Index No. 24-cv-2224 (DG) (JRC)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ALEXANDER *et al.*,

Plaintiffs,

-against-

SUTTON *et al.*,

Defendants.

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

HON. SYLVIA O. HINDS-RADIX
Corporation Counsel of the City of New York
Attorney for Defendants
100 Church Street
New York, New York, 10007

Of Counsel: Jordan Doll
Tel: (212) 356-2624
Matter #: 2024-029385

Date of Service: May 8, 2024

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Pages**

Cases **Pages**

Statutes

Statutes **Pages**

Other Authorities

Other Authorities **Pages**

PRELIMINARY STATEMENT

Defendants submit this memorandum of law in opposition to Plaintiffs' motion for a preliminary injunction seeking to enjoin the implementation of the New York City Department of Education's ("DOE") Chancellor's Regulation D-210, Citywide and Community Education Council ("CEC") Code of Conduct and Complaint Procedures: Anti-discrimination and Anti-harassment Policy ("D-210"), alleging that it violates their First Amendment rights. D-210 is the DOE's mechanism for investigating and responding to certain complaints of misconduct by CEC members, individuals responsible for developing educational policies and facilitating parent and school community engagement. To promote the effective functioning of schools, D-210, which is neither *ad hoc* nor unduly subjective, permissibly proscribes certain disruptive conduct in a viewpoint and content-neutral manner, and promotes CEC members' compliance with anti-discrimination, privacy, and conflicts laws. Enjoining D-210 would deprive the DOE of a critical tool for responding to CEC misconduct. Because Plaintiffs have failed to meet their burden as to the requisite elements for a preliminary injunction, their motion should be denied in its entirety.

STATEMENT OF FACTS

Plaintiffs Deborah Alexander, Maud Maron, and Noah Harlan, each an elected parent member of a CEC or Citywide Council, allege that Defendants DOE, DOE Chancellor David C. Banks, DOE Equity Compliance Officer ("ECO") Nina Mickens (collectively, "DOE Defendants"), CEC for Community School District 14 ("CEC 14"), and Tajh Sutton and Marissa

Manzanares, respectively the President and Vice President of CEC 14 (collectively, the "CEC 14 Defendants")[1] have violated Plaintiffs' First and Fourteenth Amendment Constitutional rights.

Plaintiffs' allegations against DOE Defendants concern Chancellor's Regulation D-210, Citywide and Community Education Council Code of Conduct and Complaint Procedures: Anti-discrimination and Anti-harassment Policy ("D-210"), which prohibits CEC members from engaging in certain conduct such as verbal abuse, making derogatory or offensive comments about DOE students, and disclosing private, personally identifiable information about a student without consent. *See* D-210(II)(C-E). Plaintiffs' allegations against the CEC 14 Defendants concern restrictions on Plaintiffs' access to CEC 14 meetings and CEC 14's social media accounts for reasons purportedly related to Plaintiffs' political viewpoints and associations.

Plaintiffs moved for a Temporary Restraining Order and Preliminary Injunction on April 15, 2024, seeking an injunction "Restraining Defendants and those acting in concert with them," from: (1) discriminating against speakers at CEC 14 public meetings; (2) restricting access to CEC 14's official X account to users approved by "Defendants"; (3) blocking access to CEC 14's official X account based upon users' viewpoints and political associations;[2] and

> (4) implementing or enforcing DOE's Regulation D-210, including conducting any investigation or disciplining or removing from office any Community

[1] Pursuant to New York City Charter § 394(a) and N.Y. Education Law § 2590-e(9), the Corporation Counsel is statutory counsel to CEC 14. As suits against individuals in their official capacity are essentially suits against the entity, pursuant to that same authority, the Corporation Counsel is statutory counsel for CEC 14 President Tajh Sutton and CEC 14 Vice President Marissa Manzanares **in their official capacities only**. *See Ky. v. Graham*, 473 U.S. 159, 166 (1985) ("As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."). The Corporation Counsel does not represent Ms. Sutton and Ms. Marissa Manzanares in their individual capacities.

[2] At this time, the CEC 14 Defendants do not oppose items 1-3 in Plaintiffs' proposed preliminary injunction concerning how CEC 14 meetings are conducted and access to the CEC 14's X (formally known as Twitter) account. However, CEC 14 Defendants do not waive any defenses they may have to these items and preserve the right to oppose these requests as this case develops.

> Education Council or Citywide Council member on the basis that the accused engaged in "frequent verbal abuse and unnecessary aggressive speech that serves to intimidate and causes others to have concern for their personal safety," Reg. D-210, § II.C, or expressed "disrespect towards children," *id.* § II.D, or "derogatory or offensive comments about any DOE student," *id.*, or speech "that would publicly reveal, share or expose private or personally identifiable information about a DOE student or a member of such student's family without their consent," *id.* § II.E[.]

At the April 18, 2024 hearing on Plaintiffs' application for a temporary restraining order, the Court denied Plaintiffs' request for a Temporary Restraining Order, noting that the record was not well-developed; requested the parties to provide additional information regarding the specific speech or conduct at issue; and set a briefing schedule for a Preliminary Injunction.

a. Statement of Relevant Law, Procedures, and Definitions

CECs are established by, and derive their authority from, the New York Education Law. There is one CEC for each community district, NY Ed L. § 2590-b(2)(a), and each council includes two non-voting high school senior students, *id.* at § 2590-c. CECs are responsible for establishing educational policies and objectives and are required to hold monthly meetings "so that parents and the community have a voice and a public forum to air their concerns." *Id*. at § 2590-e(14). CECs are required to promulgate their own bylaws, *id*. at § 2590-d(2), and CEC meetings are subject to the New York Open Meetings Law ("OML"), *id.* at § 2590-d(2)(d).[3]

Pursuant to Education Law § 2590-r and Chancellor's Regulation B-801, CECs receive a budget allocation for their administrative and operational expenses as part of the New York City school district's budget adopted by the Mayor and City Council. CEC members are not compensated to perform their functions but receive reimbursement for expenses. *See id.* at § 2590-

[3] The OML requires, among other things, that meetings of public bodies be open to the general public, except for executive sessions. N.Y. Pub. Off. Law § 103(a) & (c). A public body, such as a CEC, may use videoconferencing if certain criteria are satisfied, including having a quorum of members present in the same physical location where the public may attend. N.Y. Pub. Off. Law § 103-a(2).

c(1)(a)(2). CECs often create, administer and maintain their own websites and social media accounts, such as on Facebook, Instagram or X, to communicate with their parent communities. *See* Declaration of Toni Gantz, dated May 8, 2024 ("Gantz Decl."), ¶¶ 4-5. DOE does not host, oversee or exercise control over CEC websites or social media accounts. *See id.*

b. The Chancellor's Powers

Pursuant to Education Law § 2590-h(16), the Chancellor, as the superintendent of schools and the chief executive officer for the city district, has the power and duty to "[p]romulgate such rules and regulations as he or she may determine to be necessary or convenient to accomplish the purposes of this act, not inconsistent with the provisions of this article and the city-wide educational policies of the city board." Furthermore, under § 2590-l(1)(a), if the Chancellor determines that any CEC fails to comply with any applicable law, bylaw, rule or regulation, he may issue an order requiring the CEC to cease its improper conduct or take required action, and "may enforce that order by use of appropriate means, including:" (i) supersession of the CEC by one or more trustees appointed by the Chancellor, or (ii) suspension or removal of the CEC or any of its members. Prior to the enforcement of such an order, the Chancellor must provide an opportunity for conciliation, except where the conduct at issue is criminal, poses an immediate danger to the safety or welfare of students or employees, or, in the judgment of the Chancellor, is contrary to the best interests of the DOE. NY Ed. L. § 2590-l(1)(b). A suspended or removed CEC or member may appeal such order to the citywide board, also known as the New York City Panel for Educational Policy ("PEP"). NY Ed L. § 2590-l(2).

c. Chancellor's Regulation D-210

Parent engagement and representation are critical to DOE's development of meaningful partnerships between families and schools to improve student outcomes. *See* "Family and

Community Engagement (FACE)," https://www.schools.nyc.gov/get-involved/families/family-and-community-empowerment-face (last accessed May 6, 2024). As part of the New York City school district's governance structure, CECs perform duties and functions that involve regular interactions with DOE school community members (including parents, students, and staff) and members of the public, often in school buildings, and directly influence educational policy and the wellbeing of students. *Id.*; *see also* NY Ed. L. § 2590-e.

Prior to the enactment of D-210, the DOE received numerous complaints from parents, elected officials, community members, and other parent leaders about discriminatory and harassing conduct by CEC members, coupled with the complaint that such misconduct could not be addressed by the DOE. *See* Declaration of Nina Mickens, dated May 8, 2024 ("Mickens Decl"), ¶¶ 6-8. For example, there were complaints that CEC members referred to students and their families with racial slurs, *see* Selima Algar, "Carranza accused of 'pitting parents against each other' along racial lines," *The New York Post*, Sept. 30, 2019 (available at https://nypost.com/2019/09/30/carranza-accused-of-pitting-parents-against-each-other-along-racial-lines/) (last accessed May 5, 2024) (describing CEC member referring to students in derogatory terms in a CEC group list serve)[4] or promoted racist views, *see* Susan Edelman, "Brooklyn parents want ex-NYPD cop with 'anti-black' views off education council," *The New York Post*, June 27, 2020 (available at https://nypost.com/2020/06/27/nyc-parents-want-ex-cop-with-anti-black-views-off-education-council/) (last accessed May 5, 2024);[5] verbally and

[4] *See also* November 13, 2019 Letter from Former Council Member Chaim M. Deutsch to Chancellor Richard Carranza, attached to Mickens Declaration at Exhibit 1.

[5] As described in the *Post* article, hundreds of Community School District 20 families called for the removal of a CEC member that they asserted promoted racist views that contributed to racial violence. *See also* "Open Letter Calling for the Removal of D20 Superintendent Costantino & CEC Member Vito LaBella," June 17, 2020 (available at

physically intimidated fellow CEC members at a CEC meeting, resulting in the police being summoned, *see* CEC 5 Resolution # 86 (Mar. 9, 2020), attached to Mickens Decl. at Exhibit 4, and bullied and belittled students, and revealed students' private information online. *See* July 12, 2020 Letter to Chancellor Richard Carranza from Taylor McGraw, et al., Re: Harassment of student advocates by elected parent leaders, attached to Mickens Decl. at Exhibit 3 ("July 12, 2020 Letter") (also stating that "repeated, unchecked, online harassment has inflicted emotional and psychological pain on the individual student victims as well as on our broader community").

Then-Brooklyn Borough President Eric Adams expressed his dismay that the Chancellor did not have "jurisdiction over CECs because they operate autonomously," and other CEC members did not have the authority to suspend fellow CEC members. *See* February 14, 2020 Letter from Eric L. Adams to Chancellor Richard Carranza, Re: Concerns surrounding treatment of Brooklyn's Asian community, attached to Mickens Decl. at Exhibit 2; *see also* July 12, 2020 Letter (urging the Chancellor to take action in response to CEC members publicly bullying student activists, including "[a]mend[ing] the Chancellor's Regulations to include a zero tolerance policy across Community Education Councils for bullying, harassing, or revealing private information of public school students").

In response to the repeated requests to DOE to address CEC members' conduct, and consistent with his authority under Education Law §§ 2590-h(16), 2590-d, and 2590-l, the Chancellor promulgated, and the PEP approved, in accordance with Education Law § 2590-g, Chancellor's Regulation D-210 in December 2021. Mickens Decl., ¶¶ 9-10.

---

https://www.facebook.com/EquityEdD20/posts/open-letter-calling-for-the-removal-of-d20-superintendent-costantino-cec-member-/169056877926186/) (last accessed May 5, 2024).

This regulation is intended to ensure "the treatment of all parents with respect and dignity and the provision of opportunities for fair and just participation and parent engagement." D-210, Introduction. Significantly, "[a]s elected or appointed parent leaders, Council Members have the duty to observe a high standard of ethics, integrity and decorum. Council Members are expected to be exemplary role models on the councils and in the communities in which they serve, and to fulfill their responsibilities in a way that respects the rights of all parents and students they serve." *Id.*

To that end, D-210 proscribes certain conduct by CEC members, including discriminatory and harassing conduct, that is directly harmful to parents, students, and school community members, undermines parent and school community engagement and CECs' effective functioning, and undermines public trust in the New York City school district. Prohibiting such conduct is consistent with the Chancellor's duty to promote the best interests of schools, equal educational opportunity for DOE students, and educational equity. *See generally* N.Y. Educ. Law §§ 2590-h, 2590-h(17), & 2554(15). The regulation applies to a CEC member's verbal or physical acts, including oral and written language, "when it occurs during or at (a) CCEC [Citywide or Community Education Council] meetings, (b) events hosted by the CCEC, (c) CCEC elections and campaigns, (d) public appearances and events a Council Member attends in their official capacity [hereafter "CEC Events"], and (e) other activities when such conduct creates or would foreseeably create a risk of disruption within the district or school community the Council Member serves and/or interferes with the functioning of the CCEC or the performance of the Council Member's CCEC duties." D-210, Definitions, ¶ 3.

As relevant here, the Regulation prohibits CEC members from engaging in: "conduct that serves to harass, intimidate, or threaten, including but not limited to frequent verbal abuse and

unnecessary aggressive speech that serves to intimidate and causes others to have concern for their personal safety," *id*., Section (II)(C); "conduct involving derogatory or offensive comments about any DOE student," *id*., Section (II)(D); and "conduct that would publicly reveal, share or expose private or personally identifiable information about a DOE student or a member of such student's family without their consent," *id*., Section (II)(E).

The Regulation sets forth a complaint process under which the ECO investigates a complaint, including interviewing parties and witnesses and reviewing relevant evidence, prepares a report of her findings and recommendation, presents it to the Equity Council[6] for review, and then submits it for determination by the Chancellor or his designee. *Id*., Section (IV)(C)(2). The subject of a complaint has the right to respond to the allegations. *Id*., Section (IV)(C)(2). Furthermore, in balancing the interests of protecting the privacy of parties and witnesses to a complaint, and the obligation to provide due process to the subjects of the complaint, copies of the complaints are not provided to the subjects, but the ECO discloses the nature of the allegations to the subject either prior to or during the interview with the subject. *Id*., Section (IV)(C)(3); Mickens Decl., ¶ 11. The Chancellor has delegated authority for issuing determinations under D-210 to the Deputy Chancellor of Family and Community Engagement and External Affairs, Kenita Lloyd ("Deputy Chancellor Lloyd"). Gantz Decl., ¶ 6.

[6] The Equity Council is a group of parents from the CECs, citywide councils, and Chancellor's Parent Advisory Council. *See* Chancellor's Regulation D-210, Definitions, ¶ 6.

i. Chancellor's Orders Concerning CEC 14 Meetings and Ms. Sutton's Conduct

Since June 2023, CEC 14 has conducted its meetings fully remotely, despite extensive efforts by DOE to provide guidance to and assist the CEC in holding in-person meetings.[7] In an order directed to Ms. Sutton dated April 16, 2024, the Chancellor determined, *inter alia*, that CEC 14 had failed to fulfill its statutory duties. Gantz Decl., Ex. 2. The Chancellor also addressed the fact that the Council's meetings between November 2023 and January 2024 generated numerous complaints about exclusion and removal of participants, which "rais[ed] concerns about whether such meetings have truly been open to the general public as required by the OML, or have truly provided a public forum as required by the Education Law." *Id.* [8]

d. Ms. Maron's Conduct and D-210 Investigations

DOE received several complaints against Maud Maron, a CEC 2 member, for alleged violations of Chancellor's Regulation D-210 between October 2023 and March 2024. Mickens Decl. ¶ 12; Maron Declaration, dated April 10, 2024 (ECF No. 13-4) ("Maron Decl."), ¶ 2. The ECO made numerous attempts to interview Ms. Maron regarding these complaints beginning on February 8, 2024. *See* Maron Decl., ¶ 11. Mickens Decl. ¶¶ 13-17 In response to Ms. Maron's inquiry about the number and nature of complaints against her, on March 8, 2024, the ECO advised Ms. Maron that the allegations related to her comments about the LGBTQI+ community. *See* Maron Decl., ¶ 12-14. Mickens Decl., ¶ 14. DOE also advised Ms. Maron that the interview would

[7] In recent months, Ms. Sutton and Ms. Manzanares have cited safety concerns based on their interactions with other parents as the reason for holding the meetings remotely, though DOE offered heightened security measures to address their concerns.

[8] On or about March 11, 2024, parents in Community School District 14, who are not parties to this action, brought an appeal before the Commissioner of the New York State Education Department ("NYSED") against DOE alleging many of the same facts about CEC 14's conduct that appear in the instant action, and arguing, among other things, that CEC 14's actions violated Chancellor's Regulation D-210. *See Fink et al., v. the DOE*, Appeal No. 22109 (New York State Education Department) (decision pending).

include a complaint regarding her comments about a Stuyvesant High School student. Mickens Decl., ¶ 16. After numerous attempts to contact Ms. Maron for an interview and informing her that the investigation would proceed without her participation, Ms. Maron did not ultimately participate. Mickens Decl., ¶ 17. Pursuant to D-210, the ECO completed the investigation, prepared a report of her findings and recommendations, presented it to the Equity Council, and then submitted it for a final determination. Mickens Decl., ¶¶ 18-19.

The completed investigation concerned Ms. Maron's statements, published February 24, 2024 in a *New York Post* article (the "NY Post Article"),[9] that she made in response to an opinion piece concerning the Israel-Hamas war that was authored by a Stuyvesant High School student anonymously and published in a student newspaper.[10] *See* Mickens Decl., ¶ 18. Ms. Maron was quoted in the NY Post Article saying about the anonymous student author: "The byline should read coward instead of anonymous. If you are going to repeat revolting Hamas propaganda and transcribe your ignorance and Jew hatred, put your name to it." *See* Maron Decl., ¶ 23.

A determination issued on April 17, 2024 found a reasonable basis to conclude that Ms. Maron engaged in conduct that constitutes a violation of D-210(II)(C)&(D), and ordered Ms. Maron to "cease engaging in conduct involving derogatory or offensive comments about any New York City Public School student, and conduct that serves to harass, intimidate, or threaten, including but not limited to frequent verbal abuse and unnecessary aggressive speech that serves to intimate and cause others to have concern for their personal safety." Gantz Ex., 1. On or about April 18, 2024,

[9] Jon Levine and Anita Bohle, "NYC's Stuyvesant HS newspaper accuses Israel of 'genocide' while whitewashing Hamas' massacre," *The New York Post*, Feb. 24, 2024 (available at: https://nypost.com/2024/02/24/us-news/nycs-stuyvesant-hs-newspaper-accuses-israel-of-genocide-whitewashes-hamas-massacre/) (last accessed May 1, 2024).

[10] Anonymous, "Black and White: The Withheld History of Palestine and Israel," *The Spectator*, Vol. 114, Issue 10, Feb. 16, 2024, p. 14.

Ms. Maron requested clarity as to the conduct at issue in the determination; on the same day, DOE replied that the decision concerned Ms. Maron's comments in the NY Post Article. Gantz. Ex., 4. Ms. Maron was offered the opportunity to participate in a conciliation, which is scheduled for May 13, 2024. Gantz Decl. ¶ 15.

e. Ms. Alexander's Conduct and D-210 Investigation[11]

On or about October 10, 2023, DOE received a complaint alleging that Deborah Alexander, then a CEC 30 member, had violated Chancellor's Regulation D-210 by disclosing private information about a DOE student, the child of another CEC member, through social media. Mickens Decl., ¶¶ 20-21. The ECO presented the social media posts at issue to Ms. Alexander during the interview. Mickens Decl., ¶ 21; Declaration of Deborah Alexander, dated March 24, 2024 (ECF No. 13-3) ("Alexander Decl."), ¶¶ 23-26. Ms. Alexander was given an opportunity to respond and provided additional documentary information. Mickens Decl., ¶¶21-22. The determination issued on May 3, 2024 found that Ms. Alexander had not violated Chancellor's Regulation D-210. Gantz Decl. ¶ 17.

ARGUMENT

I. Standard of Law

A preliminary injunction is an extraordinary remedy never granted as a right. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). To succeed, Plaintiffs must show "irreparable harm and either (a) a likelihood of success on the merits or (b) a sufficiently serious question going to the merits, with a balance of hardships tipping in favor of the party requesting the preliminary injunction." *Tunick v. Safir*, 209 F.3d 67, 70 (2d Cir. 2000).

[11] Plaintiff Noah Harlan has never received a negative determination from the DOE under any of the Chancellor's regulations and is not the subject of any pending Chancellor's Regulation D-210 complaint.

In an analysis of a preliminary injunction for a First Amendment claim, likelihood of success on the merits is the most important factor. *See N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). "[When,] as here, the moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the **more rigorous** likelihood of success standard." *No Spray Coalition, Inc. v. City of New York*, 252 F.3d 148, 150 (2d Cir. 2001) (emphasis added).

Irreparable harm must be an injury "neither remote nor speculative, but actual and imminent." *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989). In the context of a preliminary injunction, the loss of First Amendment freedoms is deemed an irreparable injury. *See Tripathy v. Lockwood*, 22-949-pr, 2022 WL 17751273, 2022 U.S. App. LEXIS 34929, *5 (2d Cir. 2022). But the mere fact of pending discipline or a potential chilling effect is insufficient to justify irreparable harm in the First Amendment context. *See Latino Officers Ass'n v. Safir,* 170 F.3d 167, 171 (2d Cir. 1999).

II. Chancellor's Regulation D-210 is Consistent with the First Amendment and Plaintiff Fails to Meet the Elements of a Preliminary Injunction

A. CEC Speech May Be Regulated Due to Actual or Potential Disruption

CEC members are statutorily tasked with "establish[ing] educational policies and objectives" and "promot[ing] achievement of educational standards and objectives relating to the instruction of students" as part of the city school district, NY Ed. L. § 2590-e(3); their speech, like government employee speech, may be regulated when its value is outweighed by the disruption to government functions. *See Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995) (citing *Waters v. Churchill*, 511 U.S. 661, 672 (1994)).

Moreover, in the context of education, the impact of school district officials' speech or

conduct on the parent and school community is of particular significance because parents are "participants in public education, without whose cooperation public education as a practical matter cannot function. Any disruption created by parents can be fairly characterized as internal disruption to the operation of the school, a factor which may be accounted for in the balancing test and which may outweigh a public employee's rights." *Melzer v. Bd. of Educ. of City Sch. Dist. of City of New York*, 336 F.3d 185, 199-200 (2d Cir. 2003). Plaintiffs' reliance on *Velez v. Levy* for the proposition that CEC members cannot be removed for expressing contrary political views to the DOE is inapposite because in that case "[n]o defense of disruption [was] … asserted." 401 F.3d 75, 95, fn. 19 (2d Cir. 2005). Consistent with the framework set out above, certain provisions of Chancellor's Regulation D-210 that Plaintiffs challenge regulate speech and conduct in the course of CEC members' performance of their duties at CEC Events and when their conduct creates or would foreseeably create a risk of disruption in the district or school community they serve, or interferes with the functioning of the CEC or performance of CEC members' duties. D-210, Definitions, ¶ 3.

Here, assuming without conceding that Ms. Maron's statement calling a Stuyvesant High School student a "coward" and declaring their "ignorance" concerned a matter of public concern, the value, if any, of this disparaging speech directed towards a student – whose educational welfare she is responsible for promoting as part of her CEC duties – is easily outweighed by the disruption it caused and foreseeably would cause. *Cf. Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 476 (3d Cir. 2015), as amended (Oct. 25, 2019) (affirming dismissal of First Amendment claims arising from school district's termination of plaintiff for her "various expressions of hostility and disgust against her students," which the court found "would disrupt her duties as a high school teacher and the functioning of the School District"). Ms. Maron's inflammatory remark was essentially

bullying and any political value it theoretically might have was outweighed by harm caused to the school community. Indeed, several parents and students from Stuyvesant High School, which is located within the jurisdiction of CEC 2, complained about her quote in the NY Post Article and expressed safety concerns. Mickens Decl., ¶ 18. Furthermore, the NY Post Article in question garnered over 300 comments, many of which concerned Student A's anonymous status, called Student A a "coward," and called for violence against the students involved in publication of the opinion article.[12] Mickens Decl., ¶ 18. Therefore, DOE's action on Ms. Maron's speech was justified based on its actual and potential disruption.

B. Chancellor's Regulation D-210 Is Viewpoint-Neutral

Even if the Court were to find the government employee framework inapplicable to CEC members, the provisions of D-210 that Plaintiffs challenge survive First Amendment scrutiny because they are viewpoint- and content-neutral, and narrowly tailored to achieve compelling government interests.

The Second Circuit has recognized that "[t]here is no fundamental right of freedom of speech in a limited forum from which various types of speakers and subjects are properly excluded." *Bronx Household of Faith v. Comm. Sch. Dist. No. 10*, 127 F.3d 207, 217 (2d Cir. 1997). Moreover, because school board members "are entrusted to manage the affairs of the district to achieve the best possible outcome for the district's students" and "must engage in constructive discussion with [their] fellow board members . . . it is imperative that a board member treat his or

[12] For example, one comment stated: "In the age of the internet; may these dogs be hunted down;" another stated, "In the West Bank they string traitors up on lamp posts. Maybe we can bring a little of that Middle East culture here?" Another comment stated: "I LOVE ISRAEL. I HATE PALESTINIAN CIVILIANS, REGARDLESS OF AFFILIATION. I WISH IMMEDIATE HARM ON THOSE MINORS INVOLVED IN THE PRODUCTION OF THIS ARTICLE." *See* Jon Levine and Aneeta Bhole, "NYC's Stuyvesant HS newspaper accuses Israel of 'genocide,' whitewashes Hamas' massacre (nypost.com)," *The New York Post*, Feb. 24, 2024 (comments).

her colleagues with dignity and respect." *Appeal of Gill*, 42 Ed Dept Rep, Decision No. 14785, 2002 WL 34702304, 6 (NYSED Aug. 22, 2002) (affirming removal of school board member for "inappropriate, antagonistic and offensive conduct" that included "personal attacks, racial slurs and antagonistic behavior toward his fellow board members and a taxpayer").

Accordingly, to preserve decorum, school boards may restrict, consistent with the First Amendment, speech that is "personally directed, abusive, obscene, or irrelevant," *Moms for Liberty v. Brevard Pub. Schs.*, 582 F. Supp. 3d 1214, 1219–20 (M.D. Fla. 2022) (denying plaintiffs' motion for an injunction with respect to a school board meeting policy after finding that "prohibiting abusive and obscene comments is not based on content or viewpoint, but rather is critical to prevent disruption, preserve 'reasonable decorum,' and facilitate an orderly meeting") (omitting citations), *aff'd*, No. 22-10297, 2022 WL 17091924 (11th Cir. Nov. 21, 2022); expressed in "a hostile manner" or comprised of racial epithets, *Dyer v. Atlanta Independent School System*, 426 F. Supp. 3d 1350, 1360 (N.D. Ga. 2019), *aff'd* 852 Fed. Appx. 397 (11th Cir. 2021); or which devolves into a "rant." *Arnold v. Ulatowski*, No. 5:10-cv-1043 (MAD/ATB), 2012 WL 1142897, at *4-5 (N.D.N.Y. Apr. 4, 2012).

Chancellor's Regulation D-210's prohibitions against "frequent verbal abuse and unnecessary aggressive speech that serves to intimidate and causes others to have concern for their personal safety," Section (II)(C), and "conduct involving derogatory or offensive comments about any DOE student," Section (II)(D), fall squarely within the set of permissible viewpoint and content-neutral restrictions discussed above. *See, e.g., Moms for Liberty*, 582 F. Supp. 3d at 1219–20; *Dyer*, 426 F. Supp. 3d at 1360; *Arnold*, 2012 WL 1142897, at *4-5. Consistent with the rationale for permitting restrictions in a limited forum, these provisions target conduct that can be

reasonably expected to disrupt CEC Events and/or disrupt or would foreseeably disrupt the school or community served by the CEC member or performance of the CEC's functions and duties.

Restrictions on speech must also be narrowly tailored to achieve a compelling government interest. *See Dyer*, 425 F. Supp. 3d at 1360. While restrictions on speech must be narrowly tailored, they "need not be the least restrictive or least intrusive means" available. *Dyer*, 426 F. Supp. 3d at 1361 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)). Here, there are several well-established compelling interests at play: (1) preserving decorum at board meetings, *see id.*; (2) promoting the best interests of schools and students, *cf. Bronx Household*, 127 F.3d at 214 (describing education as "a particularly important state function"); (3) maintaining an "environment for students that is free from discrimination and harassment," NY Educ. L. §10 (noting that one of the purposes of the Dignity for All Students Act is to "prevent and prohibit conduct which is inconsistent with a school's educational mission"); and (4) preserving student privacy, *see Schuloff v. Murphy*, 1997 WL 588876, at *1 (E.D.N.Y. Sept. 17, 1997) (dismissing First Amendment claims based on defendant university's restricting plaintiff from revealing identities of other students at board of trustees meeting, finding that limitation furthered compelling interest of preserving student privacy) (citing Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"), which prohibits educational agencies and institutions from disclosing a student's personally identifiable information without consent, except in narrow circumstances).

Each of the D-210 provisions at issue here is narrowly tailored to achieve one of the above compelling interests. For example, Section II(C) is narrowly-tailored to preserve decorum and curtail the type of harassing, abusive, aggressive, intimidating and offensive behavior that deterred robust parent participation prior to the promulgation of D-210. Its application beyond CEC Events

to other activities where the conduct disrupts or would foreseeably disrupt the district or school served by the CEC member or interferes with the function of the CEC or performance of the member's duties is appropriate in scope because CEC members can engage (and have engaged) in disruptive harassing behavior not only at CEC Events, but also online (such as by expressing racial slurs on a group list serve or on social media or doxxing students online). *See* D-210, Definition, ¶ 3; Mickens Decl., ¶¶ 6-9. The Regulation does not prohibit CEC members from expressing critical views of DOE policies, officials, action or other CEC members in any forum; it only limits the manner in which they are expressed.

Section II(D) is narrowly tailored to protect students from harassment and derogatory or offensive comments by CEC members about any DOE student. This prohibition is particularly appropriate given DOE's duty to ensure a safe and harassment-free environment for students, the fact that each CEC includes two seats for student representatives, and in light of the harassing behavior CEC members exhibited towards students who held views contrary to their own prior to the promulgation of D-210. *See* NY Educ. L. §§ 10 & 2590-c(1)(d); *Santer v. Bd. of Educ. of E. Meadow Union Free Sch. Dist.*, 23 N.Y.3d 251, 269 (2014) (dismissing First Amendment claims where "petitioners' interests in engaging in that constitutionally protected speech in a manner that interfered with the safety of students were outweighed by the District's interests in maintaining an orderly, safe school"); Mickens Decl., Exhibit 3 (reporting that CEC members doxxed, bullied and harassed student activists and their families online).

Ms. Maron's statement in the NY Post Article calling a student author a "coward" and referring to their "ignorance" fell squarely within the prohibited conduct of Sections II(C) and (D) because it was unnecessary aggressive speech and a derogatory statement made towards a DOE student. Ms. Maron could have made any number of other statements critical of the opinion piece's

accuracy or perspective, but her hostile statement directed towards the DOE student author ran directly counter to the DOE's compelling interest to protect students from harassing behavior, and was thus justifiably restricted. Moreover, the comment could have implicated the student's privacy; while the article was published anonymously, the media coverage could have led to the student's identity being leaked or a knowledgeable reader extrapolating the identity based on the high school and the viewpoints expressed.

Section II(E), which prohibits the disclosure of private personally identifiable information of a student or family members, is narrowly tailored to preserve student privacy, as well as protect students from being harassed and doxxed by CEC members. Notably, FERPA defines a student's personally identifiable information as including, among other things, the student's name, the name of the student's parent or family members, and "other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty." 34 C.F.R. § 99.3. Thus, Section II(E) is appropriate in scope because it only applies to private and personally identifiable information about a student or their family that is disclosed without consent.

Here, it was determined that Ms. Alexander's social media posts and social media interactions did not amount to a violation of Section II(E) because they did not publicly reveal, share or expose private, personally identifiable information about a DOE student. Mickens Decl., ¶22.

Plaintiff's reliance on *Ison v. Madison Local School District Board of Education,* 3 F.4th 887, 894 (6th Cir. 2021), and *Mama Bears of Forsyth County v. McCall,* 642 F. Supp. 3d 1338, 1350 (N.D. Ga 2022), for the proposition that offensive speech may not be restricted in a limited

forum is misplaced because in those cases, the courts found that the meeting policies at issue either prohibited negative speech against board members, or mandated deferential treatment towards board members. By contrast, Section II(C) does not refer only to speech directed specifically at CEC members or DOE officials, but rather is applicable as to speech of all political and ideological views, and is thus viewpoint-neutral.

C. Chancellor's Regulation D-210 Is Neither Vague Nor Overbroad

Plaintiffs allege D-210 is both facially vague and overbroad. Compl. ¶¶ 120-27. Plaintiffs' Memorandum of Law ("Pl. Br.") (ECF No. 13-2) 18-21, identifying, *inter alia*, the words "disrespect," "derogatory," "abuse," "aggressive," "offensive," "private," and "personal identifiable information" as vague. Compl. ¶¶ 121-23. Plaintiffs are wrong, failing to consider the specific context in which the regulation is applied and the compelling interests it upholds. As explained above, D-210 supports the compelling interests of maintaining meaningful and inclusive parent and school engagement and effective CEC functioning, and limiting disruption to the school community. D-210, Introduction. In this context, which is explained in the Regulation itself, the provisions at issue put a reasonable person on notice on what is expected of them. Plaintiffs have not alleged, and cannot allege, any otherwise permissible constitutional conduct that has been arbitrarily investigated through D-210.

A statute or policy is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. But perfect clarity and precise guidance have never been required even where statutes restrict expressive activity." *United States v. Schulte*, 436 F. Supp. 3d 747, 752-53 (S.D.N.Y. 2020) (internal quotes omitted).

> **[T]he level of precision required for a policy or statute to survive a vagueness challenge depends on the circumstances in which the policy or statute applies.**

> [A] public employer may, consistently with the First Amendment, prohibit its employees from being 'rude to customers,' a standard almost certainly too vague when applied to the public at large. Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions. **Perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.**

Bloch v. Bouchey, 2:23-cv-00209, 2023 WL 9058377, 2023 U.S. Dist. LEXIS 231661, at *74-75 (D. Ct. Vt. 2023) (internal citations omitted) (emphasis added).

D-210 prohibits "frequent verbal abuse and unnecessary aggressive speech that serves to intimidate and causes others to have concern for their personal safety," Section (II)(C), and "conduct involving derogatory or offensive comments about any DOE student," Section (II)(D). Contrary to Plaintiffs' argument that these terms are overly subjective, it is disingenuous to suggest there are no workable, objective criteria. These provisions can reasonably be interpreted as prohibiting personal attacks, yelling, and other disruptive speech that impedes the functionality of the forum. *See Plummer v. Quinn*, 326 Fed. Appx. 571, 574-75 (2d Cir. 2009) (finding, *inter alia*, employee's First Amendment rights were not violated when their yelling and threatening language disrupted a city council vote and implicated city council members safety, and defendants showed that the disruption outweighed plaintiff's interest in free speech).[13]

Moreover, Chancellor's Regulation A-421, Pupil Behavior and Discipline – Verbal Abuse, is instructive. *See* Chancellor's Reg. A-421, available at https://www.schools.nyc.gov/docs/default-source/default-document-library/a-421-(10-30-14)2a2cd7d365694e10843741b8bd83dfb0.pdf (last accessed May 7, 2024). That regulation prohibits DOE staff as well as other individuals, including community-based organization staff

[13] *See also* "Verbal abuse" is "speech that is intended to humiliate and intimidate." See VERBAL ABUSE Definition & Meaning | Dictionary.com (last accessed May 6, 2024).

"and similar individuals" on school property and at school functions from engaging in verbal abuse, which includes, but is not limited to, language that "(1) Belittles, embarrasses or subjects students to ridicule; …(3) Has or would have the effect of unreasonably and substantially interfering with a student's mental, emotional, or physical well-being; or (4) Reasonably causes or would reasonably be expected to cause a student to fear for his/her physical safety." Chancellor's Reg. A-421, Section II(A). These examples of verbal abuse are useful in outlining the contours of the conduct prohibited in D-210(II)(C) and (D), and provide the necessary clarity to survive Plaintiffs' claims of facial overbreadth and vagueness. *See Sullivan v. N.Y. State Joint Comm'n on Pub. Ethics*, 207 A.D.3d 117, 127–28, 170 N.Y.S.3d 234, 245 (2022) ("[F]acial overbreadth will not compel invalidation 'when a limiting construction has been or could be placed on the challenged statute.'" (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, (1973))).

While Plaintiffs essentially plead only a facial challenge to D-210, courts favor an as-applied review. *See, e.g.*, *United States v. Schulte*, 436 F. Supp. 3d at 752-53 (quoting *Parker v. Levy*, 417 U.S. 733, 759, (1974) (noting a preference for "as-applied review" which "flows from 'the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court'")). This principle is particularly apt under these facts because a preliminary injunction of an entire code of conduct cannot be based on Plaintiffs' abstract concern of how it may or may not be applied.

The D-210 determination issued against Ms. Maron was based on her comments in the NY Post Article, wherein she called a student a "coward" and attributed ignorance and "Jew hatred" to the student; such comments were clearly within the scope of Sections II(C) and II(D), provisions which prohibit verbal abuse and derogatory comments about students, respectively, and which

serve the compelling interest of protecting students from harassment and bullying. *See* NY Educ. L. §10. Not surprisingly, courts have found that insults against students do not merit protection under the First Amendment when balanced against a school district's compelling interests, even where the targeted students are not specifically identified. *See Munroe*, 805 F.3d at 476 (upholding school's termination of teacher who published derogatory and insulting statements about unnamed students, such as calling them "jerks," "lazy," and "frightfully dim").

"A law is unconstitutionally overbroad if it 'punishes a substantial amount of protected free speech, judged in relation to [its] plainly legitimate sweep.'" *Schulte*, 436 F. Supp. at 750 (quoting *Virginia v. Hicks*, 539 U.S. 113, 118-19, (2003)). As explained above, D-210 does not sweep "in vast amounts of protected expression," Pl. Br. 21, but rather provides workable standards in the specific context of the DOE community. Plaintiffs have not explained what might be impermissibly included beyond the assertion that the D-210 provisions at issue "sweep unnecessarily broadly," *id.* at 20 (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)). Asking the Court to imagine instances where D-210 might overstep is not sufficient for a preliminary injunction. *See Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) ("[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.").

Moreover, Plaintiffs have failed to actually allege a change in behavior that would demonstrate any chilling effect. Conclusory allegations that Plaintiffs *may* feel less inclined to speak on certain matters, *see* Compl. ¶ 82, is an entirely subjective point and not the chilling effect that would justify a preliminary injunction. *See MacPherson v. Town of Southampton*, 738 F. Supp. 2d 353, 369 (E.D.N.Y. 2010) (dismissing First Amendment retaliation claim based upon plaintiff's failure to allege that defendants' conduct actually chilled the exercise of plaintiff's First

Amendment rights because "the complaint did not contain any factual allegations setting forth specific instances in which plaintiff desired to exercise his First Amendment rights but was chilled by defendants' alleged conduct") (internal quotation marks omitted) (cleaned up).

The First Amendment does not immunize from regulation expressive conduct whose disruption outweighs the value of that speech. The DOE should have a remedy to prevent disruption to parent engagement, the school community, and/or the discharge of the CEC's functions and duties.

D. Plaintiffs Fail to Demonstrate Irreparable Harm

Plaintiffs continue to hold positions on their respective CECs and Ms. Maron has opted to engage in the conciliation process afforded by Education Law 2590-l(1)(b) and Chancellor's Regulation D-210(IV)(E). Gantz Decl. ¶ 15. No enforcement action has been taken against Plaintiffs to date. Moreover, in the event that a CEC member is suspended or removed, they have the right to appeal that action, and request a stay of such action pending the appeal. *See* NY Educ. L. 2590-l(2); 8 NYCRR § 113.7.

Because neither Mr. Harlan nor Ms. Alexander has active investigations under D-210, the harm pled is a conjectural chilling effect. *See* Pl. Br. 21 Plaintiffs have failed to show how the Regulation has changed Plaintiffs' expressive behavior, except in broad hypotheticals.

> Although we acknowledge that, as a theoretical matter, [the notice and reporting requirements] may make some officers more reluctant to speak than they would be if they did not have to bring their speech to the Department's attention . . ., **this kind of conjectural chill is not sufficient to establish real and imminent irreparable harm.**

See Latino Officers Ass'n v. Safir, 170 F.3d 167, 171 (2d Cir. 1999) (emphasis added).

E. Plaintiffs' Request Is Against the Public Interest

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-*

Barcelo, 456 U.S. 305, 312 (1982). Plaintiffs have not shown any legal or factual basis to support their request that this Court immediately enjoin DOE from addressing serious and harmful misconduct by individuals who are responsible for developing educational policies, and who interact with school community members and students in the performance of their functions for the City school district. Were the proposed Preliminary Injunction granted, CEC members would be permitted to engage in verbal abuse and aggressive, intimidating, derogatory, offensive, disrespectful, and threatening speech at CEC meetings, on official social media sites, and to the press, including revealing students' private, personally identifiable information, without accountability.

Chancellor's Regulation D-210 is a critical mechanism, that is neither *ad hoc* nor impermissibly subjective, to investigate alleged misconduct and avoid disruption in the DOE school system. Moreover, it is important to highlight that, should a person be the subject of an adverse finding and enforcement, they have recourse to challenge such actions. *See* D-210(IV); *see* generally NY Educ. Law § 2590-l(1)(b); 8 NYCRR § 113.7. Accordingly, it is contrary to the public interest to grant the requested preliminary injunction.

CONCLUSION

For the reasons set forth above, the Court should deny Plaintiffs' request for a Preliminary Injunction in its entirety, and grant Defendants such other and further relief as it deems proper.

Dated: New York, New York
May 8, 2024

/s/
Jordan Doll
Assistant Corporation Counsel