INSTITUTE FOR FREE SPEECH

September 22, 2025

The Hon. Diane Gujarati
U.S. District Judge
225 Cadman Plaza East
Brooklyn, NY 11201

Via ECF

Re: *Alexander v. Sutton*, No. 1:24-cv-2224-DG-JRC

Dear Judge Gujarati:

Plaintiffs respectfully oppose Defendants' motion for a nearly three-month extension of the time to respond to Plaintiffs' letter requesting this Court hold a pre-motion conference. *See* Dkt. 107; Dkt. 105. Defendants' motion misstates Plaintiffs' position and cannot satisfy Defendants' burden of showing good cause to delay a scheduling conference. Fed. R. Civ. P. 6(b).

Defendants imply that Plaintiffs are not acting "in good faith," Dkt. 107 at 1, in filing the pre-motion letter, because this letter allegedly "is inconsistent with the parties' conversations over the summer months," *id.* at 2. On the contrary, over the last three months, Plaintiffs have repeatedly stated to Defendants, both orally and in writing, that Plaintiffs reserved their right to seek summary judgment at any time. For example, in an email dated September 2, 2025, Plaintiffs' counsel wrote "Plaintiffs take no position (and thus, do not oppose) on your upcoming motion on adjourning the settlement conference. However, we do want to reiterate that we reserve our right to seek summary judgment at any point in time, without regards to the adjournment" of the settlement conference. Since Defendants' counsel read and responded to the email containing this straightforward statement, it is hard to understand how Defendants can now claim that Plaintiffs have been inconsistent.

Likewise, Defendants assert that a three-month extension is necessary "to allow the parties' settlement discussions to proceed." Dkt. 107 at 1. But for the last six months, Plaintiffs have engaged in discussions and attempted to settle this case. *See* Dkt. 101 at 1; Dkt. 71 at 2. It is Defendants—not Plaintiffs—who twice sought and received adjournments of the settlement conference (originally set to occur in June). *See* Dkt. 104; Dkt. 103. Moreover, Plaintiffs stated to Defendants in a September 18 email that, although Plaintiffs would not withdraw their pre-motion letter, "We still plan to attend the telephonic settlement conference in October." Plaintiffs hope, as they always have, that parties can fully resolve their disagreements at this settlement conference.

It is Defendants, not Plaintiffs, who now appear to be unwilling to proceed with settlement talks. In a September 18 phone call, Defendants' counsel gave Plaintiffs an ultimatum: either Plaintiffs immediately withdraw their pre-motion letter or Defendants would

refuse to allow Plaintiffs to see the revisions to Regulation D-210—although Defendants had repeatedly promised that they would allow Plaintiffs to see these revisions "at the latest, by September 25, 2025." Dkt. 107 at 2. Because Plaintiffs did not withdraw their letter, Defendants now say that they will not allow Plaintiffs to see the revisions until the public notice and comment period begins.

Defendants expect notice and comment to start on October 31, 2025—two weeks after the October 16 settlement conference. *Id.* at 1 And Defendants have told this Court "that settlement is likely impossible until Plaintiffs can review the new regulation that the Department of Education is drafting to replace Regulation D-210." Dkt. 101 at 1. "[S]ettlement discussions were premised on City Defendants' disclosure of a crucial document to Plaintiffs' counsel." Dkt. 107 at 1. As a result, Defendants' decision to prevent Plaintiffs from reviewing the new regulation is in practice a decision to doom the October 16 settlement talks. Defendants' action makes settlement "likely impossible." Dkt. 101 at 1. It is Defendants—not Plaintiffs—who do not seem to be entering settlement talks in good faith.

"Engaging in motion practice prior to the parties' scheduled settlement conference," Dkt. 107 at 2, may or may not be inefficient and a waste of judicial resources. (Evaluating that would depend, for instance, on the likelihood of settlement, on whether Defendants act in good faith, and on the amount of judicial resources already wasted by the recurrent delays.) Regardless, Plaintiffs never asked to engage in motion practice prior to the parties' October 16 settlement conference. All Plaintiffs have requested is to hold a pre-motion conference setting a timetable on briefing. Scheduling is not motion practice. Because Defendants' response to Plaintiffs' letter is currently due on September 24, the pre-motion conference presumably would occur sometime in October and would almost certainly schedule Plaintiffs' opening brief for a date considerably later than October 16. If parties successfully resolve all their disagreements on October 16, there would be no motion practice.

Finally, even if the revisions to D-210 are proposed on October 31, survive the mandatory 45-day public notice and comment period, and receive the Panel for Education Policy's approval—all requirements under state law, *see* Dkt. 105-6, ¶¶ 7-10, 15-20; Dkt. 66; Dkt. 64 at 3—that would not "render the instant allegations moot," Dkt. 107 at 1. At most, that would moot Plaintiffs' request for a permanent injunction of D-210. However, the case against the Defendants would not be moot because the issue of retrospective relief in the form of nominal damages for past harms would remain. The requested permanent injunction against CEC 14's policies (that is, its Community Commitments, social media blocking policies, and so forth) would also remain pending, because CEC 14's policies have never been repealed and are not affected by any revision of D-210. It is even possible that Plaintiffs would amend their complaint to challenge the revised version of D-210, if the new version continues to violate their rights.

Because revising Regulation D-210 will not moot the case in its entirety, "a motion for summary judgment appears to be the quickest and most straightforward process for resolving the [whole] case," Dkt. 105 at 1. Delaying a pre-motion scheduling conference until sometime after December 19—that is, until either the holidays (when Plaintiffs are unavailable) or the next year—will thwart "the just, speedy, and inexpensive determination" of the case. Fed. R. Civ. P.

1. If parties cannot resolve this case on October 16 (as Defendants' own actions now make likely), then summary judgment briefs are necessary at some point. Meeting in October to schedule those briefs will ensure this case continues to progress.

Respectfully, the Court should deny Defendants' request for an adjournment, require they respond to Plaintiffs' pre-motion letter, and hold a pre-motion conference to set a briefing schedule on summary judgment.

Sincerely

/s/ Nathan J. Ristuccia
Nathan J. Ristuccia
Counsel for Plaintiffs