

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of

ANDREW GOODMAN FOUNDATION,
ELECTION@BARD, SADIA SABA, ERIN
CANNAN, and LEON BOTSTEIN,

Petitioners,

- against -

DUTCHESS COUNTY BOARD OF ELECTIONS,
ERIC J. HAIGHT, in his official capacity, and
ELIZABETH SOTO, in her official capacity,

Respondents,

For a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules.

Index No. 52737/20
(Rosa, J.S.C.)

**MEMORANDUM OF LAW IN FURTHER SUPPORT
OF PETITIONERS' REQUEST FOR INJUNCTIVE RELIEF AND IN
OPPOSITION TO RESPONDENTS' CROSS-MOTION TO DISMISS**

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I. Petitioners Are Entitled to a Preliminary Injunction¹ Because Respondent BOE's Failure to Move the Polling Place To A Safe Location Is "Arbitrary and Capricious" and an "Abuse of Discretion."

Petitioners are entitled to a preliminary injunction requiring Respondent Dutchess County Board of Elections ("BOE") to move the designated polling place for the Fifth District from The Church of St. John the Evangelist (the "Church") to the Multipurpose Room on the campus of Bard College for the November 3, 2020 election.

In an Article 78 proceeding, the CPLR clearly outlines what types of questions regarding government conduct may be presented to the court for relief as a way of defining the scope of the inquiry. Here, CPLR §7803(3) guides the Court's review, because the question is whether "a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." Under §7803(3), the Court frames the proceeding as a mandamus to review where the standard of review is "whether the agency determination was arbitrary and capricious or an abuse of discretion." (*Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educ. Servs.*, 77 NY2d 753, 758 [1991]).² Article 78 has been used to

¹ Petitioners also are entitled to permanent injunctive relief, which they will pursue in a trial on the merits.

² Commissioner Haight spends pages discussing the difference between "mandatory" and "directory" laws. (Haight MOL at Part II). Lengthy discussion is unnecessary. The provision of New York Election Law requiring compliance with the Americans With Disabilities Act (N.Y. Elec. Law § 4-104) frequently uses the word "shall" in addressing the concern that all citizens have a safe and accessible place to vote in person, and thus falls on the "mandatory" side of the line. (*See Syquia v. Bd. of Educ. of Harpursville Cent. Sch. Dist.*, 80 NY2d 531, 536 [1992])(holding that Courts "must examine both the language of the statute and the legislative intent underlying it.") Similarly, the New York Election Law mandates that the BOE "shall cause an access survey to be conducted.... upon changes to the facility." (N.Y. Elec. Law § 4-104 (McKinney)). Whether the BOE is violating mandatory or directory laws, Commissioner Haight is doing so without any foundation in fact, for an illegal purpose (to suppress youth voting) and to implement an option (the Church as a polling place) that the host effectively has withdrawn, making his actions arbitrary and capricious and an abuse of discretion.

challenge designations of polling places. (*See Matter of Krowe v. Westchester Cty. Bd. of Elections*, 155 AD3d 672 [2d Dep’t 2017]).

Continuing to insist on the Church as the designated polling place for District 5 is a textbook example of an “arbitrary and capricious” decision that is an abuse of discretion—here, by one person. Respondent Commissioner Elizabeth Soto actually supports Petitioners’ request.³ So does The Town of Red Hook Board, unanimously.⁴ Respondent BOE has not filed a response to Petitioners’ request in its own name.

Respondent Commissioner Erik J. Haight alone opposes Petitioners’ request. He does so because his “interest in keeping polling sites neutral generally weighs against using college campuses as polling sites.” (Affidavit of Erik J. Haight, sworn to September 21, 2020 (“Haight Aff.”) at ¶20). In his own words, his opposition rests upon an explicit admission of his discriminatory animus against youth voting. (*Id.*)

In the following sections, Petitioners lay out why Commissioner Haight’s refusal to move the polling location from the Church to Bard is arbitrary and capricious and an abuse of discretion: the Church is four times likelier than Bard to generate a transmission of COVID-19 (Section III); using the Church violates New York State Election Law (Section IV); and Commissioner Haight’s admitted, documented bias against youth voting is facially discriminatory (Section V). But Petitioners begin in Section II with the most remarkable fact of all, the fact that by itself is fatal to Commissioner Haight’s opposition: the Church that Commissioner Haight insists should host in-person voting on November 3, 2020 has declared itself unsafe to play that role.

³ Soto Affidavit filed September 21, 2020.

⁴ Verified Petition Ex. A and B.

II. The Church Has Declared Itself Unsafe To Serve As A Polling Location on November 3, 2020

In a letter of September 15, 2020, the Church notified the Dutchess County Board of Elections:

“...[W] are writing to recommend that you find another polling site for Red Hook district 5 other than the Church of St. John the Evangelist, Barrytown. Our concerns revolve around the current pandemic of COVID-19, and our inability to provide an adequately safe environment for the poll workers as well as the voters. Simply put, our space is too small to support much-needed social distancing, and other sites within District 5 are much larger.”

Exhibit 1 to the Affidavit of Respondent Elizabeth Soto, sworn to September 21, 2020.

This Court has the Church’s letter because Commissioner Soto provided it along with her endorsement of Petitioners’ request. Commissioner Haight says nothing about the letter in either the Haight Aff. or the memorandum of law submitted by Haight in opposition to the relief sought by Petitioner (the “Haight MOL,” and together with the Haight Aff., the “Haight Opposition”). Commissioner Haight offers no explanation how the BOE can tell the public the Church is safe when the Church has told the BOE that it is not.

Commissioner Haight’s position would appear inexplicable, except that he provides the explanation: he is opposed to using college campuses as voting locations for the general public. Commissioner Haight thinks “the interest in keeping polling sites neutral generally weighs against using college campuses as polling sites,” (Haight Aff. at ¶20), a remarkable admission of illegal bias against younger voters that Petitioners address more fully below. (*Infra* at Part V).

In addition, Commissioner Haight’s assertion that the Petitioners did not take any action to have the Church removed as the polling place for the 5th District after the Petitioners’ February 28th, 2020 letter is patently false. The Petitioners have continued to convince Commissioner Haight to abandon his indefensible position, including without limitation sending additional letters

demonstrating the clear inadequacy of the Church on July 24, 2020, and again on August 25, 2020, to no avail. (See Affirmation of Michael J. Volpe, dated September 25, 2020 (“Volpe Aff”), Ex. A).

The BOE has discretion to choose from among suitable options. When one such option declares itself unsafe, there is no discretion to choose that option. Commissioner Haight’s insistence upon an unsafe, no-longer-available alternative is “arbitrary and capricious” and an abuse of discretion.

III. The Church Is Four Times Likelier To Generate A Transmission of COVID-19 Than The Bard Location

As if to suggest that the deficiencies of the Church do not matter, Commissioner Haight proffers without citation to specific numbers that “there has been an ‘exponential’ increase in absentee ballot applications” for which voters can apply “merely by citing the risk of Covid-19.” (Haight Aff. at ¶11). Thus, “it makes little sense to move a polling place at the last moment in order to protect people from Covid-19.” (*Id.*) According to Commissioner Haight, the right to a safe polling place is abrogated by the mail-in option—a proposition without support in the law that would be troubling news to unsuspecting in-person voters.

Commissioner Haight belittles as “supposition” the explanation of infectious disease expert Dr. Felicia Keesing that the Church poses a four times greater risk of transmission of COVID-19 than does the Bard location. (Haight MOL, Part III, Section C, at p. 11). To do so, Commissioner Haight relies on an email exchange with Dr. Anil Vaidian, the Commissioner of Behavioral and Community Health for Dutchess County. Dr. Vaidian wrote “I believe having a poll location on Bard College campus may increase the potential for community transmission of COVID-19.” (Haight Aff., Ex. 8). What follows is a series of unscientific, unhelpful inadmissible statements. He names no particular college. He cites no statistics. He makes no account for large versus small

schools, or urban versus rural campuses. He makes no reference to the data about Bard's own robust program of surveillance testing that is publicly available at <https://www.bard.edu/covid19/assessment/#4908477>: "3,203 Tests Completed (students and employees combined)." "0 Active Cases/Students." "0 Active Cases/Employees." "0% Percentage of Tests Positive."⁵

In her original Declaration, Professor Keesing says that based on the relative sizes of the Church and proposed Bard location, the Church, being one-third the size of the proposed Bard location, creates a risk of transmission of COVID-19 four times higher than the risk of transmission at the proposed Bard location (Declaration of Felicia Keesing, sworn to September 3, 2020, at ¶6). Commissioner Haight scoffs at that conclusion ("This is quite a conclusion to reach based on thumbnail estimates"), implying that Professor Keesing reached that conclusion in an unscientific fashion. (Haight MOL, Part III, Section C, at p. 11). The implication is at best uninformed. At worst, it is another attempt by a public official to confuse science for non-science at a time when the public health and the lives of voters demand clarity about the difference. Professor Keesing's attached supplemental declaration, sworn to September 25, 2020 (the "Keesing Supp. Decl."), provides that clarity.

Professor Keesing explains that she uses a mathematical model that estimates air-borne transmission of the virus that cause COVID-19 in enclosed spaces. (Keesing Supp. Decl. at ¶¶10-12.) She then applies the model to the sizes and ceiling heights of the Church and proposed Bard location. (*Id.* at ¶¶13-16). The result is that the Church site is four times more likely to generate a transmission of COVID-19 than the Bard Multipurpose Room. (*Id.* at ¶¶17-18).

⁵ As of September 25, 2020.

In the COVID-19 world, size of interior space is critical to lowering the risk of transmission. The federal Centers for Disease Control and Prevention (“CDC”) explicitly urge “identify[ing] larger facilities” for use as polling places so as “[t]o ensure sufficient space for social distancing and other measures.” <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>. Health Commissioner Vaidian’s statements run counter to that guidance; Commissioner Haight simply ignores it. (Keesing Supp. Decl. at ¶21).

Professor Keesing then addresses Health Commissioner Vaidian’s concern about the danger of Bard students and faculty intermingling with community members while voting. Dr. Vaidian ignores the obvious: intermingling will happen at any polling site. (*Id.* at ¶22). The relevant question is whether the Church or the Bard location is more likely to lead to a transmission event. (*Id.*) The answer is that the Church is four times more likely to lead to a transmission. (*Id.* at ¶¶15-18; 22).

Dr. Vaidian knows or should know (because the data is publicly available) that Bard has a rigorous testing program. (Keesing Supp. Decl. at ¶¶23-27). Every student in residence at Bard College this semester was required to demonstrate that they been tested for COVID-19 immediately before, or immediately after, arriving in Annandale. www.bard.edu/covid19/#99974308. (*Id.* at ¶24). Students were tested a second time within a few days of arrival, and ~25% of the campus community is currently tested weekly as part of rigorous surveillance. (*Id.* at ¶25). With this rigorous regimen of testing, as of September 24, 2020 there have been zero cases of COVID-19 detected at Bard among the 2,755 tests that have been conducted. (*Id.* at ¶26). Should any student or employee test positive, Bard’s protocols require that person to enter a period of quarantine. This quarantine would protect any person voting at the Bard location from coming into contact with that infected person. (*Id.* at ¶27).

In contrast, the Church has no way of knowing the COVID-19 status of people in its environs, and thus cannot offer the voting public the protection Bard offers. (*Id.* at ¶28). As a result, even were the testing at Bard to reveal some number of positive results between now and November 3, 2020, Bard would still be preferable to the Church as a polling location for all voters. (*Id.* at ¶29).

These publicly-available facts are fatal to the underpinnings of Dr. Vaidian’s suggestion to avoid voting at Bard:

- He says: “[m]any of the colleges do not have regular surveillance testing.” (Haight Aff., Ex. 8). Bard, in fact, does. (Keesing Supp. Decl. at ¶¶23-26).
- He says: “[t]he campus population should be cohorted and not be allowed to mix with the community as much as possible if there are cases on campus.” (Haight Aff., Ex. 8). Bard’s policy requires quarantine of any person who tests positive. (Keesing Supp. Decl. at ¶31).
- He says: “It is reasonable to assume that there will be cases and transmission on campuses that will not be identified.” (Haight Aff., Ex. 8). Bard’s rigorous testing regiment reduces the likelihood of unidentified cases on campus, and certainly makes it less likely than the likelihood of unidentified cases in the general community. (Keesing Supp. Decl. at ¶32).

Professor Keesing concludes that “[t]he scientific evidence makes clear that the risk of a community member contracting the virus while voting at Bard is at least as low as it is anywhere else in Dutchess County that uses a room of comparable size, and certainly lower than while voting at the Church.” (Keesing Supp. Decl. at ¶33). In contrast, she says, Dr. Vaidian’s generalized references to what is supposedly happening on other, un-named college campuses across the country are not supported by specific, reliable scientific data and thus are not relevant or helpful to a public health analysis comparing the Church and Bard voting locations. (*Id.* at ¶34).

IV. Using The Church As a Voting Location Violates New York State Election Law

The Church does not satisfy the New York State Constitution and New York State Election Law requirements for a voting location, the proposed Bard location does, and Commissioner Haight's insistence otherwise is arbitrary and capricious and an abuse of discretion. (*See* Petitioner's Verified Petition, filed September 4, 2020 ("Verified Petition") at ¶¶ 26-67; *supra* at Section I). Those facts are established by sworn declarations from a student-voter (Sadia Saba), a veteran poll worker (Erin Cannan), an infectious disease expert (Professor Felicia Keesing), a Bard official responsible for compliance with the Americans With Disabilities Act (Erika van der Velden) and Bard College President Leon Botstein.

A. The Church is in violation of the Americans With Disabilities Act and New York State Election Law.

Petitioners have cited chapter and verse of the Church's many violations of the Americans With Disabilities Act ("ADA"). (*See* Verified Petition at ¶¶48-55; Declaration of Erika van der Velden ("van der Velden Decl."), Bard's Director of Accessibility and Disability Resources). The parking violates two ADA requirements. (Verified Petition at ¶51; van der Velden Decl. at ¶6). The ramp to the main entrance violates five more requirements. (Verified Petition at ¶52; van der Velden Decl. at ¶7). Uneven floors at the top of the ramp create a hindrance to those with balance problems. (van der Velden Decl. at at ¶8). And the Church lacks ADA-accessible restrooms. (Verified Petition at ¶55; van der Velden Decl. at ¶9).

Commissioner Haight asserts, with no supporting evidence, that the BOE considered "whether [the Church] would comply with the Americans With Disabilities Act." (Haight MOL, Part III, Section B, at p. 8). Commissioner Haight does not say what he supposedly considered. He does say:

Suffice it to say that the issues raised by Bard's employees are ones that intrinsically require a close assessment of the facts. Sure, it's *possible* that there is a technical ADA issue that the Board of

Elections has not yet noticed at a designated polling place, but how is the Court supposed to pass on this when Petitioners have not raised this claim with the Board of Elections.

Haight MOL, Part III, Section C, at p. 13 (emphasis in original).

“Suffice it to say” that it is the BOE’s responsibility to ensure ADA compliance by the voting locations it designates. Commissioner Haight cites the 2019 Survey Form⁶ and argues it “did not identify any areas of ADA non-compliance.” (Haight Aff., at ¶26). To the contrary, the 2019 Survey Form thumbs its nose at 17 of the 37 with the entry “N/A.” The surveyor failed to answer the entire ramp compliance section, although the ramp is the only way to enter the building. Relying on a half-empty Survey Form is no basis for determining that the Church location complied with the ADA as required by the Election Law. (Verified Petition, Ex. H). Commissioner Haight casually assures this Court that “[s]ure, it’s *possible* that there is a technical ADA issue that the Board of Elections has not yet noticed.” Commissioner Haight does not define a mere “technical ADA issue,” but lack of public transportation, handicap parking, entrance accessibility and accessible restrooms are no one’s idea of “technical” deficiencies.

To cure the Church’s obvious noncompliance, Commissioner Haight proposes:

Now that the issue of ADA compliance has been raised, the Board of Elections will inspect St. John’s and address any ADA issues that may be found to exist. However, given the current demands on our personnel (dealing with issues in the leadup to the election) this likely [sic] will not occur until early next year.

Haight Aff. at ¶28.

In other words, persons with disabilities are simply out of luck on November 3—never mind the Election Law’s requirement that a polling location comply with the ADA and that

⁶ Commissioner Haight characterizes Petitioners’ ADA non-compliance arguments as being based in part “on the incorrect assertion that an access survey has not been completed,” (Haight MOL, Part III, Section C, at p. 12), implying that the Survey Form in fact is completed. Scribbling “N/A” next to 17 of the 37 questions hardly qualifies as “completing” the form.

Commissioner Haight has known of Bard’s availability since at least February 28, 2020. Verified Petition Ex. C. Commissioner Haight’s proposal to “wait until next year” is an admission that persons with disabilities will suffer irreparable harm absent a preliminary injunction designating Bard, an ADA-compliant location, as a polling place for November 3, 2020. (*See, e.g., Westchester Disabled On the Move, Inc. v. Cty. of Westchester*, 346 F Supp 2d 473, 477 [SDNY 2004]) (finding that “irreparable harm has occurred if disabled voters are required to vote at alternative locations or by absentee ballots. . . . Disabled voters . . . faced with the prospect of finding themselves at an inaccessible voting booth, may be dissuaded from attempting to vote at all.”).

B. The Church is too small to accommodate voting and waiting to vote. (Verified Petition, at ¶¶34-47; Petitioner’s Initial Memorandum, Part II, Section A).

The Church is too small to accommodate poll workers, voters, privacy booths and Machine Operators. (Declaration of Erin Cannan, sworn to September 3, 2020 (the “Cannan Dec.”), at ¶¶6-8). Inadequate space meant people stood in the rain while waiting to vote in the 2018 midterm elections. (*See* Declaration of Leon Botstein, sworn to September 3, 2020 (“Botstein Dec.”), at ¶17). Inadequate space means that if, as depicted on the 2010 Survey,⁷ seven (7) voting booths were located on a single wall of 38.5 feet, that would leave 5.5 feet between voting booths—too little to permit social distancing this year (and following the construction at the Church, the wall is now even smaller – only 33 feet). (Verified Petition, at ¶¶40-41). About these inadequacies, Commissioner Haight says nothing.

Worse, the Church is undergoing construction that will shrink its square footage another 40 feet, down to approximately 700 square feet. (Verified Complaint at ¶43). Commissioner Haight says nothing about this, much less about whether the ongoing construction will even be

⁷ Exhibit H to Verified Petition.

complete by November 3. Commissioner Haight also ignores that this construction requires an updated ADA Survey, which has not been performed. (*See* N.Y. Elec. Law § 4-104(1-b) (McKinney) (mandating that the BOE “shall cause an access survey to be conducted for every polling site to verify substantial compliance with the accessibility standards cited in this section. . . . Each polling site shall be evaluated prior to its designation or upon changes to the facility.”) At the same time the Church is getting smaller, the need for space to accommodate critical social distancing measures is expanding.

C. The Church is on a treacherous road that is not on a public transportation route. (Verified Petition at ¶¶27-30; Petitioner’s Initial Memorandum, Part II, Section D).

Bard is not alone in its concern for the safety of River Road. Four years ago, Red Hook Town Supervisor Robert McKeon wrote to Commissioner Haight and then-Commissioner Caviglia in support of locating a polling site at Bard. (Volpe Aff., Ex. B). McKeon noted, among other factors, that “asking a population that largely does not possess public or other transportation to travel by foot or bicycle on River Road from Annandale is a dangerous proposition. The Red Hook and Bard Community have endured too much tragedy on our roadways.” (*See also* Cannan Dec. at ¶5).

Commissioner Haight responds that the “lack of a sidewalk on River Road” is mitigated by Bard’s provision of a free shuttle—as if to suggest that it is Bard’s responsibility to cure the safety ills of the BOE’s selection of a polling place (Haight MOL, Part III, Section B, at p. 8). Furthermore, even in the past the Bard Shuttle, resembling a mini-van, could seat only six students at a time. (See Declaration of Saida Saba, sworn to September 3, 2020, at ¶8). This year the Shuttle will accommodate only one or two students at a time, meaning fewer students can be

served, making the Church more problematic for Bard campus residents.⁸ Finally, even if it were Bard's responsibility to cure the unacceptable safety hazards of the Church, and even if the Bard Shuttle could meaningfully serve the on-campus community this year, the non-campus population still has to contend with the lack of a sidewalk on River Road.

Commissioner Haight concedes that Bard has "a *slight* advantage" over the Church because Bard is accessible via the Dutchess LOOP stop on campus. (Haight MOL, Part III, Section B, at p. 9) (emphasis in original). Apparently, the advantage is only "slight" because the Bard Student Center is not "immediately adjacent to the bus stop"—whatever that might mean. (*Id.*) A brief walk through a lit portion of the Bard campus that includes sidewalks is hardly comparable to a half mile walk along the sidewalk-less River Road. (*Id.*)

D. The Church lacks adequate, accessible parking. (Verified Petition at ¶¶31-33; Petitioner's Initial Memorandum, Part II, Section A).

Petitioner Erin Cannan has volunteered as a poll worker at the Church for 10 years. (Cannan Dec. at ¶3). She attests to "a limited amount of parking spots available" that require "climb[ing] up a hill or down a hill," making it "particularly problematic for elderly voters or mobility-impaired voters" to enter the Church. (*Id.* at ¶6). The 2019 Survey Form described the "Terrain Around Polling Place" as "Hilly." Ex. H. Commissioner Haight makes no reference to parking. In contrast, the Bard location is easily accessible to non-drivers and offers ample, easy parking. (Verified Petition at ¶¶58-60).

V. Commissioner Haight's Bias Against Campuses as Polling Sites Is Facially Discriminatory Against Young Voters

⁸ Commissioner Haight notes that the Bard property line "comes to within about 0.3 mile" of the Church. (*See* Haight MOL, Part III, Section B, at pp. 8-9; Haight Aff. at ¶18). This is true but silly. Bard covers nearly a thousand acres, the spot that comes "within about 0.3 mile" of the Church is an estate and farm consisting largely of fruit trees and buildings not used by the campus. No students reside near there.

In an extraordinary admission, Commissioner Haight lets the Court in on his real objective: he does not think voting locations should be on college campuses: “Small liberal arts colleges are somewhat insular environments, and I was concerned that voters in Election District 5 who are not associated with Bard’s [sic] would be less likely to vote if doing so required them to enter and navigate the campus.” (Haight Aff. at ¶20).

Factually, Commissioner Haight’s citation-less “concern” does not survive the uncontested declaration of long-time Bard College President Leon Botstein. President Botstein attests in detail about the regular, ongoing, substantial participation by the public in on-campus activities. Bard regularly hosts more than 300 learners through its Lifetime Learning Institute. (Botstein Dec. at ¶6). Local families use Bard’s state-of-the-art recreation center, its Performing Arts Center designed by Frank Gehry and its Museum, and attend productions, exhibits and public lectures on a range of topics. (Botstein Dec. at ¶7). The public has been enjoying “navigating the campus” for years.

Commissioner Haight tries to justify his discriminatory objective by positing that “[c]ollege students are often vocal about political issues, and it would be difficult or impossible to prevent political signs and other acts of political expression from taking place in the windows of dorm rooms.” (Haight Aff. at ¶20). Had Commissioner Haight ever accepted Bard’s invitation to visit the campus, he would have seen that there are no dormitories within 100 feet of the Multipurpose Center, so the legal prohibitions against electioneering are not threatened. Moreover, there are no dormitory rooms visible from the public transportation stop to the main entrance to the Multipurpose Room where voters would enter, or from the handicap parking and main parking lots to the entrance of the Multipurpose Room. The Multipurpose Room is in a discrete building. On Election Day, the entrance and entire polling area will be accessible only to

voters, and the building will be open only for voting (and essential functions, including the use of a United States Post Office, which is accessible through a separate entrance), thereby limiting intermingling.

Commissioner Haight’s invented “Bard-phobia” of the public is the false premise that leads to his real objective—suppressing student voting. He explains: “[T]he interest in keeping polling sites neutral generally weighs against using college campuses as polling sites.” (Haight Aff. at ¶20). This is facially discriminatory against young voters, full stop.

Commissioner Haight’s hostility to youth voting has a documented, litigated history. In 2012, Commissioner Haight rejected the voter registration forms of various Dutchess County college students because the forms did not identify the names and/or numbers of their dormitories, although they did list the corresponding residential dorm addresses and mailing addresses. Haight’s fellow Commissioner Knapp found the forms compliant and wrote to the New York State Board of Elections objecting to Commissioner Haight’s refusal to register the students. The dispute led to the filing of *Pitcher v. Dutchess Cnty. Bd. Of Elections*, No. 7:12-cv-8017 [SDNY filed Oct. 31, 2012]. U.S. District Judge Kenneth M. Karas granted the plaintiff’s preliminary relief and ordered the Board of Elections to register those student applicants whose registrations Commissioner Haight had rejected. The case ended in a consent decree containing a permanent injunction.⁹

Petitioner Andrew Goodman Foundation has encountered state officials with “interests” similar to Commissioner Haight’s. In *League of Women Voters of Fla. v. Detzner*, 214 F. Supp.

⁹ The case is a much longer story. See October 16, 2012 Approved Meeting Minutes of the New York State Board of Elections, available at: <https://www.elections.ny.gov/NYSBOE/News/MeetingMinutes/Approved10162012minutes.pdf> (last accessed Sept. 23, 2020). See Transcript of October 16, 2012 Meeting of the New York State Board of Elections pp 16-24, available at: <https://www.elections.ny.gov/NYSBOE/News/MeetingMinutes/CCTranscriptions10162012.pdf> (last accessed Sept. 23, 2020).

3d 1205 (N.D. Fla. 2018), the Foundation successfully challenged pursuant to the Twenty-Sixth Amendment a Florida state ban on the provision of polling stations on college campuses during the early voting period. The United States District for the Northern District of Florida found that the exclusion “lopsidedly impacts Florida’s youngest voters,” “creating a secondary class of voters . . . prohibit[ed] from even seeking early voting sites in dense, centralized locations where they work, study, and in many cases, live.”¹⁰

Commissioner Haight provides no legal basis for his “interest” in keeping polling places off of college campuses. By analogy, the legislative history to the Twenty-Sixth Amendment includes a report that explicitly discusses the need for accessible polling locations for young people, and contemplates that making students travel to an off-campus location is in violation of the purpose of the Voting Rights Act and the Fourteenth Amendment:

[F]orcing young voters to undertake special burdens – obtaining absentee ballots, or traveling to one centralized location in each city, for example – in order to exercise their right to vote might well serve to dissuade them from participating in the election. This result, and the election procedures that create it, are at least inconsistent with the purpose of the Voting Rights Act, which sought to encourage greater political participation on the part of the young; such segregation might even amount to a denial of their 14th Amendment right to equal protection of the laws in the exercise of the franchise.¹¹

S. Rep. No. 92-26, at 14 (1971) (accompanying S.J. Res. 7, 92d Cong. (1971).

The entire premise of the Haight Opposition—that on-campus polling locations are not neutral, and the community would be intimidated from coming to Bard—wilts against the undisputed facts above. Refusing to designate a polling place at Bard is arbitrary and capricious

¹⁰ *League of Women Voters of Fla. v. Detzner*, 214 F. Supp. 3d 1205, 1216-17 (N.D. Fla. 2018) (granting plaintiffs’ motion for preliminary injunction).

¹¹ See also Yael Bromberg, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 U. Penn J. Const. Law, 1105 (May 2019), available at: <https://ssrn.com/abstract=3442198>.

and an abuse of discretion that does violence to the fundamental right to vote and to equal protection pursuant to the New York State Constitution and, by analogy, the federal Fourteenth and Twenty-Sixth Amendments.

VI. Commissioner Haight's Cross-Motion to Dismiss Should Be Denied

Commissioner Haight has failed to demonstrate that he is entitled to dismissal of Petitioners' case. In fact, nothing is submitted in support of the cross-motion; no evidence, no law, no case authority—nothing. Commissioner Haight makes no reference to CPLR 3211 in either the Haight Aff. or the supporting Haight MOL, much less make any substantive argument in support of his motion. His cross-motion is a thinly-veiled attempt to file a sur-reply by another name, for the sole purpose of getting the last word in this proceeding, and must be summarily denied.

“A motion to dismiss pursuant to CPLR 3211(a)(1) based on documentary evidence may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, [thereby] conclusively establishing a defense as a matter of law.” *Sabre Real Estate Grp., LLC v. Ghazvini*, 140 A.D. 3d 724, 724, 35 N.Y.S. 3d 109, 111 (2016).

CONCLUSION

Based upon the foregoing, the Petitioners respectfully request that the Court grant the following relief:

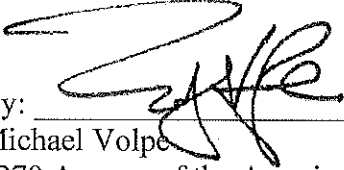
- a. Direct the Dutchess County Board of Elections to change the polling place for the 5th Legislative District of Dutchess County from St John's Episcopal Church located at 1114 River Road, Red Hook, New York 12571 to the Bertelsmann Campus Center at Bard College, 30 Campus Road, Annandale-on-Hudson, New York 12504 or make the latter location a supplemental location providing notice


- of same to all voters in the election district;
- b. Stay issuance of polling guidance in accordance with the Executive Order to impacted voters, and/or to the extent same has issued provide polling guidance indicating to all voters in the election district that the polling location has been moved to or supplemented by a location at Bard College;
 - c. Deny Respondents' Cross-Motion to dismiss the instant action pursuant to CPLR 3211(a)(1) and (7); and
 - d. Grant Petitioners such other equitable and legal relief as the Court deems just, proper, and appropriate.

Dated: New York, New York

September 25, 2020

VENABLE LLP

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Attorneys for Petitioners

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of

ANDREW GOODMAN FOUNDATION et al.,

Petitioners

- against -

DUTCHESS COUNTY BOARD OF ELECTIONS,
et al.

Respondents.

Index No. 52737/20
(Rosa, J.S.C.)

**SUPPLEMENTAL DECLARATION
OF FELICIA KEESING**

I, Felicia Keesing, declare as follows:

1. My name is Felicia Keesing.
2. On September 3, 2020, I signed a Declaration supporting Petitioners' Application for Emergent and Permanent Relief.
3. I have reviewed those portions of Commissioner Erik J. Haight's Memorandum of Law in Opposition to Petitioners' Order to Show Cause (pp. 11-12) that address my Declaration and the statements made by Anil Vaidian, Commissioner of Behavioral and Community Health for Dutchess County, cited by Commissioner Haight in his Opposition at page 12 and his affidavit at paragraph 32.
4. I am submitting this Supplemental Declaration because these issues bear directly on the lives and health of the voters of the Fifth District of Dutchess County, and ultimately of all of Dutchess County and surrounding communities. Public health demands that this Court have the clearest possible understanding of why The Church of St. John the Evangelist (the "Church") poses an unacceptable and unnecessary degree of risk of transmission of COVID-19, why the proposed location at Bard (the Multipurpose Room)

substantially reduces this risk, and why the statements of Health Commissioner Vaidian are of no scientific value.

5. Commissioner Haight says that "Professor Felicia Keesing identifies herself as an expert," as if to suggest that I am not.
6. I am in fact an expert in the transmission of infectious diseases. I have a B.S. from Stanford University and a Ph.D. in Integrative Biology from the University of California, Berkeley. In 2000, I received the United States Presidential Early Career Award for Scientists and Engineers. I am the Co-Editor of *Infectious Disease Ecology: Effects of Ecosystems on Disease and of Disease on Ecosystems* (Princeton University Press, 2008). I have published numerous articles on infectious disease in various peer-reviewed journals.
7. Recently, I and my colleagues were awarded a grant from the U.S. National Science Foundation to create a mathematical model of the most effective interventions colleges could put in place to prevent the transmission of covid-19 during a typical semester. This model addresses a broad range of typical campus activity, outdoors and indoors. The results of that work are currently in review at a major scientific journal.
8. In my original Declaration (¶6), I said that based on relative estimated size alone, the polling location at the Church, being one-third the size of the proposed Bard location, creates a risk of transmission of covid-19 four times higher than the risk of transmission at the proposed Bard location.
9. In his Opposition (p. 11), Commissioner Haight belittled my conclusion ("This is quite a conclusion to reach based on thumbnail estimates!"), implying I reached it in an

unscientific fashion. It is important for the Court to understand how I reached my conclusion.

10. To estimate the relative risk of the voting locations at the Church and Bard, I use a mathematical model of air-borne covid-19 transmission in enclosed spaces. This model was developed by atmospheric scientists at the University of Colorado at Boulder.
11. This model estimates air-borne transmission of the virus that causes covid-19. It takes into account a number of features of the biology of the virus, including (but not limited to) the rate at which the virus decays over time, the rate at which the virus attaches to surfaces such as tables and chairs, and the rate at which people breathe.
12. The model also takes into account how many people will be in a space, and how long an event will last.
13. To apply the model, I use the sizes of the voting location at the Church and the Multipurpose Room at Bard to estimate the relative risk of a person acquiring covid-19 at these two possible polling sites.
14. To offer further clarity, I describe the model below.
15. To begin, I assume everything about the two sites is the same except for their size. The Church site is 732 square feet and the proposed Bard location is 2,280 square feet, making the Church site roughly one-third the size of the Bard Multipurpose Room. (In my original Declaration, I was provided with the correct ratio (one-third) but incorrect square footage (500 and 1500 square feet, respectively).) Both actual square footages are larger, but the important point is that the relative sizes of these two sites remain the same: the Church site is one-third the size of the proposed Bard location.

16. The locations also have different ceiling heights, which is an important factor in air-borne transmission, so I include these numbers in the model as well. Because I do not have a measurement of the height of the Church site, I use a generous estimate of 16 feet. I also use the largest size of the Church space that has been mentioned (732 square feet), even though, I am told, the actual space will be approximately 40 feet smaller when current renovations are completed.

17. Under the model, the Church site is four times more likely to generate a transmission event of covid-19 than the Bard Multipurpose Room. Put another way, the Bard Multipurpose Room is four times safer than the Church site. This is because the Bard Multipurpose Room is substantially larger and has a higher ceiling.

18. I summarize my estimates in the table below.

Location	Length (ft)	Width (ft)	Sq ft	Height (ft)	Times risk is greater	Risk relative to
					than risk of car travel death*	Church location
Church	38.5	19	732	16	48	1
Bard	60	38	2280	21	12	1/4

Assuming all else is equal and there are a maximum of 13 people in the space at any one time.

Assuming that transmission is only air-borne. Transmission by contaminated surfaces is assumed to be equal.

* Estimate of the risk of death for an individual traveling by car on a given day.

19. Health Commissioner Vaidian has suggested that having a polling station at Bard College might be unsafe because of the risk of transmission from college students to community members. Haight Opp. at 12.

20. Health Commissioner Vaidian's statements are not based on relevant scientific evidence.
21. Health Commissioner Vaidian's statements also run counter to the explicit guidance of the federal Centers for Disease Control and Prevention ("CDC") to "identify larger facilities" for use as polling places so as "[t]o ensure sufficient space for social distancing and other measures." <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.
22. Health Commissioner Vaidian was asked about the dangers of students and faculty from Bard intermingling with community members. His response does not acknowledge that intermingling will happen at any polling site. The relevant question is which site is more likely to lead to a transmission event. As I explain above, the Church location is far more likely to lead to transmission.
23. Health Commissioner Vaidian also makes no reference to the publicly available data on Bard's website reflecting the results of Bard's rigorous testing regimen.
<https://www.bard.edu/covid19/assessment/#4908477>:
24. Every student in residence at Bard College this semester was required to demonstrate that they been tested for covid-19 immediately before, or immediately after, arriving in Annandale. www.bard.edu/covid19/#99974308.
25. Students were tested a second time within a few days of arrival, and ~25% of the campus community is currently tested weekly as part of rigorous surveillance.
26. With this rigorous regimen of testing, and as of my signing of this Declaration, there have been zero cases of covid-19 detected at Bard among the 2,755 tests that have been conducted.

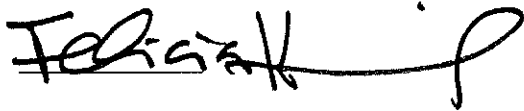
27. Should any student or employee test positive, Bard's protocols require that person to enter a period of quarantine. This requirement inures to the benefit of the general voting public, because quarantine would protect any person voting at the Bard location from coming into contact with that infected person.
28. In contrast, the Church has no way of knowing the covid-19 status of people in its environs, and thus cannot offer the voting public the element of protection that Bard offers as a result of its protocols.
29. As a result, even were the testing at Bard to reveal some number of positive results between now and November 3, 2020, Bard would still be preferable to the Church as a polling location for all voters.
30. Health Commissioner Vaidian says "[m]any of the colleges do not have regular surveillance testing." As explained above, Bard does.
31. Health Commissioner Vaidian says "[t]he campus population should be cohorted and not be allowed to mix with the community as much as possible if there are cases on campus." Bard's policy requires quarantine of any person who tests positive.
32. Health Commissioner Vaidian says: "It is reasonable to assume that there will be cases and transmission on campuses that will not be identified." Bard's rigorous testing regimen reduces the likelihood of unidentified cases on campus, and certainly makes it less likely than the likelihood of unidentified cases in the general community.
33. The scientific evidence makes clear that the risk of a community member contracting the virus while voting at Bard is at least as low as it is anywhere else in Dutchess County that uses a room of comparable size, and certainly lower than while voting at the Church.

34. Health Commissioner Vaidian's generalized references to what is supposedly happening on other, un-named college campuses across the country are not supported by specific, reliable scientific data and thus are not relevant or helpful to a public health analysis comparing the Church and Bard voting locations.

35. I remain willing to respond to any questions the Court may have in an effort to help the Court appreciate the scientific basis for my conclusion that the Church site poses an unacceptable and unnecessary risk of transmission of covid-19 and that the proposed Bard location substantially reduces this risk.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: September 24, 2020

A handwritten signature in black ink, appearing to read 'Felicia Keesing', with a long horizontal flourish extending to the right.

Felicia Keesing, Ph.D.



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DEMOCRATIC
COMMISSIONER

Marco Caviglia

To: Erik Haight
Republican Commissioner

Dear Erik,

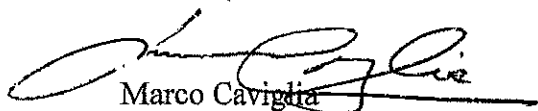
As discussed at the Commissioner's meeting this morning, we are at an impasse concerning the certification of the District 5 poll site in Red Hook. The reasons that I cannot agree to the continued use of the site as proposed include, but are not necessarily limited to, the reasons set forth in the letter dated May 4, 2016 from Bard College to us, concerning this issue. Those concerns are, not necessarily in order of importance, the unanimously approved resolution by the Town of Red Hook Board to move the poll site to the Bard campus, better accessibility for as many as 7 out of 10 registered voters in that district if moved to the campus, the huge size of the number of registered voters of approximately 1125 voters, if not more, which is tantamount to the number requiring mandatory election district realignment under EL 4-100(4), the demonstrated danger to Bard students seeking to vote when walking to the poll site (you will recall the relatively recent vehicular-related deaths of one or more Bard students when walking on such roads), and the lack of public transportation for students to ride to the poll site.

In addition, although not mentioned in the letter, I have further concerns about the disproportionate effect under these circumstances upon minority voters. On information and belief, the Town of Red Hook, per the 2000 census, has a 5.8% minority population. The Bard student composition has a 27.06% minority population. The majority of minority voters in Red Hook, and certainly within that particular district, are placed at a distinct disadvantage in terms of ease, safety,

and ability to vote. I see this as a *de facto* disenfranchisement of minorities in regard to their fundamental constitutional right to vote.

As the other proposed poll sites needing certification are not at issue, I shall certify all of them as proposed *except* the subject poll site for the upcoming elections. This will eliminate any uncertainty or confusion for those municipalities and voters, and comply with the statutory mandate concerning such certification overall.

Sincerely,



Marco Caviglia
Democratic Commissioner

Michael J. Volpe

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August 25, 2020

VIA HAND DELIVERY, OVERNIGHT MAIL AND EMAIL

Commissioner Erik J. Haight
Commissioner Elizabeth Soto
Dutchess County Board of Elections
47 Cannon Street
Poughkeepsie, New York 12601

Dear Commissioner Haight and Commissioner Soto:

As you may recall, this law firm represents The Andrew Goodman Foundation and Election@Bard, a student organization at Bard College in Annandale-on-Hudson, New York.

In our letter of July 24, 2020 (attached), we requested that the Board of Elections designate the Student Center on the Bard College campus (the “Student Center”) as a new polling location for Red Hook’s Voting District 5. We received no response.

On August 10, we visited the current polling location, the Episcopal Church of St. John the Evangelist (the “Church”), and the Student Center. Our visit underscores that every point of comparison favors the Student Center as a new location.

1. The Student Center Is More Accessible to Non-Drivers.

Many members of the Bard community, including students, faculty and staff, walk to the polling location from the campus. The approximately 1.3 mile stretch on River Road from the campus to the Church is problematic for walkers. There is no sidewalk. In parts it is narrow and winding. The combination creates a risk to walkers from vehicular traffic coming toward and from behind them. Yet many must walk to the Church because it is not easily accessible by public transportation.

Bard’s concerns about River Road pre-date this request. In its “Rules of the Road,” the school instructs Bard-authorized drivers: “Do not use River Road to or from the Rhinecliff Station, Rhinebeck, or the Kingston-Rhinecliff Bridge. Please use 9G/9/Rhinecliff Road to access Rhinecliff or Rhinebeck, and 9G/199 to the KRB.”¹ Bard-authorized drivers are only permitted to use River Road when driving the school’s shuttle to the Church to facilitate voting. This year, Bard will have to operate the shuttle to the Church at a reduced capacity due to COVID-19 social distancing measures.

¹ https://blogs.bard.edu/transportation/?page_id=1326.

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Using the Student Center as a polling location avoids these problems. Members of the Bard community can walk to it. Non-drivers in the rest of the community can use the Dutchess County Loop Bus Loop C route, which runs to the campus.

2. The Student Center Offers Better Parking.

The Church has limited parking. Most of the spaces require either walking up or down an incline to get to the building, creating a challenge for mobility-impaired voters. In contrast, the Student Center offers ample parking, all on flat terrain.

3. The Student Center Is Considerably Larger.

The room in which voting occurs in the Church is 750.75 square feet (38.5 x 19.5), according to the Polling Place Spatial Requirements Survey previously submitted by the Church (attached). This limited space will not allow for the requisite social distancing of voters and poll workers, and for prudent spacing of check-in tables, scanners and printers. Furthermore, voting frequently requires waiting in line. With the cramped quarters of the Church, it would be impossible to maintain social distancing requirements without requiring some voters to wait outside. In inclement weather, that prospect will undoubtedly deter some voters, while making it unnecessarily unpleasant for those who persist.

In contrast, the room in which voting would occur in the Student Center is 2,260.44 square feet (59.8 x 37.8). More than three times larger, the Student Center will promote social distancing among voters and poll workers and permit prudent spacing of the requisite tables, scanners and printers. Furthermore, the ample indoor space leading to the voting room in the Student Center will accommodate much longer lines of socially-distanced people waiting to vote.

4. The Student Center Complies With The Americans With Disabilities Act

The Church facility appears to violate the Public Accommodations requirements of the Americans With Disabilities Act in at least three respects:

- The concrete ramp to the main entrance measures 39 inches at the entrance, then requires a right turn at a 90 degree angle to an area that measures only 47 inches, before making a left turn at a right angle that measures only 40 inches. These narrow dimensions and 90 degree angles make it extremely challenging for any person using a wheelchair or walker to navigate;
- The restrooms are not handicap accessible; and
- There is a steep incline from the lower parking lot, and a steep decline from the upper parking lot.

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In contrast, the Student Center is fully compliant with the ADA.

5. The Student Center Is Currently Fully Operational

We understand that the Church currently is not operational and is not currently conducting worship services. It is unclear when the Church will resume operations. Furthermore, the portion of the Church used for voting is undergoing a substantial renovation. We understand this renovation already is behind schedule.

In contrast, the Student Center presently is fully operational as part of Bard’s overall program of re-opening its campus consistent with all applicable governmental regulations and recognized public health guidance pertinent to the pandemic.

6. Designating The Student Center Will Permit Safe In-Person Voting Among Those Who Prefer It, Especially Younger Voters

Promoting the accessibility of safe in-person voting remains critical even as mail-in voting is encouraged. Younger voters disproportionately vote in-person rather than by mail, even more than older voters do. Available data from New York State in the 2018 general election show that 4.7% of voters ages 18 to 24 voted by mail, whereas 7.4% of voters over age 65 voted by mail,² i.e., a factor of 1.57. Essentially, a voter age 18-24 is approximately twice as likely as a voter over 65 to vote in person.

Designating the Student Center as a polling location will serve voters of all ages. It will facilitate voting by younger voters who may be predisposed to vote in-person by enabling them to do so via a short walk across campus. It will serve older voters who wish to use public transportation or simply park more easily. And it will provide mobility-impaired voters with the accessibility to which they are entitled under the Americans With Disabilities Act.

The upcoming election amidst this pandemic has created uncertainty and confusion among the voting public. Designating the Student Center—a facility presently up-and-running, with plentiful space and accessibility to drivers and non-drivers alike—this far in advance of November 3 will minimize that uncertainty and confusion among the voters of Red Hook’s Voting District 5, and thereby promote turnout consistent with the best interests of the Board of Elections and the community.

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	Age	18 to 24	25 to 34	35 to 44	45 to 54	55 to 64	65+
New York	In-Person	94.641	94.961	99.004	97.125	96.443	92.205
	Mail	4.676	4.585	0.996	2.046	3.249	7.386

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We await your prompt response. Should the Board deny our request to designate the Student Center as a polling location, or fail to respond, we reserve the right to pursue all available legal remedies in state and/or federal court, without further notice to you.

Sincerely,



Michael J. Volpe

Yael Bromberg
Chief Counsel for Voting Rights,
The Andrew Goodman Foundation

cc: Honorable Marcus J. Molinaro, County Executive-Dutchess County
Honorable Kevin A. Cahill, Assembly Member, Assembly District 103
Honorable Sue Serino, State Senator, Senate District 41
Honorable Kristofer Munn, County Legislator
Honorable Robert McKeon, Supervisor, Town of Red Hook
New York State Board of Elections, Co-Chairs Peter S. Kosinski and Douglas A. Kellner;
Commissioner Andrew J. Spano

(All via Fedex)