

STATE OF NEW YORK
STATE EDUCATION DEPARTMENT

In the Matter of MARIA PLACENCIA, individually and on behalf of her daughter, L.R., and TANYA BAH, individually and on behalf of her son, J.B., and SUSETTE BARBOUR, individually and on behalf of her son, J.W., and NATASHA BROWN, individually and on behalf of her sons J.J. and J.J., and JOSEFINA CALCANO, individually and on behalf of her daughter, S.N., and MICHAEL EDWARDS, individually and on behalf of his son M.E., and TINICA FEIMSTER, individually and on behalf of her daughter, D.H., and MARIA GARCIA-RODRIGUEZ, individually and on behalf of her son, M.R., and LATOYA V. GRANT, individually and on behalf of her daughter, A.S., and TISHA HATCH, individually and on behalf of her son, R.L., and VELMA HOWELL, individually and on behalf of her son, A.O., and CHANNELL KIMBLE, individually and on behalf of her sons, T.C. and T.C., and YOLANDA LOWE, individually and on behalf of her daughter, M.L.B., and WENDY MARTINEZ, individually and on behalf of her daughter, B.P., and ANGEL PIMENTEL, individually and on behalf of his son, T.P., and ROSEMARIE SAUNDERS-LEE, individually and on behalf of her daughter, S.A.L., and KOKAYEE SESSION-LANSIQUOT, individually and on behalf of her son, M.W.S., and GWEN D. SHANNON, individually and on behalf of her daughter, T.Y.V., and SIMONE TAYLOR, individually and on behalf of her son, R.T.; Success Academy Charter Schools – NYC on behalf of Success Academy Charter School – Harlem 4,

No. _____

from action of the Board of Education of the School District of the City of New York and the New York City Department of Education regarding the co-location of grades five through eight of Success Academy Charter School – Harlem 4 (84M386) with existing schools P.S. 149 Sojourner Truth (03M149), P.S. M811 Mickey Mantle School (75M811), and grades kindergarten through four of Success Academy Charter School – Harlem 1 (84M351) in tandem buildings M149 and M207 beginning in the 2014-2015 school year.

**SUCCESS ACADEMY CHARTER SCHOOLS – NYC’S
MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION**

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Success Academy Charter Schools – NYC (“Success Academy NYC”), on behalf of Success Academy Charter School – Harlem 4 (“Harlem 4”),¹ and the above-captioned individual petitioners (“Parent Petitioners”—together with Success Academy NYC, “Petitioners”), by and through their counsel, respectfully submit this Memorandum of Law in support of their Verified Petition (the “Petition”) to appeal from the New York City Department of Education’s (“DOE’s”) final determination to revoke the co-location of Harlem 4’s middle school, grades 5-8, in DOE tandem public school buildings M149/M207 (“M149/M207”), beginning the 2014-2015 school year. This expedited appeal is brought pursuant to New York Education Law §§ 2853(3)(a-5) and 310, and 8 NYCRR § 276.11(b)(1).

PRELIMINARY STATEMENT

Harlem 4’s students—97% minority, 15% students with disabilities, 80% free and reduced-price lunch, and 12% English Language Learners—have achieved extraordinary results. They rank in the top 1% citywide in overall student performance, and the middle school students rank first in the entire state in fifth grade Math. At the nearby schools these students would otherwise attend, students perform 70% worse in Math and 48% worse in English Language Arts (“ELA”). In one of these schools, tragically, not a single fifth grader passed either the Math or ELA exam.

On February 27, 2014, the DOE revoked the co-location of Harlem 4’s middle school (“Harlem Central”), leaving it without a school building. Under New York Education Law, such a significant change in school utilization must be approved by the DOE’s Panel for Educational Policy (“PEP”) after an extensive process of public notification, input, and review. This law was

¹ In September 2012, Harlem 4 was merged into a new legal entity, Success Academy NYC. Following this merger, Harlem 4 is no longer a separate legal entity and is governed by Success Academy NYC. *See* Exhibit (“Ex.”) 2, Affidavit (“Aff.”) of Keri Hoyt, dated March 10, 2014 (“Hoyt Aff.”) ¶ 3. Accordingly, Success Academy NYC is the proper petitioner in this proceeding.

championed by those who believed New York City’s Mayor should not have unilateral control over school siting. Among them was the office of then-Public Advocate Bill de Blasio who issued a report stating that “community members . . . were sidelined as the [DOE] makes decisions about where and how to site schools.”²

Yet in revoking Harlem Central’s co-location, the DOE completely ignored these legal requirements. No PEP vote was held, nor were disclosures published or opportunities provided for public input as required by law. Mayor de Blasio has promised more opportunities for public input into co-location decisions.³ Yet, for Harlem Central, he allowed none whatsoever.

Instead, the DOE conducted a “review” of 49 co-locations behind closed doors and suddenly announced that it would be revoking certain co-locations on February 27, 2014 based on new “core values” and purportedly objective criteria. The “objective” criteria resulted in only three charter schools losing their buildings—all of which happened to be operated by Success Academy Charter Schools and its founder, Dr. Eva Moskowitz, toward whom the Mayor has repeatedly expressed targeted animosity. He has declared that Success Academy’s founder should “stop being tolerated, enabled, supported,” and that she has a “destructive impact” on public education (despite the extraordinary student outcomes of Success Academy’s 22 principally low-income, minority schools). A reasonable observer could only conclude that the revocation of these Success Academy schools (one of which ranks in the top 1% in the city) did

² Nicholle Manners & Ursulina Ramirez, *Consensus for Reform: A Plan for Collaborative School Co-locations*, Office of Bill de Blasio, Public Advocate for the City of New York, July 2011, available at http://advocate.nyc.gov/files/Consensus_for_Reform.pdf (last visited Mar. 7, 2014).

³ DOE Press Secretary Devon Puglia stated that “[w]ith new leadership that will listen, it’s a new era for our system. Families and educators need to know that we’re going to seek their feedback and engage with them as much as we can.” Yasmeen Khan, *City Invites More Community Input on School Space Plans*, WNYC Schoolbook, Feb. 24, 2014, available at <http://www.wnyc.org/story/city-invites-more-community-input-school-space-plans/> (last visited Mar. 7, 2014).

not arise from a rational basis in fact, but from a continuation of the arbitrary targeting of Success Academy schools and their founder.

The true victims of the DOE's improper and arbitrary revocation of the Harlem Central co-location are the 194 largely minority and low-income children who would attend Harlem Central next year. Those students and their parents were not afforded the opportunity to provide input into the DOE's decision, to which they are entitled under the law. Harlem Central parents come now before the Commissioner seeking to undo this wrong and to request that the Commissioner restore to them the high-performing school that they had chosen for their children.

FACTUAL BACKGROUND

I. THE PARTIES

A. Petitioners

1. Parent Petitioners

The petitioners include 19 parents who have children currently attending Success Academy Harlem Central (12 parents), Harlem 4 elementary school (6 parents), or both schools (1 parent) ("Children"). Exhibit ("Ex.") 1 ("Parent Affidavits"). They are: Maria Placencia, parent of L.R.; Tanya Bah, parent of J.B.; Susette Barbour, parent of J.W.; Natasha Brown, parent of J.J. and J.J.; Josefina Calcano, parent of S.N.; Michael Edwards, parent of M.E.; Tinica Feimster, parent of D.H.; Maria Garcia-Rodriguez, parent of M.R.; Latoya V. Grant, parent of A.S.; Tisha Hatch, parent of R.L.; Velma Howell, parent of A.O.; Channell Kimble, parent of T.C. and T.C.; Yolanda Lowe, parent of M.L.B.; Wendy Martinez, parent of B.P.; Angel Pimentel, parent of T.P.; Rosemarie Saunders-Lee, parent of S.A.L.; Kokayee Session-Lansiquot, parent of M.W.S.; Gwen D. Shannon, parent of T.Y.V.; Simone Taylor, parent of R.T. (the "Parent Petitioners"). *Id.*

Eight Children have Individualized Education Programs (“IEPs”),⁴ and one Child is a former English Language Learner.⁵ Each of the Parent Petitioners intended to send their Children to Harlem Central next year. *See* Ex. 1, Parent Affidavits. None of them applied for a DOE public middle school, relying on the fact that their Children would be able to attend Harlem Central. *Id.* They received no notice and had no opportunity to provide any input to be considered by the DOE before it took away their Children’s school. *See id.*

All of the Parent Petitioners have provided affidavits in support of this proceeding, and they accompany the Verified Petition as Exhibit 1. The two stories below are representative:

J.B. is a fourth grader at Harlem 4. Bah Aff. ¶ 1. J.B. has an IEP and has received special education services since he was two years old. *Id.* ¶¶ 5, 12. He initially attended his zoned school, P.S. 194, but he was not progressing so his mom moved him to Harlem 4. *Id.* ¶¶ 11-15. J.B. is excelling at Harlem 4. *Id.* ¶¶ 5, 16, 17, 18, 19. He is in the 4th grade honors math class, and he is reading above his grade level. *Id.* ¶¶ 5, 16. He will soon be graduating from his IEP and moving from his Collaborative Team Teaching (“CTT”) classroom into a general education classroom. *Id.* Rather than return to P.S. 194 for fifth grade, J.B.’s mom would opt to homeschool J.B. or send him to Catholic school, which would be economically difficult for this single-income family with four school-aged children. *Id.* ¶¶ 5, 9, 11. P.S. 194 earned an “F” on its DOE Progress Report Card, and none of its fifth grade students passed the Math or ELA

⁴ An Individualized Education Program (“IEP”) is a plan developed for a child receiving special education or related services that details the child’s academic performance, annual goals, necessary services and accommodations, and progress. 20 U.S.C. § 1414(d).

⁵ Ex. 1, Affidavit of Tanya Bah, dated March 3, 2014 (“Bah Aff.”); Affidavit of Susette Barbour, dated March 3, 2014 (“Barbour Aff.”); Affidavit of Tisha Hatch, dated March 3, 2014 (“Hatch Aff.”); Affidavit of Angel Pimentel, dated March 6, 2014 (“Pimentel Aff.”); Affidavit of Rosemarie Saunders-Lee, dated March 3, 2014 (“Saunders-Lee Aff.”); Affidavit of Kokayee Session-Lansiquot, dated March 3, 2014 (“Session-Lansiquot Aff.”); Affidavit of Gwen D. Shannon, dated March 3, 2014 (“Shannon Aff.”); Affidavit of Simone Taylor, dated March 3, 2014 (“Taylor Aff.”).

statewide assessment last year⁶ (contrasted with Harlem Central’s fifth grade ranking first in Math in New York state).⁷

T.P. is also a fourth grader at Harlem 4. Pimentel Aff. ¶ 1. T.P. has an IEP and was an English Language Learner. *Id.* ¶¶ 4, 5, 13. He started school at P.S. 180. *Id.* ¶ 6. In first grade, T.P. was struggling academically. *Id.* When his dad asked T.P.’s teacher what he could do to help, she told him everything was fine. *Id.* At the end of the year, T.P.’s dad was told that T.P. would have to repeat the first grade. *Id.* ¶ 7. T.P. went to a DOE summer program, and passed, so he could go into second grade. *Id.* T.P. continued to struggle in reading and math. *Id.* ¶ 8. He received an IEP and began speech therapy. *Id.* ¶¶ 9, 10. However, even after receiving these services for some time, T.P. was still not progressing. *Id.* ¶¶ 10, 11. After second grade, T.P.’s parents moved him to Harlem 4, where he had to repeat the second grade because he was academically too low to progress to third grade. *Id.* ¶¶ 8-11. T.P. is now thriving at Harlem 4 academically. *Id.* ¶¶ 4, 12, 13. At P.S. 180, he failed the English proficiency test three times. After a year at Harlem 4, he became English proficient and passed the test. *Id.* ¶ 13. T.P.’s dad does not want T.P. to attend fifth grade at P.S. 180 because “my son’s learning suffered” prior to attending Harlem 4. *Id.* ¶¶ 4, 17. The fifth grade pass rate at P.S. 180 last year was 17.4% in

⁶ *P.S. 194 Countee Cullen Progress Report 2012-13*, NYC Dept. of Educ., available at http://schools.nyc.gov/OA/SchoolReports/2012-13/Progress_Report_2013_EMS_M194.pdf (last visited Mar. 7, 2014); *New York State Common Core English Language Arts (ELA) & Mathematics Tests, Grades 3-8, New York City Results*, NYC Dept. of Educ., available at <http://schools.nyc.gov/Accountability/data/TestResults/ELAandMathTestResults> (last visited Mar. 7, 2014).

⁷ *See English Language Arts (ELA) and Mathematic Assessment Results*, NY State Dept. of Educ., available at <http://www.p12.nysed.gov/irs/ela-math/> (last visited Mar. 7, 2014).

Math, and 7.4% in ELA (compared to Harlem Central’s 5th grade pass rate of 96% in Math and 53% in ELA, a difference of 78.6 percentage points and 45.6 percentage points, respectively).⁸

2. Petitioner Harlem 4 Middle School (Harlem Central)

Harlem 4 is a public charter school in Harlem that serves elementary and middle school students. Hoyt Aff. ¶ 5. Harlem 4’s middle school is referred to as “Success Academy Harlem Central” or “Harlem Central.” *Id.* Currently, Harlem 4’s elementary school educates approximately 420 students in kindergarten through fourth grades in Building M113, located at 240 West 113th Street, New York, New York 10026, in Community School District (“CSD”) 3. *Id.* Elementary school students from Harlem 4 matriculate into Harlem Central, which currently educates approximately 120 students in fifth and sixth grades in tandem buildings M185, located at 20 West 112th Street, New York, NY 10026; and M208, located at 21 West 111th Street, New York, NY 10026 (“M185/M208”).⁹ Building M185/M208 is a temporary, one-year location for Harlem Central. *Id.* at ¶ 6; Ex. 7, Harlem Central EIS at 2. Next year, 2014-2015, Harlem Central will serve 180-210 students in fifth through seventh grades.¹⁰ At full scale, in 2018-2019, Harlem Central will serve 335-375 students in fifth through eighth grades.¹¹ Ex. 7, Harlem Central BUP at 19.

The middle school serves students in Central Harlem, a community that is largely low-income and minority. Hoyt Aff. ¶ 8. Ninety-seven percent of Harlem 4’s students are African American or Hispanic, and eighty percent receive free or reduced-price lunch. *Id.* Fifteen

⁸ See *English Language Arts (ELA) and Mathematic Assessment Results*, NY State Dept. of Educ., available at <http://www.p12.nysed.gov/irs/ela-math/> (last visited Mar. 7, 2014).

⁹ Hoyt Aff. ¶ 6; Affirmation of Emily A. Kim, dated March 10, 2014 (“Kim Affirm.”), Ex. 7 (Educational Impact Statement, dated March 1, 2013) (“Harlem Central EIS”) at 2.

¹⁰ Hoyt Aff. ¶ 6; Kim Affirm. Ex. 8 (Second Revised Building Utilization Plan, dated August 30, 2013) (“Harlem Central BUP”) at 7.

¹¹ When Harlem 4 opened in the fall of 2008, it served kindergarten and first grades. Hoyt Aff. ¶ 5. Each subsequent year, as the oldest group of students advances, the school adds one grade. *Id.*

percent of Harlem 4's students are children with disabilities. *Id.* Twelve percent are English Language Learners. *Id.*

Harlem 4 is governed by Success Academy NYC and operated by Success Academy Charter Schools (“Success Academy”), a not-for-profit public charter school management organization that currently operates eighteen high-performing public charter elementary schools in New York City: five schools in Harlem, three schools in the Bronx, seven schools in Brooklyn, and three schools in other neighborhoods in Manhattan. *Id.* ¶ 2; *see also supra* note 1. Additionally, Success Academy operates four public charter middle schools in Harlem that serve students matriculating from certain Success Academy elementary schools. Hoyt Aff. ¶ 2. For the 2014-2015 school year, Success Academy has been planning to operate six additional public charter elementary schools, three additional public charter middle schools, and one new public charter high school. *Id.* ¶ 4. Success Academy schools are authorized by the Board of Trustees of the State University of New York. *Id.* ¶ 2. All Success Academy schools accept students on a lottery basis, without any consideration for intellectual ability, measures of achievement or aptitude, athletic ability, disability, race, creed, gender, national origin, religion, or ancestry of its applicants. *Id.*; *see* N.Y. Educ. Law § 2854(2).

Success Academy schools have a long track record of extraordinarily high student achievement. Hoyt Aff. ¶ 10. The Success Academy schools that have reached New York State testing grades (grades three and up)¹² serve a principally minority and low-income community,¹³ and consistently rank in the top 3% of New York City public schools in student performance—

¹² Public school students take the New York State standardized tests starting in third grade. Given that Success Academy schools start with kindergarten and first grade, only Success Academy schools that have reached third grade take the state tests, which in 2012-2013 included all of Success Academy's Harlem schools and two of Success Academy's Bronx schools (Success Academy Bronx 1 and Success Academy Bronx 2).

¹³ See Hoyt Aff. ¶ 9.

matching or exceeding Gifted and Talented programs.¹⁴ Among approximately 3,500 public schools in New York State, Success Academy schools are in the top 1% in Math and Science and the top 7% in ELA.¹⁵

Harlem 4 students in particular have achieved extraordinary outcomes. On the 2012-2013 New York State Assessments, Harlem 4 testing grades (third through fifth grades) had a pass rate of 83.2% in Math and 55.3% in ELA¹⁶—nearly three times the city-wide pass rate in Math and more than double the city’s pass rate in ELA.¹⁷ Harlem 4 ranks in the top 1% citywide in overall student performance, ranking higher than four out of the five citywide gifted and talented schools.¹⁸ Harlem Central’s fifth grade rated first amongst all fifth grades in public schools across the state in Math, and in the top 11% statewide in ELA.¹⁹ Harlem Central also has a championship chess team, recently placing fifth statewide in the prestigious 2014 New York State Scholastic Chess Championship in Saratoga Springs, New York (with another Success Academy middle school taking first place). Hoyt Aff. ¶ 10.

¹⁴ This statistic is based on the DOE’s “Progress Report Citywide Results” for the 2009-2010, 2010-2011, 2011-2012, and 2012-2013 school years, *available at* <http://schools.nyc.gov/Accountability/tools/report/default.htm> (last visited Mar. 7, 2014).

¹⁵ These statistics are based on the New York State ELA and Mathematic Assessment results, *available at* <http://www.p12.nysed.gov/irs/ela-math/> (last visited Mar. 7, 2014).

¹⁶ This statistic is based on Harlem 4’s 2012-2013 Progress Report, *available at* http://schools.nyc.gov/OA/SchoolReports/2012-13/Progress_Report_2013_EMS_M386.pdf (last visited Mar. 7, 2014).

¹⁷ Citywide, students in New York City had a pass rate of 29.6% in Math and 26.4% in ELA on the 2012-2013 New York State Assessments. *See New York City Common Core ELA and Math Test Results*, NYC Dept. of Educ., *available at* <http://schools.nyc.gov/Accountability/data/TestResults/ELAandMathTestResults> (last visited Mar. 7, 2014).

¹⁸ This statistic is based on the DOE’s “Progress Report Citywide Results” for the 2012-2013 school year, *available at* <http://schools.nyc.gov/Accountability/tools/report/default.htm> (last visited Mar. 7, 2014).

¹⁹ This statistic is based on the New York State English Language Arts (ELA) and Mathematic Assessment results, *available at* <http://www.p12.nysed.gov/irs/ela-math/> (last visited Mar. 7, 2014).

By sharp contrast, the schools that many Harlem Central students would otherwise attend have produced abysmally poor student outcomes. For Harlem Central’s rising fifth, sixth, and seventh graders zoned for district schools, the average pass rate for the corresponding grades at their zoned schools is 11.9% in Math and 12.5% in ELA.²⁰ These pass rates represent a stunning average drop of 69.8 percentage points in Math proficiency and 48.3 percentage points in ELA proficiency as compared to the same middle school grades at Success Academy schools.²¹ In addition, some of Harlem Central’s rising sixth and seventh graders reside in community school districts (“CSDs”) with middle school choice and thus do not have an assigned zoned school.²² However, these students lack true choice, as the schools they have to choose among are chronically low-performing. The CSDs where these students with middle school choice reside have an average pass rate of 18.2% in Math and 18.1% in ELA for corresponding middle school grades, representing a 66.8 percentage point decrease in Math proficiency and a 46.1 percentage point decrease in ELA proficiency as compared to the same middle school grades at Success Academy schools.²³ This information is reflected in the below chart.

²⁰ See Ex. 5, Affirmation of Kyle Gruber, dated March 10, 2014 (“Gruber Affirm.”) ¶¶ 2-3.

²¹ *Id.*

²² *Middle School Admissions*, NYC Dept. of Educ., available at <http://schools.nyc.gov/NR/ronlyres/9E4D8B44-7A5D-49C9-815C-26AD4E0E833F/0/MSEnrollmentOnePager.pdf> (last visited Mar. 7, 2014).

²³ See Ex. 5, Gruber Affirm., ¶¶ 2-3.

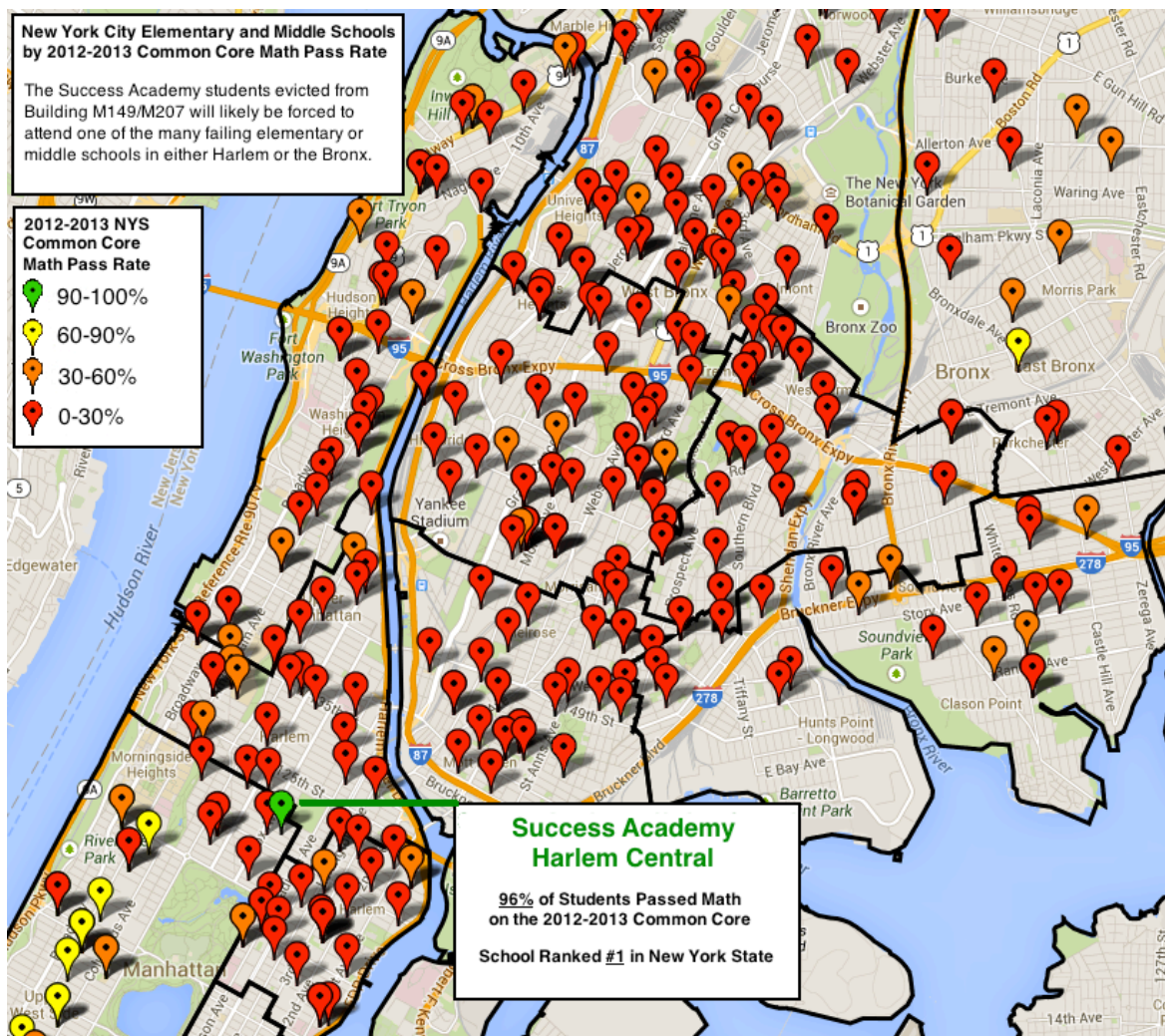
DOE MIDDLE SCHOOL OPTIONS FOR HARLEM CENTRAL'S RISING 5 TH , 6 TH , AND 7 TH GRADE STUDENTS ²⁴							
	Grade	DOE School(s) Test Performance		Success Academy Test Performance		Percentage Point Difference	
		Math	ELA	Math	ELA	Math	ELA
Harlem Central's Rising 5th, 6th, and 7th Graders with Zoned Schools	5th	13.7%	15.3%	78.0%	55.0%	64.3	39.7
	6th	10.6%	8.0%	83.0%	49.0%	72.4	40.9
	7th	9.3%	11.1%	88.0%	86.0%	78.7	74.6
Harlem Central's Rising 6th and 7th Graders with Middle School Choice (No Zoned Schools)	6th	19.9%	17.5%	83.0%	49.0%	63.1	31.4
	7th	15.9%	19.0%	88.0%	86.0%	72.1	66.7

As shown above, across all grades, the available DOE school options perform 63.1 percentage points to 78.7 percentage points lower (depending on the grade) than Harlem Central in Math and 31.4 percentage points to 74.6 percentage points lower in ELA.²⁵ If Harlem Central closes, students currently attending one of the highest-performing schools across the state will be forced to attend some of the lowest performing schools in New York City, as demonstrated in the map²⁶ below.

²⁴ *Id.*

²⁵ *Id.* at ¶¶ 4-5.

²⁶ *See id.* ¶¶ 2-3.



In any event, as of December 13, 2013, the deadline for New York City students with middle school choice to apply to DOE middle schools for the 2014-2015 middle school has passed.²⁷

B. Respondents

Respondent New York City Department of Education is the branch of municipal government in New York City that manages the city’s system of public schools. See N.Y. Educ.

²⁷ According to the DOE’s website, fifth grade public school students without a school to attend the following year must participate in the Middle School Admissions process, and the deadline to submit the application was December 13, 2013. *Middle School Choices & Enrollment*, NYC Dept. of Educ., available at <http://schools.nyc.gov/ChoicesEnrollment/Middle/default.htm> (last visited Mar. 7, 2014). Additionally, the deadlines to apply to many private schools within the city have also passed, as well as the opportunity to be considered for scholarships and financial aid. See, e.g., *Admissions Timelines*, Independent Schools Admissions Association of Greater New York, available at <http://www.isaagny.org/admissions/index.aspx> (last visited Mar. 7, 2014).

Law Art. 52-A. Respondent Board of Education of the School District of the City of New York is the governance body for the Department of Education. N.Y. Educ. Law § 2590-g(1).

II. THE CO-LOCATION APPROVAL PROCESS

On August 30, 2013, then-DOE Chancellor Dennis M. Walcott issued public notice of the proposed co-location of Harlem Central in M149/M207, pursuant to New York Charter Law § 2853(3)(a-3).²⁸ That same day, the DOE publicly filed and released its EIS and Second Revised BUP²⁹ for the proposed co-location, describing the proposal in detail in both documents. *See* Ex. 7, Harlem Central EIS; Ex. 8, Harlem Central BUP.

On October 10, 2013, a joint public hearing was held regarding the proposal to co-locate Harlem Central in M149/M207 beginning in 2014-2015.³⁰ Approximately 114 members of the public attended the hearing, and 23 people spoke. *Id.* at 3. Fifty-eight comments were received at the hearing, by email, or by voice mail. *Id.* at 3-8. Following the joint public hearing and an extensive review of the public feedback, the DOE concluded that no changes were necessary to the Educational Impact Statement. *Id.* at 19. On October 15, 2013, the PEP approved the co-location.³¹

III. THE APPROVED CO-LOCATION SITE: BUILDING M149/M207

On October 15, 2013, the PEP voted to approve the co-location of Harlem Central in M149/M207, which would serve as the permanent location for Harlem Central starting the 2014-

²⁸ Kim Affirm. Ex. 8 (August 30, 2013 Public Notice).

²⁹ The original BUP for this space was issued on December 10, 2010 and outlined the temporary co-location of Success Academy Harlem 1's sixth grade in M149/M207. *See* Ex. 8, Harlem Central BUP at 2.

³⁰ *See* Kim Affirm. Ex. 9 at 3 (DOE's October 14, 2013 Public Comment Analysis) ("Harlem Central Public Comment Analysis").

³¹ Kim Affirm. Ex. 11 (Panel for Educational Policy Resolution Regarding Harlem Central Co-location, dated October 15, 2013).

2015 school year.³² Building M149 is located at 34 West 118th Street, New York, NY 10026, and Building M207 is located at 41 West 117th Street, New York, NY 10026, both within CSD 3. *See* Ex. 7, Harlem Central EIS at 1. M149 and M207 are “tandem buildings,” meaning that they are two separate buildings with separate entrances but are joined by a central core containing large shared spaces, such as auditoriums, gymnasiums, and/or cafeterias. *Id.* The facility currently houses three schools: P.S. 149 Sojourner Truth (“P.S. 149”), a traditional public elementary and middle school that serves students in kindergarten through eighth grades and offers a pre-kindergarten program; P.S. M811 Mickey Mantle School (“P811M@M149”), one site of a District 75 school that serves students in kindergarten through eighth grades and offers a pre-kindergarten program; and Success Academy Charter School – Harlem 1 (“Success Academy Harlem 1”), a public charter school that serves students in kindergarten through fourth grades. *Id.* at 1-2. In addition, the DOE currently permits one Community Based Organization, the Harlem Children’s Zone – Harlem Gems Program, to utilize space in M149/M207 for the operation of a universal pre-kindergarten program. *Id.* at 3.

M149/M207 is an underutilized public school building. *Id.* at 3. According to the 2011-2012 Enrollment, Capacity, Utilization Report (“Blue Book”), M149/M207 has a combined target capacity to serve 1,205 students. *Id.* For the 2013-2014 school year, the building serves approximately 1,104 students. *Id.* Based on enrollment and section projections in the EIS for 2013-2014, each school in M149/M207 currently receives the “baseline” allocation of space it is entitled to under the Instructional Footprint,³³ and has further been allocated “excess space”

³² *See Panel for Education Policy - October 15, 2013 Panel Meeting*, NYC Dept. of Educ., Oct. 15, 2013, available at <http://schools.nyc.gov/AboutUs/leadership/PEP/publicnotice/2013-2014/Oct15SchoolProposals> (last visited Mar. 7, 2014).

³³ The DOE Instructional Footprint is an instructional translation of the information in the Enrollment Capacity Utilization Report (“the Blue Book”), the citywide standard for assessing capacity within DOE buildings. The Footprint sets forth the baseline number of rooms that should be allocated to a school

beyond its baseline allocation. *See* Ex. 8, Harlem Central BUP at 5. Moreover, for each year of the Harlem Central co-location currently at issue, P.S. 149 and P811M@M149 would continue to receive their baseline allocation of space or space in excess of their baseline allocation. *Id.* at 5-20. Thus, the DOE already determined prior to the October 15, 2013 PEP vote that M149/M207 has sufficient space to accommodate Harlem Central in the building, even when Harlem Central is operating at its approved full scale capacity in school year 2018-2019. *See* Ex. 7, Harlem Central EIS at 1-4.³⁴ In January of this year, the DOE again affirmed, in response to litigation challenging the October 15 approval, that the PEP approval was “equitable,” “neither arbitrary nor capricious,” and “should be upheld.”³⁵

based on the grade levels served by the school and the number of classes per grade. *See Instructional Footprints, Consolidated Version 2011*, NYC Dept. of Educ., available at http://schools.nyc.gov/NR/rdonlyres/78D715EA-EC50-4AD1-82D1-1CAC544F5D30/0/DOEFOOTPRINTSConsolidatedVersion2011_FINAL.pdf (last visited Mar. 7, 2014).

³⁴ The DOE noted in the Public Comment Analysis published on October 14, 2013 prior to the PEP vote:

Although a projected utilization rate in excess of 100% may suggest that a building will be over-utilized or over-crowded in a given year, this rate does not account for the fact that rooms may be programmed for more efficient or different uses than the standard assumptions in the utilization calculation. In addition, charter school enrollment plans are frequently based on larger class sizes or different use of administrative space, contributing to building utilization rates above 100%, while not impacting the utilization of the space allocated to the traditional public school(s) in the building.

The DOE supports the co-location of grades five through eight of SA-Harlem 4 in M149/M207 beginning in 2014-2015. This proposal is intended to create a long-term site for SA-Harlem 4’s students in grades five through eight and allow [Success Academy] to continue providing high-quality educational opportunities for students in Manhattan.

Ex. 10, Harlem Central Public Comment Analysis (emphasis supplied). *See also* Ex. 7, Harlem Central EIS (same).

³⁵ Kim Affirm. Ex. 12 (DOE Memorandum of Law, dated January 27, 2014) (“Harlem Central Memorandum of Law”) at 4.

In reality, M149/M207 has more available space than set forth in the EIS/BUP. Although P.S. 149's projected enrollment for 2013-2014 in the EIS/BUP is 387 students and 17 general education sections,³⁶ its actual enrollment for this year is far lower, with 327 students and 14 general education sections—a difference of 60 students and 3 sections.³⁷ Therefore, P.S. 149 is using an additional 3 classrooms over what it is entitled under the Footprint (beyond the excess space it was already allocated), based on its actual 2013-2014 enrollment figures.³⁸

Moreover, P.S. 149 has many class sizes significantly below the target capacity set forth in the Blue Book.³⁹ While Success Academy's average class size is 28 students per section, P.S. 149 has many class sizes significantly below this target capacity. *See* Hoyt Aff. ¶ 7. P.S. 149's two third grade sections have only 14 and 15 students respectively.⁴⁰ Similarly, its two

³⁶ *See* Ex. 7, Harlem Central EIS at 5; Ex. 8, Harlem Central BUP at 5. Additionally, P.S. 149's projected enrollment includes five special education sections. Ex. 8, Harlem Central BUP at 5.

³⁷ *See* *School Register for P.S. 149 Sojourner Truth*, NYC Dept. of Educ. (Feb. 21, 2014), available at <http://schools.nyc.gov/Common/Templates/MainTemplate/CommonMainTemplate.aspx?NRMODE=Published&NRNODEGUID=%7bE8ABB19B-D04D-4ED5-A9B9-1C264E7D6B1E%7d&NRORIGINALURL=%2fSchoolPortals%2f03%2fM149%2fAboutUs%2fStatistics%2fregister%2eh.htm&NRCACHEHINT=Guest> (last visited Mar. 7, 2014). The School Register pulls data directly from the DOE's "Automate the Schools" (ATS) system, which tracks the current enrollment of students across New York City in real-time. *See also* *2013-2014 Updated Class Size Report, Detailed School-level Data*, NYC Dept. of Educ. (Feb. 14, 2014), available at <http://schools.nyc.gov/AboutUs/data/classsize/classsize.htm> (last visited Mar. 7, 2014). The special education classroom numbers are unchanged from that which was predicted.

³⁸ If P.S. 149's actual enrollment and section count are considered, P.S. 149's baseline footprint allocation would be 17 full-size rooms, instead of the 20 full-size rooms it is currently allocated as a baseline allocation under the BUP. *See* Ex. 8, Harlem Central BUP at 5.

³⁹ *See* *2012-2013 Enrollment, Capacity and Utilization Report*, NYC Dept. of Educ. & Sch. Const. Auth., available at http://www.nysca.org/Community/CapitalPlanManagementReportsData/Enrollment/2012-2013_Classic.pdf (last visited Mar. 7, 2014).

⁴⁰ *See* *2013-2014 Updated Class Size Report, Detailed School-level Data*, NYC Dept. of Educ. (Feb. 14, 2014), available at <http://schools.nyc.gov/AboutUs/data/classsize/classsize.htm> (last visited Mar. 7, 2014).

Kindergarten sections have only 14 and 16 students respectively.⁴¹ These numbers indicate that, in addition to receiving three extra classrooms, P.S. 149 could operate within a smaller footprint.

Consequently, as the DOE's own analysis and figures reflect, M149/M207 has ample space to accommodate Harlem Central in the building, which was acknowledged by the DOE during the approval process and again just over one month ago in litigation. *See* Ex. 10, Harlem Central Public Comment Analysis; Ex. 12, Harlem Central Memorandum of Law at 4.

IV. ACTIONS TAKEN BY HARLEM CENTRAL AND PARENT PETITIONERS FOLLOWING THE PEP APPROVAL TO IMPLEMENT THE CO-LOCATION

Following the PEP approval on October 15, 2013, Harlem Central undertook several steps in anticipation of opening its doors in M149/M207 for the 2014-2015 school year. Harlem Central proceeded with staffing plans, including extensive recruitment activities and the hiring of a new principal, other administrators, and teachers. Hoyt Aff. ¶ 12. The school started detailed planning for the use of the rooms it had been allocated, and met with the DOE and contractors to discuss appropriate modifications to those rooms. *Id.*

Additionally, Harlem Central parents began preparing for the upcoming school year. In particular, Harlem Central parents did not seek to enroll their children in DOE district schools during the enrollment period, which ended on December 13, 2013.⁴² *See* Ex. 1, Parent Affidavits. They did not seek a middle school seat at other schools or scholarships to private schools. *Id.* Instead, they believed that their children would continue to be able to attend Harlem Central, and planned for them to do so. *Id.*

⁴¹ *Id.*

⁴² *Middle School Choices & Enrollment*, NYC Dept. of Educ., available at <http://schools.nyc.gov/ChoicesEnrollment/Middle/default.htm> (last visited Mar. 7, 2014).

V. THE TARGETING OF SUCCESS ACADEMY SCHOOLS

The campaign to elect a new Mayor of New York City took place throughout 2013. Bill de Blasio, Public Advocate for the City of New York at the time, announced his intention to run for Mayor on January 27, 2013.⁴³ Prior to this announcement, the then-Public Advocate, a vocal supporter of teachers' unions, used his public office and the public forum to target Success Academy schools and the founder and Chief Executive Officer of Success Academy. For example, he publicly called for the DOE to halt the co-location of a Success Academy school and “wholeheartedly support[ed]” a lawsuit against Success Academy and the co-location.⁴⁴

During his mayoral campaign, the then-Public Advocate's attacks on Success Academy and its founder intensified. For example, at a forum hosted by the United Federation of Teachers in May 2013, the then-Public Advocate said that it was “time for Eva Moskowitz to stop having the run of the place,” that she must “stop being tolerated[,] enabled[,] supported[,]” and that she has a “destructive impact” on public education.⁴⁵ He held a press conference in April 2013 specifically targeting one Success Academy school, and said “[i]t's time for Eva Moskowitz's

⁴³ David W. Chen, *De Blasio, Announcing Mayoral Bid, Pledges to Help People City Hall Forgot*, N.Y. TIMES, Jan. 27, 2013, available at <http://www.nytimes.com/2013/01/28/nyregion/bill-de-blasio-kicks-off-campaign-for-mayor.html?hpw&r=1&> (last visited Mar. 7, 2014). Courts may take judicial notice of newspaper publications. See *Grebow v. City of New York*, 173 Misc. 2d 473, 379, 661 N.Y.S.2d 441 (Sup. Ct. N.Y. Cty. 1997).

⁴⁴ *Lawsuit over lost classrooms, programs has backing of all UWS officials, Public Advocate*, Press Release, NYC Public Advocate Website, Apr. 10, 2011, available at <http://archive.advocate.nyc.gov/news/2011-04-10/parents-upper-west-side-high-school-sue-school-stop-co-location> (last visited Mar. 7, 2014); *De Blasio Opposes Removing Innovation High School from Brandeis Campus on UWS*, NYC Public Advocate Website, Dec. 4, 2012, available at <http://archive.advocate.nyc.gov/news/2012-12-04/de-blasio-opposes-removing-innovation-high-school-brandeis-campus-uws> (last visited Mar. 7, 2014).

⁴⁵ Aaron Short, *Charter-school board members donating to Cuomo's re-election*, N.Y. POST, Jan. 27, 2014, available at <http://nypost.com/2014/01/27/charter-school-board-members-donating-to-cuomos-re-election/> (last visited Mar. 7, 2014).

privilege and power to end.”⁴⁶ At a campaign primary debate in June 2013, when speaking about his plan to charge charter schools rent, he again singled out the Success Academy founder, stating, “There’s no way in hell Eva Moskowitz should get free rent, OK?”⁴⁷ Mr. de Blasio never publicly singled out any other charter operator during his tenure as Public Advocate or his campaign for Mayor.

After he was elected on November 5, 2013, the Mayor appointed Carmen Fariña as the Chancellor of the NYC Department of Education on December 30, 2013.⁴⁸ The Chancellor serves at the will of the Mayor.⁴⁹ The Mayor took office on January 1, 2014 and has continued to speak out against Success Academy and its founder. For example, the Mayor stated that Success Academy’s response to the decision to revoke three co-locations was a “sideshow” and that the Success Academy founder was only “an individual with a soapbox.”⁵⁰ The Chancellor has also expressed her opinion on charter schools, stating that the DOE needs to find space for “our own kids” and not public charter school students.⁵¹ After the February 27 revocation

⁴⁶ Anika Anand, *De Blasio takes on city’s treatment of Moskowitz charter schools*, N.Y. CHALKBEAT, Apr. 22, 2013, available at <http://ny.chalkbeat.org/2013/04/22/de-blasio-takes-on-citys-treatment-of-moskowitz-charter-schools/> (last visited Mar. 7, 2014).

⁴⁷ Eliza Shapiro, *What now for Eva Moskowitz?*, CAPITAL NEW YORK, Jan. 29, 2014, available at <http://www.capitalnewyork.com/article/city-hall/2014/01/8539382/what-now-eva-moskowitz> (last visited Mar. 7, 2014).

⁴⁸ Frank James, *Bill de Blasio Wins New York City Mayoral Election*, NPR.ORG, Nov. 5, 2013, available at <http://www.npr.org/blogs/itsallpolitics/2013/11/05/243333617/bill-de-blasio-wins-nyc-mayoral-election> (last visited Mar. 7, 2014); Yoav Gonen, *Former teacher Carmen Farina named school chancellor*, N.Y. POST, Dec. 30, 2013, available at <http://nypost.com/2013/12/30/former-teacher-carmen-farina-named-school-chancellor/> (last visited Mar. 7, 2014).

⁴⁹ See N.Y. Educ. Law § 2590-h (“Such chancellor shall serve at the pleasure of and be employed by the mayor of the city of New York by contract”).

⁵⁰ Transcript of Mayor Bill de Blasio Press Conference, Feb. 28, 2014, available at <http://www1.nyc.gov/office-of-the-mayor/news/072-14/transcript-mayor-de-blasio-appoints-nisha-agarwal-commissioner-mayor-s-office-immigrant> (last visited Mar. 7, 2014).

⁵¹ Beth Fertig, *Schools Chancellor Challenges Status Quo on Charters, New Schools*, WNYC, Jan. 31, 2014, available at <http://www.wnyc.org/story/interview-farina-says-some-charters-should-pay-rent/> (last visited Mar. 7, 2014).

decision, when asked about where Harlem Central students would go next year, the Chancellor stated “they’re charter schools. They’re on their own now.”⁵²

VI. THE FEBRUARY 27, 2014 SURPRISE REVOCATION OF HARLEM CENTRAL’S CO-LOCATION

After the Mayor took office, he and the Chancellor indicated that they were undertaking a review of co-locations approved by the prior administration, but provided no details regarding what such a review would involve.⁵³ They published no criteria for such a review and did not invite Harlem Central, other charter schools, the public, parents, teachers, or students to be a part of the “review” process. They also did not indicate, prior to their final decision, that such a review could involve the revocation of lawfully approved co-locations.

On February 27, 2014, DOE Press Secretary Devon Puglia distributed a press release via e-mail setting forth a final determination by the DOE to revoke the co-location of Harlem Central in M149/M207 (the “Press Release”).⁵⁴

The Press Release stated that the DOE had conducted a “review of the proposals previously approved last fall.” *Id.* The DOE then stated that, as a result of the “review,” “we are withdrawing 9 proposals,” but that three of the nine would be reworked with new EISs, leaving six revocations. *Id.* The Press Release did not explain how the New York Education Law or any other law allowed a proposal to be “withdrawn” after it had already been approved.

⁵² Aaron Short and Carl Campanile, *Farina to charter kids: You’re on your own*, N.Y. POST, Mar. 6, 2014, available at <http://nypost.com/2014/03/06/farina-to-homeless-charter-schoolkids-youre-on-your-own/> (last visited Mar. 7, 2014). Later, Chancellor Fariña said that she had “misspoken” and regretted the remarks. Javier Hernandez, *Chancellor Says She Regrets Remarks About a Harlem Charter School*, N.Y. TIMES, Mar. 7, 2014, available at <http://www.nytimes.com/2014/03/08/nyregion/chancellor-says-she-regrets-remarks-about-a-harlem-charter-school.html?hpw&rref=nyregion> (last visited Mar. 7, 2014).

⁵³ Beth Fertig, *All Eyes on Chancellor as She Reviews Bloomberg-Approved Charter schools*, WNYC, Jan. 13, 2014, available at <http://www.wnyc.org/story/chancellor-reviewing-charters-approved-bloomberg-left-office/> (last visited Mar. 7, 2014).

⁵⁴ Ann Powell Aff. Ex. 3 (Press Release from Devon Puglia, *Update on 2014 Proposals*, February 27, 2014) (“Press Release”).

The Press Release stated that the DOE considered 49 co-locations approved by the PEP at its October 15 and October 30 meetings in 2013. Ex. 3, Press Release. These were not the only co-locations approved for the 2014-2015 school year during 2013; the PEP also approved co-locations on January 16, March 11, March 20, May 22, and June 19.⁵⁵ However, these co-locations were not selected for the “review.”

The Press Release set forth “several core values” that it claimed “comprised the lens” through which it conducted the “review”:

First, we do not believe new elementary schools should be opened on high school campuses. While there are examples where it can be effective, overall we have heard concerns from high school communities, as well as elementary level ones, about this practice. We believe high school campuses should serve high school students. Second, we want to ensure that all new schools have the resources they need to provide the services students deserve. Very small schools under 250 students may have difficulty providing the range of support needed to serve our students effectively. Third, we considered construction. We looked closely at proposals that would have depended on significant capital work to create space for the co-location, or those that required substantial dislocation to the existing schools within a building. Last, we considered District 75 capacity. We will not reduce seats for these students.

Ex. 3, Press Release. In a press conference held the same day, the Mayor described the “core values” as “consistent, objective criteria.”⁵⁶ The Chancellor has also repeatedly referred to them as “criteria.”⁵⁷

As demonstrated in the chart below, the six fully revoked co-locations included three charter schools, all of which were Success Academy schools: Harlem Central and two new

⁵⁵ See *Panel for Educational Policy*, NYC Dept. of Educ., available at <http://schools.nyc.gov/AboutUs/leadership/PEP/default.htm> (last visited Mar. 7, 2014).

⁵⁶ Rebecca Fishbein, *De Blasio Blocks Expansion of 3 City Charter Schools*, GOTHAMIST, Feb. 27, 2014, available at http://gothamist.com/2014/02/27/de_blasio_blocks_expansion_of_city.php (last visited Mar. 7, 2014).

⁵⁷ Interview with Carmen Fariña, Chancellor of NYC Dept. of Educ., MyFOXNY (Mar. 7, 2014), available at <http://www.myfoxdc.com/story/24913914/schools-chancellor-carmen-farina-on-rough-first-2-months#axzz2vIKqgsIE> (last visited Mar. 7, 2014).

elementary schools, Success Academy Charter School – City Hall (“Success Academy City Hall”) and Success Academy Charter School – Jamaica (“Success Academy Jamaica”).⁵⁸

REVOKED CO-LOCATIONS			
	Charter or DOE School?	Existing or New School?	Re-sited?
Success Academy Harlem Central @ M149/M207	Charter	Existing	No
Success Academy City Hall @ M520	Charter	New	No
Success Academy Jamaica @ Q400	Charter	New	No
Middle School @ M096	DOE	New	No
Middle School - CPE II @ M013	DOE	New	No
Middle School @ K335	DOE	New	No
CTE High School @ M446	DOE	New	Yes
High School @ K540	DOE	New	Yes
CTE High School @ Q452	DOE	New	Yes

Harlem Central was the only existing school with current students that had its co-location revoked by the DOE, even though the DOE purportedly sought to be as “minimally disruptive to those existing [enrollment] processes and the families going through them.” Ex. 3, Press Release. The DOE did not offer any plans to re-site any of the revoked Success Academy schools. *Id.* Meanwhile, other co-locations considered by the DOE met certain of the criteria and were not revoked.⁵⁹ Notably, the DOE did not state which, if any, of the criteria each of the schools did or did not meet. Ex. 3, Press Release.

The DOE did not follow the Press Release with any report or further discussion of the details or process for its review. As of the date of this Petition, even the Press Release itself is not on the DOE’s website. Instead, the Mayor issued an opaque statement that “we []

⁵⁸ Success Academy – City Hall and Success Academy – Jamaica will be the subject of a separate Commissioner’s appeal.

⁵⁹ *See infra* Argument Part III.B.

review[ed]” the co-locations; “[w]e set out consistent, objective criteria;” and “[m]oving forward we will have a new approach in place.”⁶⁰

Given the timing of the announcement (less than six months before the August 25, 2014 start of Harlem Central’s 2014-2015 school year⁶¹) and the significant difficulty and expense associated with locating a new facility,⁶² the DOE’s announcement effectively closed Harlem Central, one of the top-performing schools in New York State.⁶³

Parents whose children were scheduled to attend Harlem Central in the fall had no warning from the DOE and no opportunity to be heard by any decision-maker. *See* Ex. 1, Parent Affidavits. Now, as the Chancellor put it in a moment of candor that she later regretted, they and Harlem 4 are “on their own”⁶⁴ — with even the deadline for participating in the dismal available alternatives expired.⁶⁵

ARGUMENT

I. THE COMMISSIONER HAS JURISDICTION TO REVIEW THIS PETITION ON AN EXPEDITED BASIS

The Commissioner has jurisdiction to hear this expedited petition under section 2853(3)(a-5) and section 310 of the New York Education Law. N.Y. Educ. Law §§ 2853(3)(a-5); 310. Any party may petition the Commissioner “in consequence of any action . . . [b]y any other official act or decision of any officer, school authorities, or meetings” concerning any

⁶⁰ Rebecca Fishbein, *De Blasio Blocks Expansion of 3 City Charter Schools*, GOTHAMIST, Feb. 27, 2014, available at http://gothamist.com/2014/02/27/de_blasio_blocks_expansion_of_city.php (last visited Mar. 7, 2014) (emphasis supplied).

⁶¹ *See* Hoyt Aff. ¶ 11.

⁶² *See* Ex. 4, Aff. of David Umansky, dated March 7, 2014 (“Umansky Aff.”) ¶¶ 4-5.

⁶³ *See supra* Factual Background Part I.A.2.

⁶⁴ *See supra* note 51.

⁶⁵ *See supra* note 26.

matters under New York Education Law or pertaining to public schools. *Id.* § 310(7). The Commissioner is authorized and required to examine and decide such actions. *Id.* § 310.

Additionally, under New York Education Law § 2853(3)(a-5) and 8 NYCRR § 276.11(b)(1)(i), the petitioners may make an expedited appeal to the Commissioner regarding the failure of the Board of Education to enforce implementation of or compliance with, and the failure of the DOE to implement and comply with, a Building Utilization Plan. N.Y. Educ. Law § 2853(3)(a-5); 8 NYCRR § 276.11(b)(1)(ii).⁶⁶ Appeals timely brought pursuant to these provisions must be considered on an expedited basis. *Id.*

On February 27, 2014, the DOE announced its official, final decision to revoke the co-location of Harlem Central in Building M149/M207. Ex. 3, Press Release. In so doing, the DOE fully manifested its intent and determination not to implement and comply with the final October 15, 2013 determination of the PEP to co-locate Harlem Central in M149/M207, and not to implement and comply with the approved EIS and BUP related to the Harlem Central co-location. *See id.* By virtue of its decision, the DOE inflicted an actual injury on the Parent Petitioners, whose children can no longer attend Harlem Central and who have not pursued other options for the upcoming school year, and on Harlem Central, which has hired personnel and taken other concrete steps in reliance on the co-location that has now been revoked. *See Essex County v. Zagata*, 91 N.Y.2d 447, 453, 672 N.Y.S.2d 281, 284 (N.Y. 1998) (administrative action is final for purposes of review when “the decisionmaker has arrived at a definitive

⁶⁶ Moreover, a “final determination” by the Panel for Education Policy (“PEP”) to co-locate a charter school in a public school building is entitled to expedited review before the Commissioner. N.Y. Educ. Law § 2853(3)(a-5); 8 NYCRR 276.11(b)(1)(i). The PEP issued its final determination on October 15, 2013. On February 27, 2014, when the DOE officially announced its determination not to enforce the PEP’s October 15, 2013 approval of the Harlem Central co-location, it effectively, although not legally, usurped the role of the PEP as the body determining whether to approve or reject a co-location under New York Education Law § 2853(3)(a-5). Therefore, all claims brought in this proceeding, as they arise out of this improper DOE action, are entitled to expedited review on this basis as well.

position on the issue that inflicts an actual, concrete injury” (internal quotations and brackets omitted)); *see also Appeal of K.W.*, Comm’r’s Decision No. 16,457, 2013 WL 865602, at *3 (Feb. 21, 2013) (acknowledging that the charter school’s rights would be adversely affected if a co-location determination were overturned).

Accordingly, the Commissioner has jurisdiction to review this appeal on an expedited basis.

II. THE DOE’S DECISION TO REVOKE THE HARLEM CENTRAL CO-LOCATION WAS CONTRARY TO LAW

The DOE’s revocation of the co-location of Harlem Central in M149/M207 violated the New York Education Law because the DOE failed to conduct the diligence and hearings required for such a significant change in school utilization, *particularly* one that will result in effectively closing one of the most successful schools in the state. N.Y. Educ. Law § 2590-h(2-a); *see also Appeal of Robert E. Riccobono*, Comm’r’s Decision No. 14,485, 2000 WL 35921532, at *3 (Nov. 22, 2000); *Board of Educ. of Lawrence Union Free Sch. Dist. No. 15 v. McColgan*, 18 Misc. 3d 572, 575 (Sup. Ct. Albany Co. 2007); *In the Matter of Little Falls City Sch. Dist. v. Ambach*, 68 A.D.2d 995 (3d Dept. 1979) (“A full review of the record supports the determination of the Commissioner setting aside the [Board of Education’s] decision . . .”). The DOE’s revocation must therefore be overturned.

A. The Revocation Was Contrary to Law Because Respondents Failed to Comply With Procedural Requirements for a Significant Change in School Utilization, and Due Process Requirements

1. Respondents Failed to Prepare an EIS and Hold a Joint Public Hearing and PEP Vote

The Chancellor violated the New York Education Law by failing to prepare an EIS before revoking the Harlem Central co-location. Under the New York Education Law, the Chancellor has a “duty to”:

[n]otwithstanding any other provision to the contrary, prepare an educational impact statement regarding any proposed school closing or significant change in school utilization, including the phase-out, grade reconfiguration, re-siting, or co-location of schools, for any public school located within the city district.

N.Y. Educ. Law § 2590-h(2-a)(a). In other words, an EIS must be prepared “regarding any” significant change in school utilization, which “includes” but is not limited to “co-location of schools.” *See id.* (emphasis supplied).

Similarly, altering the grades offered at an existing school constitutes a “significant change in school utilization” that requires the preparation of an EIS. *See Appeal of Santos*, Comm’r’s Decision No. 16,116, 2010 WL 8056483, at *4 (Aug. 2, 2010) (finding expansion of grade levels at charter school effected “a significant change in school utilization” requiring preparation of EIS).

New York Education Law specifically defines the information that the Chancellor must provide to the public in an EIS regarding a significant change in school utilization or a school closing. In particular, the EIS must describe, *inter alia*:

- (i) . . . the ramifications of such school closing or significant change in school utilization upon the community . . . the potential disposability of any closed school;
- (ii) the impacts of the proposed school closing or significant change in school utilization to any affected students . . . ;
- (iv) the effect of such school closing or significant change in school utilization on personnel needs, the costs of instruction, administration, transportation, and other support services . . . ;
- (vi) the ability of other schools in the affected community district to accommodate pupils following the school closure or significant change in school utilization; and
- (vii) information regarding such school’s academic performance including whether such school has been identified as a school under registration review or has been identified as a school requiring academic progress, a school in need of improvement, or a school in corrective action or restructuring status.

N.Y. Educ. Law § 2590-h(2-a)(b). This is exactly what was included in the EIS proposing to co-locate Harlem Central in M149/M207 that was published for public comment in August 2013.

See Ex. 7, Harlem Central EIS.

Moreover, the EIS must be publicly available “at least six months in advance of the first day of school in the succeeding school year.” *Id.* § 2590-h(2-a)(c). In addition, the Chancellor is required to follow a specific process relating to soliciting public comment on an EIS, including, amongst other requirements: “hold[ing] a joint public hearing . . . [to] allow all interested parties an opportunity to present comments or concerns regarding the proposed school closing or significant change in school utilization.” N.Y. Educ. Law § 2590-g(8) (requirement for a public review process). The PEP must then approve the proposal. N.Y. Educ. Law § 2590-h(2-a)(d) (requirement for PEP approval), (e); § 2590-g(1)(h) (same). All of these procedures and requirements were followed leading up to the PEP’s October 15, 2013 approval of the Harlem Central co-location.

Yet the Chancellor and the DOE failed to comply with any of these mandated procedural requirements when they unilaterally announced that they had secretly conducted a “review” of earlier approvals using unpublished criteria, and, on that basis, were revoking the PEP’s approval of Harlem Central’s co-location. No EIS—or even a proposal to revoke Harlem Central’s co-location—was ever published for public comment or analysis, or submitted to the PEP for a vote. Such failure is manifestly contrary to the law, and the DOE’s action must be overturned. *See Appeal of Espinet*, Comm’r’s Decision No. 16,212, 2011 WL 6144226, at *10 (Mar. 31, 2011) (reversing DOE’s final action due to its “substantive failure to analyze the impact of a significant change in school utilization on the affected students” and the DOE’s “failure to comply with the statute’s requirements”).

2. Respondents Have Denied Harlem Central Due Process As Required By Law

The DOE has further deprived Harlem Central of its right to due process, which includes the right to adequate notice and a meaningful opportunity to be heard prior to the revocation of its co-location in M149/M207. *See* U.S. Const. amend. XIV; N.Y. Const. art. I, § 6.

The PEP vote on October 15, 2013 approving Harlem Central’s co-location in M149/M207 effectively created a “license” under applicable law. *See* N.Y. A.P.A. § 102(4) (defining a “license” as “the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law”) (emphasis supplied).

“[O]nce the government has granted . . . [a] license to an individual, the government cannot deprive the individual of such an interest without appropriate procedural safeguards.” *Patgin Carriages Co. v. NYC Dept. of Health*, 28 Misc. 3d 1229(A), 2010 WL 3420457, at *7 (Sup. Ct. N.Y. Cty. 2010) (citing *Spinelli v. City of N.Y.*, 579 F.3d 160, 169 (2d Cir. 2009)) (internal quotation marks, brackets, and ellipses omitted); *see also Malley & Argyle Home Imp., Inc. v. Farley*, 32 Misc. 3d 819, 825-26, 927 N.Y.S.2d 757, 764 (Sup. Ct. Nassau Cty. 2011) (holding the same, distinguishing between a “possible future license,” in which “an individual has no property right” and a license “the government has granted,” in which an individual has a property right).

Here, the provisions of New York Education Law not only create an entitlement for Harlem Central, but expressly require the Chancellor to follow significant and meaningful procedures before revoking an earlier co-location decision, making it apparent that Harlem Central has a vested interest in that decision. *See* N.Y. Educ. Law § 2590-h(2-a)(a)-(e); *see also Daxor Corp. v. N.Y. Dept. of Health*, 90 N.Y.2d 89, 98 (N.Y. 1997) (“In considering whether a legitimate claim of entitlement, or right, is granted by State law, the focus is on the relevant

statute, regulation, or contract establishing eligibility for the benefit at issue.” (internal quotation marks and citation omitted)). Specifically, Harlem Central has a state-created property interest that arose by virtue of the New York Education Law, which requires the DOE to prepare an EIS “regarding any proposed . . . significant change in building utilization,” including co-location revocations, and hold a joint public hearing and PEP vote concerning the revocation. N.Y. Educ. Law § 2590-h(2-a).

Indeed, the Commissioner has acknowledged that a cognizable right attaches upon the PEP approval, as he has repeatedly recognized that charter schools are necessary parties to co-location appeals because their rights are implicated. *See, e.g., Appeal of K.W.*, Comm’r’s Decision No. 16,457, 2013 WL 865602, at *3 (Feb. 21, 2013) (“In a co-location appeal, a determination in the petitioner’s favor could adversely affect the charter school. A party whose rights would be adversely affected by a determination of an appeal in favor of a petitioner is a necessary party and must be joined as such.” (citations omitted)); *Appeal of Amponsah*, Comm’r’s Decision No. 16,549, 2013 WL 5373608, at *4 (Sept. 12, 2013) (“As the charter school was not clearly named in the caption as a respondent, the appeal must be dismissed for failure to join a necessary party.”).

Harlem Central relied on the statutory co-location process that culminated in the PEP’s October 15, 2013 approval by proceeding with staffing plans, including extensive recruitment activities and the hiring of a new principal, teachers, and other staff in anticipation of its August 2014 opening in M149/M207. Hoyt Aff. ¶ 12. The Parent Petitioners also took steps to plan for the upcoming school year believing that, as their children would be attending Harlem Central, they did not need to make alternative plans for their children’s education. *See* Ex. 1, Parent Affidavits.

In view of the property right Harlem Central holds in the M149/M207 co-location, Harlem Central is entitled to due process of law before being deprived of its authorized co-located space, including notice and an opportunity to be heard. *See Daxor Corp. v. N.Y. Dept. of Health*, 90 N.Y.2d 89, 98 (N.Y. 1997) (“existing licenses cannot be revoked without a hearing”). Respondents deprived Harlem Central of this right in direct contravention to the law, and, on these grounds alone, the Chancellor’s revocation of the Harlem Central co-location should be reversed.

B. The Revocation Was Contrary to Law Because the DOE Failed to Comply With Procedural Requirements for School Closures

The Respondents’ decision to overturn the approval of Harlem Central’s co-location effectively closes one of the highest-performing schools in the state. Harlem Central is not situated to open in August 2014 if it cannot co-locate in M149/M207. Hoyt Aff. ¶ 13. There are precipitous challenges to locating appropriate private space at this late stage, less than six months before the start of the next school year, including exorbitant costs and the difficulty of finding appropriate space in or near Harlem. Umansky Aff. ¶¶ 4-5.

The process of identifying, leasing, designing, improving and financing an appropriate replacement facility in private space would take significantly longer than six months, and would be cost prohibitive given the sky-high costs of the New York real estate market. Umansky Aff. ¶¶ 4-5. Charter schools already receive 30% less funding per pupil than their traditional public school counterparts, and receive no funding for facilities.⁶⁷ In order to make up this funding gap,

⁶⁷ The statutory funding formula used to calculate charter school tuition excludes any funding for facilities. N.Y. Educ. Law § 3602(1)(t)(3) (excluding from the Approved Operating Expense “any payments for capital outlays and debt service for school building purposes.”). In 2010-2011, the DOE spent \$18,598 per pupil, and charter schools in New York City received \$13,527 per pupil, almost 30% less. *See School Based Expenditure Reports School Year 2010-11*, NYC Dept. of Educ., available at https://www.nycenet.edu/offices/d_chanc_oper/budget/exp01/y2010_2011/function.asp?R=3 (last visited

charter schools must do more with less, or raise private funds to bring to children the level and quality of education they are entitled to. Even if Harlem Central were able to find a replacement facility within this impossible timeframe, the inflated cost would be prohibitive. Hoyt Aff ¶ 13; *see also* Umansky Aff. ¶¶ 4-5. Given the substantial resources that would be required to be diverted from academic and enrichment programming, its longer school day, necessary staffing, and so on, Harlem Central simply could not continue and would be forced to close. Hoyt Aff. ¶ 13.

Given that the DOE is effectively closing Harlem Central, the DOE was not only required to comply with the procedures outlined under New York Education Law § 2590-h(2-a), it also had to comply with additional DOE procedures and protocols governing school phase-outs and closures.⁶⁸

The Chancellor’s Regulations provide guidance on the additional analysis required for an EIS relating to a school closing.⁶⁹ The EIS must provide: (1) a “description of the accountability criteria that informed the phase-out proposal,” (2) an “explanation of Persistently lowest Achieving designation (if applicable),” (3) a summary of “significant steps taken by DOE to improve school performance before decision to seek phase-out was reached,” and (4) “school

Mar. 7, 2014); *Final 2010-11 Charter School Basic Tuition*, NY State Educ. Dept., *available at* https://stateaid.nysed.gov/charter/html_docs/charter_1011_final.htm (last visited Mar. 7, 2014).

⁶⁸ *See Support and Intervention at Schools*, NYC Dept. of Educ., *available at* <http://schools.nyc.gov/community/planning/support+and+intervention.htm> (last visited Mar. 7, 2014); *see, e.g.*, Kim Affirm. Ex. 13 (Educational Impact Statement, Building M030, dated December 10, 2010) (“KAPPA II EIS”) at 2.

⁶⁹ NYC Dept. of Educ. Regulation of the Chancellor No. A-190 (“Reg. A-190”), Attachment No. 1A, at 1, *available at* <http://docs.nycenet.edu/docushare/dsweb/Get/Document-341/A-190%20FINAL.pdf> (last visited Mar. 7, 2014).

performance information that led to proposal and involvement of community prior to recommendation.”⁷⁰

Moreover, for schools meeting school closure criteria, the DOE initiates “a comprehensive review . . . with the goal of determining what intensive supports and interventions would best benefit its students and the . . . community.”⁷¹ This review includes:

- a. Analyzing the school’s recent historical performance and enrollment data,
- b. Analyzing efforts already underway to improve the schools,
- c. Consulting with superintendents and experienced educators, and
- d. Gathering community feedback.⁷²

None of the above-required analysis or additional review was conducted for Harlem Central.⁷³ Had the DOE conducted any such analysis or review, it would have reflected that Harlem Central, based on its extraordinary student outcomes, should not have been targeted for closure. The DOE’s failure to afford Harlem Central the additional process and protections afforded school closures and phase-outs under the Respondents’ own policies and protocols is contrary to law. *See* N.Y. Educ. Law § 2590-h; *see also Harner v. County of Tioga*, 5 N.Y.3d 136, 140, 800 N.Y.S.2d 112, 114 (N.Y. 2005) (citing U.S. Const. amend. XIV; N.Y. Const. art. I, § 6). For this reason as well, the Respondents’ decision must be reversed.

⁷⁰ *Id.*

⁷¹ *See* Ex. 13, Kappa II EIS at 2; *see also* Kim Affirm. Ex. 14 (Amended Educational Impact Statement, Building K009, dated January 21, 2011) at 2-3; Kim Affirm. Ex. 15 (Educational Impact Statement, Building X183, dated February 5, 2013) at 2; Notice: Closure of Academy of Business and Community Development, at 2-3 (Dec. 19, 2011), *available at* http://schools.nyc.gov/NR/ronlyres/442F7C27-FD97-4B1A-91EA-28D53BC9B394/116373/13K336ABCDClosurePEP_Notice_Vfinal1.pdf (last visited Mar. 7, 2014); *Support and Intervention at Schools*, NYC Dept. of Educ., *available at* <http://schools.nyc.gov/community/planning/support+and+intervention.htm> (last visited Mar. 7, 2014).

⁷² *Support and Intervention at Schools*, NYC Dept. of Educ., *available at* <http://schools.nyc.gov/community/planning/support+and+intervention.htm> (last visited Mar. 7, 2014).

⁷³ *Cf. Appeal of M.S.*, Comm’r’s Decision No. 16,420, 2012 WL 5358754, at *4 (Oct. 5, 2012) (finding that DOE’s decision to close a school was not arbitrary and capricious and noting that the DOE “[a]nalysis was 12 pages long and comprehensively addressed performance issues at the school”).

III. THE DOE'S DECISION TO REVOKE THE HARLEM CENTRAL CO-LOCATION WAS ARBITRARY AND CAPRICIOUS

The DOE's revocation of the PEP's decision to co-locate Harlem Central was also arbitrary and capricious, and was made without a rational basis; therefore, it must be nullified on this ground as well. *See Appeal of Malone*, Comm'r's Decision No. 14,194, 1999 WL 35132780 (Aug. 19, 1999); *Appeal of Burnett*, Comm'r's Decision No. 13,164, 1994 WL 16854635 (Apr. 29, 1994).

To evaluate whether a determination is "arbitrary and capricious," a reviewing body must analyze "whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact." *Ador v. Div. of Hous. and Cmty. Renewal*, 25 A.D.3d 128, 139 (2d Dept. 2005) (citing *Pell v. Board of Educ.*, 34 N.Y.2d 222, 231 (1974)) (emphasis supplied). An administrative decision or action is arbitrary if it is "without sound basis in reason and is generally taken without regard to the facts." *Id.* (emphasis supplied). Furthermore, if there is evidence that an agency determination intended to unfairly target a particular individual or entity, that determination is "arbitrary and capricious." *See, e.g., Diaz v. Board of Educ. of City of New York*, 162 Misc.2d 998, 1003 (Sup. Ct. Kings Co. 1994) (overturning NYC DOE scholastic sports administrative rule for being "arbitrary and capricious, and discriminatorily imposed" upon petitioner because record indicated the rule was "imposed against [petitioner] and no other school"). DOE determinations related to school sitings, co-locations, or closures are also subject to an arbitrary and capricious standard. *See Appeal of Torres*, Comm'r's Decision No. 15,515, 2007 WL 7617517 (Jan. 11, 2007) ("respondent's decision to reorganize its schools [cannot be] arbitrary, capricious or contrary to sound educational policy").

The DOE’s final determination to revoke Harlem Central’s co-location in M149/M207 was arbitrary and capricious and lacked a rational basis. A reasonable observer must conclude that the sudden change, resulting in the revocation of three Success Academy co-locations, arose not from a rational basis in fact, but from a change in personnel, who had previously publicized negative statements toward Success Academy schools and their founder.⁷⁴ Remarkably, when the DOE released new criteria for evaluating co-locations, and simultaneously applied these criteria to revoke co-locations that had already been approved, the only charters whose co-locations were reversed were Success Academy schools. *See* Ex. 3, Press Release. And, the only existing school that had its co-location revoked was Harlem Central—a Success Academy school. *Id.*

Both the criteria themselves and the application of the criteria by the DOE were arbitrary and capricious, and without rational basis. The determination to revoke Harlem Central’s co-location must, therefore, be nullified. *See Pell v. Board of Educ.*, 34 N.Y.2d 222 (1974).

A. The DOE’s Retroactively Applied Co-location Criteria Are Arbitrary and Capricious and Lack a Rational Basis

In its February 27 press release, without any explanation or analysis, the DOE set forth certain criteria it claims it considered during the “review” it had conducted behind closed doors: (1) no elementary schools are permitted to be co-located in high school buildings, (2) small schools, serving under 250 students, are disfavored, (3) co-locations that would require significant capital work or substantial dislocation to existing schools in the building are disfavored, and (4) no co-locations that result in reduced seats for District 75 students are permitted. *See* Ex. 3, Press Release.

⁷⁴ *See supra* Factual Background Part IV.

It must be emphasized at the outset that these considerations are exactly the types of considerations that are often raised by the public and considered by the PEP prior to its vote on a co-location. *See, e.g.*, Ex. 10, Harlem Central Public Comment Analysis. Indeed, the DOE’s detailed 24-page EIS proposing the Harlem Central co-location, and the 27-page BUP approved by the PEP, included analysis on much of the criteria above, as did the Public Comment Analysis that the DOE published prior to the PEP’s October 15, 2013 vote. *See* Ex. 7, Harlem Central EIS; Ex. 8, Harlem Central BUP; Ex. 10, Harlem Central Public Comment Analysis. Therefore, although the Press Release treated these criteria as new considerations, they were not. They had been considered and addressed at the time set by the New York Education Law—during the PEP process.

But in addition to the above criteria, in approving the Harlem Central co-location, the DOE also considered the strong academic track record of Harlem Central, concluding that the DOE “intended to create a long-term site for SA – Harlem 4’s students in grades five through eight and allow [Success Academy] to continue providing high-quality educational opportunities for students in Manhattan.” Ex. 7, Harlem Central EIS at 3-4. In other words, the DOE took into consideration how successfully the school educated its students—inarguably, what should be the most important consideration, and the consideration most arbitrarily absent from the DOE’s criteria set forth in the Press Release. Instead, the DOE relied upon four purportedly new criteria that were demonstrably arbitrary and capricious.

B. Criterion 1: No Elementary Schools Co-located with High Schools

The first criterion applied by the DOE is that no elementary schools should be co-located with high schools. Ex. 3, Press Release.

The DOE itself acknowledged in its February 27, 2014 e-mailed press release setting forth the co-location criteria that “there are examples where [the co-location of elementary schools with high schools] can be effective.” *Id.* In fact, the DOE has regularly co-located elementary schools with high schools and, furthermore, expressly stated that it has experienced no particular issues or concerns with elementary schools sited with high schools. For example, when proposing to site Success Academy Charter School – Upper West, an elementary school, with Louis D. Brandeis High School and four other high schools in 2011, the DOE noted the following:

Currently, the DOE manages other campuses where elementary schools are co-located with high schools, including the Julia Richman Educational Complex (the “Richman Campus”), which houses Ella Baker (a K-8 school), four high schools, and part of a District 75 special education program; Building M013, which houses Central Park East I Elementary School, Central Park East High School, and a middle school; and the Adlai Stevenson Campus (the “Stevenson Campus”) which houses eight high schools, an Alternative Learning Center, and the full-day pre-Kindergarten sections of elementary school P.S. 138. . . . Based on its experiences with these co-locations, none of these co-locations have presented any unusual problems due to the co-location of elementary age students with high school age students.⁷⁵

The DOE has repeatedly reiterated this view,⁷⁶ and a top DOE official even submitted a sworn statement to the Commissioner underscoring this point: “Moreover, DOE’s chief portfolio officer indicated in her affidavit that multiple schools in the city with elementary and high school

⁷⁵ Kim Affirm. Ex. 16 (Revised Educational Impact Statement, Building M470, dated June 6, 2011) at 8 (emphasis supplied).

⁷⁶ See, e.g., Kim Affirm. Ex. 17 (Educational Impact Statement, Building M045, dated February 29, 2012) at 5 (“The DOE is not aware of any unusual discipline problems caused by the co-location of elementary age students with high school age students”). See also Educational Impact Statement: The Proposed Re-siting and Co-location of Harlem Success Academy Charter School 3 (84M385) in Building M099, March 16, 2012, at 7 (Mar. 16, 2012), available at http://schools.nyc.gov/NR/rdonlyres/811AB883-1E56-49E7-A515-C9BD36AA5C2F/121799/REVISED_EISHSA3M099_vfinal.pdf (last visited Mar. 7, 2014); Amended Second Revised Educational Impact Statement: The Proposed Co-location of a New Public Charter School, Success Academy Charter School – Manhattan 2 (84MTBD) in Building M625, December 18, 2012, at 6 (Dec. 18, 2012), available at <http://schools.nyc.gov/NR/rdonlyres/8B6C9413-80AE-4624-8EE3-ECBB2B301134/136048/84MTBDSuccessManhattan2vFINAL.pdf> (last visited Mar. 7, 2014).

students located on one campus have maintained safety on campus.” *Appeal of Jumane D. Williams*, Comm’r’s Decision No. 16,548 (Sept. 5, 2013).

In fact, over the past four years, the DOE has approved the co-location of at least 30 elementary schools in buildings that simultaneously serve high school students.⁷⁷ Notably, throughout the city, elementary school and high school students learn on shared campuses, including public schools, public charter schools, and private schools that serve kindergarten through high school grades.⁷⁸

Success Academy schools’ experiences in buildings where its elementary schools are co-located with high schools further underscores the lack of rationality in the DOE’s criterion. Far from posing issues, the presence of Success Academy elementary schools in the buildings has served to improve stability and order within the buildings. Hoyt Aff. ¶ 14. Additionally, these co-locations have presented unique opportunities for elementary students and high school students to build a cohesive school community spanning the full range of ages. *Id.* For example, high school students have volunteered with, read to, and sang holiday carols for Success Academy elementary school students. *Id.* The elementary and high schools have benefited from each other’s arts programs, including attending concerts. *Id.* Each of these buildings has a richer school environment attributable to the combination of elementary students with high school students. *Id.*

⁷⁷ See Kim Affirm. Ex. 18 (Elementary and High School Co-locations Approved by the Panel for Educational Policy).

⁷⁸ See *Campus Schools Home*, Hunter College Campus Schools, available at <http://www.hunterschools.org/home> (last visited on Mar. 7, 2014); *Contact, Promise Academy Charter Schools*, available at <http://www.hczpromiseacademy.org> (last visited on Mar. 7, 2014); *All About Trinity*, Trinity School, available at <http://www.trinityschoolnyc.org/podium/default.aspx?t=143406> (last visited Mar. 7, 2014); *Campus Tour*, Marymount School of New York, available at <http://marymountnyc.org/admissions/campus> (last visited Mar. 7, 2013).

The evidence thus reflects that the practice of co-locating elementary schools with high schools is commonplace⁷⁹ and without any unusual incident, as the DOE has repeatedly recognized.⁸⁰

The DOE's only basis for its new "first criterion" was that "we have heard concerns from high school communities, as well as elementary level ones." Ex. 3, Press Release. It is hard to believe that the DOE actually "heard" such concerns during its review, since it did not conduct any hearings, did not solicit any community comment, and did not make any administrative record documenting any such concerns. In light of the DOE's own assertions that elementary-high school co-locations "have [not] presented any unusual problems" and in the face of extensive evidence that elementary-high school co-locations work, the DOE's explanation is "without foundation in fact." See *Pell*, 34 N.Y.2d at 231; *Diaz*, 162 Misc. 2d at 1003.

Therefore, the criterion that elementary schools should not be co-located with high schools lacks any factual or rational basis and is thus arbitrary and capricious. See *Pell*, 34 N.Y.2d at 231; *Diaz*, 162 Misc. 2d at 1003.

C. Criterion 2: Disfavor of Small Schools, Under 250 Students

The second criterion applied by the DOE is that small schools, under 250 students, are disfavored. Ex. 3, Press Release. The only explanation offered by the DOE was that "[v]ery

⁷⁹ Indeed, many private schools in New York City also successfully serve kindergarten through 12th grades in the same building. See, e.g., *Spence School: About Spence School – School Profile*, The Spence School, available at http://www.spenceschool.org/about_spence/school_profile/index.aspx (last visited Mar. 7, 2014); *Avenues: Our Building*, Avenues, available at http://www.avenuesnyc.org/about/our_building (last visited Mar. 7, 2014); *Friends Seminary – Our Mission*, Friends Seminary NYC, available at <http://www.friendsseminary.org/podium/default.aspx?t=138387> (last visited Mar. 7, 2014); *Chapin School: About Chapin*, The Chapin School, available at <http://www.chapin.edu/page.cfm?p=280> (last visited Mar. 7, 2014); *About Browning*, The Browning School, available at <http://www.browning.edu/about-browning> (last visited Mar. 7, 2014). See also Kim Affirm. Ex. 18 (Elementary and High School Co-locations Approved by the Panel for Educational Policy).

⁸⁰ See *supra* note 75.

small schools under 250 students may have difficulty providing the range of support needed to serve our students effectively.” *Id.* The DOE did not state whether “small schools under 250 students” includes schools that are expanding as new grade levels are added. Harlem Central currently serves approximately 120 students, but is projected to ultimately grow to 375 students when its middle school grades are fully phased in during the 2018-2019 school year. *See* Harlem Central BUP at 19. It therefore appears that the DOE intended to include expanding schools. *Id.*

The “more than 250” requirement thus effectively forces charter schools to open anew with 250 students or risk being ousted, which is neither rational nor practical. Most charters start with only kindergarten and first grades, phasing in one additional grade each year as the schools scale to capacity.⁸¹ Existing elementary schools expanding to middle school grades necessarily start with only a single grade (attended by their oldest former elementary students), and then continue to add grades as students grade up. Bizarrely, under the DOE’s “more than 250” requirement, new elementary or middle schools that open with only one grade level are at risk of eviction simply because their students are not yet old enough to immediately fill the school to capacity.

The “more than 250” criterion is also arbitrary and capricious in that it is directly contrary to the purpose of the Charter Law. Pursuant to the New York Education Law, if enrollment at a charter school exceeds 250 students within the first two years of operation, the

⁸¹ Amended Educational Impact Statement: Co-location of East Harlem Scholars Academy Charter School II in M013, at 1 (Mar. 1, 2013) *available at* <http://schools.nyc.gov/NR/rdonlyres/BF115982-FF79-4522-AA19-1F9BE2F133D8/140222/EHS2EISvFINAL4.pdf> (last visited Mar. 7, 2014); Educational Impact Statement: Co-location of Girls Preparatory Charter School of the Bronx in X052, at 1 (Nov. 5, 2012), *available at* http://schools.nyc.gov/NR/rdonlyres/8B6C9413-80AE-4624-8EE3-ECBB2B301134/133387/EIS_GirlsPrepExpansionX052_1220_vfinal.pdf (last visited Mar. 7, 2014); Educational Impact Statement: Co-location of PAVE II Charter School in K111, at 2 (May 3, 2013) *available at* http://schools.nyc.gov/NR/rdonlyres/D5369995-5FC0-41F8-BF1A-6E8BAC200A23/144107/EIS_PAVEIIK5K111_FINAL1.pdf (last visited Mar. 7, 2014).

school's teachers are automatically unionized.⁸² See N.Y. Educ. Law § 2854(3)(b-1). The DOE's "more than 250" criterion, therefore, sharply penalizes non-unionized schools. This is an inappropriate end run around charter law, which was intended to free charters from onerous collective-bargaining agreements that are imposed on traditional public schools, and that advance the interests of adults (and their associations) over the interests of children. See N.Y. Educ. Law §§ 2850; 2854(1). If this criterion is applied without exception (which remains unclear absent any explanation or record by the DOE), new charters must now choose between automatic unionization of its teachers or having the DOE revoke, or reject, its co-location. For these reasons, it is patently irrational, arbitrary, and capricious.

D. Criterion 3: Disfavor of Co-locations Depending On Significant Capital Work or Requiring Substantial Dislocation of Existing Schools in the Building

The DOE's third criterion disfavors co-locations that depend on significant capital work or require substantial dislocation to existing schools in the building. Ex. 3, Press Release.

This third criterion appears to build on the Mayor's prior criticism singling out Success Academy's capital improvement spending.⁸³ Like other schools, Success Academy makes necessary capital improvements and facilities upgrades whenever a Success Academy school enters a new building in order to help create a hall of learning for its students. Hoyt Aff. ¶ 15. In fact, capital improvements are necessary whenever a school is co-located within a building regardless of the entity responsible for the co-location. The DOE typically spends well over

⁸² Information on the 250 student threshold for charter schools is widely available to the public, the DOE, and the teacher's union. See, e.g., *Guide to Charter Schools in New York State*, The Office of Innovative Schools Models, NY State Educ., Dept., 2011, available at <http://www.p12.nysed.gov/psc/documents/csparentguide.PDF> (last visited Mar. 7, 2014).

⁸³ See, e.g., *De Blasio Demands Investigation*, NYC Public Advocate Website, Apr. 22, 2013, available at <http://archive.advocate.nyc.gov/news/2013-04-22/de-blasio-demands-investigation-reports-toxic-chemicals-were-removed-only-charter-sc> (last visited Mar. 7, 2014) (alleging "inequities in capital improvements between co-located Success Academy charter schools and public schools").

\$100,000 in start-up costs to co-locate just one new district school,⁸⁴ and will spend up to \$400,000 in start-up costs co-locating the three new schools that are replacing two Success Academy charter school co-locations that were revoked on February 27.⁸⁵

Nothing could be more arbitrary and capricious than preventing Success Academy schools—or other charter schools—from spending their own funds (as they must, since they receive no public funding for this purpose) to upgrade the public school facilities in which they co-locate. *See* Hoyt Aff. ¶ 15. Charter school students are public school students (principally minority and low-income), and they benefit from these important facilities improvements. *Id.* Additionally, when the DOE moves charter schools to different buildings, the DOE retains the benefit of the improvements and upgrades.⁸⁶ *Id.* ¶ 17. A criterion that deprives public charter students of facilities improved at charter schools' (not DOE's) expense can have no legitimate justification, and thus this third criterion is arbitrary and capricious.

⁸⁴ *See, e.g.*, Educational Impact Statement: Co-location of Two District High Schools in M520, at 26-27 (Mar. 4, 2014) *available at* http://schools.nyc.gov/NR/rdonlyres/1DD21B74-8CFD-415B-8200-7F9F3B324068/160168/M520EIS_vFINAL.pdf (last visited Mar. 7, 2014); Educational Impact Statement: Co-location of District High School in Q400, at 18-19 (Mar. 4, 2014) *available at* http://schools.nyc.gov/NR/rdonlyres/1DD21B74-8CFD-415B-8200-7F9F3B324068/160158/Q400_Colocation_EIS_vfinal.pdf (last visited Mar. 7, 2014).

⁸⁵ *See* Educational Impact Statement: Co-location of Two District High Schools in M520, at 26-27 (Mar. 4, 2014) *available at* http://schools.nyc.gov/NR/rdonlyres/1DD21B74-8CFD-415B-8200-7F9F3B324068/160168/M520EIS_vFINAL.pdf (last visited Mar. 7, 2014); Educational Impact Statement: Co-location of District High School in Q400, at 18-19 (Mar. 4, 2014) *available at* http://schools.nyc.gov/NR/rdonlyres/1DD21B74-8CFD-415B-8200-7F9F3B324068/160158/Q400_Colocation_EIS_vfinal.pdf (last visited Mar. 7, 2014).

⁸⁶ The DOE has moved four elementary schools operated by Success Academy from one location to another. Hoyt Aff. ¶ 17. A fifth elementary school, Success Academy Charter School – Crown Heights, will move into a new building this summer. *See* Educational Impact Statement for the Resiting of Success Academy Charter School – Crown Heights from DOE public school building K167 to building K161 (Aug. 30, 2013), *available at* http://schools.nyc.gov/NR/rdonlyres/7AC20E2C-5933-4F54-806B-DA19BE3A9C55/149510/EISResitingandCoLocationofSACrownHeightsK161_vFina.pdf (last visited Mar. 7, 2014); Hoyt Aff. ¶ 17. Each move leaves behind substantial improvements and upgrades that were undertaken at the Success Academy school's expense. *Hoyt Aff.* ¶ 17.

E. Criterion 4: No Reduced Seats for District 75 Students

The fourth criterion is that no co-locations will result in reduced seats for District 75 students. Ex. 3, Press Release.

In setting forth this criterion, the DOE provided no rationale for its sweeping statement that it will “not reduce seats” for District 75 students within a particular building. *See id.*

Importantly, DOE has addressed considerations regarding District 75 programs in other ways.

For example, in the EIS proposing to co-locate Harlem Central in M149/M207, the DOE explained the following:

In addition to the existing District 75 schools across Manhattan, there are three new school buildings opening in 2013-2014 and 2014-2015 that will be able to accommodate new District 75 students. Based on the School Constructive Authority’s Programs of Requirements for each new building in Manhattan, these three new school building have a combined target capacity to serve 180 District 75 students. . . .

Ex. 7, Harlem Central EIS, at 12 n. 25. The DOE further noted that “there will continue to be an excess of District 75 seats in Manhattan. This means that there will be sufficient District 75 capacity in Manhattan to meet the needs of future District 75 students.” *Id.* at 12.

As with the other “criteria,” the DOE made no record of any kind explaining why it was changing course. It said only that “we will not reduce seats” in any building for District 75 students. The DOE’s new inflexibility with respect to this criterion is without regard to the facts previously found by the DOE, such as whether there remain sufficient (or an excess of) District 75 seats across Manhattan. Such a criterion entirely lacks a sound basis. *See Enide v. N.Y.C. Emp. Ret. Sys.*, 26 Misc. 3d 1236(A), 907 N.Y.S.2d 436 at *5-6 (Sup. Ct. Kings Cty. 2010) (vacating agency decision because agency relied upon “only those tests and reports that supported its [finding] and ignored those tests and reports that contradicted its position” and thus findings were “unsupported by any credible evidence”).

F. The DOE’s Final Determination to Oust Harlem Central Based on Its Own Criteria Was Arbitrary and Capricious

Even assuming *arguendo* that the DOE’s criteria were lawful, the decision to revoke the co-location of Harlem Central, allegedly on the basis of these four criteria, was arbitrary and capricious. It is impossible to know which criteria the DOE applied in its review of Harlem Central, specifically because the DOE made no record explaining its decision as to each school, let alone Harlem Central. However, none of the criteria fairly or reasonably apply to Harlem Central.

In regard to the first criterion, Harlem Central is not an elementary school moving into a high school building. The oldest grade served in M149/M207 is eighth grade; there are no high schools that co-locate in M149/M207. *See* Ex. 7, Harlem Central EIS at 4. Thus, Harlem Central’s co-location approval could not have been revoked on this ground.⁸⁷

Harlem Central’s co-location also passes the DOE’s “more than 250” criterion as well. Harlem Central will serve approximately 335 to 375 students at full scale, and will cross the 250-student threshold starting in August 2016. Ex. 8, Harlem Central BUP at 13, 19. To the extent that the DOE determined that Harlem Central failed the “more than 250” criterion because its enrollment was projected at 180-210 students during the 2014-2015 school year, a significant number of the other 49 co-locations also failed this requirement, with projected enrollments for many of them targeted at less than 250 during the 2014-2015 school year while phasing in.⁸⁸

⁸⁷ In any event, it appears that the DOE applied this criterion arbitrarily, if at all. For example, on October 30, 2013, the PEP approved the co-location of another charter school in a building that houses a high school. Kim Affirm. Ex. 19 (Educational Impact Statement, Building K166, dated September 13, 2013) at 1. Despite the co-location of high school and elementary students in one building, the DOE did not reverse that co-location on February 27, 2014. *See* Ex. 3, Press Release. Instead, it announced that it would be implemented. *Id.*

⁸⁸ *See, e.g.*, Educational Impact Statement: The Proposed Opening and Co-location of New District Elementary School 28Q312, at 3 (Aug. 29, 2013) *available at* <http://schools.nyc.gov/NR/ronlyres/305400E6-AC46-43C3-8704->

However, unlike Harlem Central, these schools' co-locations were not revoked. *See* Ex. 3, Press Release. Furthermore, less than one week after the February 27 press release, the DOE proposed replacing two of the revoked co-locations with three new DOE schools, each of which will enroll fewer than 250 students during the first two years that they phase in.⁸⁹ In addition, four of the co-locations that were not affected had projected enrollment *at full capacity* ranging from 210 to 255 students, which resulted in them not passing the DOE's "core value" of not "more than 250" students.⁹⁰ These co-locations included three new district middle schools (New District Middle Schools – 18K763 and 06M209; New Secondary School Eagle Academy for Young Men of Staten Island – 31R028). Each of these co-locations will be implemented next year. *See* Ex. 3, Press Release.

The DOE could not have found that Harlem Central met the third "no significant capital work" requirement. The co-location of Harlem Central would not have required extensive capital work, since Harlem Central would have largely used rooms already renovated by a sister school sharing the building, Success Academy Harlem 1. Hoyt Aff. ¶ 16. Nor would the co-

[753805AAF2F5/149371/EIS_28Q312ES_Colocation_vfinal.pdf](http://schools.nyc.gov/NR/rdonlyres/7AC20E2C-5933-4F54-806B-DA19BE3A9C55/149347/EIS_X192_NewDistrictESColocation_vfinal.pdf) (last visited Mar. 7, 2014); Educational Impact Statement: The Proposed Co-location of a New Elementary School (08X392), at 3 (Aug. 29, 2013), available at http://schools.nyc.gov/NR/rdonlyres/7AC20E2C-5933-4F54-806B-DA19BE3A9C55/149347/EIS_X192_NewDistrictESColocation_vfinal.pdf (last visited Mar. 7, 2014); Educational Impact Statement: The Proposed Opening and Co-location of New District High School (27Q314), at 4 (Sept. 12, 2013) available at http://schools.nyc.gov/NR/rdonlyres/305400E6-AC46-43C3-8704-753805AAF2F5/150067/EIS_27Q226_Colocation_vfinal.pdf (last visited Mar. 7, 2014)

⁸⁹ Educational Impact Statement: The Proposed Co-location of Two District High Schools in M520, at 1, 6 (Mar. 4, 2014) available at http://schools.nyc.gov/NR/rdonlyres/1DD21B74-8CFD-415B-8200-7F9F3B324068/160168/M520EIS_vFINAL.pdf (last visited Mar. 7, 2014); Educational Impact Statement: The Proposed Co-location of District High School in Q400, at 1, 6 (Mar. 4, 2014) available at http://schools.nyc.gov/NR/rdonlyres/1DD21B74-8CFD-415B-8200-7F9F3B324068/160158/Q400_Colocation_EIS_vfinal.pdf (last visited Mar. 7, 2014).

⁹⁰ *See, e.g.*, Kim Affirm. Ex. 20 (Amended Educational Impact Statement, Building K244, dated October 11, 2013) at 2; Kim Affirm Ex. 21 (Educational Impact Statement, Building M192, dated August 29, 2013), at 3; Kim Affirm. Ex. 22 (Educational Impact Statement, Building R049, dated September 13, 2013) at 3; Kim Affirm. Ex. 23 (Educational Impact Statement, Building X120, dated September 12, 2013) at 3.

location of Harlem Central require substantial dislocation of any non-Success Academy school in the building. *Id.* P.S. 149 would have maintained the same number of rooms within the building. *See* Ex. 8, Harlem Central BUP at 5, 21. P811M@M149 would have changed its room allocation by zero rooms the first year of the co-location, and only three rooms over the next four years. *Id.* at 5-21. None of its current students would have been required to move to a different location (the change would only affect future enrollment). Ex. 7, Harlem Central EIS at 2-3, 12. Thus, no non-Success Academy school would have been substantially affected by Harlem Central's co-location.

Harlem Central does not meet Criterion 4 either. However, although the Press Release is silent about how the fourth criterion might have affected Harlem Central, it appears from a public comment by the Chancellor that the DOE based its decision completely on this item. On March 7, 2014, the Chancellor stated: "We would have had to displace the kids who are presently there . . . [t]here are kids in that building that would have to leave to accommodate them."⁹¹ As with the other criteria, the DOE made no new findings on this issue and does not appear to have gathered any evidence during the review. The DOE could not rationally have found that the Harlem Central co-location failed the requirement that a co-location not result in reduced seats for District 75 students.

Moreover, the effect that Harlem Central would have on P811M@M149, a District 75 school, was carefully considered by the PEP as part of its approval process, and addressed in the EIS, which the PEP approved on October 15, 2013.⁹² The EIS noted that PS811M@M149

⁹¹ Interview with Carmen Fariña, Chancellor of NYC Dept. of Educ., MYFOXNY (Mar. 7, 2014), available at <http://www.myfoxdc.com/story/24913914/schools-chancellor-carmen-farina-on-rough-first-2-months#axzz2vIKqgsIE> (last visited Mar. 7, 2014).

⁹² *See* Ex. 7, Harlem Central EIS at 12-13; *see also* Panel for Educational Policy, NYC Dept. of Educ., available at <http://schools.nyc.gov/AboutUs/leadership/PEP/publicnotice/2013-2014/Oct15SchoolProposals> (last visited Mar. 7, 2014).

serves 93 students in kindergarten through eighth grade, and that, under the co-location plan, each year the school would enroll fewer new students.⁹³ As the DOE stated in the Harlem

Central EIS:

In addition to the existing District 75 schools across Manhattan, there are three new school buildings opening in 2013-2014 and 2014-2015 that will be able to accommodate new District 75 students. Based on the School Construction Authority's Program of Requirements for each new building in Manhattan, these three new school buildings have a combined target capacity to serve 180 District 75 students.

Ex. 7, Harlem Central EIS at 12 n.25. The DOE further noted that “there will continue to be an excess of District 75 seats in Manhattan. This means that there will be sufficient District 75 capacity in Manhattan to meet the needs of future District 75 students.” *Id.* at 12. Thus, as a result, the DOE found as a fact in October 2013 that *no current students at PS811M@M149 would be displaced or affected.* *See id.* at 10. Only the *capacity* of PS811M@M149 would be reduced as its students matriculated out of the program, but even then the DOE noted that it would continue to enroll students in District 75 schools consistent with current practice. *See id.* at 9. In short, the DOE's own study makes clear that the Harlem Central co-location would not result in reduced seats for District 75 students in Manhattan. The only way that Harlem Central's co-location could have failed this criterion is through the DOE's disregard of its own record evidence and its own findings.

Thus, even if each of the four new criteria announced by the Chancellor were rational—and they were not—the Chancellor's determination to revoke the Harlem Central co-location was not based on a rational application of the criteria. The only rational conclusion is that the DOE considered arbitrary criteria applied in a capricious fashion with no rational basis for their use or consideration. Therefore, the revocation of Harlem Central's co-location must be reversed.

⁹³ Ex. 7, Harlem Central EIS at 5, 12.

G. The DOE’s Revocation Effectively Constitutes an Arbitrary Decision to Close One of the Highest-Performing Schools in the State In Violation of DOE’s Own Previously Announced Criteria

As explained above, the decision to revoke the Harlem Central co-location effectively forces the school to close. The schools the DOE targets for closure meet the following criteria:

- a. Schools receiving a D, F, or a third consecutive C on their annual DOE Progress Report;
- b. Schools receiving a rating of “Underdeveloped” on their annual Quality Review;
- c. Schools that have been identified as “Priority” by the New York State Education Department, defined as falling within the bottom 5% of schools in the state; or
- d. Schools that have graduation rates below 60% for the last several years.⁹⁴

Harlem Central meets none of these regulatory criteria; to the contrary, it is one of the highest-performing middle schools in the state.⁹⁵ Closing this school violates DOE’s own previously announced standards and therefore lacks any possible rational basis.

IV. THE DOE’S DECISION TO REVOKE THE HARLEM CENTRAL CO-LOCATION IS CONTRARY TO SOUND EDUCATIONAL POLICY

The Commissioner may overturn a final determination made by the DOE if the determination is “contrary to sound educational policy.” *See Appeal of Malone*, Comm’r’s Decision No. 14,194, 1999 WL 35132780, at *4 (August 19, 1999); *Appeal of Burnett*, Comm’r’s Decision No. 13,164, 1994 WL 16854635, at *1 (April 29, 1994). The determination to revoke Harlem Central’s co-location in M149/M207 is entirely contrary to sound educational policy.

Across New York City, access to free, high-quality education is not available to all. This is particularly true with respect to low-income, minority children in New York City. For example, schools in Community School District 7 in the South Bronx had pass rates of only

⁹⁴ *See Support and Intervention at Schools*, NYC Dept. of Educ., available at <http://schools.nyc.gov/community/planning/support+and+intervention.htm> (last visited Mar. 7, 2014); *see, e.g.*, Ex. 13, Kappa II EIS.

⁹⁵ *See supra* Factual Background Part I.A.2.

9.5% in Math and 9.1% in ELA on the 2012-2013 New York State Assessment.⁹⁶ By contrast, schools in Community School District 2 in Manhattan (including the Upper East Side, Midtown, and Financial District) had average pass rates of 60.2% in Math and 54% in ELA, a staggering difference of 50.7 percentage points in Math and 44.9 percentage points in ELA.⁹⁷ The percentage of African American students citywide who passed the Math and ELA 2012-2013 Assessments was 15.3% and 16.3%, respectively.⁹⁸ Hispanic students had similarly low pass rates of 18.6% and 16.6%, respectively. These numbers stand in stark contrast to the average pass rates for Caucasian and Asian students—55.7% passed the Math test, 47.4% passed the ELA test.⁹⁹ Additionally, citywide, the achievement gap on New York State’s 2012-2013 Assessments between students qualifying for free and reduced priced lunch as compared with students not qualifying was 28.3 percentage points in Math and 28.7 percentage points in ELA.¹⁰⁰ It is a disturbing yet irrefutable fact that the New York City public school system is profoundly failing its most vulnerable scholars.

Success Academy has opened schools in Harlem, in the South Bronx, and in areas of Brooklyn such as Bedford-Stuyvesant and Crown Heights—parts of the city that have a long history of providing an inadequate public education to low-income, minority children. *See, e.g.*, Ex. 1, Parent Affidavits. These Success Academy schools¹⁰¹ have, on average, a 90.7% African

⁹⁶ See *New York City 2013 Test Results for ELA and Math*, NYC Dept. of Educ., available at <http://schools.nyc.gov/Accountability/data/TestResults/ELAandMathTestResults> (last visited Mar. 7, 2014).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ These statistics include Success Academy Schools located throughout Harlem (Success Academy Charter School – Harlem 1, Harlem 2, Harlem 3, Harlem 4, and Harlem 5), the Bronx (Success Academy

American and Hispanic student population, with 82.5% of their students receiving free and reduced price lunch. Hoyt Aff. ¶ 9. Against tremendous odds, students attending Success Academy schools have achieved extraordinary outcomes, with Success Academy schools¹⁰² outperforming traditional DOE schools across the city by 52.4 percentage points in Math and 31.6 percentage points in ELA.¹⁰³ Notably, Success Academy Charter School – Bronx 2 in the South Bronx, the poorest Congressional district in the United States,¹⁰⁴ ranks as the second highest-scoring elementary school on the statewide tests across the entire state of New York—outperforming schools in wealthy suburbs and top gifted-and-talented programs.¹⁰⁵ Success Academy schools have soundly debunked the myth that poor, minority children or children living in certain zip codes cannot achieve at such extraordinary levels, and in large numbers.

Harlem Central is among the best of Success Academy schools, with a fifth grade that is first in the entire state in Math.¹⁰⁶ This school has literally reversed the achievement gap, with low-income, minority scholars significantly outperforming their wealthier, Caucasian peers in

Charter School – Bronx 1 and Bronx 2), and the Bedford-Stuyvesant area of Brooklyn (Success Academy Charter School – Bed-Stuy 1 and Bed-Stuy 2). Hoyt Aff. ¶ 8.

¹⁰² See *supra* note 12.

¹⁰³ This statistic is based on the DOE's New York State Common Core ELA & Mathematics Tests, Grades 3-8, New York City Results, *available at* <http://schools.nyc.gov/Accountability/data/TestResults/ELAandMathTestResults> (last visited Mar. 7, 2014).

¹⁰⁴ Richard Sisk, *South Bronx is Poorest District in Nation, U.S. Census Bureau Finds: 38% Live Below Poverty Line*, Sept. 29, 2010, *available at* <http://www.nydailynews.com/new-york/south-bronx-poorest-district-nation-u-s-census-bureau-finds-38-live-poverty-line-article-1.438344> (last visited Mar. 7, 2014); *see also* Jeremy White, *et al.*, *New York Redistricting*, N.Y. Times, Mar. 20, 2012, *available at* <http://www.nytimes.com/interactive/2012/03/20/nyregion/new-york-redistricting.html> (noting redistricting boundary changes in New York since 2010 U.S. Census).

¹⁰⁵ This statistic is based on New York State ELA and Mathematic Assessment results, *available at* <http://www.p12.nysed.gov/irs/ela-math/> (last visited Mar. 7, 2014).

¹⁰⁶ *Id.*

the best public schools across the state.¹⁰⁷ Harlem Central students, having attended a Success Academy school since the early elementary grades, have, for the most part, only known a world in which they receive a world-class education. To force these children from a top school into traditional public schools that perform 70 percentage points worse in Math proficiency and 48 percentage points worse in ELA proficiency¹⁰⁸ is to close the door to untold opportunities for these children in the future.

The Chancellor must exercise her duties “to promote an equal educational opportunity for all students in the schools of the city district, promote fiscal and educational equity, increase student achievement and school performance and encourage local school-based innovation.” N.Y. Educ. Law § 2590-h. But by revoking the Harlem Central co-location, the Chancellor, and, by extension, the DOE, has failed to live up to these statutory duties.

The Commissioner must not allow a top-performing public middle school in Harlem to close its doors. It would be unconscionably bad educational policy to close a world-class school in Harlem, one of the few in New York City serving mostly minority and low-income children. The Commissioner should accordingly reverse the DOE’s determination to revoke Harlem Central’s co-location in M149/M207.

¹⁰⁷ For example, Harlem Central outperformed Scarsdale School District, a suburban, predominantly Caucasian school district, by 28 percentage points in Math in 2013. This statistic is based on New York State ELA and Mathematic Assessment results, *available at* <http://www.p12.nysed.gov/irs/ela-math/> (last visited Mar. 7, 2014).

¹⁰⁸ *See supra* note 20.

CONCLUSION

For the foregoing reasons, the Parent Petitioners and Success Academy Charter Schools – NYC respectfully request that the Commissioner nullify the DOE’s determination to revoke Harlem Central’s co-location in M149/M207, order the DOE to comply with the PEP’s determination to co-locate Harlem Central in M149/M207, and order the DOE to comply with and implement the EIS and BUP for Harlem Central approved by the PEP in October 2013.

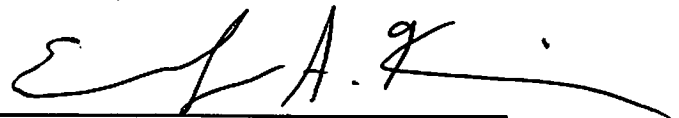
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