

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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In the Matter of the Application of :  
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THE PROFESSIONAL STAFF :  
CONGRESS/CUNY, :  
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Petitioner, :  
 :  
- against - :  
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THE CITY UNIVERSITY OF NEW YORK, :  
 :  
Respondent. :  
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Verified Petition  
Index No:

**VERIFIED PETITION PURSUANT TO CPLR ARTICLE 78  
FOR ORDER IN THE NATURE OF MANDAMUS**

This Verified Petition in the nature of mandamus to compel is brought pursuant to Article 78 of the Civil Practice Law and Rules (“CPLR”). The Professional Staff Congress/CUNY (“PSC”) petitions to compel, through a temporary restraining order (“TRO”) and an injunction, Respondent City University of New York (“CUNY”), and its constituent college Hunter College, to act as mandated by its own rules and regulations contained in its Reopening Plan for the Hunter College Campus Schools (“Hunter” or “HCCS”) and install portable high-efficiency particulate arrestance (HEPA) air filtration units in all classrooms with ventilation systems using recirculated air. Without a TRO and injunction, Hunter’s faculty and students will be subject to increased risk of serious illness or death related to SARS-CoV-2 (“COVID-19”) infection if they are forced to return to HCCS without compliance with the Reopening Plan. PSC alleges as follows:

## INTRODUCTION

1. CUNY's Hunter College operates HCCS, a kindergarten through twelfth grade public school located in Manhattan. The PSC is the labor union that represents the faculty and laboratory technicians at HCCS. Aff. of Naomi Zauderer, dated Sept. 17, 2020 ("Zauderer Aff."), ¶3.

2. After initially banning in-person instruction for public schools, Governor Cuomo's Executive Orders 202.45 and 202.60 permitted schools to reopen subject to adherence to New York State Department of Health issued guidance and directives.

3. In turn, each school was required to issue a reopening plan designed to protect employees and students against the spread of COVID-19, including providing for ventilation that protects employees and students. Proper ventilation is critical, as airborne particles are a major source of infection.

4. On or about August 20, Hunter issued its "Hunter College Campus Schools K-12 Reopening Plan." The Plan, which was approved by CUNY, is a CUNY rule or regulation that has the force of law.

5. The Plan states that one of the first steps for Hunter to implement is that the "portable high-efficiency particulate arrestance (HEPA) air filtration units **will be** installed in classrooms which have ventilation systems that use recirculated air." Aff. of Jean Grassman, dated Sept. 17, 2020 ("Grassman Aff."), Exhibit A (emphasis added). This provision of the Plan was critical. The American Society of Heating, Refrigerating and Air-Conditioning Engineers ("ASHRAE") is the authoritative source for COVID-19 HVAC / air filtration guidance. The ASHRAE specifically states that in rooms where Minimum Efficiency Reporting Value ("MERV") 13 Filters cannot be used, like at HCCS, schools should have, **in each such classroom**, HEPA filters that recirculate air within that space at least two times per hour. This is

because ASHRAE has concluded that “HEPA filters are more than 99.97% efficient at capturing airborne viral particles associated with SARS-CoV-2.”<sup>1</sup> Grassman Aff. ¶9.

6. However, on September 14, 2020, the PSC and the faculty learned that Hunter did NOT install or even purchase HEPA filters. Hunter instead purchased and installed an untested air purifier (not even a filter) whose efficacy against COVID-19 or other viruses is at best unknown. Contrary to the ASHRAE requirement, this untested device does not recirculate the air at least two times per hour. Yet, despite CUNY’s failure to comply with its own Reopening Plan, CUNY is compelling some HCCS faculty to return to school and begin in-person instruction on Tuesday, September 29. By compelling faculty and students to start in-person instruction on September 29 despite having no HEPA filters – as required by CUNY’s own HCCS Reopening Plan – CUNY is putting HCCS faculty and students at greater risk of being infected with COVID-19.

7. HCCS faculty and staff are devoted to their students and recognize the critical importance of returning to the classroom for in-person instruction, particularly for the youngest of the students. Nevertheless, the faculty, staff, and students should not be forced (a) to be exposed to increased risk of serious illness or death and (b) to return to the classroom in direct violation of the HCCS Plan, which was intended to keep them safe.

8. PSC accordingly requests that CUNY and Hunter be ordered to comply with its own Reopening Plan and be enjoined from starting in-person classes until such time as (a) Hunter installs HEPA filters in all HCCS classrooms which have ventilation systems that use recirculated air and (b) an independent inspection determines that the building is safe.

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<sup>1</sup> <https://www.ashrae.org/technical-resources/filtration-and-disinfection-faq> (last visited Sept. 21, 2020) (answer to Question No. 3).

9. The PSC is forced to seek a temporary restraining order and preliminary injunction now because it only learned of the lack of HEPA filters on September 14, 2020.

### **THE PARTIES**

10. PSC is an “employee organization” under § 201(5) of the Civil Service Law. PSC is the collective bargaining representative of approximately 30,000 members of the CUNY instructional and professional staff, including the faculty and laboratory technicians at HCCS. Its primary purpose is to advance and secure the professional and economic interests of its members. It maintains its office at 61 Broadway, New York, New York 10006. Zauderer Aff. ¶4.

11. PSC’s objectives include, but are not limited to, improving the quality of education and scholarship at CUNY; negotiating and administering CBAs; serving as the public representative for CUNY instructional staff and other PSC-represented employees; and cooperating with other CUNY employee and academic organizations and student bodies in order to advance the interests of the faculty, staff, and students of CUNY, and the communities it serves. Zauderer Aff. ¶5.

12. CUNY is a “public employer” under § 201(6) of the Civil Service Law. It is a public university created by the New York State legislature. N.Y. Educ. Law § 6203. It has eleven senior colleges, seven community colleges, and seven graduate, honors, and professional schools, as well as HCCS. Its principal place of business is located at 205 East 42nd Street, New York, New York 10017. CUNY is governed by a Board of Trustees, which “shall govern and administer all educational units of the city university.” N.Y. Educ. Law § 6204(1); *see also id.* § 6206(1). Zauderer Aff. ¶6.

13. Hunter College is one of CUNY’s constituent colleges, and Hunter College Campus Schools is a division of Hunter College. Hunter College Campus Schools

consists of an elementary school (kindergarten to sixth grade) and a high school (seventh to twelfth grades) with enrollments of 336 and 1200 students, respectively. The schools are publicly funded, chartered by the Board of Trustees of the City University of New York, and administered by Hunter College. HCCS is located at 71 East 94th St, New York, New York 10128. Zauderer Aff. ¶7.

### **JURISDICTION AND VENUE**

14. This Court has jurisdiction pursuant to CPLR §§ 7801-7806 to determine whether the Respondent failed to perform a duty enjoined upon it by law.

15. Venue is proper in New York County pursuant to CPLR § 7804(b) and 506(b), because that is where Respondent refused to perform the duty specifically enjoined upon it by law, and it is where Respondent's principal place of business is located.

### **FACTS**

#### **The COVID-19 Pandemic**

16. We are in the middle of a global pandemic with no certain end. The United States and the State of New York remain firmly in its grip. According to the CDC (Centers for Disease Control), as of September 16, 2020, COVID-19 has killed nearly 200,000 people in the United States, including more than 32,000 New Yorkers, and more than 40 CUNY employees.<sup>2</sup> Studies show that COVID-19 may be as much as 10 times deadlier than the influenza virus.<sup>3</sup>

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<sup>2</sup> See <https://psc-cuny.org/InMemoriam> (last visited Sept. 21, 2020).

<sup>3</sup> See <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-disease-2019-vs-the-flu> (last visited Sept. 21, 2020).

17. There have been more than 240,000 cases of COVID-19 in New York City, including almost 2,500 cases in just the last seven days. New York State’s website still maintains a banner that highlights at the very top that “Coronavirus is still active in New York,” and as recently as September 3, Governor Cuomo emphasized that “even as our numbers remain stable, we cannot become complacent. We have to stay vigilant. We have come this far together, and we will get to the other side of this nightmare together, as long as we stay New York tough.”<sup>4</sup>

18. COVID-19 is a severe, acute respiratory virus primarily spread from person to person through respiratory droplets when an infected person coughs, sneezes, or talks. It is spread when an infected person is asymptomatic and pre-symptomatic, as well as when they are symptomatic.<sup>5</sup>

19. On March 7, 2020, Governor Cuomo signed Executive Order (“EO”) 202, which declared a New York State emergency disaster. A copy of Executive Order 202 is attached as Exhibit A.

### **COVID-19, the Schools, and CUNY**

20. Governor Cuomo’s March 16, 2020 Executive Order 202.4 (Exhibit B) required all schools in the State to close for in-person instruction for a two-week period by March 18, 2020. Governor Cuomo repeatedly extended that Order to prohibit in-person instruction for the remainder of the 2019-2020 school year.

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<sup>4</sup> See <https://www.governor.ny.gov/news/governor-cuomo-updates-new-yorkers-states-progress-during-covid-19-pandemic-27> (last visited Sept. 21, 2020).

<sup>5</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited Sept. 21, 2020).

21. In compliance with the Order, HCCS developed and implemented plans for alternative instruction options. HCCS did not have any in-person instruction between mid-March and the end of the 2019-2020 school year. Faculty taught remotely during that time. Zauderer Aff. ¶8.

22. Under Executive Law Section 29-a of Article 2-B, the Governor has broad powers to issue executive orders during a declared State of emergency, and executive orders have the full force and effect of law.

23. On June 15, 2020, Governor Cuomo issued Executive Order 202.45 (Exhibit C) which mandates that entities including Pre-K to Grade 12 Schools “must be operated in compliance with the guidance promulgated by the Department of Health.”

24. On August 8, 2020, Governor Cuomo permitted schools in the State to open for in-person instruction for the 2020-2021 school year, but required schools to adopt and submit detailed reopening plans compliant with New York State Department of Health (“DOH”) guidance, and to post remote learning plans and plans for testing and tracing students and teachers for COVID-19.<sup>6</sup>

25. Governor Cuomo stated that parents and “teachers must feel safe and secure in each school district’s plan to return to school, and those plans must adhere to the Department of Health’s guidance.” Governor Cuomo further noted that “teachers have to feel safe, they can’t teach if they don’t feel safe.”<sup>7</sup>

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<sup>6</sup> <https://www.governor.ny.gov/news/governor-cuomo-announces-based-each-regions-infection-rate-schools-across-new-york-state-are> (last visited Sept. 21, 2020).

<sup>7</sup> <https://www.nytimes.com/2020/08/07/nyregion/cuomo-schools-reopening.html> (last visited Sept. 21, 2020).

26. On September 4, 2020, Governor Cuomo issued Executive Order 202.60 (Exhibit D) which provides that the “directive contained in Executive Order 202.45, as extended, requiring closure of all schools statewide to in-person instruction, is hereby modified only insofar as to authorize schools statewide to be open for instruction, effective September 1, 2020, subject to adherence to Department of Health issued guidance and directives.”

27. Executive Orders 202.45 and 202.60 require schools to operate in compliance with the guidance promulgated by the DOH.

28. On or about July 13, 2020 (as updated on August 26, 2020), the DOH issued guidance entitled “Interim Guidance for In-Person Instruction at Pre-K to Grade 12 Schools During the Covid-19 Public Health Emergency.” The guidance is attached as Exhibit E.

29. The purpose of the guidance is “to provide all elementary (including pre-kindergarten), middle, and high schools, as well as their employees, contractors, students, and parents/legal guardians of students with precautions to help protect against the spread of COVID-19 for schools that are authorized to provide in-person instruction in the 2020-2021 school year.” *Id.* at 1.

30. In addition to this guidance, the DOH provided that “school districts, boards of cooperative educational services (BOCES), charter schools, and private schools must develop individual plans for reopening and operating during the COVID-19 public health emergency.” *Id.*

31. The DOH required the reopening plan to be “submitted” either to the DOH or another relevant governing body (though not specified, in Hunter’s case, to CUNY). *Id.* The DOH requires school plans to address the “containment of potential transmission of the 2019

novel coronavirus (COVID-19),” including by affirmatively addressing issues of ventilation. *Id.* at 1, 2-4, 12.

32. The Board of Trustees of CUNY, for its part, on July 9, 2020, adopted a resolution regarding the partial reopening of CUNY campuses for certain courses that cannot effectively be taught remotely and delegated to the Chancellor of the University (Felix Matos Rodriguez) the authority to take the steps necessary to effectuate the resolution.<sup>8</sup> The Chancellor in turn instructed each CUNY campus to form a reopening committee to develop a personalized plan which followed guidelines from CUNY Central and the New York Forward Phase 4 Higher Education guidelines. Each reopening committee plan is subject to final approval by the Office of the Chief Operating Officer of CUNY.<sup>9</sup> Zauderer Aff. ¶9.

33. Chancellor Matos Rodríguez also stressed that “each CUNY campus has formed a Reopening Committee to develop personalized plans, following guidelines from CUNY Central that are consistent with Governor Cuomo’s Phase 4 blueprint for higher education institutions and subject to final approval from the Office of the Chief Operating Officer.”<sup>10</sup> Zauderer Aff. ¶10.

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<sup>8</sup> See <https://www.cuny.edu/wp-content/uploads/sites/4/page-assets/about/trustees/meetings-of-the-board/DISPO070920.pdf> (and attached as Exhibit F).

<sup>9</sup> See CUNY Guidelines for Safe Campus Reopening, Section IV, Institution Plans, available at <https://www.cuny.edu/coronavirus/reopening-guidelines/guideline-safe-campus-reopening/> (last visited September 21, 2020); see also CUNY Guidance on Academic Continuity to campuses, available at <https://www.cuny.edu/coronavirus/academic-continuity/guidance-on-academic-continuity-to-campuses/> (last visited September 21, 2020).

<sup>10</sup> *Id.*

34. CUNY also issued Guidelines for a Safe Campus Reopening.<sup>11</sup> Those Guidelines provide that each “CUNY college will have to implement its plan for moving forward safely by managing competing demands while ensuring that their plans meet minimum guidelines. To ensure compliance, these Guidelines include a checklist of the New York State minimum requirements that each college must complete and submit along with its plan to the Chancellery/Office of the Chief Operation Officer (COO) as discussed in the Governance section below.” Zauderer Aff. ¶11.

35. The CUNY Guidelines further provide that following “internal campus-level review of reopening plans, the Chancellery/COO’s Office will review and approve the campus reopening plans. The Chancellery/COO’s Office will: Ensure that each campus reopening plan contains appropriate safety measures, comports with the reopening requirements in these Guidelines and has a fully completed checklist. Serve in an advisory capacity for implementation issues that arise in the development and implementation of the reopening plans.” Zauderer Aff. ¶12.

36. The CUNY Guidelines further require campuses to identify “small, confined spaces, especially those with less than optimal ventilation, and restrict occupancy constituent with public health guidelines.” Citing guidance from the American Industrial Hygiene Association, these guidelines provide that CUNY campuses should optimize ventilation system settings by taking steps such as (1) “ensur[ing] that the proper filtration is being used for not only office use but also what is recommended to control COVID-19 transmission”; (2) “clean[ing] and disinfect[ing] all HVAC intakes and returns daily” and reviewing “ASHRAE

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<sup>11</sup> CUNY Guidelines for Safe Campus Reopening, *supra*, n.9

updates for guidance”; and (3) “upgrad[ing] ventilation per OSHA guidance to remove aerial antigens.”

**Hunter’s “Brick Prison,” Ventilation Problems, Hunter’s Rejection of an Independent Inspection, and Hunter’s Reopening Plan and Its HEPA Filter Requirement**

Hunter Rejects an Independent Inspection of a Newly-Repaired HVAC System

37. Hunter’s planned reopening to in-person instruction has been plagued with problems from the outset.

38. The HCCS building is located at East 94th Street on the East Side of Manhattan and is colloquially known as the “brick prison.” Grassman Aff. ¶3. According to the Hunter Reopening Plan, Hunter will use this building for in-person, full day instruction for Grades 4-6 four days per week and Grades 7-8 for 2 to 3 days per week of in-person instruction. Grassman Aff. ¶7 & Ex. A at 2.<sup>12</sup>

39. The hallways in the “brick prison” are on the perimeter of the building with windows, and the classrooms are on the interior. Thus, most classrooms in the “brick prison” lack windows or have hardly any windows. In the rare instance where those classrooms have windows, they do not open. Grassman Aff. ¶3.

40. Moreover, for years the school operated with an inadequate and under-construction HVAC system. As of last year, even pre-pandemic, 40 out of a total of 87 HVAC unit ventilators needed repairs to achieve proper fresh air flow to the student-occupied spaces. In a PSC Health and Safety walkthrough in February 2020, numerous health and safety issues were raised with the HCCS administration. Grassman Aff. ¶¶4-5.

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<sup>12</sup> Grades 9-10 will take place in person 2 to 3 days per week at the Silberman School of Social Work campus at 119th Street.

41. The work repairing that system continued through the summer of 2020. During that time, the PSC repeatedly asked for an independent inspection of the ventilation and air-flow in the school building before faculty, staff, and students would be required to engage in in-person instruction. PSC suggested that Hunter and PSC jointly hire a health and safety expert to inspect the building. When Hunter rejected that, PSC offered to pay the entire cost of an independent inspection. Hunter refused and continues to refuse permission for an independent inspector to enter the building. Zauderer Aff. ¶13.

42. On September 3, 2020, PSC wrote that it would secure its own independent inspection firm and requested that it be permitted to inspect “each classroom and building” to ensure compliance “with current ASHRAE regulations for ventilation during the COVID pandemic.” Zauderer Aff. ¶14 & Ex. A.

43. In response, on September 8, 2020, Hunter Director Lisa Siegmann wrote that CUNY “is responsible for the operation and maintenance of the Hunter College Campus School facilities and as such, the provision of safety monitoring is within CUNY’s purview. Safety inspections are conducted by CUNY, and may include independent third party monitoring as required (as on our recent 94th street construction project). CUNY will not permit an external group to conduct an inspection of the Hunter College Campus Schools.” Zauderer Aff. Ex. A. She also said that soon “the whole community will receive the letter from the engineering firm (Genesys Engineering) retained to assess the recent HVAC upgrades and the ventilation in the Hunter College Campus Schools’ 94th Street building.” This firm was, remarkably, the *same firm* that performed the upgrades. Zauderer Aff. ¶15.

44. Genesys Engineering sent that letter, dated September 4, 2020. The Genesys letter states that the work repairing the HVAC system finally was complete. The

accompanying report from Genesys Engineering states that the “core unit ventilators have been retrofitted with new controllers, and their functionality has been validated by Trane technicians. The most current balancing report prepared by All City Balancing, under contract to Trane, confirms that all but 2 spaces investigated in Hunter College Campus Schools are being supplied with adequate outside air. Pertinent to the Air Handler Units, it is noted that 3 of the 7 air handlers are not providing Outside Air CFM [cubic feet per minute] in accordance with the original design intent of the building’s HVAC system.” Grassman Aff. ¶21 & Ex. B. Despite the fact that Genesys’ own report admits that “2 spaces” at HCCS are not being supplied with enough outside air, and despite the fact that Genesys admits that “3 of the 7 air handlers are not providing Outside Air CFM in accordance with the original design intent of the building’s HVAC system,” the company concluded that students and faculty could safely occupy the building. Notably, Genesys did *not* analyze whether the school was ready for occupancy in light of the ventilation demands required to minimize COVID-19 spread. Remarkably, the Genesys report did not even mention COVID-19.

45. On September 10, 2020, PSC President Barbara Bowen wrote to CUNY President Jennifer Raab and stated that the “report by Genesys Engineering, P.C., dated September 4, is not only deeply flawed in itself, but also written by representatives of the company that did the repairs. It can hardly be considered an independent report.” Zauderer Aff. ¶16 & Ex. B.

46. She wrote that to ensure that each classroom is safe, what “is required is full access for a genuinely independent inspector and immediate compliance with the DOE protocols.” *Id.* She stated that PSC is “working with Airpath Engineering, P.C., and Airpath Testing Services, Inc. to conduct a room-by-room inspection of all rooms to be in use by Hunter

College Campus Schools faculty, staff, and students.” *Id.* President Bowen concluded by asking for dates on which Airpath could conduct their analysis and stating that “No employees should be called back to work at any HCCS worksite until a credible, independent report attests that the buildings are safe and until all DOE protocols for reopening are adhered to.” *Id.*

47. Hunter President Raab responded on September 15, 2020. President Raab’s response falsely asserted that “HEPA filters have been installed in classrooms.” Her statement was false on September 15, 2020, and is false today. In her September 15 response, she also refused to permit an independent inspection of the building. Zauderer Aff. ¶17 & Ex. C.<sup>13</sup>

48. Separately, PSC hired an industrial hygienist and HVAC expert, David Newman, and his company EOHS Associates, to analyze the Genesys report. His report, an addendum to his report, and his CV are attached as Exhibit C to the Grassman Affidavit. EHOS concluded that the Genesys report suffered a variety of flaws. Most glaringly, the Genesys report “contain[s] not a single reference to the ongoing SARS-CoV-2 pandemic. The documents provide no indication of whether the Genesys/Trane work comprises the full range of ventilation modifications that HCCS will be utilizing to minimize virus transmission in the indoor environment or whether additional ventilation changes are planned for this purpose.” Grassman Aff. Ex. C at 3.

49. EOHS also noted a crucial contradiction in the Genesys report. Despite Genesys concluding that three ventilators serving three rooms will require additional work before

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<sup>13</sup> Hunter College runs another high school, Manhattan Hunter Science High School, that is under the jurisdiction of the City’s Department of Education. It is in a similar building to Hunter, located on Amsterdam Avenue. Pursuant to the DOE procedure, it received an independent inspection, failed it, and was one of the few DOE schools that will not open for any in-person instruction.

they will be able to supply adequate outside air, that three of seven HVAC systems were providing insufficient outside air, and that six of seven HVAC systems were providing insufficient supply air, Genesys nevertheless concluded that virtually all spaces are being supplied with adequate outside air. *Id.* at 4-5. In a supplemental report, EOHS found that “the ability to maximize provision of outdoor air supply is compromised by the current deficient performance of 6 of the 7 centralized HVAC systems, as documented in the Genesys Final Balancing Report.” Grassman Aff. ¶25 & Ex. C.

50. In short, both Genesys – CUNY’s chosen inspector – and EOHS, the PSC’s consultant, agree that the HCCS HVAC system does not supply adequate outside air to the HCCS building. Today, based on the report of CUNY’s chosen inspector, it is clear that the “brick prison’s” ventilation is inadequate. Despite this, and despite the importance of a properly functioning HVAC system for COVID-19 safety, Hunter insists on forcing HCCS students and faculty to start in-person instruction on September 29.

51. Moreover, in addition to the ventilation systems problem, faculty have recently discovered mold that, upon testing, turned out to be toxic black mold. *See Zauderer Aff.* ¶20 & Ex. E.

#### The Reopening Plan

52. Hunter issued its Reopening Plan for HCCS on or about August 20, 2020. Grassman Aff. ¶6 & Ex. A.

53. The Plan provides that it will be “approved” by CUNY, Grassman Aff. Ex. A at 2, and states that HCCS “designed our hybrid instruction model based first on the protection of the health and safety for our students, faculty and staff and on minimizing exposure risks through the programming of our classes.” Grassman Aff. Ex. at 2.

54. With respect to ventilation, the Plan states that Hunter “shall increase ventilation with outdoor air to the greatest extent possible while maintaining health and safety protocols, particularly for younger students.” *Id.* at 17.

55. The Plan also asserts that HCCS has “modified buildings’ ventilation systems to maximize the use of outside air and reduce the amount of recirculated air to the extent that we can maintain reasonable building comfort levels.” *Id.*

56. The Plan further obligates HCCS to install “portable high-efficiency particulate arrestance (HEPA) air filtration units . . . in classrooms which have ventilation systems that use recirculated air.” *Id.*

57. The Plan similarly states on its second page that Hunter will “install HEPA filters in each classroom.” *Id.* at 1.

58. In further communications, Hunter has highlighted that it is safe for faculty and students to return to work in part because of the use of HEPA filters. For instance, on September 8, 2020, Hunter’s Director, Lisa Siegmann, wrote to PSC stating that Hunter is “ordering and planning to install portable HEPA and UV-C light filters to address ventilation and filtration capacities.” Zauderer Aff. ¶18 & Ex. B. Whatever Hunter’s plans are, today, there are no HEPA filters at HCCS.

59. As recently as September 15, 2020, in rejecting an independent inspection of the ventilation system, Hunter’s President Jennifer Raab emphasized that “HEPA filters have been installed in classrooms in both buildings.” Zauderer Aff. ¶19 & Ex. D. Raab’s statement is simply false. HCCS does not have HEPA filters in the brick prison.

## **Hunter Fails to Obtain and Install HEPA Filters**

60. However, on the previous day, September 14, PSC learned that HEPA filters had *not* in fact been installed in classrooms in both of Hunter’s buildings (at 94th Street and 119th Street). Grassman Aff. ¶10.

61. Instead, photochemical oxidizers were installed in the classrooms. *Id.*

62. These are not filters at all, but instead are air purifiers that send free radicals and ozone into the air to “purify” *rather* than actually filter the air. The model CUNY purchased is the Greentech Environmental PureAir 3000.<sup>14</sup> Greentech appears to be a small company based out of Johnson City, Tennessee. Grassman Aff. ¶11.

63. On September 16, PSC corresponded with a representative of Greentech, who confirmed that “No,” it is not a HEPA filter, and is not a filter at all, it is “an active air purifier, not a filter.” Grassman Aff. ¶12 & Ex. B.

64. It works by “generating active cleaning ‘agents’ that are propelled into the environment to seek out and destroy air pollutants, rather than requiring them to have to migrate to a filter and be trapped there.” Grassman Aff. Ex. B.

65. HEPA filters have been widely studied and proven effective to destroy airborne viruses – that is *why* Hunter presumably required them in its Reopening Plan. ASHRAE has concluded that “HEPA filters are more that 99.97% efficient at capturing airborne viral particles associated with SARS-CoV-2.”<sup>15</sup> Grassman Aff. ¶13.

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<sup>14</sup> See <https://www.greentechenv.com/product/pureair-3000-whole-home-purifier/> (last visited Sept. 21, 2020).

<sup>15</sup> <https://www.ashrae.org/technical-resources/filtration-and-disinfection-faq> (last visited Sept. 21, 2020) (response to question 3).

66. That is also why the ASHRAE standards and guidelines for schools recommends the use of HEPA filters where, like here, MERV13 filters cannot be used. Grassman Aff. ¶14. These authoritative protocols recommend that schools “[p]rovide a HEPA filtration unit which re-circulates air within the space,” that the school provide “portable, all electric HEPA/UV Machines in each classroom,” and that the machine re-circulates the air a minimum of two times per hour. *Id.*

67. By contrast, the technology used by the PureAir 3000 has not been widely studied and proven to be effective at virus destruction. Nor is it recommended by ASHRAE. PSC is unaware of *any* studies conducted as to its effectiveness at preventing the spread of COVID-19. Grassman Aff. ¶15.

68. Nor have any studies been conducted to show that the hydrogen peroxide, hydroxyl groups, and superoxide generated by PureAir 3000 are safe to humans, although the Company did cite *one* study of the technology used in the device by Kansas State University. *Id.*

69. The study was a 13-year-old article which tests the efficacy of a similar technology against bacteria and fungi on polished steel surfaces. The study does not address whether the technology is able to neutralize airborne viruses. *Id.* ¶16.

70. At bottom, Hunter is not filtering the air through a HEPA filter as its own Reopening Plan requires, but is instead attempting to purify it by use of a process that is neither widely used nor proven effective against COVID-19 or other airborne toxins.

**CAUSE OF ACTION**  
**CPLR 7801 AND 7803 TO COMPEL**  
**COMPLIANCE WITH HUNTER'S REOPENING PLAN**

71. PSC incorporates each of the above-listed paragraphs as if fully set forth herein.

72. Executive Orders 202.45 and 202.60 require Respondent to adhere to the DOH Guidance in order to provide in-person instruction, which in turns requires all schools to develop plans for reopening during the COVID-19 public health emergency. Similarly, New York Labor Law Section 27-c requires CUNY to “prepare a plan for the continuation of operations in the event that the governor declares a public health emergency involving a communicable disease.” N.Y. Lab. Law § 27-c(2).

73. CUNY itself adopted a reopening plan and requires that its constituent colleges each adopt a reopening plan that CUNY itself must approve. The constituent college must abide by its approved Reopening Plan.

74. Mandamus is available to compel public agencies to follow their own rules and regulations.

75. The Hunter College Campus Schools Reopening Plan constitutes a rule and regulation of CUNY that has the force and effect of law.

76. The Hunter College Campus Schools Reopening Plan explicitly requires the installation of HEPA air filtration units in every classroom which has ventilation systems that use recirculated air before requiring faculty and students to return for in-person classes.

77. Hunter College Campus Schools, which are set to begin in person instruction on September 29, 2020, do not have HEPA air filtration units in any classrooms.

78. By failing to install the HEPA air filtration units in each classroom, Respondent violated a duty enjoined upon them by law.

79. Petitioners have no other adequate remedy at law to enforce compliance with the Hunter College Campus Schools Reopening Plan.

80. The Court must compel CUNY to halt in-person instruction until CUNY has installed HEPA air filtration units in each classroom that uses recirculated air in compliance with the Hunter Reopening Plan.

81. Reopening Hunter before this time will irreparably harm CUNY's employees, students, and the community at large because it will put CUNY employees, students, and the community at increased risk of contracting and spreading COVID-19.

82. COVID-19 causes some individuals who contract it to die, some individuals who recover to have serious ongoing health problems, and others to face severe symptoms of which we do not yet understand the full extent.

83. Those who contract COVID-19 at Hunter will bring the virus home and are likely to transmit it to some of their family members, friends, caretakers, and others with whom they come into close contact.

84. Becoming infected with COVID-19 is irreparable harm. Infecting others with COVID-19 is irreparable harm.

### **REQUEST FOR RELIEF**

WHEREFORE, for all the foregoing reasons, PSC respectfully requests that the Petition be granted and that this Court:

1. Issue an order pursuant to Article 78 of the CPLR directing CUNY to immediately comply with the Hunter College Campus Schools Reopening Plan.
2. Issue a preliminary injunction barring CUNY from compelling faculty and laboratory technicians to physically return to work at the Hunter College Campus School for in-person instruction (at either the 94th Street or 119th Street campus) unless and until such Plan is complied with by, at

minimum, the installation of HEPA air filtration units in every classroom which has ventilation systems that use recirculated air.

3. Issue a temporary restraining order barring CUNY from compelling faculty and laboratory technicians to physically return to work at the Hunter College Campus School for in-person instruction (at either the 94th Street or 119th Street campus) unless and until such Plan is complied with by, at minimum, the installation of HEPA air filtration units in every classroom which has ventilation systems that use recirculated air before and providing for the above relief in order to avoid irreparable harm pending a hearing on this application.
4. Issue an order pursuant to Article 78 of the CPLR directing CUNY to permit an independent inspection of the HCCS building and ventilation system in order to ensure compliance with the Reopening Plan.
5. Award PSC its reasonable fees, costs, and expenses, including attorneys' fees; and grant such other and further relief as the Court deems just and proper.

Dated: September 21, 2020  
New York, New York

Respectfully submitted,

*/s/ Hanan B. Kolko*

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**VERIFICATION**

Peter Zwiebach, an attorney duly admitted to practice law before the Courts in the State of New York, affirms the following:

1. I am the Director of Legal Affairs of Petitioner the Professional Staff Congress/CUNY.
2. I have read the foregoing Verified Petition. The same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and to those matters, I believe them to be true.
3. I am personally familiar with, and was personally involved in, the matters alleged in the Verified Petition.

Dated: September 21, 2020  
New York, New York

*/s/ Peter Zwiebach*  
Peter Zwiebach