IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
GENERAL CHANCERY SECTION

ELISABETH GREER, INDIVIDUALLY AND AS NEXT FRIEND OF H.G. AND N.G. MINORS; COURTNEY EVERETTE, INDIVIDUALLY AND AS NEXT FRIEND OF W.E. AND K.E., MINORS; DENETTA JONES, INDIVIDUALLY AND AS NEXT FRIEND OF A.H. AND J.H., MINORS; ANIKA MATTHEWS, INDIVIDUALLY AND AS NEXT FRIEND OF P.F., A MINOR; CONCERNED PARENTS OF NTA; AND CHICAGO UNITED FOR EQUITY, Plaintiffs, v. BOARD OF EDUCATION OF THE CITY OF CHICAGO, A/K/A CHICAGO PUBLIC SCHOOLS, JANICE JACKSON, CHIEF EXECUTIVE OFFICER. Defendants.	Case No. 2018 CH 7647 Calendar 03 Honorable Franklin U. Valderrama

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Plaintiffs, Elisabeth Greer, et. al's Motion for Preliminary Injunction and Defendants, Board of Education of the City of Chicago and Janice Jackson, Chief Executive Officer's Motion to Dismiss Plaintiffs' Complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure. For the reasons that follow, Plaintiffs' Motion for Preliminary Injunction is granted and Defendants' 2-615 Motion to Dismiss is granted in part and denied in part.

INTRODUCTION

Education is considered the gateway to success. As such, "few topics, understandably, incite our passions more than the education of our children."[1] A school board's decision to close, phase-out or consolidate a school predictably stirs these emotions. The Board of Education of the City of Chicago decided to convert a well-performing CPS elementary school, comprised of mostly of minority students, to a local high school and assign its students to a well-performing elementary school, comprised of mostly non-minority students. This decision has thus ignited much public discourse and gave rise to the present lawsuit challenging it.

1 *Smith v. Henderson*, 944 F. Supp. 2d 89, 94 (D.D.C. 2013).

BACKGROUND[2]

"The constitutional duty of the State to provide and the right of the public to receive an efficient high-quality educational system is discharged by the State through local boards of education which are primarily responsible for fulfilling the constitutional mandate." *Tyska v. Board of Education*, 117 Ill. App. 3d 917, 925 (1st Dist. 1983). Pursuant to Article 34 of the Illinois School Code, the Board of Education (the "Board of Education") is responsible for overseeing the education of students enrolled in Chicago Public Schools ("CPS"). The Board of Education is further responsible for the governance, maintenance, and financial oversight of CPS.105 ILCS 5/34-18 (West 2016).

National Teachers Academy Elementary School

The National Teachers Academy Elementary School ("NTA") is an elementary school within CPS, currently serving 722 students enrolled in pre-kindergarten through eighth grade. NTA is located at 55 West Cermak Road, in Chicago, Illinois and stands at the site of the former Harold Ickes Homes, a Chicago Housing Authority public housing development. NTA accepts all students within its attendance boundary, and its Regional Gifted Center accepts students from outside of NTA's attendance boundary who meet certain requirements. *See* Pls. Ex. A. NTA is considered to be have a "minority-majority" student population. Approximately 79% of NTA students are African-American and 7% are Caucasian. Approximately 76% of NTA students come from low-income households. *See* Pls. Mot., Ex. O.

NTA features a community health center, which provides crisis intervention services, First Aid training, low-cost childcare, school-based dental and health services, and targeted interventions through a relationship with a research hospital. NTA also offers free athletic teams, including but not limited to football, basketball, cheerleading, wrestling, and soccer. Additionally, NTA offers recreational activities, including swimming lessons, provided through a partnership with the Chicago Park District.

South Loop Elementary School

South Loop Elementary School ("SLES") is a CPS elementary school with its main branch located at 1212 South Plymouth Court in Chicago, Illinois. SLES' branch building for kindergarten and first grade classes is located at 1915 South Federal Street. Pls. Ex. EE. SLES currently serves 796 students in kindergarten through eighth grade. Approximately 41.8% of SLES students are African-American and 33% of SLES students come from low-income households. Pls. Ex. EE. CPS has classified SLES as overcrowded for several years. Pls. Ex. W.

The School Quality Rating Policy

The School Quality Rating Policy (the "SQRP") is CPS' official policy for evaluating school performance. *See* Pls. Ex. P. The purpose of the SQRP is to: (1) communicate to parents

[2] The well-pleaded facts recited herein are derived from Plaintiffs' Complaint, as well as the exhibits and affidavits submitted in support of Plaintiffs' Motion for Preliminary Injunction and accepted as true for purposes of the motions. *Kedzie & 103rd Currency Exchange v. Hodge*, 156 Ill. 2d 112, 115 (1993).

and community members about the academic success of individual schools and the district as a whole; (2) recognize high achieving and high growth schools and identify best practices; (3) provide a goal-setting framework for schools; (4) identify schools in need of targeted or intensive supports; and (5) guide the Board of Education's decision-making process for school actions and turnarounds. Pls. Ex. N.

For elementary schools, SQRP is calculated as the sum of the following weighted metrics: (1) student improvement ("growth") on the "NWEA MAP," which is a series of assessments that measures a student's performance at different times of the school year, weighted at 25%; (2) student attendance, weighted at 20%; (3) growth of students in certain "priority groups," which, among others, include African-American and Hispanic students on the NWEA MAP, weighted at 10%; (4) the results of the "5 Essentials Survey," weighted at 10%; (5) student attainment on the NWEA MAP for grades three through eight and separately for grade two, weighted at 10% and 5% respectively; (6) English language learner development growth on "ACCESS," a standardized test measuring English language proficiency for students identified as English learners, weighted at 5%; and (7) data quality, weighted at 5%. Pls. Ex. S.

The SQRP has five different rating levels: 1+, 1, 2+, 2 and 3. Pls. Ex. P. According to CPS, a Level 1+ is the highest possible score and indicates that the measured school "is a nationally competitive school with the opportunity to share best practices with others." Initially, NTA students struggled with low achievement and behavioral challenges. However, by the fall of 2017, NTA climbed to a performance rating of Level 1+. Pls. Compl., ¶ 1, Pls. Mot., Exs. M and O. SLES also had a level 1+ SQRP score. Pls. Ex. L.

In addition to academic ratings, CPS also classifies schools according to the efficiency and adequacy of their facilities' usage pursuant to the "Utilization Standards." Pls. Ex. V. CPS' Utilization Standards include three classifications of building efficiency levels: "underutilized," "efficient," and "overcrowded." Pls. Ex. W. NTA has "efficient" utilization based on CPS's 2017-2018 Space Utilization Standards. Pls. Ex. W.

The Proposal

In May 2017, CPS announced a school action proposal (the "Proposal") related to NTA. Pls. Ex. HH. CPS proposed reassigning a portion of NTA's attendance boundary to neighboring SLES beginning in the academic school year of 2019-2020, and using NTA's building for a new neighborhood high school. Pls. Ex. HH. Under the Proposal, SLES' attendance boundary would be extended four blocks from 18th Street to Cermak Road, and all current NTA students residing north of Cermak Road would be sent to SLES. Pls. Ex. HH. Students living south of Cermak Road would be excluded from SLES' expanded boundaries.

CPS hosted three community meetings during the summer of 2017 to discuss the Proposal. NTA students, parents and local school council ("LSC") members attended the community meetings and voiced their objections to NTA's proposed closure. Pls. Exs. #2, #6, #7, #9 and H. At the third community meeting on July 10, 2017, CPS representatives announced that beginning with the 2019-2020 school year: (1) NTA students in pre-kindergarten through third grade would be relocated to SLES; (2) NTA would stop enrolling students in pre-kindergarten through third grade; and (3) NTA students in fourth through eighth grade could

continue at NTA or transfer to SLES. Pls. Ex. FF. According to CPS, during the fall of 2019, the new high school would start enrolling ninth grade students at NTA's building. Pls. Ex. FF. After the 2019-2020 school year, the new high school would continue to phase in higher grades, and NTA would continue to phase out elementary grades. Pls. Ex. FF. By school year 2024-2025, NTA would be completely closed as an elementary school, and the new high school would serve grades nine through twelve. Pls. Ex. FF. CPS estimates that 1,800 students will eventually attend SLES, making it the tenth largest school in the entire school district, including all high schools. Pls. Exs. FF and W.

Draft Guidelines and Final Guidelines

To effectuate any "school action," which includes both phase-outs and reassignment boundary changes, CPS must comply with the School Code, 105 ILCS 5/1, *et seq.* (West 2016). School Code requires the Chief Executive Officer of CPS (the "CEO") to publish guidelines by October 1 of that respective year. On September 29, 2017, former CPS CEO Forrest Claypool ("CEO Claypool") published CPS' Draft Guidelines for School Actions (the "Draft Guidelines"). Pls. Ex. KK. The Draft Guidelines provided that a reassignment boundary change could be proposed only if "school(s) principal, parents, or community members have requested that a reassignment boundary change proposal be considered via the process to request proposals...and the resulting space utilization after the reassignment change will not exceed any affected schools' enrollment efficiency range as defined by CPS' Space Utilization Standards." Pls. Mot., Ex. KK. The Draft Guidelines further provided that the school transition plan for any proposed school action would include options to enroll in higher performing schools, as the School Code requires. Pls. Ex. KK. The Draft Guidelines defined a "higher performing school" as:

> (1) receiving a higher level on SQRP for the 2016-2017 school year, or
> (2) if the 2016-2017 school year level on the SQRP is equal or higher performing means performing higher on the majority of the following metrics:
> (a) for elementary schools--for the 2016-2017 school year, multi-value added results in reading, multi-year value added results in math, NWEA attainment percentile for reading grades 3-8, NWEA attainment percentile for reading grade 2, NWEA attainment percentile for math grades 3-8 and NWEA attainment for math grade 2.

Pls. Ex. KK.

The Draft Guidelines were subject to a public comment period of twenty-one (21) days, ending on October 20, 2017. The public comment period generated various responses from the community. In particular, Concerned Parents of NTA ("Concerned Parents") and Chicago United for Equity ("CUE") submitted comments to the Draft Guidelines. Pls. Exs. #7 and #8. Concerned Parents is an unincorporated organization whose purpose is to preserve NTA as an elementary school. CUE is an organization working to connect Chicagoans and equip them with tools to promote racial equality. Both groups criticized the Draft Guidelines for its alleged lack of "objective" criteria for school phase-outs, the failure to define "community members" eligible to

request a school action proposal, and the racial bias inherent in using academic attainment metrics for defining a "higher performing" school. Pls. Exs. #7 and #8.

On November 22, 2017, CEO Claypool published CPS' Final Guidelines for School Actions for the academic school year 2017-2018 (the "Final Guidelines"). CPS made no changes to the Criteria or Definitions for school actions in the Final Guidelines.

On December 1, 2017, CEO Claypool announced the proposed school action plan for school year 2017-18, including CPS' Proposal for NTA. CPS characterized its Proposal for NTA as a "proposed reassignment boundary change" for NTA. CPS issued letters regarding its Proposal to NTA parents, staff, and LSC members. Pls. Exs. MM and NN. The letters, among other things, stated that the proposed reassignment of NTA's boundary complied with the School Code because: (1) it was "requested by parents or community members via the process to request proposals;" (2) the resulting utilization of SLES and NTA would not exceed utilization capacity of either school; and (3) SLES was a higher performing school than NTA "as defined by the Guidelines." *Id.* The letters did not disclose who had requested a school action for NTA, when the request was made or what type of school action had been requested. *Id.*

On January 8, 2018, CPS announced the "draft preliminary" enrollment boundaries for the proposed neighborhood high school located in NTA's building. Pls. Ex. PP. On January 9, 2018, CPS convened the first public hearing to address its Proposal. Of the 41 people who attended and testified at the hearing, 35 opposed the Proposal and three supported the Proposal. Pls. Ex. QQ. Not a single SLES or NTA parent testified in support of CPS' Proposal at the first public hearing. Pls. Ex. QQ.

On January 16, 2018, CPS convened the second public meeting to address its Proposal. Pls. Ex. RR. 51 people testified. Of those 51 people, 39 testified against the CPS Proposal and three testified in support of the Proposal. Pls. Ex. RR. Elisabeth Greer ("Greer"), NTA's LSC chairperson, testified at the second public meeting and asked CPS personnel to identify who requested the school action and what that individual requested. Pls. Exs. RR and #2. Greer did not receive a response to her questions at the public hearing. Pls. Ex. #2.

On January 29, 2018, CPS convened the third and final public hearing at its central office. CPS selected retired Judge Francis Dolan to preside over the hearing as the Hearing Officer. Pls. Exh. TT. At the hearing, CPS' counsel presented numerous exhibits, including documents CPS identified as the requests for proposal. Pls. Exh. UU. This was the first time CPS identified any "request[s] for proposal" as a basis for its Proposal. CPS produced four requests that discussed a new for a boundary change, a phase-out, or development of a new neighborhood high school from: (1) Alderman Pat Dowell in a letter dated July 17, 2017; (2) two letters from the Near South Planning Board dated August 25, 2017 and January 22, 2018; (3) a petition signed by parents and community members from the Dearborn Homes requesting that the Proposal be presented to the Board of Education at the July 26, 2017 Board Meeting; and (4) 270 letters in support of the Proposal signed by members of the Pui Tak Center in Chinatown. Pls. Ex. UU.

Approximately 87 people testified at the public hearing. Of the 87 people who testified, 59 opposed CPS' proposal, 16 supported it, and eight did not clearly support or oppose the plan.

Pls. Compl., ¶ 134. The Hearing Officer held the record open for additional submissions until January 30, 2018. Pls. Compl., ¶ 145, Pls. Mot., Ex. L. By the close of business on January 30, 2018, CPS and the Hearing Officer received an additional 1,178 letters. Pls. Ex. UU. Of these letters, 1,110 letters expressed opposition to CPS' Proposal, and 68 expressed support. Pls. Ex. UU. Concerned Parents of NTA and CUE submitted a joint written statement in opposition to CPS' Proposal on January 30, 2018. Pls. Ex. #2.

On February 7, 2018, the Hearing Officer issued his final report (the "Hearing Report") to CPS, finding that CPS had complied with the requirements of the School Code and CEO's Guidelines. Pls. Ex. UU. The Hearing Officer found that CPS had properly executed a "reassignment boundary change." Pls. Ex. UU. On February 28, 2018, the Board of Education approved the Proposal. Pls. Ex. YY.

On or about February 26, 2018, CPS published a report titled: "Chicago Public Schools Equity Report: Taking stock of proposed school boundary changes: Issues and opportunities to achieve equity" (the "CPS Equity Report"). Among the findings, the CPS Equity Report noted that: (1) NTA and SLES serve distinct populations and differ significantly on all demographic characteristics; (2) the two schools have very distinct cultures, each with a different focus; (3) participants from the NTA community directly attribute their successful school environment to student wellness, with a focus on the "whole child" and a culturally relevant curriculum; (4) both NTA and SLES are categorized as having "above average" growth by CPS; and (5) while SLES students scored higher on math and reading in the spring of 2017, there are no statistically significant differences upon examination of year-to-year growth.

On February 28, 2018, the Board of Education approved CPS' Proposal. On June 19, 2018, Greer, individually and as next friend of H.G. and N.G. minors, along with several other parents and students of NTA, Concerned Parents and CUE (collectively "Plaintiffs") filed a five-count complaint (the "Complaint") against the Board of Education of the City of Chicago and Janice Jackson, the Chief Executive Officer of the Chicago Public Schools (collectively "Defendants"). Count I alleges a violation of the Illinois Civil Rights Act of 2003 ("ICRA"). Count II alleges a violation of the Illinois School Code (the "School Code") for the use of insufficient guidelines and lack of objective criteria in effectuating the school action. Count III alleges a violation of the School Code for CPS' failure to comply with its guidelines by proceeding with the school action with an inadequate community request. Count IV alleges a violation of the School Code for failing to provide NTA students with a higher-performing school. Count V alleges a violation of the School Code for CPS's failure to implement an adequate transition plan.

As to the ICRA count, Plaintiffs seek: (1) a preliminary and permanent injunction against CPS to reverse the decision to phase out NTA and reassign its attendance boundary; (2) a declaration that CPS' decision to phase out NTA and reassign its boundary was a violation of ICRA; and (3) monetary damages and reasonable attorneys' costs and fees. As to the School Code counts, Plaintiffs seek: (1) a preliminary and permanent injunction to reverse the decision to phase out NTA and move the school's attendance boundary; (2) a declaration that CPS' Transition Plan failed to comply with the School Code and CPS' own guidelines, and was arbitrary and capricious; and (3) in the alternative, a writ of *certiorari* to reverse CPS' decision to phase out and re-assign NTA's attendance boundary.

On July 31, 2018, Plaintiffs filed a Motion for Preliminary Injunction[3] asking the Court to enjoin Defendants from pursuing the planned phase-out and boundary changes of NTA. Defendants filed a memorandum[4] in opposition to Plaintiffs' Motion for Preliminary Injunction

[3] Plaintiffs submitted voluminous exhibits in support of its Motion for Preliminary Injunction. For purposes of brevity, the Court will only recite the exhibits cited by Plaintiffs and Defendants. Accordingly, in support of its motion, Plaintiffs submit: (1) Affidavit of David Stovall, Ex. 1; (2) Affidavit of Elisabeth Greer, Ex. 2; (3) Affidavit of Sara Rothschild, Ex. 4; (4) Affidavit of Sally Nuamah, Ex. 5; (5) Affidavit of Denetta Jones, Ex. 6; (6) Affidavit of Anika Matthews-Feldman, Ex. 7; (7) Affidavit of Niketa Brar, Ex. 8; (8) Affidavit of Courtney Everette, Ex. 9; (9) Affidavit of Sean Reardon, Ex. 10; (10) Affidavit of Daniel Koonce, Ex. 11; (11) excerpts of CPS' School Profile Page for NTA, Ex. A; (12) excerpts of NTA's website, Ex. B; (13) "Vacant Lot: The Chicago Ickes Community Remembered" by Sarah Weidmann, Ex. C; (14) "School Closings in Chicago: Staff and Student Experiences and Academic Outcomes" by Molly F. Gordon, Ex. H; (15) Excerpts from the Hearing Transcript for the Public Hearing to Consider the Proposed Reassignment Boundary Change of NTA, Ex. L; (16) CPS' 2017-2018 School Quality Rating Report for NTA, Ex. M; (17) CPS' School Quality Rating Policy (2018), Ex. N; (18) an archived copy of CPS' NTA School Profile Page, Ex. O; (19) CPS' Policy Manual on School Quality Rating Policy, Ex. P; (20) CPS' Facility Standards, Ex. V; (21) excerpts from CPS' 2017-18 School Utilization and Enrollment Data, Ex. W; (22) "New Model for Student Support in High-Poverty Urban Elementary Schools, American Educational Research Journal" by Mary E. Walsh, Ex. Y; (23) CPS' School Profile Page for South Loop Elementary, Ex. EE; (24) CPS' Building Neighborhood Schools for Near South Community, Ex. FF; (25) "Who Controls South Loop Schools?" by Daniel Moattar, Ex. HH; (26) CPS' Draft Guidelines for School Actions 2017-2018 School Year, Ex. KK; (27) CPS' Letter to NTA Parents, Ex. MM; (28) CPS' Letter to NTA Staff and LSC, Ex. NN; (29) CPS' Draft Transition Plan for the Proposed Reassigned Boundary Change of NTA, Ex. OO; (30) CPS Releases Draft Neighborhood High School Boundaries for Proposed Near South High School at NTA, Ex. PP; (31) a Transcript of the Testimony of the Community Meeting of the Proposed Reassignment Boundary Change of National Teachers Academy, Ex. QQ; (32) Near South Community Meeting No. 2—Proposed Reassignment Boundary Change of National Teachers Academy (Jan. 16, 2018), Ex. RR; (33) excerpts from the Public Hearing to Consider the Proposed Reassignment Boundary Change of National Teachers Academy (Jan. 29, 2018), Ex. TT; (34) excerpts from the Hearing Officer's Report and Determinations to the Chief Executive Officer Regarding the Proposed Reassignment Boundary Change of National Teachers Academy (Feb. 7, 2018), Ex. UU; and (35) Board of Education's excerpt from Regular Meeting (Feb. 28, 2017), Ex. YY.

[4] In response to Plaintiffs' Motion for Preliminary Injunction, Defendants submit: (1) excerpts of the Senate Tr., 97h General Assembly, April 15, 2011, Ex. 1; (2) Near South Side School Planning Meeting Power Point, June 6, 2017; (3) the Wendell Affidavit, Ex. 3; (4) Dunbar, Phillips, Tilden Investments 8/5/18, Ex. 3A; (5) The Johnson Affidavit, Ex. 4; (6) Community Meeting on the Proposed Boundary of National Teachers Academy, July19, 2018, Ex. 4A; (7) Community Meeting on the Proposed Boundary of National Teachers Academy, August 7, 2018, Ex. 4B; (8) Community Meeting on the Proposed Boundary of National Teachers Academy, September 7, 2018, Ex. 4C; (9) excerpts of the Board of Education Meeting Transcript, July 25, 2018, Ex. 5; (10) excerpts of the Board of Education Meeting Transcript, August 22, 208, Ex. 6; (11) "The Benefits of Racial and Economic Integration in our Education System: Why This Matters for Our Democracy" by the Kirwin Institute, February 2009, Ex. 7; (12) the SLES SQRP Report, Ex. 8A; (13) The NTA SQRP Report, Ex. 8B; (14) the SLES Progress Report, Ex. 9A; (15) the NTA Progress Report, Ex. 9B; (16) *Brown v. Bd. of Education of the City of Chicago*, Case No. 12 CH 4526 (Cir. Ct. Cook Cnty. May 25, 2012), Ex. 10; (17) "When Schools Close: Effects on Displaced Students in Chicago Public Schools: Consortium on Chicago School Research (Oct. 2009)" by Marisa de la Torre and Julia Gwynne, Ex. 11; (18) Engberg, Gill, Zamarro, Zimmer, "Closing Schools in a Shrinking District: Do Student Outcomes Depend on Which Schools are Closed," 71 J. Urban Econ. 189 (2012), Ex. 12; (19) the Shelton Affidavit, Ex. 13; (20) Climate and Culture Powerpoint, Ex. 13A; (21) Restorative Justice Form, Ex. 13A; (22) Sample Agendas and Notes, Ex. 13B; (23) Planned Work of the Committee, Ex. 13D; (24) the Papineau Affidavit, Ex. 14; (25) Transcript proceedings from *Chicago Teachers Union, et. al. v. Board of Education*, Case No. 13 CH 13624 (Cir. Ct. Cnty. July 31, 2013), Ex. 15A; and (26) Complaint from *Chicago Teachers Union, et. al. v. Board of Education*, Case No. 13 CH 13624 (Cir. Ct. Cook Cnty. July 31, 2013).

and a Motion to Dismiss Plaintiffs' Complaint.[5] The parties' fully briefed motions are before the Court.

Supplemental Memorandum

On November 7, 2018, Plaintiffs filed a Motion and Memorandum to Submit Newly Available Evidence to which Defendants filed a Response. The new evidence is that while NTA maintains a Level 1+ SQRP rating, SLES has fallen to a Level 1 rating. Thus, Plaintiffs argue now that NTA has a higher rating than SLES, SLES can no longer be considered a "higher performing school" for purposes of the transition plan pursuant to Section 225(c)(2) of the School Code. Plaintiffs further contend that Section 225(c)(2) mandates that the school to which affected students transition must continue to be higher-performing so as the transition plan is pending, citing Section 18.43 in support. Plaintiffs conclude that the purpose of the School Code would be thwarted if CPS were not required to maintain an ongoing obligation to transition students to a higher-performing school rather than at the time the transition plan was initially implemented.

Defendants respond that Plaintiffs' arguments are misplaced for three reasons: (1) at the time of implementation, the transition plan complied with the School Code to provide options for displaced students to transition to a higher-performing school; (2) the change in SQRP ratings is irrelevant following the Board of Education's approval of the school action; and (3) SLES remains a higher performing option for NTA students. Defendants further assert that accepting Plaintiffs' contention that a change in SQRP ratings may invalidate the entire school action and transition plan is illogical as it undermines CPS' discretion and threatens any long-term decision by the Board of Education.

The Court's Memorandum will consider the supplemental information only to the extent that the information aligns with the arguments raised by the parties in their motions to dismiss and for preliminary injunction. To the extent that the information diverges from what was initially argued, the Court will not consider said information at this time.

PRELIMINARY INJUNCTION STANDARD

A preliminary injunction is an extraordinary remedy to be used only where an emergency exists to prevent serious harm that would result if an injunction is not issued. *Beahringer v. Page*, 204 Ill. 2d 363, 378 (2003). The purpose of a preliminary injunction is to preserve the status quo until a decision is rendered on the merits of the case. *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk and Western Railway Co.*, 195 Ill. 2d. 356, 365 (2001).

To obtain a preliminary injunction, the movant must establish: (1) a clearly ascertained right in need of protection; (2) irreparable harm in the absence of an injunction; (3) no adequate remedy at law; and (4) a likelihood of success on the merits. *Mohanty v. St. John Heart Clinic,*

[5] In support of Defendants' Motion to Dismiss, Defendants submit: (1) *Swan v. Board of Education of the City of Chicago*, Nos. 13 CH C 3623, 13 C 3624, 2013 WL 4401439 (N.D. Ill. Aug. 15, 2013), Ex. 1; and (2) *Brown, et. al. v. Board of Education of the City of Chicago*, (Cir. Ct. Cook County, May 25, 2012).

S.C., 225 Ill. 2d 52, 62 (2006). The movant is not required to make out a case which would entitle it to the relief on the merits of the underlying case; it need only raise a fair question about the existence of its rights and that the court should preserve the status quo until it can decide the merits of the case. *Buzz Barton & Associates, Inc., v. Giannone*, 108 Ill.2d 373, 382 (1985). Put simply, the party seeking a preliminary injunction is not required to make out a case that would be sufficient to entitle her to judgment at trial. *Stocker Hinge Mfg. Co. v. Darnel Industries, Inc.*, 94 Ill. 2d 535, 542 (1983). If the movant on a motion for preliminary injunction satisfies the elements for a preliminary injunction, then the court must the balance hardships and consider the public interests involved. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 62 (2006). A court may deny a preliminary injunction where the balance of hardships do not favor the moving party. *Id.* In ruling on a motion for preliminary injunction, the court may not decide the merits of the case and need only ascertain whether the movants raise a fair question as to the existence of the claimed rights. *People ex. rel. Klaeren v. Vill. of Lisle*, 202 Ill. 2d 164, 178 (2002).

The nature of the hearing on a motion for preliminary injunction is dependent upon the status of the pleadings. *Kable Printing Co. v. Mt. Morris Bookbinders Union Local 65-B*, 27 Ill. App. 3d 500, 504 (2d Dist. 1975), aff'd 63 Ill.2d 514 (1976). An evidentiary hearing on a motion for preliminary injunction is required when the party opposing the motion for preliminary injunction has filed a verified answer to the movant's pleading that denies the material allegations therein. *Five Mile Capital Westin N. Shore SPE, LLC v. Berkadia Commer. Mortg., LLC*, 2012 IL App (1st) 122812, ¶ 22; see *also Kable Printing Co. v. Mt. Morris Bookbinders Union Local 65-B*, 27 Ill. App. 3d 500, 504 (2d Dist. 1975) ("evidentiary hearing required where there is a question of material fact"). On the other hand, "[w]here no responsive pleading has been filed the injunction may be issued solely on the sufficiency of the complaint." *Kable Printing*, 27 Ill. App. 3d at 504.

The Court notes that in response to Plaintiffs' Complaint and Motion for Preliminary Injunction, Defendants filed a Motion to Dismiss Plaintiffs' Complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure, as opposed to an answer denying the material allegations of Plaintiffs' Complaint. Thus, there are no issues of material fact before the Court at this time because Defendants have admitted the material allegations of Plaintiffs' Complaint for purposes of their Motion to Dismiss. Therefore, an evidentiary hearing on Plaintiffs' Motion for Preliminary Injunction is not required and the Court may resolve the Motion for Preliminary Injunction on the sufficiency of the Complaint.

A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). The motion does not raise affirmative factual defenses, but rather alleges only defects on the face of the complaint. *Beahringer v. Page*, 204 Ill. 2d 363, 369 (2003). The question presented by a section 2-615 motion to dismiss is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Id.* The allegations of the complaint will be construed in the light most favorable to the plaintiff. *Burger King Corp.*, 222 Ill. 2d at 429. In reviewing the sufficiency of a complaint, a court must accept all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Id.* A complaint is deficient when it fails to allege facts necessary for recovery. *Chandler v. Ill. Cent. R.R.*, 207 Ill. 2d 331, 348 (2003). A court should not dismiss a cause of

action unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. *Redelman v. Sprayway, Inc.*, 375 Ill. App. 3d 912, 917 (1st Dist. 2007).

DISCUSSION

Plaintiffs argue that they satisfy all of the requirements for the Court to grant preliminary injunctive relief, whereas Defendants maintain that Plaintiffs fail to satisfy any of the requirements.

As a preliminary matter, as noted prior, Defendants filed a Motion to Dismiss Plaintiffs' Complaint while briefing Plaintiffs' Motion for Preliminary Injunction. The Court will address the two briefings in the present Memorandum Opinion and Order. To clarify, Defendants' Motion to Dismiss argues that Plaintiffs fail to state a claim under the School Code for two reasons: (1) Plaintiffs fail to allege a claim that they have an ascertainable right; and (2) Plaintiffs fail to allege a claim demonstrating a likelihood of success on the merits. Defendants' response to Plaintiffs' Motion for Preliminary Injunction contends that Plaintiffs do not have an ascertainable right under ICRA.

The threshold inquiry before the Court is, therefore, whether Plaintiffs' Motion for Preliminary Injunction seeks to preserve the status quo.

i. Status Quo

The purpose of a preliminary injunction is to preserve the status quo until the case can be resolved on the merits. *Postma v. Jack Brown Buick,* 157 Ill. 2d 391, 397 (1993). "The status quo to be preserved is the last actual, peaceable, uncontested status which preceded the pending controversy." *Id.* at 397-398. However, "sometimes... the status quo is not a condition of rest[,] but rather one of action and...the condition of rest is what inflicts the irreparable harm." *Makindu v. Ill. High School Ass'n,* 2015 IL App (2d) 141201, ¶ 45. A preliminary injunction is improper where it alters, rather than preserves the status quo. *Id.*

Plaintiffs' motion does not address whether the injunctive relief they seek maintains the status quo. The Defendants similarly fail to address whether the injunctive relief Plaintiffs seek maintains the status quo. No matter, the Court must ensure that the injunctive relief sought, in fact, seeks to maintain the status quo.

Plaintiffs ask the Court, among other things, to enjoin the Defendants from engaging in any action to effectuate CPS' decision to phase out NTA. The Court finds that this request seeks to maintain the status quo. In this case, the last actual, peaceable and uncontested status was NTA's existence as an open and functioning elementary school. As such, the Court proceeds to the merits of Plaintiffs' Motion for Preliminary Injunction.

ii. Ascertainable Right

To establish a clearly ascertainable right in need of protection, a movant must raise a fair question that it has a substantive interest recognized by statute or common law. *Delta Med. Sys. v. Mid-America Med. Sys., Inc.*, 331 Ill. App. 3d 777, 789 (1st Dist. 2002). A well-pleaded

complaint for injunctive relief must contain on its face a clear right to relief and allege facts which establish the right to such relief in a positive, certain and precise manner. *Sadat v. American Motors Corp.*, 104 Ill. 2d 105, 116 (1984).

Plaintiffs contend that they have an ascertainable right under the Illinois Civil Rights Act ("ICRA"), 740 ILCS 23/5 (West 2016), and the Illinois School Code (the "School Code"), 105 ILCS 5/34-230(a) (West 2016), in need of protection. Defendants do not challenge Plaintiffs' assertion that they have a right in need of protection under ICRA in their Motion to Dismiss, but challenge Plaintiffs' claim that they have an ascertainable right in need of protection under the School Code in their Motion to Dismiss. Because Defendants move to dismiss Counts II through V of Plaintiffs' Complaint, the Court will address the factor of "ascertainable right clearly in need of protection" based on the arguments raised in Defendants' Motion to Dismiss.

COUNTS II – V (Violations of the School Code)

In Counts II through V, Plaintiffs allege that CPS' decision to reassign NTA's elementary school boundaries and to convert NTA to a high school violates various provisions of the School Code.

Defendants move to dismiss Counts II through V on the basis that Plaintiffs do not have an ascertainable right to challenge the substantive basis for a school boundary reassignment because: (1) Plaintiffs do not have a right of private action through which to compel CPS to comply with the requirements imposed by the School Code; (2) Plaintiffs cannot seek a writ of mandamus because the challenged decisions are discretionary rather than mandatory; (3) Plaintiffs are not entitled to a writ of *certiorari* because the procedures for effectuating a school action are quasi-legislative and not quasi-judicial in nature; and (4) Plaintiffs fail to state claim for declaratory relief. The Court will address each argument in turn.

Private Right of Action

Defendants argue that there is no private right of action to enforce the School Code, citing *Noyola v. Board of Education*, 179 Ill. 2d 121 (1997) and *Lewis v. Spagnolo*, 186 Ill. 2d 198 (1999).

Plaintiffs counter that they do not need a private right of action under the School Code to proceed against the Defendants. As an initial matter, Plaintiffs contend that Defendants overstate the holding of *Noyola* as the *Noyola* court only found that the private right of action was unnecessary as plaintiffs had the right to challenge the school action via a writ of mandamus. Plaintiffs reason that *Noyola* did not preclude other avenues to challenge the actions of school officials. In any event, argue Plaintiffs, where a plaintiff seeks to compel a public official to do what the law requires, that plaintiff need not establish a private right of action.

If, however, an implied right of action is required, Plaintiffs posit that they have such a right. Plaintiffs note that in determining whether an implied right of action exists under a statute, courts analyze whether: (1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) the plaintiff's injury is one such injury that the statute was designed to prevent; (3) a private right of action is consistent with the underlying purpose of the statute; and (4)

implying a private right of action is necessary to provide an adequate remedy for violations of the statute, citing *Pilotto v. Urban Outfitters W., L.L.C.*, 2017 IL App (1st) 160844, ¶ 22.

Applying the above-factors, Plaintiffs argue that they have an implied right of action. Plaintiffs contend that the School Code exists to protect communities affected by school actions like phase-outs and to mitigate the harm that such school actions inflict. In particular, assert Plaintiffs, the School Code's requirement to use and apply criteria to determine appropriate phase-outs is meant to minimize the disruptive impact of a phase-out by assuring that only objective criteria, and not arbitrary, post-hoc, or politically motivated decisions are used in such decision-making.

Defendants reply that there is no private right of action to enforce the School Code. Defendants maintain that Plaintiffs have no such right under *Noyola*, while Plaintiffs counter that *Noyola* is not dispositive.

In *Noyola*, the plaintiffs, parents of economically disadvantaged schoolchildren attending Chicago Public Schools, filed a lawsuit against the Board of Education of the City of Chicago and the Illinois State Board of Education challenging the manner in which the defendants allocated funds under the School Code. The plaintiffs contended that they had an implied right of action to compel compliance with the School Code. The trial court disagreed and dismissed the complaint, finding that there was no implied private right of action to enforce the School Code. The appellate court reversed, finding that a private right of action could be implied under the School Code, and Defendants subsequently appealed. *Noyola*, 179 Ill. 2d at 126.

The Illinois Supreme Court surveyed the origin of implied private rights of action in federal and state courts. In Illinois, observed the court, an implied private right of action may exist where the plaintiffs seek to use a statutory violation as a basis for imposing tort liability. *Id.* at 129-131. The court noted, however, that the plaintiffs were not attempting to use the statute as the predicate for a tort action but instead were attempting to force public officials to do what the law required. *Id.* at 132. As such, the court reasoned that it did not need to examine the criteria necessary for an implied private right of action. *Id.*

That, however, did not end the court's analysis. The court rejected the defendants' contention that judicial review of a school board's decision as to school actions was beyond the reach of the courts. While the court acknowledged that it could not legislate in the field of public education, courts have authority to ensure that the actions of public officials do not deprive citizens of their rights conferred by statute or constitution. *Id.* The court concluded that an action for mandamus was the proper avenue for the plaintiffs' respective claim. As such, the court found that the School Code imposed specific requirements on the school board regarding the use the allocated funds at issue, and that the plaintiffs' complaint alleged that the defendants used the funds in violation of those requirements. *Id.*

Accordingly, the Court finds that *Noyola* does not stand for the proposition that there is no private right of action to enforce the School Code. The *Noyola* court never reached the issue of whether the plaintiffs had a private right of action under the School Code because the plaintiffs' complaint did not allege a School Code violation as a basis for imposing tort liability on the defendants. Similarly, in the case here, the Plaintiffs also do not seek to use the

Defendants' alleged violation of the School Code as basis for imposing tort liability on the Defendants.

Notwithstanding this, upon review of the Plaintiffs' Complaint, the Court notes that Plaintiffs appear to seek relief solely through a declaratory judgment or by a writ of *certiorari.* It is well-established that a court may only grant requested relief pursuant to the underlying complaint. *See Morris v. City of Chicago,* 130 Ill. App. 3d 740, 744 (1st Dist. 1985); *Ligon ex rel. Williams v. Williams*, 264 Ill. App. 3d 701, 707 (1st Dist. 1994). However, Defendants argue in their motion to dismiss that Plaintiffs do not have any avenue to challenge the school board's decision, including through a writ of mandamus. Plaintiffs substantively respond to this contention, and assert, for the first time, that they are also entitled to a writ of mandamus. Given the substantial amount of debate concerning this specific right to relief, the Court must address this issue.

Writ of Mandamus

While maintaining that Plaintiffs do not have a private right of action under the School Code, Defendants suggest that under *Noyola*, the appropriate vehicle for alleging a violation of the School Code is a writ of mandamus. Defendants assert that mandamus may only be used to compel a public official to perform nondiscretionary official duties, citing *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185 (2009) and *Tyska v. Bd. of Educ.*, 117 Ill. App. 3d 917 (1st Dist. 1983). Accordingly, Defendants contend that Plaintiffs also do not have an ascertainable right to a writ of mandamus because Plaintiffs challenge discretionary, and not mandatory, decisions of CPS.

Plaintiffs counter that Defendants' reading of *Noyola* is incorrect as *Noyola* does not limit the private right of action to a school code violation solely to a writ of mandamus. However, even assuming that Defendants' reading of *Noyola* is correct, Plaintiffs insist that they are entitled to that relief because they are challenging mandatory, rather than discretionary, requirements of the School Code. Plaintiffs assert that before initiating a school phase-out or school boundary change, under the School Code CPS must ensure that: (1) it complies with its guidelines for "academic and non-academic criteria" for instituting a phase-out; (2) affected students are able to attend a higher-performing school; and (3) the transition plan provides services comparable to those of their old school, citing Sections 200 and 225 of the School Code. Pls. Resp. to Def. Mot., at 15. Plaintiffs reasons that Defendants have no discretion to deviate from these requirements and thus the requirements are mandatory.

Defendants reply that Plaintiffs do not have a judicial remedy for challenging the NTA school action pursuant to a writ of mandamus and cannot compel Defendants' compliance with the School Code. Defendants assert that Plaintiffs have not cited, nor is there any case that stands for the proposition that an Illinois court may overturn the decision of a school board regarding a boundary change or related other school action. Moreover, Defendants note that while Section 230 of the School Code is designed to provide an open and transparent process for school actions, the School Code does not limit the powers of the Board of Education to exercise its authority and discretion in effectuating such actions.

Mandamus is an extraordinary remedy granted to enforce a public officer to perform official nondiscretionary duties when plaintiff has demonstrated a clear right to this relief. *Smith v. Policemen's Annuity & Benefit Fund*, 391 Ill. App. 3d 542, 548 (1st Dist. 2009). "A writ of mandamus will not issue unless the plaintiff can show: (1) a clear, affirmative right to relief; (2) a clear duty of the defendant to act; and (3) clear authority in the defendant to comply with the writ." *Lewis v. Spagnolo*, 186 Ill. 2d 198, 229 (1999). A court will not grant a writ of mandamus where its effect is to substitute the court's judgment or discretion for that of the body commanded to act. *Spagnolo*, 186 Ill. 2d at 198. Thus, "where the legislature has empowered a school board to perform certain acts, courts will not interfere with the exercise of those powers, or substitute their discretion for that of the school board, unless the board's action is palpably arbitrary, unreasonable, or capricious." *Peters v. Board of Education*, 97 Ill. 2d 166, 171 (1983).

The cardinal rule of statutory construction is to ascertain and give effect to the true intent of the legislature. In construing a statute, a court's task is to "ascertain and give effect to the legislature's intent," the most reliable indicator of which is "the language of the statute, which is to be given its plain and ordinary meaning." *Solon v. Midwest Med. Records Ass'n*, 236 Ill. 2d 433, 440 (2010). To determine the plain meaning of statutory terms, a court should "consider the statute in its entirety, the subject it addresses, and the apparent intent of the legislature in enacting it." *Id.* "When the statutory language is clear and unambiguous, it must be applied as written, without resort to extrinsic aids of statutory construction." *Id.*

When a statute prescribes the performance of an act by a public official or a public body, whether it is mandatory or directory depends on its purpose. *Read v. Sheahan*, 359 Ill. App. 3d 89, 94 (1st Dist. 2005). Notwithstanding the plain meaning of the word "shall" and the fact that it does not appear ambiguous, "shall" may be interpreted to mean "must" or "may" depending on the context and intent of the legislature. *Id.* If the provision merely directs a manner of conduct for the guidance of the officials or specifies the time for the performance of an official duty, it is directory, absent negative language denying the performance after the specified time. *In Re James E.*, 363 Ill. App. 3d 286, 290 (5th Dist. 2005). If, however, the conduct is prescribed to safeguard someone's rights, which may be affected by failure to act within the specified time, the statute is mandatory. *Id.* at 291. If a statute is mandatory, strict compliance is required. *Id.* In construing statutory provisions as being mandatory or directory, the word "shall" is indicative of a mandatory legislative intent. *Id.*

Whether Plaintiffs have a right to a writ of mandamus requires examination of the relevant School Code provision in relation to school actions. Section 230 of the School Code is entitled "School action public meetings and hearings" and defines the procedures that the CEO omust follow when seeking to effectuate a school action. Section 230(a), states, in relevant part:

> 230(a). By October 1 of each year, the chief executive officer shall prepare and publish guidelines for school actions. The guidelines shall outline the academic and non-academic criteria for a school action. These guidelines shall be created with the involvement of local school councils, parents, educators, and community organizations. These guidelines, and each subsequent revision, shall be subject to a public comment period of at least 21 days before their approval.

105 ILCS 5/34-230(a) (West 2016).

While Plaintiffs cite Section 230(a) as demonstrative of evidence that the School Code is mandatory as to the publishing of school guidelines and the use of academic and non-academic criteria, their argument fails to appreciate the purpose of the section as a whole. *See Sheahan*, 359 Ill. App. 3d at 94. The Court agrees with Plaintiffs that the School Code is mandatory in nature, but only as to the *process* by which a chief executive must follow in order to effectuate a school action. For instance, pursuant to the School Code, the CEO is mandated to perform the following actions:

> School action public meetings and hearings.
>
> (a) By October 1 of each year, the chief executive *shall* prepare and publish guidelines…[which] *shall* be subject a public comment period…
> (b) The chief executive *shall* announce all proposed school actions to be taken at the close of the current academic year…by December 1 of each year.
> (c) On or before December 1 of each year, the chief executive *shall* publish notice of the proposed school actions…
> (1) Notice of the proposal *shall* include…
> (2) The chief executive officer…*shall provide notice*…of any school that is subject to the proposed school action
> (3) The chief executive officer *shall provide written notice*…to the [state representatives] for the school…that [is] subject to the proposed school action…
> (4) The chief executive officer *shall publish* notice…on the district's Internet website
> (5) The chief executive officer *shall* provide notice…at least 30 calendar days in advance of a public hearing or meeting…
> (d) The chief executive officer *shall publish* a brief summary of the proposed school actions…
> (e) The chief executive officer *shall designate* at least 3 opportunities to elicit public comment at a hearing or meeting…
> (f) Public hearings *shall* be conducted by a qualified independent hearing officer…
> *** *** ***
> (3) The independent hearing officer *shall issue* a written report that summarizes the hearing…and the chief executive officer *shall* publish the report on the district's Internet website within 5 calendar days after receiving the report…

> (h) *If the chief executive officer proposed a school action without following the mandates set forth in this Section, the proposed school action shall not be approved by the Board during the school year in which the school action was proposed.*

105 ILCS 5/34-230 (emphasis added).

The Court agrees in part with Plaintiffs that Section 230 is mandatory, but only as to the actual subject matter of the provision, namely the process of effectuating a school action. Pursuant to Section 230, the CEO is required to implement certain procedures within a certain time period, such as proposing a school action by a certain deadline, providing notice of public hearings within a certain period of time, and so forth. Section 230(h) supports this interpretation as it invalidates any action that does not follow the delineated procedures in the provision. As such, Section 230 provides that if CPS fails to adhere to the procedures listed in the statute, then any approved school action proposal is void.

That does not mean, however, that the mandatory requirement for CPS to consider "non-academic and academic" criteria necessitates that any action affecting an individual school or community must be evaluated by the same criteria. While the School Code mandates the use of these two broad categories of criteria, it does not expressly delineate nor require an individual school board to evaluate a school action by "clear system-wide criteria." In fact, other provisions of the School Code cited by the Plaintiffs demonstrate that the designation, consideration, and application of school-specific academic and non-academic criteria is discretionary based on the individual needs of the school community. As such, Plaintiffs' contention that Section.1843 of the School Code requires the use of "clear system-wide criteria" is misplaced. Section 18.43(a)(5) establishes the creation of the Chicago Educational Facilities Task Force, an entirely separate subsection of Section 230. *See* 105 ILCS 5/34-18.43(b), (c). Indeed, while Section 18.43(a)(5) outlines various legislative findings and establishes the advisory Task Force, it has no bearing on Section 230, which specifically governs the procedures for school actions.

The Court finds that Section 230 may only be read in mandatory terms relating to the process by which a school action may be effectuated, and that the case-specific circumstances arising from each individual school action are dependent on the individual school's needs. Thus, Plaintiffs may only challenge a school board's decision based on a writ of mandamus if Plaintiffs can point to a decision or action that failed to comply with Section 230, such as failure to hold public hearings, failure to publish notice of a school action, and so forth. As such, the Court agrees with Plaintiffs in part that so long as they allege a violation of the School Code relating to CPS' failure to abide by such procedures, they are entitled to seek a writ of mandamus.

Writ of Certiorari

Next, Defendants assert that Plaintiffs are not entitled to a *writ of certiorari* in Counts II through V because the school action procedures delineated in the School Code are quasi-legislative in nature, citing *Walters v. Department of Labor*, 356 Ill. App. 3d 785 (1st Dist. 2005) and *Brown v. Bd. of Educ. of the City of Chicago*, No. 12 CH 4526 (Cir. Ct. Cook Cnty., May 25, 2012).

Although Plaintiffs do not directly respond to this contention, Plaintiffs cite *Brown v. Duncan*, 361 Ill. App. 3d 125 (1st Dist. 2005) and *E. St. Louis Sch. District No. 189 Bd. Of Educ. v. E. St. Louis Sch. Dist. 189 Fin. Oversight Panel*, 349 Ill. App. 3d 445 (5th Dist. 2004), for the proposition that *certiorari* review is available if CPS exercised both a quasi-judicial and quasi-legislative function rather than a quasi-legislative one. *See* Pls. Resp., p. 11-12. Plaintiffs contend that the school action process is quasi-judicial because CPS conducted a hearing where evidence was taken, testimony was taken before a hearing officer, a record was created, and a report was issued with conclusions that CPS ultimately based its decision on. Plaintiffs contend that the process was also quasi-legislative in nature because CPS' decision involved the adjudication of rights for a small number of persons on individual grounds pursuant to *Brown.*

Defendants reply that no writ of *certiorari* is available because CPS' action was quasi-legislative as the purpose of Section 230 is to elicit public comment and not to adjudicate the rights of an individual of entity.

"A common law writ of *certiorari* is a general method for obtaining circuit court review of administrative actions when the act conferring power on the agency does not expressly adopt the Administrative Review Law and provides no other form of review." *Hanrahan v. Williams*, 174 Ill. 2d 268, 273 (1996). The purpose of *certiorari* review is to have the entire record of the inferior tribunal brought before the court to determine, from the record alone, whether the tribunal proceeded according to applicable law. *Reichert v. Court of Claims*, 203 Ill. 2d 257, 260 (2003). The standards of review under a common law writ of *certiorari*, however, are essentially the same as those under the Administrative Review Law. *Hanrahan v. Williams*, 174 Ill. 2d 268, 273 (1996).

Under the Administrative Review Law, courts generally do not interfere with an agency's discretionary authority unless the exercise of that discretion is arbitrary and capricious, or the agency action is against the manifest weight of the evidence. *Id.* However, the nature of an administrative agency's decision controls whether the court may proceed to review. *Brown v. Bd. of Education of the City of Chicago*, No. 12-CH-4526 (Cir. Ct. Cook County, May 25, 2012)[6] (citing *Chesko v. Ill. Civ. Serv. Comm'n*, 355 Ill. App. 3d 488, 494 (4th Dist. 2005)). The nature of an administrative decision may be quasi-legislative or quasi-judicial in nature, where quasi-judicial decisions are reviewable while quasi-legislative decisions are not. *Chesko* at 494. Quasi-judicial decisions affect "a small number of persons on individual grounds based on a particular set of disputed facts that were adjudicated, while a quasi-legislative agency decision involves general facts affecting everyone in which no individual rights are at stake." *Id.* In contrast, "[quasi-judicial] hearings are information-gathering in nature [and]...involve the adversarial adjudication of an individual's rights." *Id.*

The issue is whether the school action procedures set forth in the School Code constitute a quasi-legislative or quasi-judicial function. The Court finds that the process for a school action is quasi-legislative in nature. The crux of Plaintiffs' argument is that the process is quasi-judicial in nature because a hearing was conducted where evidence was taken by a hearing officer and

[6] While not binding authority, the Court finds the Honorable Michael B. Hyman's Opinion in *Brown v. Bd. of Education of the City of Chicago*, No. 12-CH-4526, instructive as to its discussion of quasi-legislative and quasi-judicial administrative decisions.

ultimately compiled into a report upon which CPS based its decision. While it is certainly true that the Code requires a public hearing to be conducted by an independent hearing officer, the purpose of the hearing is to determine whether the chief executive officer complied with the requirements of the School Code. Specifically, Sections 230(e) and (f) state that:

> (e) The chief executive officer shall designate at least 3 opportunities to elicit public comment at a hearing or meeting on a proposed school action and shall do the following:
>
> (1) Convene at least one public hearing at the centrally located office of the Board.
>
> (2) Convene at least 2 additional public hearings or meetings at a location convenient to the school community subject to the proposed school action.
>
> (f) Public hearings shall be conducted by a qualified independent hearing officer chosen from a list of independent hearing officers. The general counsel shall compile and publish a list of independent hearing officers by November 1 of each school year....
>
> *** *** ***
>
> *The independent hearing officer shall issue a written report that summarizes the hearing and determines whether the chief executive officer complied with the requirements of this Section and the guidelines.*

105 ILCS 5/34-230(e), (f) (emphasis added).

Further, Plaintiffs' cited authority, *E. St. Louis Sch. District No. 189 Bd. Of Educ. v. E. St. Louis Sch. Dist. 189 Fin. Oversight Panel*, supports this Court's reading of the statute. In *E. St. Louis*, the school board submitted to the oversight panel a request for approval of a proposed contract between the school board and an architectural firm to build two new school buildings. The oversight panel rejected the proposed contract and issued a directive to the school board to find another architectural firm for the construction projects. However, the school board selected the same architectural firm and subsequently submitted another request. The oversight panel rejected the second request and issued another directive instructing the school board to negotiate a contract with a different firm. Subsequently, the school board filed suit against the oversight panel, seeking, among other things, a declaratory judgment that the second directive was invalid.

Following an evidentiary hearing, the trial court concluded that the oversight panel had acted arbitrarily and capriciously in rejecting the contract. On appeal, the oversight panel argued that its decisions as an administrative agency were only subject to administrative review pursuant to a writ of *certiorari* and not a *de novo* evidentiary hearing. The appellate court disagreed, reasoning that the nature of the administrative decision, and not the status of the individual

agency, determined the right to relief through a writ of *certiorari. E. St. Louis*, 349 Ill. App. 3d at 449. The court further found that *certiorari* was an inappropriate vehicle for review of the oversight panel's decision because the panel was not acting in a quasi-judicial role when it rejected the firm's contract. *Id.* at 450. The court noted that the rejection was not a quasi-judicial function because there had been no adjudicatory hearing to determine individual rights or disputed facts, and no final administrative decision rendered by the panel. *Id.* at 451.

As noted by the court in *E. St. Louis*, an administrative decision rendered by an agency is quasi-judicial in nature because an "administrative decision or decision means any decision, order, or determination of any administrative agency rendered in a particular case, which affects the legal rights, duties, or privileges of parties and which terminates the proceedings before the administrative agency." *Id.* at 451. Here, the purpose of the public hearings is to take evidence as to whether Board complied with the procedural requirements of the School Code. The hearings do not adjudicate any individualized legal rights or privileges of any party, and only take evidence as to the proposal and procedures of the school action before it is officially approved. Moreover, contrary to Plaintiffs' suggestion, the presence of an independent hearing officer is not relevant as it is the nature of the hearing that controls whether the procedure is quasi-legislative or quasi-judicial. *Id.* at 449. Here, the nature of the public hearing is based on the propriety of the process, evaluates general facts and evidence, is not adversarial in nature, and no individual rights are at stake. *See* 105 ILCS 5/34-230(h).

Further in *Brown*, the court found that plaintiffs' request for a writ of *certiorari* was inappropriate. In *Brown,* members of the local school council brought suit against the Board of Education, among others, after the defendants refused to ratify a contract offered by the local school council to a candidate for the position of principal at an elementary school. Plaintiffs' complaint sought administrative review, a writ of *certiorari* and a declaratory judgment, alleging that the Board of Education's refusal to approve the principal's contract was a violation of the Illinois School Code. Defendants subsequently moved to dismiss the complaint, arguing, among other things, that the petition for writ of *certiorari* was an inappropriate vehicle for relief because the Board had not made a final decision. The trial court agreed and dismissed the complaint. The appellate affirmed and relied on *E. St. Louis*, holding that the petition for writ of *certiorari* was improper because the Board of Education did not conduct any type of hearing and did not render an ultimate determination of the issue. *Brown*, 361 Ill. App. 3d at 133.

Accordingly, the Court finds that the School Code's process for effectuating a school action is quasi-legislative in nature and Plaintiffs do not have a right to seek judicial review pursuant to a common law writ of *certiorari*.

Declaratory Judgement

Having found that Plaintiffs do not have an ascertainable right to a writ of *certiorari* due to the quasi-legislative nature of the school action process, the Court considers whether Plaintiffs have a right to a declaratory judgment.

Defendants argue that Plaintiffs do not have an ascertainable right for declaratory relief because a declaratory judgment is strictly remedial and does not create any substantive rights or duties, citing *Beahringer v. Page*, 204 Ill. 2d 363 (2003). Even if Plaintiffs could challenge CPS'

discretionary actions, posit Defendants, Plaintiffs have not alleged any facts that show that CPS acted arbitrarily or capriciously in its application of any of the School Code provisions cited by Plaintiffs. Plaintiffs counter that they may seek a declaratory judgment to obtain judicial review of "quasi-legislative" administrative decisions, including the decisions of school boards under the School Code, citing *E. St. Louis* and *Brown*.

Under Section 2-701 of the Illinois Code of Civil Procedure, a court may make a binding declaration of rights having the force of a final judgment in justiciable cases. 735 ILCS 5/2-701 (West 2016). The elements of a declaratory judgment action are: (1) a plaintiff with a legal tangible interest; (2) a defendant having an opposing interest; and (3) the existence of an actual controversy between the parties concerning such interests. *Beahringer*, 204 Ill. 2d at 372; *Record-A-Hit, Inc. v. Nat'l Fire Ins. Co.*, 377 Ill. App. 3d 642, 645 (1st Dist. 2007).

A court may review the Board of Education's legislative actions under a declaratory judgment action for arbitrariness, capriciousness, or unreasonableness. *E. St. Louis Sch.*, 349 Ill. App. 3d 445 at 450, 453-454. An agency action is considered arbitrary and capricious if:

> [The] agency: (1) relies on factors that the legislature did not intend for the agency to consider; (2) entirely fails to consider an important aspect of the problem; or (3) offers an explanation for its decision which runs counter to the evidence before the agency or which is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

E. St. Louis Sch., 349 Ill. App. 3d 445 at 450, 453-454.

Further, in *Brown,* the court found that the petition for writ of *certiorari* was improper. However, the court found that plaintiffs' request for a declaratory judgment was proper. Additionally, in *E. St. Louis*, the court found that quasi-legislative actions of an administrative agency can be reviewed in a declaratory action if it is alleged that the action is unlawful and that declaratory relief in that case was appropriate. *E. St. Louis*, 349 Ill. App. 3d at 449. Thus, contrary to Defendants' contention, pursuant to *E. St. Louis* and *Brown*, a plaintiff may challenge a board's failure to follow the School Code via a writ of mandamus or through a declaratory judgment action. Notably, Defendants failed to address, much less distinguish either *E. St. Louis* or *Brown* in their reply. However, whether Plaintiffs have in fact adequately pled such a claim will be analyzed under the following factor.

iii. *Likelihood of Success on the Merits*

To show a likelihood of success on the merits, a party must: (1) raise a fair question as to the existence of the right claimed; (2) lead the court to believe that he or she will probably be entitled to the relief prayed for if the proof sustains her allegations; and (3) make it appear advisable that the positions of the parties stay as they are until the court has an opportunity to consider the merits of the case. *Abdulhafedh v. Secretary of State*, 161 Ill. App. 3d 413, 417 (2d Dist. 1987). To satisfy likelihood of success on the merits factor, the complaint must state a cause of action sufficient to withstand a section 2-615 motion to strike. *See Strata Marketing, Inc. v. Murphy,* 317 Ill. App. 3d 1054 (1st Dist. 2000).

Plaintiffs contend that they have a likelihood of success on the merits for Counts II through V of their Complaint relating to the School Code. Defendants counter that Plaintiffs fail to state cause of action under said counts and therefore the Motion to Dismiss should be granted. The Court will address each count in turn.

The Court begins with an overview of the School Code. The School Code defines a "school action" as "any school closing; school consolidation; co-location; boundary changes that require reassignment of students, unless the reassignment is to a new school with an attendance area boundary and is made to relieve overcrowding or phase out." 105 ILCS 5/34-230.

To effectuate a school action, CPS must abide by the requirements of Section 230 of the School Code. By October 1 of each year, the CEO must "prepare and publish guidelines for school actions" which shall include "academic and non-academia criteria." 105 ILCS 5/34-230(a). Such guidelines are to be created with the "involvement of local school councils, parents, educators, and community organizations" and are subject to a public comment period before final approval. *Id.* If the CEO fails to take the required steps, the Board of Education shall not approve the school action in that school year. 105 ILCS 5/34-230(h).

If a school action is approved, the CEO must follow the requirements of Section 225(d), which governs the implementation of a school action. 105 ILCS 5/34-225(d). Section 225 provides, in pertinent part:

> (d) When implementing a school action, the Board must make reasonable and demonstrated efforts to ensure that:
>
> (1) affected students receive a comparable level of social support services provided by the Chicago Public Schools that were available at the previous school, provided that the need for such social support services continue to exist; and
> (2) class sizes of any receiving school do not exceed those established under the Chicago Public Schools policy regarding class size, subject to principal discretion.

105 ILCS 5/34-225(d) (West 2016).

In the case before the Court, the Board of Education's school action sought to close one school by a phase-out and reassign boundaries leading to an eventual consolidation of two schools. Pursuant to CPS' Draft and Final Guidelines, such school actions are defined as followed:

> "Consolidation" means the consolidation of two or more schools by closing one or more schools and reassigning the students to another school.
>
> *** *** ***

> "Phase-Out" means the gradual cessation of enrollment in certain grades each school year until a school closes or is consolidated with another school.
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> *** *** ***
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> "Reassignment boundary change" means an attendance area boundary change that involves the reassignment of currently enrolled students."

Pls. Ex. KK, LL.

Count II

In Count II, Plaintiffs allege that CPS violated section 230(a) of the School Code by issuing Guidelines for the school phase-out and boundary reassignment that failed to include any academic or non-academic criteria. Plaintiffs assert that before proposing any school action, the CEO must create and publish guidelines for school actions that contain academic and non-academic criteria to minimize the negative impact of a school facility decision on affected communities, citing section 18.43(a)(5) of the School Code. Plaintiffs posit that if CPS' issuing of guidelines without such criteria invalidates the Board of Education's approval of the school action pursuant to Section 230(h), and failure to use such criteria or any objective standards is arbitrary and capricious.

Defendants argue that Count II does not state a cause of action for several reasons. First, Defendants note that Plaintiffs' Complaint and attached exhibits demonstrate that CPS complied with its Guidelines as the Guidelines contained academic and non-academic criteria, such as space utilization, safety and security, school culture and climate, school leadership, and academic performance. *See* Defs. Mot. at 12, citing to Pls. Compl., Ex. C. Second, Defendants assert that Plaintiffs' contention that the criteria must be objective improperly substitutes their judgment for that of the school board and does not support a claim that CPS acted arbitrarily or capriciously in adopting the criteria, citing *Tyska v. Bd. of Educ. of Twp. High Sch. Dist. 214*, 117 Ill. App. 3d 917 (1st Dist. 1983).

Plaintiffs respond that CPS approved NTA's phase-out based on its Guidelines, which solely purported to consider a phase-out based on the condition that the "school(s) principal, parents or community members have requested that a phase-out be considered." Pls. Compl., Ex. B. According to Plaintiffs, this condition failed to constitute the required "academic or non-academic criteria" for a school phase-out, and CPS' decision was solely based on the fact that a request was made. As such, Plaintiffs argue, this decision was arbitrary and capricious, and Defendants make no attempt to explain how this decision could constitute "criteria" required by the School Code.

Plaintiffs further contend that any criteria listed in the Guidelines is insufficient because the Guidelines fail to provide any system-wide standard or rule, citing *Swan v. Board of Education of the City of Chicago*, Nos. 13 CH C 3623 and 13 C 3624, 2013 WL 4401439 (N.D. Ill. Aug. 15, 2013) and *Brown* as examples of sufficient criteria. Plaintiffs argue that the criteria

in the Guidelines do not reflect educational goals or serve any educational purpose. Thus, Plaintiffs argue that their use is arbitrary and capricious.

Last, Plaintiffs argue that Defendants incorrectly cite *Brown* and *Tyska* for the proposition that CPS enjoys limitless discretion in writing its Guidelines. According to Plaintiffs, neither case supports CPS' ability to disregard mandatory requirements in the School Code. Moreover, Plaintiffs do not contend that CPS must rely on particular criteria, but rather, CPS' failure to consider *any* criteria is itself arbitrary and capricious.

Defendants reply that Plaintiffs have failed to allege facts to show that CPS acted arbitrarily or capriciously. Defendants note that Plaintiffs solely focus on the preliminary criterion that a request for a school action must be received in order to trigger the process. However, Defendants state that the Guidelines clearly delineate criteria to be considered by the Board of Education. Further, Defendants continue, Plaintiffs' contention that the criteria was not objective is misplaced as they simply dislike the criteria used. Regardless, Defendants point out, the School Code does not require the use of "objective criteria." Defendants conclude that the Court does not have authority to enjoin a school action based on the belief that the criteria are flawed, citing *Tyska.*

Pursuant to Section 230(a), the CEO must publish guidelines for school actions that include both academic and non-academic criteria. 105 ILCS 5/34-230(a). On November 22, 2017, CPS published its "Final Guidelines for School Actions 2017-2018 School Year." The Preamble of the Guidelines noted that:

> The Illinois School Code....requires the Chief Executive Officer (CEO) to publish draft guidelines for school actions by October 1 of each year. These guidelines shall outline the academic and non-academic criteria for a school action....The draft guidelines were published on September 29, 2017. Public comments were received on the draft guidelines under October 20, 2017. On November 22, 2017, Chicago Public Schools hereby publishes the Final Guidelines for School Actions applicable for the 2017-2018 School Year.

Final Guidelines, Pls. Ex. LL.

The Final Guidelines list the criteria to be considered for a reassignment boundary change and a school phase-out:

> B. Criteria for Reassignment Boundary Change
>
> The CEO may propose a reassignment boundary change that results in the reassignment of current students from one school to one or more other schools only if:
>
> The school's principal, parents or community members have requested that a reassignment boundary change proposal be considered via the process to request proposals outlined in the definitions section and the resulting space utilization after the reassignment boundary change will not

exceed any affected schools' enrollment efficiency range as defined by CPS' Space Utilization Standards.

In determining whether to propose a reassignment boundary change that meets the above-specified condition, the CEO may consider other information, including, but not limited to: safety and security; school culture and climate; school leadership; quality of the facilities; transition costs; the academic performance of the schools; and the feasibility of impacted students to access options that are higher performing, including the likelihood of admittance and distance of travel required.

C. Criteria for Phase-Out

The CEO may propose a phase out only if: the school's principal, parents or community members have requested that a reassignment boundary change proposal be considered via the process to request proposals outlined in the definitions section.

In determining whether to propose a phase-out that meets the above-specified condition, the CEO may consider other information, including, but not limited to: safety and security; school culture and climate; school leadership; transition costs; and the academic performances of the schools.

Final Guidelines, Pls. Mot., Ex. LL.

To establish that they have a likelihood of success on the merits for declaratory relief, Plaintiffs must allege that CPS' transition plan is arbitrary and capricious because it: "(1) relied on factors that the legislature did not intend for the agency to consider; (2) failed to consider an important aspect of the problem; or (3) offers an explanation for its decision which runs counter to the evidence before the agency or which is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *E. St. Louis Sch. Dist. 189 Bd. Of Educ.*, 349 Ill. App. 3d at 454.

Plaintiffs do not expressly indicate which element of the *E. St. Louis* test they seek to challenge CPS' decision. However, Plaintiffs cite Section 18.43(5) for the proposition that the General Assembly specifically intended for CPS to consider "clear-wide system criteria" when making school action decisions. This argument resonates with the first element, whether CPS relied on factors that the legislature did not intend for it to consider. But as noted prior, Section 18.43 does not mandate the use of system-wide criteria. Section 18.43 merely recites legislative findings and establishes the Chicago Educational Facilities Task Force. Specifically, Section 18.43 states that:

(a) The General Assembly finds all of the following:

*** *** ***

> (4)....The factors that impact the equitable and efficient use of facility-related resources *vary* according to the needs of each school community. Therefore, decisions that impact school facilities should include the input of the school community to the greatest extent possible.
>
> (5) School....phase-outs....[and] school boundary changes...often have a profound impact on education in a community. In order to minimize the negative impact of school facility decisions on the community, these decisions should be implemented according to a clear-system wide criteria and with the significant involvement of local school councils, parents, educators, and the community in decision-making.
>
> *** *** **
>
> (j) The Chicago Educational Facilities Task Force *shall prepare final proposed policy and legislative recommendations* for the General Assembly, the Governor, and the School District. The recommendations may address issues, standards, and procedures set forth in this Section.
>
> (k) *The recommendations may address issues of system-wide criteria for ensuring clear priorities, equity, and efficiency.* Without limitation, the final recommendations *may...recommend* clear criteria or processes for establishing criteria with respect to....school phase-outs....school boundary changes...

105 ILCS 5/34-18.43 (West 2016) (emphasis added).

The Court must construe the School Code as a whole and thus may not interpret Section 18.43 in isolation. *Solon v. Midwest Med. Records Ass'n*, 236 Ill. 2d at 440. Nothing in Section 18.43 requires a school board to accept the recommendations of the Chicago Educational Task Force as to the *proposed* system-wide criteria. In fact, the General Assembly's legislative findings recognize that the individualized needs of a school vary and because of this, Section 18.43 does not list any required system-wide criteria. Further, when read in conjunction with Section 230(a), Section 18.43 is silent as to whether the non-academic and academic criteria must include the criteria potentially contemplated by the Task Force. Had the General Assembly intended for the use of such proposed system-wide criteria, which were not even expressly determined in Section 18.43, it would have reasonably mandated their usage. The plain language of the School Code demonstrates that the General Assembly chose not to do so, and as such the Complaint fails to demonstrate that CPS relied on factors that the General Assembly would not have required CPS to consider.

The Court further agrees with Defendants that the Proposal recites non-academic and academic criteria for consideration of the school action as required by Section 225(a). The Court

also agrees with Defendants that the School Code only requires the consideration of "non-academic" and "academic criteria," and does not contemplate whether such criteria must be deemed "objective" or "measurable." As such, the Court finds that Plaintiffs have failed to allege facts that CPS' decision was arbitrary and capricious, and have thus failed to demonstrate a likelihood of success on the merits. As such, Count II must be dismissed with prejudice as there is no set of facts upon which Plaintiffs' Complaint may allege a violation of the School Code under this count.

Count III

In Count III, Plaintiffs allege that CPS violated the School Code by failing to comply with its own Guidelines to effectuate a school action, specifically by failing to present a "request" for a school action proposal. Plaintiffs note that CPS began presenting its Proposal before it received requests to effectuate a school action. Hence, Plaintiffs allege, these requests could not have possibly formed the basis of CPS' proposal. Plaintiffs assert that none of the authors of the purported requests were connected to NTA, that none of the requests sought a phase-out or boundary change, and at most the requests simply recognize the need for an additional neighborhood high school.

Defendants argue that Count III should be dismissed because the Guidelines provide that for either a boundary change or a phase-out, CPS may propose such a school action if the school(s) principal, parents, or community members have requested the action via the process to request proposals. Defendants assert that Plaintiffs' Complaint acknowledges that four requests were made within the requisite time period. Defendants suggest that Plaintiffs seek to improperly impose timing requirements not contained in the School Code or the Guidelines, as well as challenge the substance of the requests themselves.

Plaintiffs counter that in order to propose a phase-out, the Guidelines require that: (1) CPS receives a request from the school(s) principal, parents, or community members; (2) that the requests ask for a phase-out to be considered; and (3) that the phase-out be considered via the process to request proposals. While Defendants point out that CPS received four requests and presented them at the third public hearing, Plaintiffs counter that these requests did not comply with any of the Guideline requirements, resulting in an arbitrary and capricious violation of the School Code.

First, Plaintiffs note that none of the purported requests were submitted by or on behalf of NTA's principal, parents or school community as required by the Guidelines, and that the NTA community was unaware of who submitted the requests until the third public hearing in direct violation of Section 230(h). Second, Plaintiffs note that none of the purported requests actually asked for a phase-out, and only support CPS' proposal for a new high school. Third, Plaintiffs note that CPS' Proposal could not have been based on those requests because the Proposal predates them. According to Plaintiffs, the Proposal was publicly presented in May 2017, and all such requests were submitted after. Plaintiffs contend that they do not seek to impose timing requirements, and emphasize that the School Code and the Guidelines specify that a submitted request must have been received for CPS to consider a phase-out. Plaintiffs argue that the school action here appeared to work in reverse and in direct contravention of the School Code, where

the Proposal was publicly presented, comments were received, and then CPS relied on a handful of response to satisfy its request requirement.

Moreover, Plaintiffs posit, CPS' argument that the May 2017 Proposal was just a preliminary framework to expand school options mischaracterizes the facts of the case. Plaintiffs note that the well-pleaded facts in their Complaint state that the May 2017 Proposal was the only option presented to the community. Further, Plaintiffs assert that CPS' reliance on *Brown* and *Tyska* for the proposition that it complied with its Guidelines is misplaced.

Defendants reply that Plaintiffs' Complaint undermines their contention that CPS did not receive a proper request. *See* Defs. Repl. to Defs. Mot., at. 8. Defendants assert that CPS received four requests from community members, including one from the local Alderman prior to CPS' release of its Draft Guidelines in November 2017. As such, Defendants conclude that CPS' action was not arbitrary or capricious.

To effectuate the process for a school action plan, including actions for boundary changes or phase-outs, CPS' Guidelines state that the following actions must occur:

> B. Criteria for Reassignment Boundary Change
>
> The CEO may propose a reassignment boundary change that results in the reassignment of current students from one school to one or more other schools *only if:*
>
> > The school's principal, parents or community members have requested that a reassignment boundary change proposal be considered via the process to request proposals outlined in the definitions section and the resulting space utilization after the reassignment boundary change will not exceed any affected schools' enrollment efficiency range as defined by CPS' Space Utilization Standards.
>
> *** *** ***
>
> C. Criteria for Phase-Out
>
> The CEO may propose a phase out *only if:* the school's principal, parents or community members have requested that a reassignment boundary change proposal be considered via the process to request proposals outlined in the definitions section.

Final Guidelines, pgs. 1-2, Pls. Ex. LL. (emphasis added).

Further, the "process to request proposals" is defined by the Guidelines as any one of the following:

> (1) Requesting a proposal via e-mail at ceoguidelines@cps.edu by October 20, 2017; (2) requesting a proposal via e-mail at transition@cps.edu during the 2017 calendar year; (3) requesting a proposal via formal communications to the CEO or Chief Education Officer within the 2017 calendar year; and (4) requesting a proposal at a community meeting or open public meeting during the 2017 calendar year.

Final Guidelines, Pls. Ex. LL. (emphasis added).

After a Proposal is created, CPS is required to provide notice of the proposed action to the principal, staff, local school council, parents or guardians, Illinois State Senator, Illinois State representative, and Alderman for the school or schools that are subject to the proposed school action. 105 ILCS 5/34-230(c)(2), (3). Effective notice includes the "date, time, and place of the hearing or meeting" at least thirty calendar days prior to a public hearing or meeting. *Id.* at 230(c)(5). Notably, effective notice does not include public disclosure of the requests.

Plaintiffs' own exhibits indicate that on December 1, 2017, CPS communicated to NTA parents, students, and NTA staff members that "community requests to strengthen educational options in the Near South Community" had been made. Pls. Exs. MM and NN. Neither the School Code or CPS' own guidelines require a community request to be disclosed at any point in time during the hearing process or even *at all*. Rather, CPS need only provide notice to the interested parties that a request was received. Nevertheless, CPS provided the requests at the third public hearing.

Further, Plaintiffs' contention that CPS failed to abide by its own Guidelines as to the timing and substance of the requests is misplaced. Pursuant to the School Code, CPS may only begin the formal process of creating draft guidelines to effectuate its proposal after receiving related requests. The CEO released the Draft Guidelines on September 29, 2017. Although not noted by the Defendants, pursuant to the Hearing Officer's Report, the Hearing Officer noted that four requests proposing a phase-out and boundary change were requested prior to the release of the Draft Guidelines. See Pls. Mot., Ex. UU. Specifically, at least three of the requests appear to have been received prior the issuance of the Draft Guidelines:

> In Alderman Pat Dowell's letter of *July 17, 2017*...she recognizes the proposed reassignment boundary change of NTA...and...highlights the fact that while both NTA and [SLES]...provide a high-quality education for their students, [SLES] has been consistently rated as one of the top elementary schools in the City of Chicago. Thus, *the reassignment boundary change* would make it possible for all K-8 students in the area to have the opportunity to enjoy the same academic rigor and access to a new state-of-the-art facility.
>
> *** *** ***
>
> The *August 27, 2017* and January 22, 2018, letters of the Near South Planning Board...advise...the committee wholeheartedly welcomed the idea of a proposed high school in the Near South Side...They also urged

> CPS to consider extending the boundary of South Loop further south to include the redevelopment of the Harold Ickes Homes, ensuring that children returning or moving into these buildings also have access to South Loop. The CEO's proposal does exact this *and is in response to this request.*
>
> *** *** ***
>
> A petition signed by parents and community members of the Dearborn Homes requesting the proposal was presented to the Board of Education at its July 26, 2017 Board Meeting. The petition...urges CPS to convert NTA to a new neighborhood high school...and further affirms that the addition of a high school with quality educational opportunities would suit the needs of current and future students. The proposed reassignment boundary change would address this request.

Pls. Mot., Ex. UU (emphasis added).

The Hearing Officer further concluded that: "*compliance with the criterion requiring requests from the public for a reassignment boundary as set out in the 'Guidelines' has been [satisfied].*" Pls. Mot., Ex. UU (emphasis added).

The crux of Plaintiffs' concerns appears to be that the requests were not made public until the last possible moment for public comment, thus leaving very little room for transparency or evaluation of the source of the triggering request for a school action. The Court is sympathetic to this contention given the highly sensitive and political nature of a school action. However, while Plaintiffs' interpretation of both the School Code and Guidelines are otherwise reasonable, the Court does not have the authority to read additional requirements into the statute or the guidelines created by local school boards in order to have the School Code reflect what the Plaintiffs desire it to say. The task of re-writing a statute to reflect the needs and wishes of the public is a job better suited for the legislature. *Bd. of Educ. Of Woodland Cmty. Consol. Sch. Dist. 50 v. Ill. St. Bd. of Educ.*, 2018 IL App (1st) 162900, ¶ 9 ("...it is not our function to rewrite a statute or depart from its plain language by reading into the statute exceptions, limitations, or conditions not expressed therein").

As such, the Court agrees with Defendants that Plaintiffs have failed to allege facts that CPS' decision was arbitrary and capricious and thus have failed to satisfy that they have a likelihood of success on the merits. Count III must also be dismissed with prejudice as there is no set of facts upon which Plaintiffs' Complaint may allege a violation of the School Code under this count.

Count IV

In Count IV, Plaintiffs allege that CPS violated Section 225(c)(2) of the School Code by failing to assign NTA students to a higher-performing school. Plaintiffs allege that NTA and SLES both have Level 1+ SQRP ratings and were performing at equally high levels. Plaintiffs

allege that CPS' failure to provide NTA students with the opportunity to attend a higher performing school was arbitrary and capricious.

Defendants move to dismiss Count IV for failure to state a claim. As an initial matter, Defendants assert that determinations of school quality or school performance are delegated exclusively to the General Assembly and local boards of education and thus are non-justiciable, citing *Lewis v. Spagnolo*, 186 Ill. 2d 198 (1999). Next, Defendants insist that CPS' determination that SLES was higher performing through the usage of attainment scores cannot be challenged as arbitrary and capricious. Last, Defendants maintain that SLES meets the definition of a higher performing school because it performed higher than NTA on a variety of metrics, including but not limited to standardized test score attainments.

Plaintiffs respond that they are not, contrary to Defendants' assertions, asking the Court to review or modify CPS' 2017 school performance rating for NTA or SLES. Instead, insist Plaintiffs, they are challenging CPS' decision to disregard its own performance policy and rely on a factor that the General Assembly did not intend for it consider in its determination that SLES is a higher performing school. Plaintiffs maintain that based on CPS' SQRP policy and calculations, SLES is not higher performing than NTA and thus cannot be considered the "higher-performing option" for NTA students pursuant to the transition plan. As for CPS' contention that SLES was "higher performing" based on SLES' attainment scores on a standardized test, Plaintiffs maintain that the School Code does not authorize CPS to deviate from or otherwise modify its performance monitoring standards. Plaintiffs further argue that CPS' actions violate the intent of the School Code by requiring a higher-performing school to be displaced as this would defeat the requirement that displaced students should have the opportunity to attend a better performing school.

Defendants reply that Plaintiffs' position that CPS can never effectuate a school action when the school at issue is rated Level 1+ is illogical and strips the Board of Education of its authority and discretion. Further, Defendants suggest that Plaintiffs' disapproval of the manner in which CPS evaluates its schools cannot be the basis for legal action, as such determinations are delegated exclusively to the General Assembly and local boards of education, citing *Spagnolo*. Defendants state that Plaintiffs acknowledge that under CPS' Guidelines, when schools have the same performance rating, the higher performing school is determined based on a variety of metrics, including standardized test score attainments. Based on those metrics, reason Defendants, SLES is a higher performing option, and in no way did CPS disregard its own performance standards. Last, Defendants conclude, Plaintiffs' assertion that the General Assembly did not intend for CPS to make distinctions between higher performing schools is not supported by the language of the School Code.

Section 225 proscribes the procedures for implementing a school transition plan following the approval of a school action plan. 105 ILCS 5/34-255. Section 225(a) dictates that "the chief executive officer…shall work collaboratively with local school educators and families of students attending a school that is the subject of a school action to ensure successful integration of affected students into new learning environments." 105 ILCS 5/34-225(a). To ensure successful integration, the CEO is mandated to prepare and implement a school transition plan. 105 ILCS 5/34-225(b). Pursuant to Section 225(c)(1), the school transition plan must include:

(1) Services to support the academic, social, and emotional needs of students; supports for students with disabilities, homeless students, and English language learners; and support to address security and safety issues;
(2) Options to enroll in higher performing schools;
(3) Informational briefings regarding the choice of schools that include all pertinent information to enable the parent or guardian and child to make an informed choice, including the option to visit the schools of choice prior to making a decision;
(4) The provision of appropriate transportation where practicable;
(5) The departments that are responsible for oversight;
(6) Specific programs to be offered; and
(7) Support to implement plans at receiving schools, specifying the funding source.

105 ILCS 5/34-225(c) (West 2016).

The gravamen of Count IV is that SLES is not a higher performing school, and thus CPS acted arbitrarily and capriciously by failing to provide NTA students with options to enroll in higher performing schools. Plaintiffs' Complaint appears to challenge the first element of the *E. St. Louis* test, namely that the Board of Education relied on factors to effectuate the school action that the General Assembly did not intend for the school board to contemplate. In response, while acknowledging that SLES and NTA both have Level 1+ SQRP ratings, Defendants note that Plaintiffs concede that when two schools have the same performance rating, the higher performing school is determined by additional metrics, citing Pls. Complt., ¶135.

As continually noted by the Illinois Supreme Court, questions "relating to the quality of education are solely for the legislative branch to answer." *Spagnolo*, 186 Ill. 2d at 206 (reaffirming previous holding in *Committee for Educational Rights v. Edgar*, 174 Ill. 2d 1 (1996). The Illinois Supreme Court has noted that "courts are no more capable of defining high quality educational institutes and services...than they [are] able to define a good common school education." *Id.* As such, "what constitutes a high quality education cannot be ascertained by a judicially discoverable or manageable standards." *Id.*

As noted prior, the General Assembly recognized that the individual school community in conjunction with local school boards are in a better position to determine the standards for higher quality education. *See* 105 ILCS 5/34-18.43, 5/34-230. Plaintiffs essentially ask this Court to invalidate CPS' variable metrics for determining what is a higher-quality institution based on their assertion of what constitutes a higher-quality institution. Again, the Court is in no position to enforce this contention. Thus, Plaintiffs have failed to allege facts demonstrating that they have a likelihood of success on the merits as to Count VI and as such it must be dismissed. However, at this juncture, the Court does not find that there is no set of facts upon which Plaintiffs may allege to sustain a violation of the School Code. As such, this count is dismissed without prejudice and Plaintiffs are granted leave to amend.

Count V

In Count V, Plaintiffs allege that CPS violated Section 225(d) of the School Code by failing to provide an adequate transition plan for NTA's phase out and boundary changes. Plaintiffs allege that following the Board of Education's approval of a school action, CPS must prepare a transition plan to support the academic, social, and emotional needs of impacted children, citing Sections 225(b) and (c). Plaintiffs allege that the NTA transition plan provides minimal support for programs such as the NTA Health Center and the Park District programming, and its failure to provide comparable services is arbitrary and capricious.

Defendants move to dismiss Count V on the basis that Plaintiffs' Complaint and supporting exhibits confirm that CPS' transition plan complied with the School Code. The transition plan, note Defendants, lays out the specific resources that CPS has committed to the transition, including but not limited to: (1) stipends for the creation of a Culture and Climate team; (2) funding for joint activities with the NTA and SLES parents and students; (3) funding for professional development for parents and students; (4) exploration of options for after-school programs at SLES; and (5) funds for an equity study. While Plaintiffs also assert that CPS was required to make efforts to ensure students receive a comparable level of social support services, Defendants contend that Plaintiffs fail to allege how the transition plan fails to comply with this provision.

Plaintiffs retort that NTA currently provides students with an array of supportive services, which CPS either fails to acknowledge or address in its transition plan. Plaintiffs assert that NTA has a federally qualified health care center on site, offers low-cost childcare before and after school, provides students with free participation in a variety of athletic programs, and has a partnership with the Park District to provide low-cost recreational activities and childcare. In contrast, Plaintiffs state that SLES offers no such services, and CPS' transition plan does not address the loss of NTA's partnership with the Park District. Instead, according to Plaintiffs, the transition plan vaguely recites the implementation of resources arguably required at any public school. Moreover, Plaintiffs conclude, the phase-out itself causes students at NTA to suffer consecutive years of significant budget cuts which implies that NTA's allocated resources will inevitably be inadequate.

Defendants reply that Plaintiffs mischaracterize CPS' obligation to create a transition plan pursuant to Section 225 of the School Code. Defendants maintain that CPS is not required to guarantee identical services between NTA and SLES. Rather, assert Defendants, CPS is only required to create a transition plan that provides services to support the academic, social, and emotional needs of students and commits resources for a minimum of the first full academic year. Defendants state that the Board of Education has and will continue to make reasonable efforts to provide a comparable level of services at SLES, and that Plaintiffs' own pleadings and supporting exhibits confirm that CPS complied with this mandate. Additionally, Defendants posit that Plaintiffs fail to allege how the transition plan does not comply with the School Code.

As previously noted, Plaintiffs are not entitled to a writ of *certiorari* due to the quasi-legislative nature of the school action plan. Thus, to establish demonstrate a likelihood of success on the merits for declaratory relief, Plaintiffs must allege facts as to whether CPS' transition plan

is arbitrary and capricious. The implementation of a school action's transition plan is governed by the School Code. Section 225(d) provides, in pertinent part:

> (d) When implementing a school action, the Board must make reasonable and demonstrated efforts to ensure that:
>
> (1) affected students receive a comparable level of social support services provided by the Chicago Public Schools that were available at the previous school, provided that the need for such social support services continue to exist; and
>
> (2) class sizes of any receiving school do not exceed those established under the Chicago Public Schools policy regarding class size, subject to principal discretion.

105 ILCS 5/34-225(d) (West 2016).

Pursuant to the School Code, CPS published a "Draft Transition Plan for the Proposed Reassignment Boundary Change of National Teacher's Academy." Pls. Mot., Ex. OO. The Draft Transition Plan articulates support services and plans for the phase-out and boundary reassignment, including support services for "Community Building and Culture Integration," "Safety and Security," "Supports for Students and Schools," "Support for Students' Social and Educational Needs," "Support for Specific Students' Needs" in relation to "Support for Diverse Learners," "Support for Students in Temporary Living Situations," and "Support for English Learners." See Pls. Mot., Ex. OO, at. 4-7. The Draft Transition Plan details that it will provide supportive services for professional development, community activities, commuter options, and individualized needs for students who currently have IEPs or behavioral issues, trauma, and/or disabilities.

Moreover, the Draft Transition Plan acknowledges that the plan is in fact a draft and is subject to further revision upon the course of the five-year phase out:

> The transition plan outlined below summarizes what will be provided to support the transition of NTA and South Loop students and families into one school community. Throughout this plan, we will be offering answers to *key questions* and *considerations* that parents and community members raised throughout the community engagement process CPS held earlier this year. *We expect to provide additional information as transition plans are finalized in partnership with the community and school administrations.*
>
> *** *** ***
>
> One of the major benefits of this proposal is the opportunity to create a more integrated school community, not just among students but among parents and the broader community as well. Successful integration requires time, effort and resources to unite communities around a shared, cohesive identity. Though students from NTA would not transition to South Loop until the fall of 2019, the process to bring these two

> communities will start this school year, should the Board approve this proposal. *These supports may be further customized as feedback is obtained at community meetings and a public hearing regarding this proposal. Additionally, resources may be adjusted to meet the unique needs of affected students if deemed necessary.*

Draft Transition Plan, Pls. Mot., Ex. OO, at 4. (emphasis added).

The gravamen of Count V concerns Section 225(d)(1), where Plaintiffs allege that NTA students will not receive a comparable level of social support services at SLES that were provided at NTA. Again, Plaintiffs do not expressly argue how the transition plan is arbitrary and capricious, though it would appear that Plaintiffs seek to allege that CPS failed to address an important aspect of the problem or have not offered an explanation for its decision that appears contrary to the evidence presented.

Regardless, Plaintiffs' argument is unavailing. Section 225(d) of the Code solely requires that the Board of Education must make *reasonable* and *demonstrated* efforts to ensure that affected students be provided with comparable resources at their new school. Section 225(d) does not mandate that the services be identical, and only requires that the Board of Education make such efforts to provide comparable services *provided that the need for such social support services continues to exist.* Additionally, Plaintiffs do not assert nor allege that such services currently provided at NTA will be further required at the new school. Accordingly, so long as the Board of Education can demonstrate that it has made reasonable efforts to effectuate the school action, the Court cannot substitute its judgment for that of the Board's. *Hanrahan v. Williams*, 174 Ill. 2d at 273.

Here, the facts alleged in Plaintiffs' Complaint do not support the inference that the Draft Transition plan was arbitrary and capricious. In at least four pages, CPS documents in detail the ways in it seeks to provide supportive transitional services to NTA students and the community at large. CPS also indicates that the transition plans are subject to review and revision based on further input from the community and a showing that services previously offered at NTA are also necessary for SLES. Viewed in the light most favorable to the Plaintiffs, Plaintiffs have not alleged facts that CPS failed to satisfy its requirement to make *reasonable* and *demonstrated* efforts to provide support to the NTA community. As such, Count V of Plaintiffs' Complaint fails to allege facts that they are entitled to a likelihood of success on the merits and must be dismissed. However, at this juncture, the Court also does not find that there is no set of facts upon which Plaintiffs may allege to sustain a violation of the School Code. As such, this count is dismissed without prejudice and Plaintiffs are granted leave to amend.

The Court having addressed Counts II through V of the Plaintiffs' Complaint now turns to the remaining count, CPS' alleged violation of ICRA.

Count I (ICRA)

In Count I, Plaintiffs allege that ICRA prohibits CPS from using criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race. NTA and SLES, note Plaintiffs, were both high performing schools. In order to effectuate

the school action, CPS, according to Plaintiffs, used an "attainment score" as a tiebreaker. Plaintiffs assert that "attainment" is a low-valued and racially biased metric that was used to define SLES as "higher performing" school and in effect subjected African-American students to discrimination based on their race in violation of Section 5(a)(2) of ICRA. Plaintiffs allege that they have the right to be free from school actions that discriminate on the basis of race.

Defendants argue that Plaintiffs fail to state a cause of action under ICRA because Plaintiffs have not alleged that the use of attainment scores to determine the relative performance of the NTA and SLES school populations had a racially disparate impact on Plaintiffs. According to Defendants, Plaintiffs must both identify a specific practice that is allegedly responsible for a statistical disparity and offer statistical evidence of such a disparity, citing *Swan v. Bd. of Educ. of City of Chicago*, Nos. 13 CH C 3623, 13 C 3624, 2013 WL 4401439 (N.D. Ill. Aug. 15, 2013). While Plaintiffs assert that the use of attainment scores puts schools such as NTA that serve predominately African-American populations at an extreme disadvantage, observe Defendants, they provide no factual allegation as to how the use of attainment scores to determine that SLES was higher performing that NTA actually had a racially disparate impact on the Plaintiffs as required to state a valid disparate impact claim.

Plaintiffs' ICRA claim also fails, according to Defendants, because Plaintiffs have not alleged a "relevant and statistically significant disparity" between the racial composition of the group allegedly harmed by the alleged discriminatory criteria, and that the group that was disadvantaged by the criteria, citing *Adams v. City of Indianapolis,* 742 F.3d 720 (7th Cir. 2014) and *Swan.* According to Defendants, there is only one action at issue in this case, namely the reassignment of boundaries and conversion to a high school. Defendants note that Plaintiffs assert that the use of attainment data created a disparate impact for African-American students at NTA. However, argue Defendants, Plaintiffs have not identified any other similarly situated individuals who were treated better because of the use of attainment data, as they must do to state a valid disparate impact claim. SLES and NTA students, submit Defendants, are not valid competitors because the determination that SLES would expand its attendance boundaries and that NTA would be converted to a high school was not based on the relative attainment scores of students at the two schools. Rather, assert Defendants, that determination was based on a host of different criteria, including the location, size and infrastructure of the two buildings.

Moreover, Defendants contend that a mere allegation that African-American students from underprivileged backgrounds perform lower on "attainment" metrics in general does not support an inference that this was the case at NTA or SLES, and does not support Plaintiffs' claim that the use of attainment metrics as one of multiple factors to determine that SLES was a higher performing school that had a racially disparate impact on NTA students.

Finally, Defendants argue that although Plaintiffs point to attainment as the discriminatory criteria or method of administration that violated ICRA, the only allegations of comparative impact on African-American students and non-African-American students has nothing whatsoever to do with attainment and do not support a finding that the use of attainment data had a racially disparate impact on Plaintiffs. According to Defendants, the disconnect between the criteria being challenged and the alleged disparate impact requires dismissal in and of itself, citing *Elston v. Talladega Cty. Bd. of Educ.,* 997 F.2d 1394 (11th Cir. 1993).

Specifically, Defendants note that Plaintiffs allege that "31% of the 4,550 students who will allegedly benefit from the new high school are African American," whereas "78% of the students who will be displaced or otherwise adversely impacted by the NTA boundary reassignment are African Americans." This analysis, according to Defendants, is flawed for four reasons. First, Defendants argue that the statistical comparison is facially invalid, as one statistic has nothing to do with the other. Second, Defendants insist that no racially disparate impact on Plaintiffs can be inferred from a comparison of current NTA elementary school students and future NTA high school students, as Plaintiffs are part of the population that CPS asserts will be harmed by the school action, as well as part of the population whom they assert will benefit from the school action. Third, Defendants maintain that Plaintiffs' assertion that all elementary students at NTA will be harmed is contradicted by the Complaint and exhibits. Fourth, Defendants argue that these "bottom line results are not sufficient to show that the use of attainment data as a tiebreaker to measure relative school performance has a disparate impact," citing *Wards Cove Packing Co. v. Antonio,* 490 US 2215, 657 (1989).

Plaintiffs retort that they have pled a viable disparate impact claim, citing *Cent. Austin Neighborhood Ass'n v. City of Chicago,* 2013 IL App (1st) 123041, ¶ 10. Plaintiffs observe that ICRA prohibits a unit of local government, such as CPS, from utilizing "criteria or methods of administration" that have the effect of discriminating based on race. The School Code, note Plaintiffs, mandates that students displaced by a closure or phase-out have the opportunity to attend a higher performing school, citing to 225(c)(2) of the School Code. Since CPS assigned NTA the highest possible rating of 1+, CPS should have deemed NTA ineligible for closing. Instead, submit Plaintiffs, CPS decided to create and apply a tiebreaker between the two 1+ rated schools. The sole measure CPS used to break this tie, according to Plaintiffs, were attainment scores, a metric that puts schools serving mostly African-American populations at a stark disadvantage as compared to non-majority African-American schools. Plaintiffs conclude that CPS, in using attainment scores as the sole tie-breaking metric to compare NTA and SLES, discriminated against African-American students based on their race in violation of ICRA. The attainment metric, submit Plaintiffs, was the single factor permitting CPS to deem NTA lower performing. All other factors, according to Plaintiffs, resulted in a tie. Therefore, reason Plaintiffs, but for this racially discriminatory metric by which CPS deemed NTA inferior to SLES, CPS could not have met the requirement of 105 ILCS 5/34-225(c)(2).

Next, Plaintiffs contend that the Complaint adequately alleges the causal connection between CPS's use of attainment scores and the discriminatory impact on African-American students. Plaintiffs note that they are not required to provide evidence in the Complaint, citing *Fiala v. Bickford Sr. Living Group, LC,* 2015 IL App (2d) 150067, ¶ 64. In addition, Plaintiffs insist that the Complaint states facts showing how attainment often results from factors independent of school quality, and which often correlate with race, such as outside achievement opportunities unavailable to low-resourced students. Compl. ¶ 224.

Plaintiffs argue that their Complaint establishes that they are, and are in the protected class disproportionately harmed by CPS's discriminatory actions. Plaintiffs reiterate that their ICRA claim is straightforward: African-American students have lower attainment scores than non-African-American students, and such the use of attainment scores as "tie-breaking" criteria has a discriminatory effect on African-American students. In this case, since the majority of NTA students are African American, NTA was deemed lower performing based on the use of

attainment, which resulted in CPS proceeding with the phase-out of NTA. As attainment was the sole criterion used to "tie-break" between NTA and SLES, which were found to be equal in all other measures, this resulted in disparate impact to African-American students. Moreover, contrary to the assertions of Defendants, the Complaint sets forth, according to Plaintiffs, how all students, and not just those entering kindergarten, first, and second grades will be harmed by the phase-out and reassignment boundary change. The younger students, Plaintiffs assert, will be subjected to the social-emotional harms of school closings and will lose access to NTA's Health Center, low-cost childcare, free sports programs, and Park District programming.

Finally, Plaintiffs maintain that the statistics used by Plaintiffs are the relative percentages of African-American students at NTA (78%) and SLES (46%), as well as the data showing that evaluating schools solely by attainment scores consistently results in majority African-American schools being deemed lower performing and "losing" in the tiebreaker to non-African-American majority schools.

Plaintiffs assert that the cases cited by CPS, *Swan* and *Adams*, are distinguishable. On the other hand, note Plaintiffs, in other disparate impact cases, courts have found specific policies, practices and criteria sufficient to allege an ICRA violation, citing, *McFadden v. Bd. of Educ.*, 984 F. Supp. 2d 882 (N.D. Ill. 2013) and *Daniel v. Board of Educ.*, 379 F. Supp. 2d 952 (N.D. Ill. 2005). Plaintiffs maintain that they have pleaded sufficient facts necessary to their claim that CPS "used criteria and methods of administration that had the effect of subjecting African-American students to discrimination based on their race." Compl. ¶ 212.

Defendants' reply reiterates that Plaintiffs have failed to state an actionable harm because NTA is not "closing." The inability to attend NTA *as an elementary school,* argue Defendants, is not an actionable harm. (emphasis added). Moreover, Defendants contend that Plaintiffs have not shown a causal connection between the use of attainment score and the reassignment of SLES's boundaries and the conversion of NTA to a high school, and that Plaintiffs have been discriminated against on the basis of their race by virtue of CPS's use of attainment data.

Defendants maintain that Plaintiffs fail to state a cause of action under ICRA because attainment data was not used to decide that NTA was subject to phase-out and a boundary reassignment. Rather, assert Defendants, the criterion for boundary reassignment and conversion of NTA to a high school was a community request for the action. That criterion, submit Defendants has nothing to do with attainment data. Attainment data, according to Defendants was used solely to determine that SLES was "a higher performing option" that NTA elementary students displaced by the conversion of NTA to a high school could attend for purposes of complying with Section 225(c)(2) of the School Code. The use of attainment data, insist Defendants, will not cause the displacement of any students. Plaintiffs' assertion that students cannot be reassigned from NTA because it is a 1+ rated school and there is no higher performing option lacks legal support.

Next, Defendants argue that Plaintiffs' statistics do not support Plaintiffs' disparate impact claim. Defendants assert that Plaintiffs' Complaint does not allege any facts showing that the use of attainment by the Board of Education discriminated against the Plaintiffs in this case.

Finally, Defendants contend that the ICRA claim should be dismissed with prejudice because any attempt to amend their Complaint to cure this deficiency would be futile.

Defendants assert that the exhibits cited by Plaintiff, such as the Equity Report, establish that SLES performs higher on attainment even when results are controlled for race, refuting any claim that the use of attainment had a discriminatory impact.

Count I of Plaintiffs' Complaint is predicated on Section 5(a)(2) of ICRA, which provides, in pertinent part:

> (a) No unit of State, county, or local government in Illinois shall:
>
> > (1) exclude a person from participation in, deny a person the benefits of, or subject a person to discrimination under any program or activity on the grounds of that person's race, color, national origin, or gender; or
> >
> > *(2) utilize criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color, national origin, or gender.*
>
> (b) Any party aggrieved by conduct that violates subsection (a) may bring a civil lawsuit, in a federal district court or State circuit court, against the offending unit of government. Any State claim brought in federal district court shall be a supplemental claim to a federal claim... If the court finds that a violation of paragraph (1) or (2) of subsection (a) has occurred, the court may award to the plaintiff actual damages. The court, as it deems appropriate, may grant as relief any permanent or preliminary negative or mandatory injunction, temporary restraining order, or other order.

740 ILCS 23/5 (West 2016) (emphasis added).

ICRA provides individuals with a cause of action under Illinois law for Title VII discrimination claims, including claims based on a disparate impact theory of liability. *Ill. Native Am. Bar Ass'n v. Univ. of Ill.*, 368 Ill. App. 3d 321, 327 (1st Dist. 2006); *Jackson v. Cerpa,* 696 F. Supp. 2d 962, 964 (N.D. Ill. 2010) ("[ICRA] was expressly intended to provide a state law remedy that was *identical* to the federal disparate impact canon.") (emphasis added). ICRA did not create new rights, but "merely created a new venue in which plaintiffs could pursue in the State courts discrimination actions that had been available to them in the federal courts." *Ill. Native Am. Bar Ass'n*, 368 Ill. App. 3d at 327; see also *Weiler v. Vill. of Oak Lawn*, 86 F. Supp. 3d 874, 889 (N.D. Ill 2014) (noting that ICRA was patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq).*

As a preliminary matter, the Court must define the elements of a claim under ICRA, i.e. what a plaintiff must plead to assert a cause of action under ICRA. The parties have not cited nor is the Court aware of any Illinois appellate court decision that has articulated the elements of a claim under ICRA.

Defendants cite a federal district court decision for the purported elements of an ICRA claim. According to the Defendants, to establish a prima facie case of disparate impact discrimination, Plaintiffs must: (1) identify a "method or criteria" that has a disparate impact

based on race; (2) articulate a valid comparison between similarly situated individuals inside and outside of the alleged protected class, which if proven at trial, would establish a racially disparate impact; and (3) allege facts showing a causal connection between the alleged disparity and the Plaintiffs' alleged injury, citing *Swan v. Bd. of Educ. of City of Chicago*, Nos. 13 CH C 3623, 13 C 3624, 2013 WL 4401439 (N.D. Ill. Aug. 15, 2013).

Plaintiffs, on the other hand, maintain that, at the pleading stage, all that a plaintiff is required to plead are facts sufficient to support a "robust" casual connection between a challenged policy and a disparate impact upon members of the protected class, citing *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015).

The Court finds the standard proffered by Defendants inapplicable with respect to the pleading standard for an ICRA claim. Although the Defendants correctly state the prima facie case for a disparate impact claim, a plaintiff need not establish a prima facie case at the pleading stage. "The prima facie case under the disparate impact analysis is an evidentiary standard, [and] it defines the quantum of proof a plaintiff must present to create a rebuttable presumption of discrimination... under the Federal Rules of Civil Procedure, an evidentiary standard is not a proper measure of whether a complaint fails to state claim *Powell v. Ridge*, 189 F.3d 387, 394 (3rd Cir. 1999) (quoting *Ring v. First Interstate Mortg., Inc.*, 984 F. 2d 924, 926 (8th Cir. 1993), *abrogated other grounds by Alexander v. Sandoval*, 532 U.S. 275 (2001); *accord Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002) (noting that the Court has never held that the requirements for establishing a prima facie case under *McDonnell-Douglas* also apply to the pleading standard that plaintiff must satisfy to survive a motion to dismiss.). Put simply, a plaintiff need not include allegations that would establish a prima facie case of discrimination under the relevant method of proof. *McGinnis v. United States Cold Storage,* No. 16-cv-8841, 2018 U.S. Dist. LEXIS 85389, at *13 (N.D. Ill. May 22, 2018); *Flanagan v. Excel Staffing*, No. 16-CV-05653, 2018 U.S. Dist. LEXIS 12054, at *5 (N.D. Ill. Jan. 25, 2018).

Swan does not support Defendants' position as *Swan* was not decided on a motion to dismiss. Rather, *Swan* was decided following an evidentiary hearing on the plaintiffs' preliminary injunction motion. A Title VII disparate impact claim need not allege statistical support to survive a motion to dismiss. *McQueen v. City of Chicago*, 803 F. Supp. 2d. 892, 906 (N.D. Ill. 2011).

While the parties have not cited any appellate court decisions defining the elements of an ICRA claim, two circuit court decisions, including one submitted by Defendants as an exhibit to their Motion to Dismiss, have set forth the elements for an ICRA claim. To state a claim under ICRA, the plaintiffs must plead sufficient facts to establish that: (1) they are members of a protected class; and (2) they suffered injury from the discriminatory effect of the defendants' use of criteria or methods of administration. *Brown v. Bd. of Education of the City of Chicago*, No. 12 CH 4526 (Cir. Ct. Cook Cnty., May 25, 2012), citing *Daniel v. Bd. of Ed. for Ill. Sch. Dist. U-46*, 379 F. Supp. 2d 952, 963 (N.D. Ill 2005) and *Powell v. Ridge*, 189 F. 3d 387, 393 (3rd Cir. 1999). It is within this framework that the Court analyzes Plaintiffs' ICRA claim.

The Court finds, in viewing the Complaint in the light most favorable to Plaintiffs, that Plaintiffs have adequately alleged a cause of action under ICRA.

As to the first element to state a claim under ICRA, the well-pleaded facts, accepted as true, establish that Plaintiffs are members of a protected class. Several of the Plaintiffs are parents of African-American students who attend NTA, and several are African-American students themselves. Pls. Compl. ¶¶ 10-46. Plaintiffs have alleged that NTA is a majority African-American school. In fact, Plaintiffs have alleged that 78% of NTA students are African American. Pls. Compl. ¶ 51. Moreover, Plaintiffs allege that the NTA students, 78% of whom are African American, will be harmed by Defendants' action of using attainment scores to determine that SLES is a better performing school than NTA, leading to the closure of NTA and displacement of those students. Thus, Plaintiffs have adequately pleaded that they are members of a protected class.

As to the second element, that Plaintiffs suffered injury from the discriminatory effect of the Defendants' use of criteria or methods of administration, Plaintiffs have satisfied this element in the Complaint as well. The gravamen of Plaintiffs' ICRA claim is that African-American students have lower attainment scores than non-African-American students. Pls. Compl. ¶ 65. Section 5(a)(2) of ICRA prohibits the use by any governmental body of criteria or methods of administration that have the effect of subjecting individuals to discrimination based on their race, color, national origin, or gender. The use of attainment scores, according to Plaintiffs as the "tie-breaking" criteria has a discriminatory effect on African-American students. Plaintiffs allege that the harm, namely the closure of the school which would result in, among other things, dismantling of the educational service, school culture, and ancillary services that support African-American NTA students, flows directly from the discriminatory effect of the Defendants' use of attainment score as a tiebreaker. Pls. Compl. ¶ 176-194.

The Court further finds that Plaintiffs' Complaint adequately alleges a causal connection between the use of the challenged criteria, attainment scores, and the discriminatory impact on African-American students. Plaintiffs' Complaint alleges that African-American students start the year at lower attainment levels and will be disadvantaged when greater weight is assigned to attainment instead of growth on standardized assessments. Pls. Compl. ¶ 65. Further, Plaintiffs' Complaint alleges that research has shown that African-American students score lower than students of other races on standardized academic assessments, creating a persistent scholastic achievement gap across the nation, Pls. Compl. ¶ 65. Using attainment metrics over other options like growth puts schools like NTA, serving majority African-American populations, at an extreme disadvantage compared to other schools with similar racial demographics to SLES and will consistently result in majority African-American schools being disproportionately labeled as lower-performing. Pls. Compl. ¶ 227.

Both NTA and SLES were rated 1+. According to Plaintiffs, CPS relied solely on the attainment metric to compare the two schools. CPS' use of the attainment metric as tie-breaking criteria had a discriminatory impact on NTA students. In this case, when NTA, a majority African-American school, was compared to SLES, a school that is not majority African-American using this criteria, NTA was deemed lower-performing, which resulted in CPS proceeding with the phase-out of NTA. While CPS insists that the use of attainment scores was not the criteria or rationale relied on by CPS to decide to reassign NTA's boundaries, on a section 2-615 Motion to Dismiss, CPS cannot challenge the well-pleaded allegations of Plaintiffs' Complaint. The transition of NTA, according to Plaintiffs, has caused or will cause academic, emotional and financial harm not only to the students of NTA, but to NTA itself. The

Plaintiffs submit several affidavits and a study in support of this proposition. At this juncture, the Court must accept these well-pleaded facts as true for purpose of a section 2-615 motion to dismiss.

The Court agrees with Defendants that Plaintiffs do not have the right to attend a particular school. However, that it not the right advanced in Plaintiffs' Complaint. Rather, Plaintiffs, as parents and students of NTA, allege that they have a right to enforce the mandates of ICRA, which prohibits Defendants from employing discriminatory criteria and methods of administration in any decisions, such as a phase-out. Here, Plaintiffs allege that CPS voted to close NTA by phasing it out and reassigning its attendance boundary, using discriminatory criteria and methods of administration, that in turn have harmed them. Thus, the Court finds that Plaintiffs have an ascertainable right under ICRA. As Plaintiffs have adequately pled a cause of action under ICRA, Defendants' Motion to Dismiss is denied as to Count I.

Moving on to Plaintiffs' Motion for Preliminary Injunction, the Court next addresses whether Plaintiffs have made a *prima facie* case of disparate impact discrimination. As noted above, Plaintiffs must: (1) identify a "method or criteria" that has a disparate impact based on race; (2) articulate a valid comparison between similarly situated individuals inside and outside of the alleged protected class, which if proven at trial, would establish a racially disparate impact; and (3) allege facts showing a causal connection between the alleged disparity and the Plaintiffs' alleged injury. *Swan v. Bd. of Educ. of City of Chicago*, Nos. 13 CH C 3623, 13 C 3624, 2013 WL 4401439 (N.D. Ill. Aug. 15, 2013).

Count I of Plaintiffs' Complaint asserts a disparate-impact theory of liability under Section 5(a)(2) of ICRA. Since ICRA was patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, Illinois courts "look to cases concerning alleged violations of federal civil rights statutes to guide our interpretation of [ICRA]." *Central Austin Neighborhood Ass'n v. City of Chicago,* 2013 IL App (1st) 123041, ¶ 10. "In contrast to a disparate-treatment case, where a 'plaintiff must establish that the defendant had a discriminatory intent or motive,' a plaintiff bringing a disparate-impact claim challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified to a legitimate rationale." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2513 (2015) (quoting *Ricci v. DeStefano,* 557 U.S. 557, 577 (2009)).

i. Likelihood of success on the merits

A. Discriminatory Method or Criteria

Plaintiffs maintain that they have a likelihood of success on the merits because CPS, in purporting to determine that SLES was a "higher performing school" than NTA and therefore, that its Proposal was permissible under the School Code, used criteria and methods of administration that had the effect of subjecting African Americans students to discrimination based on their race. Pls. Mot., at 32.

Defendants argue that Plaintiffs fail to allege that the use of attainment scores to determine the relative performance of NTA and SLES population had a racially disparate impact on Plaintiffs. Defendants maintain that Plaintiffs must both identify a specific practice that is allegedly responsible for a statistical disparity and offer statistical evidence of a disparity. In fact,

assert the Defendants, rather than challenge a specific policy or practice as required by ICRA, Plaintiffs instead rely on a "bottom line" theory of disparate impact that courts have rejected.

Plaintiffs identify attainment metrics as the discriminatory criteria used by CPS that has a disparate impact upon Plaintiffs. Plaintiffs argue that the use of attainment metrics to rate schools has the effect of subjecting African-American students to unfair discrimination, and did so in this case. Plaintiffs argue that attainment metrics provide "a poor measure of school quality," but they also place African-American students at an unfair disadvantage as African-American children enter school, on average with lower levels of school readiness and lower academic skills, qualities captured by attainment metrics, than higher-income and white students, citing Pls. Mot., Exs. 10, Reardon Aff., ¶ 11 and Ex. Y, Walsh Study, 704-06. Therefore, Plaintiffs conclude that schools serving high concentrations of low-income minority students (as does NTA) often have much lower average scores than schools serving predominantly affluent and white students, citing Pls. Mot., Exs. 10, Reardon Aff., ¶ 11 and Ex. 11 Koonce Aff., ¶ 18. Plaintiffs note that attainment metrics do not necessarily reflect a difference in the quality or performance of the schools, citing Pls. Mot., Ex. 10, Reardon Aff., ¶ 11 and Ex. Y, Walsh Study, 706.

Plaintiffs argue that *Swan* is distinguishable because in that case the plaintiffs could not supply the statistical support needed to establish causation. In other words, note Plaintiffs, the plaintiffs in *Swan* could not show that it was the challenged utilization criteria, and not other factors, that ultimately caused the racial disparities with respect to which schools were closed. In this case, assert Plaintiffs, the Complaint alleges that Plaintiffs, African-American students and parents of those students, belong to the group disparately impacted and have been significantly harmed by CPS' action. The Court agrees.

Notably, Defendants do not argue that attainment metrics were not used in the comparison of NTA and SLES. Moreover, Defendants do not offer any evidence to counter Plaintiffs' evidence that African-American students are at an unfair disadvantage when attainment metrics are used, as African-American children enter school, on average, with lower levels of school readiness and lower academic skills, qualities captured by attainment metrics, than higher-income and white students.

Further, the Court finds *Swan* distinguishable on this point. In *Swan*, the plaintiffs, parents of children enrolled in special education programs in CPS schools slated for closure, brought two suits against the CPS alleging that the school closures violated ICRA and the Americans with Disabilities Act. For the alleged ICRA violation, the plaintiffs alleged that the criteria CPS used to identify schools for closure resulted in the disproportionate closure of schools with African-American children, causing African-American children to disproportionately suffer academic and personal safety in violation of ICRA. The plaintiffs contended that CPS's decision to carry out any school closings based on the concept of "underutilization" resulted in the closure of schools with disproportionate number of schools with African-American student populations. In support of this contention, Plaintiffs offered a single statistic, namely that African-American students make up 87% of the students in the closing schools, but only 40.5% of the students in CPS as a whole.

The *Swan* court noted that the concept of underutilization was not a specific policy or practice sufficient to establish a disparate impact claim in and of itself. *Swan*, 2013 WL 4401439, *62. In addition, according to the *Swan* court, the only statistic offered by the *Swan* plaintiffs did not advance plaintiffs' theory that the "utilization" criterion caused the disproportionate closure of schools because there were numerous additional factors considered unrelated to utilization.

The Court finds that here, Plaintiffs have alleged the requisite statistical disparity. Approximately 78% of the students attending NTA are African American, compared to the 46% attending SLES. This statistic, coupled with the analysis showing that evaluating schools solely by attainment scores results in majority African-American schools like NTA being deemed lower-performing and losing the "tiebreaker" to a non-majority African-American school like SLES. Thus, Plaintiffs have met their burden of identifying a discriminatory policy or practice used by CPS, namely the use of attainment metrics as a tiebreaker in determining whether NTA or SLES is a higher performing school.

B. Actionable Harm

Plaintiffs argue that school closings have a long-term negative impact on the math achievement of students displaced by schools. Plaintiffs also insist that there will be fiscal harm, as CPS's student-based approach to school funding relies on the number of students enrolled on the 20th day of school to determine a school's annual budget, citing Ex. 1, Stovall Aff., ¶ 8 and Ex. 4, Rothschild Aff., ¶21.

Defendants, on the other hand, argue that the affidavits and studies are irrelevant in determining the potential impact of the boundary reassignment and fail to show that the Plaintiffs are likely to suffer academically as a result of the proposed action. Put simply, Defendants contend that the harm Plaintiffs have alleged in this case arises from the loss of NTA as elementary school, not the loss of their right to an education. It is Defendants' position that Plaintiffs have no actionable harm because they lack the right to attend a particular school. As for the study cited by Plaintiffs, Defendants claim that that study examined school closings and not a boundary reassignment. Moreover, Defendants argue that the Affidavit of Daniel A. Koonce, submitted by Plaintiffs, provides no support for Plaintiffs' disparate impact claim, citing Pls. Mot., Ex. 11. According to Defendants, Koonce offers a speculative opinion that the attainment metric could lead a decision maker to underestimated the performance of students, particularly students of color, citing *Id.*

Plaintiffs reply to Defendants' argument that they have no right to attend a particular school by stating that while that may be true, they have a right to be free from race discrimination in school actions that affect them, citing 740 ILCS 23/5(a)(2). Moreover, Plaintiffs insist that they are harmed by CPS' action as they have presented extensive evidence of harm affecting students who must transfer and those who remain, including academic setbacks, social and emotional difficulties, loss of community, and loss of vital wraparound services. Finally, Plaintiffs reiterate that the use of attainment had a disparate impact, and that CPS does not deny that attainment metrics have a discriminatory impact.

Here, Plaintiffs have submitted evidence demonstrating that school closings have a long-term negative impact on the math achievement of students displaced by schools. *See* Pls. Mot., Ex. 4, Rothschild Aff., ¶ 18; Ex. H UChicago Study at 9-10; Ex. 1, Stovall Aff., ¶ 6; Ex. 5,

Nuamah Aff., ¶ 9. Moreover, Plaintiffs have submitted evidence that the negative academic impacts of school closings occur during the year of the school closing announcement before the closing is actually executed. While closing a neighborhood school is not, by itself, an actionable harm, and that the traumatic nature and sadness that accompany the loss of a neighborhood school are not sufficient to constitute a cognizable injury that the law protects, the harms and accompanying evidence that Plaintiffs allege they have and will suffer, in support of their Motion for Preliminary Injunction are over and above the normal sadness of losing a neighborhood school. *Swan*, 2013 U.S. Dist. LEXIS 115294, *66. In addition to the negative academic impact, Plaintiffs have also established fiscal harm. Unlike in *Swan*, Defendants have not submitted counter-affidavits demonstrating that the NTA students who will be displaced as a result of the closing will not be harmed by same.

Also, unlike in *Swan*, there is no evidence in this case that the receiving school, SLES, has comparable programs to those at NTA. Thus, Plaintiffs have demonstrated a likelihood of success on the merits of their claim that students will be harmed emotionally, academically, and by the lack of services provided at SLES as compared to NTA.

C. Legitimate, Nondiscriminatory Reason

Plaintiffs contend that CPS fails to identify a legitimate reason to use an attainment metric. In fact, note Plaintiffs, CPS has recognized attainment's low value in determining school quality, citing Pls. Mot., 33-36. Moreover, Plaintiffs maintain that, contrary to Defendants' contention, CPS's Equity Report demonstrates that SLES does not perform higher than NTA in many areas, including year-to-year growth and the 5Essentials Survey, citing Def. Resp., Exs. 9A, 9B.

Defendants counter that while both NTA and SLES are rated 1+ under CPS's five-point scale, that does not mean that both schools are identical or are performing equally. Defendants assert that it is beyond question that student attainment is a legitimate and relevant criterion in assessing relative school performance between schools that have the same rating on the five-point scale. Moreover, Defendants contend that Plaintiffs cannot identify an alternative criterion that would have produced an equally valid less discriminatory result, as they must do to prevail on their ICRA claim. Defendants insist that SLES performs higher than NTA in virtually every other performance metric measured by CPS and reported on each school's Progress Report that is maintained on the CPS website, citing Def. Resp., Exs. 7 and 8.

The Court finds that CPS has identified a legitimate, nondiscriminatory reason to use attainment as a tiebreaking criterion. Consequently, the burden shifts back to Plaintiffs to establish that there is an equally valid, less discriminatory alternative.

D. Equally Valid, Less Discriminatory Alternative

According to Plaintiffs, less discriminatory alternatives to attainment metrics exist. For example, Plaintiffs argue that growth metrics are both superior and less biased, citing Pls. Mot., Exs. 10, 11. In addition, Plaintiffs point out that CPS's SQRP rating system, which reflects a weighted and multi-factored analysis of school quality, also provides a less discriminatory alternative.

"In determining whether an alternative is equally effective, the [c]ourt considers factors such as the cost or other burdens of proposed alternatives. *Swan*, 2013 WL 4401439, *62. The Court finds that Plaintiffs have satisfied their burden of establishing a likelihood of success on the merits as to the existence of an equally valid, less discriminatory alternative to attainment for tie-breaking between NTA and SLES in determining which is a higher performing school. According to Plaintiffs, there were numerous metrics available to Defendants to use in tie-breaking between NTA and SLES which both had the same SQRP level 1+. With the research showing that attainment scores results in a discriminatory effect for racial minorities, Defendants could have equally used other measures to determine whether one school or the other was superior. Moreover, using other available data in tie-breaking would not involve any increased cost or burden when compared with the use of attainment data. Consequently the Court finds that Plaintiffs have demonstrated a likelihood of success on the merits of their disparate impact claim.

ii. Irreparable Harm

The Court next turns to whether Plaintiffs have raised a fair question that the harm they face is irreparable if an injunction does not issue.

An irreparable injury is one which cannot be adequately compensated in damages or be measured by any certain pecuniary standard. *Diamond Sav. & Loan Co. v. Royal Glen Condo. Ass'n,* 173 Ill. App. 3d 431 (2d Dist. 1988). However, irreparable injury does not necessarily mean injury that is great or beyond the possibility of repair or compensation in damages, but is the type of harm of such constant or frequent recurrence that no fair or reasonable redress can be had in a court of law. *Bally Mfg. Corp. v. JS&A Group, Inc.*, 88 Ill. App. 3d 87, 94 (1st Dist. 1980).

Plaintiffs contend that violation of a person's civil rights causes irreparable harm, citing *Makindu v. Illinois High School Ass'n*, 2015 IL App (2d) 141201. Specifically, Plaintiffs assert that research establishes that school closings harm students and that the harm begins even before the closing occurs. Plaintiffs offer the affidavits of Sara Rothschild and Sally Nuamah, along with a study in support of this contention. Pls. Mot., Exs. 4 and 5. Plaintiffs also argue that in addition to the harm inherent in violation of their civil rights, Plaintiffs have suffered and will continue to suffer injuries ranging from direct academic harm, loss of funding and loss of current services.

Defendants counter that Plaintiffs' contention that a violation of a person's civil rights causes irreparable harm is misplaced, as the case they cite for their proposition, *Makindu v. Illinois High School Ass'n*, 2015 IL App (2d) 141201, addressed a violation of the Equal Protection Clause of the United States Constitution and not ICRA. As for Plaintiffs claim that "school closings" harm students, Defendants retort that the affidavits and studies cited by Plaintiffs are irrelevant in determining the potential impact of the boundary reassignment in this case, and fails to show that the Plaintiffs are likely to suffer academically as a result of the proposed action. Plaintiffs' purported harm, Defendants note, is the loss for some NTA students of a particular school, not the loss of their right to education. The loss of a particular school, assert Defendants, is not a harm demanding the protection of an injunction, citing *Smith v. Henderson,* 944 F. Supp. 2d 89 (D.D.C. 2013), amongst other cases. As for Plaintiffs' claim that

SLES does not offer reduced cost childcare, health services, extracurricular activities or social programs, that contention according to Defendants is false. Defendants submit the Affidavit of Tara Shelton, the Principal of SLES in support of that proposition. Defs. Resp., Ex. 13.

The Court finds that Plaintiffs have adequately alleged an irreparable injury. "Conceding that the school a pupil shall attend is primarily a question for the determination of the school officials, we believe that the school authorities and the courts should be ever concerned with the 'social and emotional problems' of the students to see that the students receive 'a good common school education.'" *People ex rel. Altman v. Board of Education*, 90 Ill. App. 2d 21, 30, 234 N.E.2d 362, 366 (1st Dist. 1967)

iii. Inadequate Remedy at Law

The Court now addresses whether Plaintiffs have raised a fair question that their remedy at law is not adequate. The elements of irreparable injury and inadequate remedy at law required for a preliminary injunction are closely related. *Happy R. Sec., LLC v. Agri-Sources, LLC,* 2013 IL App (3d) 120509, ¶ 36.

With respect to the inadequate remedy at law element, it is widely held that money damages constitute adequate compensation absent a showing that it would be impossible, rather than merely complicated, to ascertain the amount of damages. *Wilson v. Wilson,* 217 Ill. App. 3d 844, 856-59 (1st Dist. 1991). However, "the fact that plaintiffs' ultimate relief may be a money judgment does not deprive a court of equity the power to grant a preliminary injunction." *All Seasons Excavating Co. v. Bluthardt*, 229 Ill. App. 3d 22, 28 (1st Dist. 1992) (citing *K.F.K. Corp. v. American Continental Homes, Inc.*, 31 Ill. App. 3d 1017, 1021 (2d Dist. 1975)). Instead, "for a legal remedy to preclude injunctive relief, the remedy must be 'clear, complete, and as practical and efficient to the ends of justice and its prompt administration as the equitable remedy.'" *In re Marriage of Hartney*, 355 Ill. App. 3d 1088, 1090 (2d Dist. 2005).

Plaintiffs' argument of an inadequate remedy at law is intertwined with their argument of irreparable harm. In short, the Plaintiffs contend that money damages cannot remedy the harm the students will suffer. Defendants did not address this element in their Response brief. In any event, the Court finds that Plaintiffs have satisfied their burden of raising a fair question that their remedy at law is inadequate.

The Court, having found that Plaintiffs satisfied all of the elements for a preliminary injunction under Count I, must proceed to balance the hardships.

iv. Balance of the Equities

If the movant on a motion for preliminary injunction satisfies the elements for a preliminary injunction, then the court must the balance hardships and consider the public interests involved. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 62 (2006). A court may deny a preliminary injunction where the balance of hardships does not favor the moving party. *Id.*

Plaintiffs contend that the balance of harms and public interest favor preliminary injunctive relief. Plaintiffs, elementary schoolchildren and their parents, insist that they have

endured racial bias and unlawful treatment. Plaintiffs maintain that with the help of the wholesome and supportive community at NTA, Plaintiffs have risen above the history of school-related discrimination. As such, Plaintiffs conclude that the balancing of the equities favors Plaintiffs because their interests represent the public interest, as the public shares a stake in public administration of schools in a non-discriminatory manner.

Defendants counter that Plaintiffs fail to demonstrate that the balance of harms weigh heavily in their favor for several reasons: (1) Plaintiffs have failed to show that any student will be harmed because of the school closings; (2) an injunction would undermine the Board's long standing authority to make critical decisions regarding closings or phase-outs and (3) an order reversing the NTA conversion would negatively impact the thousands of families and students who will be the beneficiaries of the new high school.

Admittedly, this is a close call. On the one hand, the Court has found that Plaintiffs have raised a fair question as to the existence of the right claimed, that leads the Court to believe that they will probably be entitled to the relief sought, should the proofs sustain their allegations. On the other hand, the issuance of an injunction will impact numerous families who would be the beneficiaries of the new high school. The Court finds, upon balancing the hardships and the public interests involved, that the balance of hardships does not outweigh the need for an injunction.

CONCLUSION

In sum, the Court agrees with Defendants that the School Code affords CPS broad discretion in implementing phase-outs and boundary reassignments. However, that discretion is not unfettered. Where the phase-out or boundary reassignment is based upon impermissible criteria, courts have the authority, indeed the duty, to enjoin said action. In this case, the Court's ruling *does not* mean to suggest that CPS' decision to phase out NTA and reassign its boundaries violated ICRA. Rather, at this juncture, the Court has found that as to the ICRA Count, Plaintiffs have raised a fair question as to whether they have a clearly ascertainable right in need of protection, that they will suffer irreparable harm in the absence of an injunction, that they have no adequate remedy at law, and that they have a likelihood of success on the merits as to Count I of their Complaint. *See Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 62 (2006).

For the foregoing reasons, Defendants, the Board of Education of the City of Chicago and Janice Jackson, Chief Executive Officer's Motion to Dismiss Plaintiffs, Elisabeth Greer, et. al's Complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure is granted in part and denied in part. The Motion to Dismiss is granted as to Counts II, III, IV, and V, and denied as to Count I. Additionally, Plaintiffs' Motion for Preliminary Injunction is granted. CPS is enjoined preliminarily from engaging in any action to effectuate or facilitate the CPS decision to phase out NTA, to change NTA's boundaries, and/or to put a high school in the building currently occupied by NTA.

ENTERED

JUDGE FRANKLIN U. VALDERRAMA-1968

ENTERED: DEC 03 2018

DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Franklin U. Valderrama, Judge Presiding

DATED: December 3, 2018