presented at such hearings is perhaps debatable, the most important consideration, from the legislature's perspective, is that affected community members were given a voice in this process.<sup>59</sup>

Indeed, requiring "joint" hearings ensures that someone is listening.<sup>60</sup> Once community members are informed by the applicable EIS and have decided whether they support the proposal, the hearings provide a space to engage in meaningful dialogue and potentially persuade others.<sup>61</sup> If CECs and school leadership do not actually take part in the process, public hearings are simply a show, a parody of the engagement required by statute.<sup>62</sup> Providing a jointly created forum for expressing concern, disapproval, or support allows community members to participate meaningfully in proposed school closures and significant changes.<sup>63</sup> Community members are stakeholders in school governance, and the legislature has not only decided that they must have the

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Academy, summarized significant issues raised at the hearing, and explained why the school would still be phased out. See *Proposed Phase-Out and Eventual Closure of New Day Academy and Co-Location of Dr. Izquierdo Health and Sciences Charter School with Existing Schools in School Building X158*, N.Y.C. DEPARTMENT OF EDUC., 1-7 (Jan. 25, 2010), [http://schools.nyc.gov/NR/rdonlyres/F0043783-8608-433C-855E-99228622A268/76289/X158\\_NewDay\\_analysis\\_12610\\_FinalI.pdf](http://schools.nyc.gov/NR/rdonlyres/F0043783-8608-433C-855E-99228622A268/76289/X158_NewDay_analysis_12610_FinalI.pdf). The DOE explained in part that "while New Day was deemed 'Proficient' on its 2008 and 2009 Quality Reviews, the report cited serious concerns that suggest the school is ill-positioned to rapidly turn around to better serve students." *Id.* at 3. Some argue, however, that what failing schools need is sufficient and equal support. See Martha Minow, *School Finance: Does Money Matter?*, 28 HARV. J. ON LEGIS. 395, 398-99 (1991). As Professor Martha Minow noted, "Schools are not just means to ends, but also places where great numbers of people spend their days. This means such disparities don't just look bad on paper; they feel bad in life." *Id.* at 399.

<sup>59</sup> See EDUC. § 2590-h(2-a)(d); *Mulgrew I*, 902 N.Y.S.2d at 889-890; Petitioners' Brief, *supra* note 25, at 8-9; *New York State Senate Record*, *supra* note 29.

<sup>60</sup> See EDUC. §§ 2590-g(8)(c), 2590-h(2-a)(d); *Mulgrew I*, 902 N.Y.S.2d at 890; Petitioners' Brief, *supra* note 25, at 8-9; *New York State Senate Record*, *supra* note 29.

<sup>61</sup> See EDUC. §§ 2590-g(8)(c), 2590-h(2-a)(d); *Mulgrew I*, 902 N.Y.S.2d at 890; Petitioners' Brief, *supra* note 25, at 8-9; *New York State Senate Record*, *supra* note 29; e.g., *New Day Academy*, *supra* note 46, at 11-17.

<sup>62</sup> See *Mulgrew I*, 902 N.Y.S.2d at 889. For example, in *Mulgrew I*, the court found that the DOE's public hearings were meaningless because they were not "joint" hearings. *Id.* The hearings were not joint because CECs and school leadership teams were merely "invited" to attend. *Id.* at 886, 889. The court explained that these representative bodies "must be part of the process of structuring [the] meetings and not merely be told when and where to be present and be given a script of what they are to say . . ." *Id.* at 889.

<sup>63</sup> See EDUC. §§ 2590-g(8)(c), 2590-h(2-a)(d); *Mulgrew I*, 902 N.Y.S.2d at 890; e.g., *New Day Academy*, *supra* note 46, at 11-17, 23-28, 36-39. One teacher described the process as imperfect but nonetheless important, saying, "Even if the people from the DOE are on their BlackBerries during the hearing, it's really important to the parents; they're more engaged in their kids' education when they feel like someone is listening." Telephone Interview with Jane Doe, an anonymous teacher in a Harlem charter school (Sept. 19, 2010).

opportunity to speak and be heard on these matters, but it has also provided a forum.<sup>64</sup>

### III. HOLDING THE DEPARTMENT OF EDUCATION TO A HIGHER STANDARD

The authority to close or significantly change the use of a school ultimately lies with the mayor.<sup>65</sup> Nevertheless, the legislature amended section 2590-h with explicit procedures to create a viable, effective working relationship between the Chancellor and the communities served.<sup>66</sup> Regardless of whether the best way to involve the community meaningfully in these matters is simply to inform them and listen to them, the legislature's pattern of safeguarding community involvement is evident.<sup>67</sup> How the courts must be involved is less clear.<sup>68</sup>

#### A. A Higher Standard

In *Mulgrew I*, the court explained that the DOE's compliance with section 2590-h should be reviewed under a strict compliance standard.<sup>69</sup> The court reasoned that a strict compliance standard was necessary because the legislature laid out clear procedures for the DOE in order to effectuate meaningful community involvement.<sup>70</sup> In *Mulgrew II*, however, the court introduced uncertainty about the standard of review with the following dicta: "Whether the applicable standard of review is strict compliance or substantial compliance, the court properly

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<sup>64</sup> See *Mulgrew II*, 906 N.Y.S.2d at 12; *Mulgrew I*, 902 N.Y.S.2d at 889–90; *Public Hearing*, *supra* note 23, at 141; Petitioners' Brief, *supra* note 25, at 7–8; *New Day Academy*, *supra* note 46, at 31–33, 36–39; *New York State Senate Record*, *supra* note 29; Stringer, *supra* note 11, at 1–3. As one parent and CEC member explained, "[P]arents must have a way to question the system and get a straight answer. . . . [W]e are parents, we are taxpayers, and we are voters. We are stakeholders in this system." *Public Hearing*, *supra* note 23, at 141.

<sup>65</sup> *Mulgrew I*, 902 N.Y.S.2d 882, 890 (Sup. Ct.), *aff'd*, 906 N.Y.S.2d 9 (App. Div. 2010); see also EDUC. § 2590-h (explaining that the "[C]hancellor shall serve at the pleasure of and be employed by the mayor").

<sup>66</sup> See EDUC. § 2590-h(2-a)(a)–(d); *Mulgrew I*, 902 N.Y.S.2d at 890; *New York State Senate Record*, *supra* note 29; Stringer, *supra* note 11, at 1–3; *supra* Part I.

<sup>67</sup> See *Mulgrew I*, 902 N.Y.S.2d at 890; Johnson, *supra* note 29, at 1788–89, 1800; Stringer, *supra* note 11, at 1–3.

<sup>68</sup> See *Mulgrew II*, 906 N.Y.S.2d 9, 12 (App. Div. 2010) (mentioning the standard of review issue but failing to specify the applicable standard).

<sup>69</sup> *Mulgrew I*, 902 N.Y.S.2d at 887–88. The court compared section 2590-h to the State Environmental Quality Review Act (SEQRA) and reasoned that, because the court has required strict compliance with SEQRA, a strict standard should be applied to section 2590-h. *Id.*

<sup>70</sup> See *id.* at 889–90.

determined that respondents' EIS for each school failed to comply . . . .<sup>71</sup> Thus, the applicable standard of review remains a question.<sup>72</sup>

The court should apply a strict compliance standard because it allows for greater judicial oversight.<sup>73</sup> A strict compliance standard permits a court to determine not only whether the DOE complied with the required procedures before closing or significantly changing the use of a school, but also whether the DOE took a "hard look" and made a "reasoned elaboration" for its proposed action.<sup>74</sup> Such a standard allows a court to ensure an EIS is not written in "boilerplate fashion" but instead gives community members the information they need to cope with the DOE's proposed changes.<sup>75</sup> Without a strict standard of review, courts would not be able to scrutinize the DOE's compliance closely, as the court properly did in *Mulgrew I*.<sup>76</sup>

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<sup>71</sup> See *Mulgrew II*, 906 N.Y.S.2d at 12.

<sup>72</sup> See *id.*

<sup>73</sup> See N.Y. C.P.L.R. 7803 (McKINNEY 2009) (permitting judicial review of the Chancellor's compliance); *Jackson v. N.Y. State Urban Dev. Corp.*, 494 N.E.2d 429, 435–36 (N.Y. 1986) (reviewing whether respondents have "procedurally and substantively" complied with SEQRA's mandates), cited with approval in *Chinese Staff & Workers Ass'n v. City of New York*, 502 N.E.2d 176, 178 (N.Y. 1986), and *Mulgrew I*, 902 N.Y.S.2d at 887–88.

<sup>74</sup> See *Chinese Staff & Workers Ass'n*, 502 N.E.2d at 178 (reviewing whether respondents took a "hard look" at environmental concerns in Chinatown neighborhood and made a "reasoned elaboration" prior to constructing luxury condominium there); *Jackson*, 494 N.E.2d at 435–36 (explaining that the "hard look" and "reasoned elaboration" review allows courts to ensure agencies are "complying strictly with prescribed procedures and giving reasoned consideration to all pertinent issues"); *Pyramid Co. of Watertown v. Planning Bd. of Watertown*, 807 N.Y.S.2d 243, 245 (App. Div. 2005) (finding town planning board failed to take a hard look at environmental issues because report "merely stated in conclusory fashion" that allowing shopping center to be built would not affect nearby wetlands); *Mulgrew I*, 902 N.Y.S.2d at 887–88 (reasoning that because section 2590-h and SEQRA are similarly worded, the legislature intended for reviewing courts to apply a strict standard of compliance for both); Petitioners' Brief, *supra* note 25, at 12–13 (arguing that the DOE should be required to give the same reasoned consideration pursuant to section 2590-h as the "hard look" and "reasoned elaboration" required pursuant to SEQRA).

<sup>75</sup> See *Chinese Staff & Workers Ass'n*, 502 N.E.2d at 178; *Jackson*, 494 N.E.2d at 435–36; *Mulgrew II*, 906 N.Y.S.2d at 12; *Pyramid Co. of Watertown*, 807 N.Y.S.2d at 245; *Mulgrew I*, 902 N.Y.S.2d at 888; Petitioners' Brief, *supra* note 25, at 12–13. The EISs at issue in *Mulgrew I* were found insufficient because, with respect to the availability of alternate schools, they were completed in "boilerplate" fashion—they "merely indicated the number of seats that were being eliminated by the proposal and stated that they would be absorbed throughout the city." *Mulgrew II*, 906 N.Y.S.2d at 12, *aff'g Mulgrew I*, 902 N.Y.S.2d at 888.

<sup>76</sup> See *Mulgrew I*, 902 N.Y.S.2d at 888; see also *Chinese Staff & Workers Ass'n*, 502 N.E.2d at 178 (reviewing whether respondents took a "hard look" at environmental concerns in Chinatown neighborhood and made a "reasoned elaboration" prior to constructing luxury condominium there); *Jackson*, 494 N.E.2d at 435–36 (explaining that the "hard look" and "reasoned elaboration" review allows courts to ensure agencies are "complying strictly with prescribed procedures and giving reasoned consideration to all pertinent issues"); *Pyramid Co. of Watertown*, 807 N.Y.S.2d at 245 (finding town planning board failed to take a hard

Comparatively, a substantial compliance standard is a lower standard of review that only allows a court to intervene if there is a substantial deviation from required procedures.<sup>77</sup> Such a standard would encourage rote or incomplete compliance by the DOE, resulting in EISs that lack the depth the legislature intended them to have.<sup>78</sup> The lower standard would also undermine a court's ability to hold the DOE accountable because, without clear authority, a court would likely hesitate to impose the inconvenience of reissuing EISs on the DOE and the hardship of living in educational limbo on parents and students.<sup>79</sup> A substantial compliance standard is also too weak to enable courts to protect communities from future unilateral action by the mayor.<sup>80</sup>

Moreover, New York courts commonly apply a substantial compliance standard when reviewing whether universities and other organizations are in compliance with their own, self-imposed rules and procedures.<sup>81</sup> With respect to school governance, the legislature has given an explicit directive buttressed by decades of demonstrated attempts to involve the community.<sup>82</sup> Consequently, the court should apply a strict

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look at environmental issues because report "merely stated in conclusory fashion" that allowing shopping center to be built would not affect nearby wetlands); Petitioners' Brief, *supra* note 25, at 12–13 (arguing that the DOE should be required to give same reasoned consideration pursuant to section 2590-h as the "hard look" and "reasoned elaboration" required pursuant to SEQRA).

<sup>77</sup> See *Tedeschi v. Wagner Coll.*, 404 N.E.2d 1302, 1306 (N.Y. 1980) (holding that university must substantially observe its own procedures); *Loebl v. New York Univ.*, 680 N.Y.S.2d 495, 496–97 (App. Div. 1998) (applying substantial compliance standard in reviewing university's compliance with its own rules).

<sup>78</sup> See *Mulgrew II*, 906 N.Y.S.2d at 12; *Mulgrew I*, 902 N.Y.S.2d at 888–90. In response to *Mulgrew II*, Mayor Bloomberg said the city would follow the procedures but mentioned concern about future litigation. See *Martinez*, *supra* note 2. He then criticized the law, saying, "The law is drafted such that you probably can never be 100% in compliance." See *id.*

<sup>79</sup> See *Mulgrew I*, 902 N.Y.S.2d at 889–90; *Altman*, *supra* note 3. Parents, students, and educators must wait to plan for the next school year if a school's future is uncertain. See *Altman*, *supra* note 3.

<sup>80</sup> See *Williamsburg Around the Bridge Block Ass'n v. Guiliani*, 644 N.Y.S.2d 252, 258–59 (App. Div. 1996) (requiring the city to prepare an EIS to ensure that the community was involved as the legislature required); *Mulgrew I*, 902 N.Y.S.2d at 890. The court in *Mulgrew I* warned that unilateral action by the mayor is unacceptable. See 902 N.Y.S.2d at 890. The court conceded that the 2009 amendment continued to give control to the mayor, but explained that the "entire legislative scheme must be enforced, and not merely the portion extending mayoral control." *Id.*

<sup>81</sup> See, e.g., *Tedeschi*, 404 N.E.2d at 1306; *Pace Coll. v. Comm'n on Human Rights*, 339 N.E.2d 880, 885 (N.Y. 1975); *Loebl*, 680 N.Y.S.2d at 496–97 ("Where a university has adopted rules or guidelines in such areas, the courts will only intervene where there has not been substantial compliance with those procedures."); *Pamilla v. Hosp. for Special Surgery*, 637 N.Y.S.2d 689, 689 (App. Div. 1996).

<sup>82</sup> See N.Y. EDUC. LAW § 2590-h(2-a)(a)–(d) (McKinney 2007 & Supp. 2010); *Mulgrew I*, 902 N.Y.S.2d at 889 ("[W]here statutory language is clear regarding procedural steps

compliance standard to lessen the mayor's temptation "to circumvent the legislative mandates."<sup>83</sup>

### B. *In the Wake of Mulgrew II*

By creating uncertainty as to the applicable standard of review, the court in *Mulgrew II* left future courts without precedential boundaries in reviewing DOE actions under section 2590-h—a situation that may ultimately subvert the legislative intent.<sup>84</sup> For example, in a recent EIS challenge, the Commissioner of Education reviewed the DOE's compliance with section 2590-h under a lower, substantial compliance standard.<sup>85</sup> In August 2010, parents of children attending P.S. 15 in Brooklyn challenged an EIS before Commissioner David Steiner.<sup>86</sup> They argued that the DOE did not adequately assess the harm of allowing a charter school to extend its operation in the same building.<sup>87</sup> Specifically, they argued that P.S. 15 would lose building space to the detriment of its students, particularly students with special needs.<sup>88</sup> In reviewing the EIS, the Commissioner decided that the DOE should only be required to demonstrate substantial compliance with section 2590-h.<sup>89</sup> The Commissioner explicitly stated that he could apply a substantial compliance standard because the court in *Mulgrew II* did not specify which standard was applicable.<sup>90</sup> He also relied on the court's statement that the district has a "considerable measure of discretion" in determining what information an EIS should contain.<sup>91</sup> The Commissioner's

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which must [be] taken . . . and those steps have not been taken, the administrative action must fail."); Stringer, *supra* note 11, at 1–3.

<sup>83</sup> See EDUC. § 2590-h(2-a)(a)–(d); *Mulgrew II*, 906 N.Y.S.2d at 12; *Mulgrew I*, 902 N.Y.S.2d at 887–88, 889.

<sup>84</sup> See *Mulgrew II*, 906 N.Y.S.2d at 12; *Mulgrew I*, 902 N.Y.S.2d at 889–90; see also *In re Battis*, No. 16,115, 2010 N.Y. Educ. Dept. LEXIS 109, at \*15–16 (N.Y. State Educ. Dept. Aug. 2, 2010) (applying substantial compliance standard because, although the court in *Mulgrew I* found SEQRA instructive, the court in *Mulgrew II* left the standard of review a question).

<sup>85</sup> See *Battis*, 2010 N.Y. Educ. Dept. LEXIS 109, at \*15–16.

<sup>86</sup> *Id.* at \*1.

<sup>87</sup> *Id.* at \*4–5.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at \*16.

<sup>90</sup> See *Battis*, 2010 N.Y. Educ. Dept. LEXIS 109, at \*15–16 ("Petitioners cite to *Mulgrew I* in support of their argument. . . . However . . . [*Mulgrew II*] left open the question of whether strict compliance or substantial compliance is the applicable standard. . . . I find that the appropriate standard . . . is substantial compliance.").

<sup>91</sup> *Id.* (quoting *Mulgrew II*, 906 N.Y.S.2d at 12). When the petitioners argued that the DOE failed to comply with the notice requirements of section 2590-h, the Commissioner found it sufficient that the DOE had substantially complied by making copies of the EIS available both online and at each school's main office. *Id.* at \*18–21. Also, although the



application of the lower standard, justified by the lack of clarity in *Mulgrew II*, arguably undermined the legislature's goal of meaningful community participation.<sup>92</sup>

Indeed, holding the DOE to a lower standard may actually encourage rote or incomplete compliance that does not effectuate the legislature's intent.<sup>93</sup> In another recent hearing, parents whose children attend P.S. 94 and P.S. 188 in Manhattan challenged an EIS because it was incomplete.<sup>94</sup> In part, they argued that the DOE failed to adequately assess the impact of expanding a charter school in the same building.<sup>95</sup> The EIS failed to provide any information about replacement programs for the displaced students, but it also failed to explain where students would attend classes, and it failed to substantiate that other schools could accommodate the students.<sup>96</sup> Although the DOE claimed these omissions were "harmless error," the Commissioner found that the DOE failed to comply with section 2590-h, thereby halting its plans to expand the charter school.<sup>97</sup> Seemingly, the uncertainty created by *Mulgrew II* has allowed the DOE to comply with the legislature's mandates in a rote and incomplete way.<sup>98</sup> To avoid such incomplete compliance, New York courts should require the DOE to demonstrate strict, not substantial, compliance with section 2590-h before closing or significantly changing the use of a school.<sup>99</sup>

#### CONCLUSION

Section 2590-h contains no provision regarding the standard of judicial review for DOE compliance. Although community involvement is a work in progress, the legislature has demonstrated a deep commitment to involving the community in school governance through the

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schools failed to send notice home, the Commissioner found it sufficient that the DOE had instructed them to do so. *Id.* at \*18–19. The Commissioner also noted that the petitioners should have had adequate notice because the schools' co-location was the subject of two public hearings petitioners attended and at which they presented. *Id.* at \*19.

<sup>92</sup> See *Mulgrew I*, 902 N.Y.S.2d at 890; *Battis*, 2010 N.Y. Educ. Dept. LEXIS 109, at \*15–16.

<sup>93</sup> See *Mulgrew II*, 906 N.Y.S.2d at 12; *Mulgrew I*, 902 N.Y.S.2d at 888–90; *In re Santos*, No. 16,116, 2010 N.Y. Educ. Dept. LEXIS 110, at \*9–11, \*14 (N.Y. State Educ. Dept. Aug. 2, 2010).

<sup>94</sup> *Santos*, 2010 N.Y. Educ. Dept. LEXIS 110, at \*1, \*4.

<sup>95</sup> *Id.* at \*4.

<sup>96</sup> *Id.* at \*10–11.

<sup>97</sup> *Id.* at \*13–14.

<sup>98</sup> See *Mulgrew II*, 906 N.Y.S.2d at 12; *Mulgrew I*, 902 N.Y.S.2d at 888–90; *Santos*, 2010 N.Y. Educ. Dept. LEXIS 110, at \*9–11, \*14; *Battis*, 2010 N.Y. Educ. Dept. LEXIS 109, at \*18–21.

<sup>99</sup> See *Mulgrew II*, 906 N.Y.S.2d at 12; *Mulgrew I*, 902 N.Y.S.2d at 888–90; *Santos*, 2010 N.Y. Educ. Dept. LEXIS 110, at \*9–11, \*14; *Battis*, 2010 N.Y. Educ. Dept. LEXIS 109, at \*18–21.

history of its actions and the current legislation. EISs and joint public hearings are simply the newest embodiment of that commitment. EISs are designed to help community members become informed participants and the hearings are meant to give them an official voice in the process. If the community is to be a truly joint participant in school governance, New York courts must be empowered to ensure that the DOE has complied with section 2590-h in a way that is meaningful. Thus, the courts should apply a strict standard when reviewing the DOE's compliance with section 2590-h. Certainly, the mayor retains much control over school governance, but he is forbidden from unilaterally closing schools. This, the legislature has decided, is a community affair.

