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## Class Size Matters testimony concerning NYC's spending of Foundation Aid increases and federal ARP funds

October 5, 2021

Thank you for holding these important hearings today. My name is Leonie Haimson and I'm the Executive Director of Class Size Matters. Despite the requirements that there be public input into the spending of these additional federal funds, the DOE undertook no surveys of parents as to how they'd like these funds spent. However, every year the DOE surveys parents, and every year the top priority of parents at non-District 75 NYC public schools when asked what change they'd most like to see in their schools is to lower class size.<sup>1</sup>

Given the critical need for social distancing and the additional academic support required to make up for a year and half of disrupted education due to the pandemic, the consensus for smaller classes this year was stronger than ever before. In the parent survey we posted last May, co-sponsored by NYC Kids PAC and the Teens Take Charge, 46% of respondents named their #1 priority for the additional federal and state funds was to reduce class size.<sup>2</sup> Similarly, in a statewide survey of Black and Latinx families,

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<sup>1</sup> Every year between 2007 and 2014, smaller classes were reported as the top priority of parents for their schools on the DOE survey. In 2015, that option was left out of the survey, but after parent protest the DOE put it back the following year. Starting in 2016, DOE reported that more enrichment was now the top choice of parents, but that year for the first time they included the responses of thousands of parents at CBO PreK programs. Class size in PreK is strictly limited to 18 to twenty students by state law. DOE also included the responses of D75 parents, where class sizes are also legally limited at much smaller levels. See [https://nycpublicschoolparents.blogspot.com/2019/08/the-nyc-school-survey-changes-over-time\\_27.html](https://nycpublicschoolparents.blogspot.com/2019/08/the-nyc-school-survey-changes-over-time_27.html) An analysis of the latest DOE survey data reveals that if the responses of parents with children at DOE non-D75 schools are calculated, smaller classes is still their top preference, even though we were unable to subtract the responses thousands of parent responses whose children attend PreK classes at elementary schools rather than CBOs. 2020 DOE parent survey data posted here: [https://infohub.nyced.org/docs/default-source/default-document-library/2020-public-data-file\\_parent\\_final.xlsx](https://infohub.nyced.org/docs/default-source/default-document-library/2020-public-data-file_parent_final.xlsx)

<sup>2</sup> <https://nykidspace.org/2021/05/results-from-parent-action-conference-2021-how-do-parents-educators-students-want-8b-in-state-federal-funds-spent-to-improve-our-schools/>

students and educators, the Alliance for Quality Education found that the top two priorities for spending were to hire more staff for mental health support and for class size reduction.<sup>3</sup>

In recognition of the crying need for smaller classes, and the unprecedented resources being provided to the DOE via the approximately \$8 billion in additional state and federal funds over the next three years, the City Council advocated in its preliminary budget response that \$250 million be invested in smaller classes in schools this fall.<sup>4</sup> And yet the Mayor and DOE refused to do so, and instead is implementing a small, \$18 million class size “pilot”, in which principals are encouraged to use the funds for push-in teachers if they preferred, which does not offer the same proven benefits in terms of safety, health, or academic support.<sup>5</sup>

Despite DOE claims, Mark Cannizzaro, President of the Council of School Supervisors and Administrators as well as many teachers and principals have reported that most schools are unable to provide the three feet of social distancing recommended by the CDC, because class sizes are too large.<sup>6</sup> In a poignant Daily News oped just published Saturday, long-time teacher NYC Catherine Vail revealed that she is being forced to retire because of the lack of safety protocols: *“Twenty-six kids, most in ill-fitting masks drooping below their noses, were in my small classroom barely a foot apart — nowhere near the three feet recommended by the CDC.”*<sup>7</sup>

As you in the State Senate well know, in addition to the billions of dollars in additional federal funds that our schools are receiving, our schools are also provided with an additional \$530 billion this year in state Foundation funds that will increase to \$1.3 billion annually over the next three years, in fulfillment of the goals of the Campaign for Fiscal Equity lawsuit. In that case, the state’s highest court said that classes in NYC public schools were too large for children to receive their right under the State Constitution to a sound basic education:

*Plaintiffs presented measurable proof, credited by the trial court, that NYC schools have excessive class sizes, and that class size affects learning....evidence of the advantages of smaller class sizes supports the inference sufficiently to show a meaningful correlation between the large classes in City schools and the outputs...of poor academic achievement and high dropout rates...[T]ens of*

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<sup>3</sup> [http://www.aqeny.org/wp-content/uploads/2021/06/survey\\_report.pdf](http://www.aqeny.org/wp-content/uploads/2021/06/survey_report.pdf)

<sup>4</sup> See <https://council.nyc.gov/budget/wp-content/uploads/sites/54/2021/04/Fiscal-2022-Preliminary-Budget-Response-1.pdf#page21>

<sup>5</sup> For more on this “pilot”, see <https://classsizematters.org/list-of-elementary-schools-to-be-included-in-class-size-pilot/>; also article in Chalkbeat at <https://ny.chalkbeat.org/2021/6/30/22558104/nyc-budget-deal-2022-smaller-class-size-covid-learning-loss>

<sup>6</sup> See Mark Cannizzaro letter dated Aug. 11, 2021 posted at <https://csa-nyc.org/social-distancing-letter/>; also <https://nypost.com/2021/08/13/principals-union-says-schools-wont-be-able-to-fully-reopen-with-doe-distancing-policy/>

<sup>7</sup> Catherine Vail, “Making our Schools Truly Covid Safe,” Daily News, Oct. 1, 2021, <https://www.nydailynews.com/opinion/ny-oped-making-schools-truly-safe-20211001-4ijorh1mtnc13g4ezwfaof4xwi-story.html>

*thousands of students are placed in overcrowded classrooms . The number of children in these straits is large enough to represent a systemic failure.* <sup>8</sup>

And yet since that decision was issued, class sizes have risen especially in the early grades. Charts showing these increases are included in the Appendix.

The Contracts for Excellence law that passed in 2007 was supposed to address this constitutional deficiency, by requiring that in return for more funding, DOE had to submit and implement a five-year plan to lower class size in all grades.<sup>9</sup> And yet, rather than lower class size as that plan required, class sizes rose sharply after 2008, especially in the early grades, and remain much larger today than when the law was passed, and indeed larger than when the Court of Appeals issued its decision in 2003.

In 2020, despite the fact that the city never carried out its mandated plan, in a lawsuit filed by nine NYC parents, Class Size Matters and AQE, the Appellate Court ruled since the dates cited in the law for the city's implementation of a class size reduction plan have now lapsed, the DOE no longer has a legal obligation to lower class size.<sup>10</sup>

Given the fact that NYC students are still deprived of their right to smaller classes, many of us believe that there still remains an ethical obligation if not a legal one for the city to reduce class size. To ensure that children's rights under the State Constitution are achieved, we urge the members of the Legislature to pass S6296/A7447, introduced by Sen. Jackson and Assemblymember Jo Anne Simon, which would amend the C4E law by updating the years required for their five-year class size plan.<sup>11</sup> Many NYC legislators have signed onto these bills, and I'd like to thank them for their efforts on behalf of our children.

We have additional serious concerns about the NYC Department of Education's proposed Contract for Excellence plan for FY 2022, which we, along with AQE and the Educational Law Center, shared with the State Education Commissioner and Regents Chancellor in a letter sent in July.<sup>12</sup>

- Firstly, in its proposed C4E plan, the DOE allocates no more dollars to the C4E program than it did in previous years. The DOE claims that, *"For FY 2022, the State has not allocated to NYCDOE*

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<sup>8</sup> Campaign for Fiscal Equity, Inc., et al. v. State of New York, et al., 100 N.Y.2d 893, 911-12 (2003) ("CFE II"). [https://www.law.cornell.edu/nyctap/I03\\_0084.htm](https://www.law.cornell.edu/nyctap/I03_0084.htm)

<sup>9</sup> See N.Y. Education Law §211-d( 6) at <https://codes.findlaw.com/ny/education-law/edn-sect-211-d.html>

<sup>10</sup> See Agostino vs. Elia, March 5, 2020, at <http://decisions.courts.state.ny.us/ad3/Decisions/2020/527579.pdf>

<sup>11</sup> <https://www.nysenate.gov/legislation/bills/2021/S6296>

<sup>12</sup> The full letter is posted here: <https://classsizematters.org/wp-content/uploads/2021/08/Memp-to-Commissioner-and-Regent-Chancellor-Young-re-C4E-7.29.21-final.pdf>

any additional C4E funding above the amount it provided in SY 2009-2010,” despite the fact that that our schools are receiving an additional \$530 million in Foundation Aid this year.<sup>13</sup>

- The DOE plan also claims that SED allows them to use C4E funds to supplant spending that was previously provided by the city.<sup>14</sup> Yet supplanting is specifically prohibited in the C4E law.<sup>15</sup>
- In their proposed C4E plan, if principals choose to spend their discretionary funds in the category of class size reduction, DOE advises them they can also use them to maintain class size or minimize class size increases, though the law specifically specifies that these funds be used for lowering class size, *not preventing further increases*. Preventing or minimizing class size increases will not provide NYC children with their constitutional right to a sound basic education.
- In addition, we have grave concerns with the deeply flawed public process. The DOE failed to send out a single email to parents, CEC members, or public officials concerning this year’s borough C4E hearings that took place in July and August, nor any notice as to how they could submit comments on the proposed plan via email during the public comment period that ended

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<sup>13</sup> The DOE’s proposed C4E plan for 2021-2022 school year is posted here: [https://infohub.nyced.org/docs/default-source/default-document-library/fy22-c4e-boroughwide-presentation\\_july-2021\\_v2.pdf](https://infohub.nyced.org/docs/default-source/default-document-library/fy22-c4e-boroughwide-presentation_july-2021_v2.pdf) In response to a query, the DOE further explained: “*It is a portion of Foundation Aid and the amount is determine by statute and by the NYS Commissioner of Education. In prior years, the Commissioner has provided school districts with the specific amount that should be set-aside for C4E (based on a complex formula). The Commissioner has not done this for several years, but the statute provides that the amount set aside for C4E should not be less than the amount set aside for it in the prior year. This is what NYC has followed.*” Email from Joyce Elie, DOE Director of State Legislative Affairs, to Jasmine Gripper, 7/27/21. At the Manhattan C4E hearings on Aug. 5, 2021, I asked Lindsey Oates, the DOE’s Chief Financial Officer, whether DOE would have to comply if the State Education Department required them to allocate more C4E funds, and Ms. Oates said they would. In addition, Ms. Oates mentioned that NYSED has not updated their C4E website in many years. In subsequent discussions with SED officials on August 19, 2021, they claimed that the C4E amount had not increased because of language in Section 1 (e) of the law. We responded that instead, the law clearly says that the “**amount ... shall be not LESS than the amount approved by the commissioner in the contract for excellence**” [emphasis added] in the previous year. There is no prohibition against increasing the amount, and that indeed, 1 (a) and (b) of the law strongly implies that as the Foundation aid increases, so should the amount subject to the C4E requirements. See N.Y. Education Law § 211-d.

<sup>14</sup> See the DOE proposed plan, op.cit. which says: “*SED has provided guidance explaining that certain expenditures may be paid for with C4E funds even though these programs or expenditures were originally or have been typically paid for by the district or by other grants.*”

<sup>15</sup> N.Y. Education Law §211-d( 6) at <https://codes.findlaw.com/ny/education-law/edn-sect-211-d.html> includes that an annual audit shall show that “the increases in total foundation aid and supplemental educational improvement plan grants have been used to supplement, and not supplant funds allocated by the district in the base year for such purpose.” In addition, the regulations say that the plan shall “ensure that expenditures of the annual contract amount shall be used to supplement and not supplant funds expended by the district in the base year for such purposes.” In conversations with SED officials on Aug. 19, 2021, they seemed aware of DOE’s claim, but uncertain as to why they said they believed they had permission to supplant.

Sept. 3 .<sup>16</sup> This is contrary to the regulations, which say that: *“Each school district shall provide reasonable notice of such public comment period to parents of students or persons in parental relation to students, teachers, administrators, and any distinguished educator appointed pursuant to Education Law, section 211-c.”*<sup>17</sup> The only people to attend these hearings or send in comments, to my knowledge, did so because Class Size Matters alerted them to the opportunity.

This sorry performance continues a long record of DOE’s failure to comply with public process and transparency provisions of the C4E law and its regulations, which require districts to post summaries of the public comment and an assessment to explain the reasons they incorporated these suggestions into their final C4E proposed plan or not, which the DOE has never done, to my knowledge.<sup>18</sup>

Every year, the DOE holds Community Education Council C4E hearings in the fall and winter, long after the money has been spent, making a mockery of the entire public process. Whenever the state has posted a calendar of C4E events, the DOE has ignored the deadlines set for such hearings, which the state has held should be completed by July or August.<sup>19</sup>

Not since 2008 has the state or the city posted the city’s final adopted plan nor revealed any amendments recommended by the state, and the only time the public has been made aware of any additional amendments required by the state since then has been through a FOIL, a leak, or a lawsuit. This violates the regulations, which say that a districts *“shall, within 48 hours ... post a copy of such amended contract on its website.”*

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<sup>16</sup>The dates of the borough hearings and public comment period that ended Sept. 3 are published here: <https://infohub.nyced.org/reports/financial/contracts-for-excellence/c4e-2021-2022-annual-hearings>

<sup>17</sup> See 8 CRR-NY 100.13 regulations, section (d) public process at [https://govt.westlaw.com/nycrr/Document/I36530535c22211ddb29d8bee567fca9f?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/nycrr/Document/I36530535c22211ddb29d8bee567fca9f?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default))

<sup>18</sup> Regulations 8 CRR-NY 100.13 say the following: (b) *Not later than 12 days after expiration of the public comment period or conclusion of public hearings, whichever occurs later, each school district shall prepare a public comment assessment, based upon any written comments submitted to the school district and any oral comments presented at any public hearing held pursuant to this subdivision.*

(1) *The public comment assessment shall contain:*

- (i) *a summary of the substance of the comments received, grouped by subject matter; and*
  - (ii) *the school district's response to each substantive comment, including a statement of any changes made to the contract for excellence as a result of such comment, or an explanation of why the comment's suggestions were not incorporated into the contract for excellence.*
- (2) *The public comment assessment shall be posted on a school district website and otherwise made available upon request.*

<sup>19</sup> The last time NYSED posted a schedule for districts to follow in their C4E public process and plan submission was in 2016. [http://www.p12.nysed.gov/mgtserv/C4E/16-17\\_C4E/2016-17\\_ContractsforExcellence.htm](http://www.p12.nysed.gov/mgtserv/C4E/16-17_C4E/2016-17_ContractsforExcellence.htm)

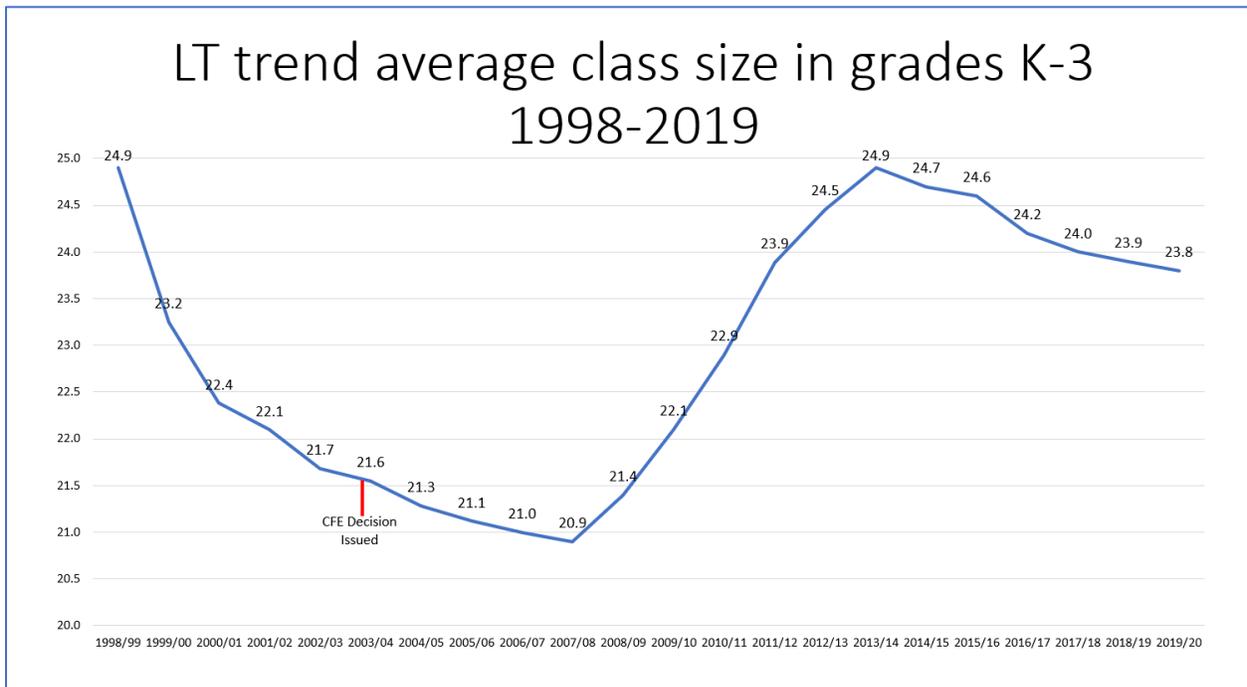
I have asked both the state and the city as to the status of this year's proposed plan, whether the DOE has yet submitted it and/or the state has approved it, and have gotten no response, forcing me last week to FOIL for that information.

Given that the city is at long last due to receive the full amount mandated by the CFE lawsuit so many years ago, it is more important than ever that the requirements that the DOE seriously consider the input from stakeholders before submitting its plan or spending these funds be adhered to, and that NYC students finally receive their right to a sound, basic education, which will not happen without providing them with the smaller classes that they need and deserve.

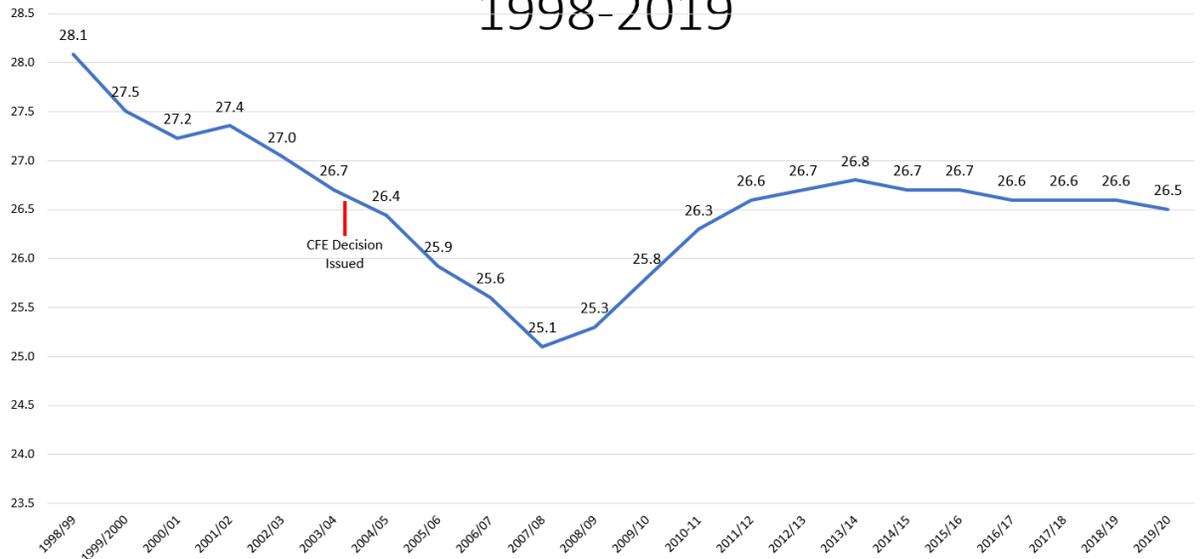
Thank you for the opportunity to speak to you today.

**Appendix:**

Charts showing the increase in average class size since 2003 when the Court of Appeals decision was made in the CFE case. Data pre-2006, from the Independent Budget Office. Data 2007-2019 from DOE's annual Nov. 15 class size reports. C4E goals are from the DOE's original class size reduction plan, submitted and approved by NYSED in 2007.

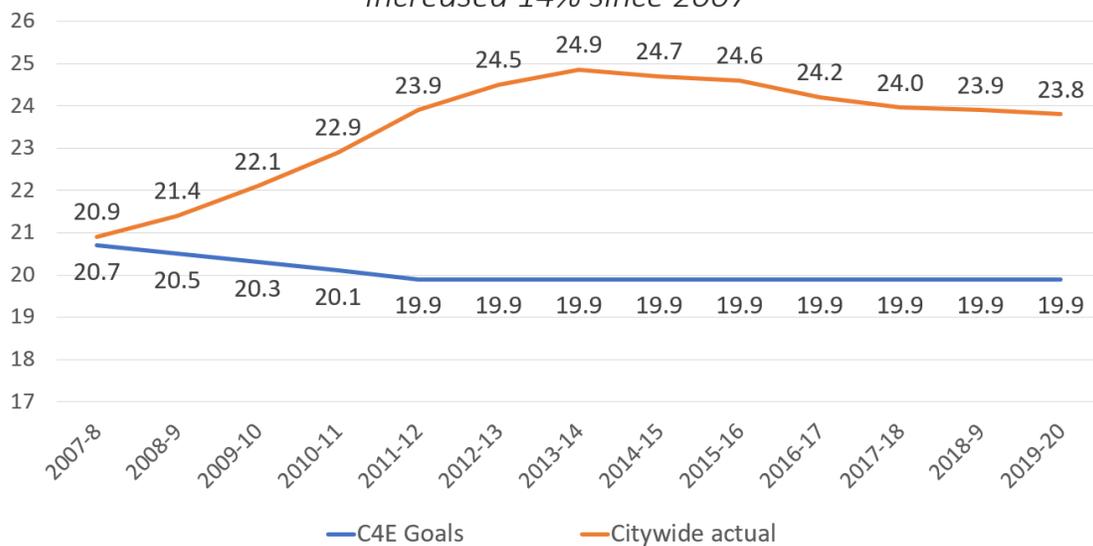


## LT trend average class size in grades 4-8 1998-2019



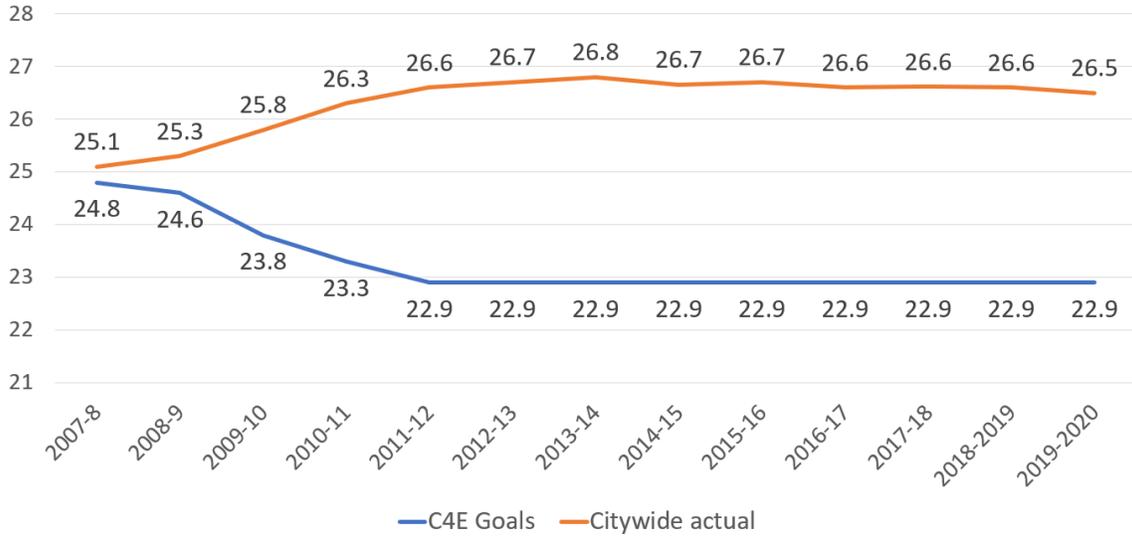
## Average Citywide K-3rd Class Sizes

*Increased 14% since 2007*



## Average Citywide 4<sup>th</sup>-8<sup>th</sup> Class Sizes

*Increased 6% Since 2007*



## Average Citywide HS Class Sizes

*Increased 2% Since 2007*

