

U.S. Department of Education  
Office for Civil Rights  
New York Office  
32 Old Slip, 26th Floor  
New York, NY 10005-2500

**ADMINISTRATIVE CLASS COMPLAINT**

COMPLAINANTS: Natasha Capers, Carmen Rojas, Katharine Yourke, Brooke Parker, Gretchen Mergenthaler, Rosaline Daughtry, Carlos Ruiz, Juan Pagan, Janet Duran, Guillermo Croussett, Sonya Hampton, Monse Santana, Betty Key, the Alliance for Quality Education, New York Communities for Change, Mirabal Sisters Cultural and Community Center, El Puente, La Fuente.

RECIPIENT: Board of Education of the City School District of the City of New York  
Dennis M. Walcott, Chancellor  
52 Chambers Street  
New York, New York 10007

**PRELIMINARY STATEMENT**

Complainants file this Complaint pursuant to Title VI of the Civil Rights Act of 1964, as amended (“Title VI”), and the regulations promulgated thereunder, which prohibit discrimination on the basis of race and national origin. As detailed in the Factual Allegations below, the New York City high school admissions process, and the lack of controls thereon, as administered by the Chancellor and the Board of Education of the City School District of the City of New York (together the “DOE”), results in African American and Latino high school students having a lesser chance than their white peers to attend and benefit from an education in a school that is not affected with high concentrations of students with high needs. As shown below, African American and Latino high school students are more likely than their white peers to attend a school with a high concentration of students with high needs, a *prima facie* disparate impact.

The DOE, however, continues to perpetuate this disparity through its high school admissions process, despite knowledge confirmed by its own consultants that such conditions will invariably cause the schools at issue to have low graduation rates, and cause many students to struggle through life without a high school diploma.

Given the evidence presented in the DOE-commissioned Parthenon Reports, discussed below, the DOE cannot reasonably assert that there exists an educational necessity for its admissions policy nor defend its seemingly hands-off approach over the process. Parthenon plainly states that the concentration of students with high needs not only reduces the graduation prospects for *all* students who attend these schools (not just those students with high needs) but also increases the chances that the school will be closed by the DOE as a result. Indeed, this concern was recognized by New York State Education Department Commissioner John King, when, approving in July 2011 the closure of 11 more high schools, nine of which have a student enrollment that is more than 90% African American and Latino, he cautioned that the replacement schools should be serving the same population of students (*see infra* at ¶43). In contrast, white students are more than twice as likely as one would expect (based on the percentage of white students attending New York City high schools) to attend high schools with the lowest concentrations of high-needs students, giving them a far greater likelihood of graduating.

To address these disparities, the DOE could institute a controlled choice policy that limits the concentration of students with high needs in *every* school so that no school, nor the students attending them, will be burdened with the impact of high concentrations of these students. Indeed, the New York State Education Department (“NYSED”) has recognized that the DOE has the “capacity to delimit the degree to which a school’s entering class is disproportionately

comprised of high need students.” (May 31, 2012 Letter from Commissioner John B. King to Chancellor Dennis M. Walcott (“May 31, 2012 King Letter”), a copy of which is annexed hereto as Ex. A).

Accordingly, the complainants request that the United States Department of Education, Office for Civil Rights (“OCR”) investigate the DOE’s high school admissions processes to determine whether the administration of these policies is denying equal educational opportunities for African American and Latino students.

**PARTIES**

1. Complainant Natasha Capers resides at \_\_\_\_\_ and has two children in New York City public schools, specifically.

2. Complainant Carmen Rojas resides at \_\_\_\_\_ and has two children in New York City public schools,

3. Complainant Katharine Yourke resides at \_\_\_\_\_ and has two children in New York City public schools

4. Complainant Brooke Parker resides at \_\_\_\_\_ and has a child in New York City public schools.

5. Complainant Gretchen Mergenthaler resides at \_\_\_\_\_ and has a child in the New York City public schools, .

6. Complainant Rosaline Daughtry resides at \_\_\_\_\_, and has a child who attends New York City public schools,

7. Complainant Carlos Ruiz resides at \_\_\_\_\_ and has a child in the New York City public schools.

8. Complainant Juan Pagan resides at and has a child in the New York City public schools, specifically .

9. Complainant Janet Duran resides at , and has children in the New York City public schools,

10. Complainant Guillermo Coussett resides at, and has a child in the New York City public schools,

11. Complainant Sonya Hampton resides at and has child in New York City public schools,.

12. Complainant Monse Santana resides at and has a child in the New York City public schools

13. Complainant Betty Key resides at , and has a child in the New York City public schools, .

14. Complainant the Alliance for Quality Education (“AQE”) is a grassroots advocacy and community organizing coalition, with an office at 233 Broadway, Suite 720, New York, NY 10279. AQE works with communities in New York City and across New York State to ensure a high quality public education for all students.

15. Complainant New York Communities for Change (NYCC) is an organization of working families in low and moderate income communities in New York City and across New York State. Its main office is located at 2-4 Nevins Street, 2<sup>nd</sup> Floor, Brooklyn, NY 11217. NYCC works to ensure that every family has equal access to quality public schools.

16. Complainant Mirabal Sisters Cultural and Community Center is a non-profit community organization that, among other things, organizes, trains and mobilizes parents in

District 6 of New York City’s public schools to work to achieve a quality public education for all children.

17. Complainant El Puente is a community human rights institution that promotes leadership for peace and justice. Over the past thirty years, El Puente has been a leading advocate in addressing issues of educational equity in North Brooklyn (District 14) and empowering parents to take a leadership role.

18. Complainant La Fuente empowers immigrants, workers, and their communities to take action through civic participation, grassroots organizing, and leadership development. La Fuente works with its members and in collaboration with other community groups to promote equity and quality in public education throughout New York City.

19. Recipient BOE is a school board organized under and existing pursuant to the Education Law of the State of New York.<sup>1</sup> The BOE is the recipient of Federal financial assistance and, therefore, is prohibited from discriminating on the basis of race, ethnicity or national origin by Title VI.

### **JURISDICTION**

20. OCR is responsible for ensuring compliance with Title VI and receiving information about, investigating and remedying violations of Title VI and its implementing regulations. 34 CFR §§100.6, 100.7, and 100.8.

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<sup>1</sup>In conjunction with amendments to the State Education Law enacted in 2002 and 2009, many of the powers previously held by the BOE now exist at the “Panel for Education Policy” (the “PEP”), the majority of which members are also appointed by the Mayor. The PEP devolves to the Chancellor, with the administrative operations assigned by the Chancellor to a body denominated by the Mayor as the New York City Department of Education (“DOE”). The BOE, however, continues to be the legal entity receiving Federal financial assistance. As administrative decisions, however, are now made by the DOE and the Chancellor, the DOE, the Chancellor and the PEP are collectively referred to herein as the DOE.

21. This complaint is timely given the ongoing nature of the problems documented herein.

22. The complainants have not filed this Complaint with any other agency or institution.

### **BACKGROUND**

23. Since 2002, New York City Mayor Michael Bloomberg (who, *inter alia*, appoints the Chancellor) and the DOE have embarked on a mission to close rather than improve struggling schools, virtually all of which serve a predominantly minority student population. Moreover, as detailed below, early in 2006 the DOE was formally put on notice that concentrating students with high needs (*e.g.*, overage, under-credited and low proficiency levels) in any one school creates conditions that exacerbate student failure and the attendant failure of the school as a whole. Yet, despite this knowledge, the DOE continued down the path of implementing admissions policies that resulted in high concentrations of students with high-needs in predominantly minority schools, thereby effectively sealing their fate.

24. In 2005, the DOE engaged The Parthenon Group, a Boston-based management consulting firm with a particular expertise in education strategy, innovation and implementation (“Parthenon”). In 2006, Parthenon issued a report entitled “NYC Secondary Reform Selected Analysis” (the “2006 Parthenon Report”- a summary of which is annexed hereto as Ex. B).<sup>2</sup> In this report, Parthenon examined students who were not progressing on pace to graduate high school “on time.” What Parthenon found was that these students, who are older than their classmates (so-called “overage and under-credited” or “OA-UC”), are highly likely to eventually

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<sup>2</sup>Although the entire report has never been released to the public, the findings of the report have been summarized in the attached DOE/Parthenon PowerPoint presentation.

drop out of school. Indeed, only 19% of OA-UC students ultimately receive a HS diploma or GED. (2006 Parthenon Report, at 19).

25. Parthenon further analyzed what caused students to become OA-UC and found that there was a direct correlation to the percentage of a school's incoming student population that have low proficiency levels. (2006 Parthenon Report, at 29). Unsurprisingly, Parthenon found that the larger the percentage of low performing students – that is, the greater the concentration of such students – the more likely it is that they will not be successful (or become OA-UC). (*Id.* at 35). It also found that the size of the school, by itself, had very little impact on student success. The size of the school, however, *combined* with the concentration of low-performing students had a significant effect on graduation rates. (*Id.* at 29). Significantly, it was not just the students with high needs that were impacted when they were concentrated in a particular school; rather, the performance of *all* students was affected. (*Id.* at 38).

26. In 2008, Parthenon issued a follow-up report entitled “Beat the Odds HS Update” (the “2008 Parthenon Report”, a summary of which is annexed hereto as Ex. C).<sup>3</sup> In this report Parthenon found what educators already knew through experience: not only is a school's overall performance affected by concentrations of students with low proficiency, but also by the concentration of other students with high needs, such as students who are overage or those with a history of poor attendance. (2008 Parthenon Report, at 5). Again, the 2008 Parthenon Report illustrated how students who did not have high needs were also affected by the concentrations. Indeed, Parthenon found that at a large school with concentrations of students with high needs well above the City average, the typical student was predicted to graduate only

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<sup>3</sup>The 2008 Parthenon Report has also not been released to the public. The findings of the report have been summarized in the attached PowerPoint presentation.

55% of the time, while a similar student placed in a school with lower concentrations of these students was predicted to graduate 83% of the time. (Id. at 8). Simply stated, schools with high concentrations of low-performing and overage/undercredited (particularly large schools) are likely to have markedly lower graduation rates and if the issue of concentration remained unaddressed, these schools would almost invariably fall short of their goals. (Id. at 19). For this reason, Parthenon specifically recommended that the new smaller schools opened by the DOE should absorb students with high needs, in order to dilute the concentration of these students in any one school. (2006 Parthenon Report, at 53).

27. Despite the findings and recommendations set forth in both the 2006 and 2008 Parthenon Reports, the DOE continues to concentrate students with high needs (*e.g.*, low performance scores, OA-UC's) in predominantly minority high schools. The DOE is knowingly populating these schools in a way that makes them likely to have low graduation rates. DOE is knowingly assigning African-American and Latino students disproportionately to schools where they are much less likely to obtain a high school diploma. Then, when these schools struggle with student performance (as predicted by Parthenon, among others), the DOE moves to close them. In contrast, DOE establishes high schools with significant populations of white students that are far more academically diverse and, as Parthenon would predict, they are not struggling by DOE's measures.

28. Research has shown that the failure to earn a high school diploma not only harms the student, but also costs society billions of dollars in health care costs, criminal justice costs and lost earnings and tax revenues.<sup>4</sup>

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<sup>4</sup> Bellfield, C. and Levin, H., The Price We Pay: Economic and Social Consequences of Inadequate Education. Washington, DC: The Brookings Institution Press, 2007.



## **FACTUAL ALLEGATIONS**

### I. **DEMOGRAPHICS AS REPORTED IN THE DOE’S DEMOGRAPHIC AND ACCOUNTABILITY DATA SET**

29. The following analyses are based on the DOE’s Demographic and Accountability Data (herein referred to as “DOE data”) for 386 high schools in New York City.<sup>5</sup>

30. There are approximately 271,659 high school students attending these 386 New York City public high schools. Of these 271,659 students, 109,750 students (or 40%) are Latino, 89,275 students (or 33%) are African American, 33,095 students (or 12%) are white, and the remaining 39,538 students (or 15%) are Asian or multi-racial.

31. Of the 386 high schools at issue in this Complaint, 242 schools (or 63%) have a student population that is more than 90% African American and Latino (herein referred to as “Minority Schools”). Thirty-seven of the 386 high schools (or 10%) have a student population that is more than 24% white, thus more than double the percentage of white students in the district. For purposes of this Complaint, these schools with a significant percentage of white students (twice the high school average) are referenced as “Disproportionately White Schools.”

32. Recognizing that the New York City high schools serve a predominantly minority population, the DOE’s implementation of its admissions process and the resulting school failures consistently and devastatingly impact African American and Latino students in a

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<sup>5</sup>Although the DOE operates more than 386 high schools, the complainants have not included the 15 International Schools, 47 Transfer Schools or 9 Specialized High Schools in this analysis so as to not distort the data, given the unique nature of the populations served by these schools. International Schools provide education for new learners of English, a very specific population with many overlapping characteristics explored in the data analyses below. Transfer Schools admit students who have not succeeded in other high schools so, by definition, these schools contain primarily low-performing and overage-undercredited students. Specialized High Schools admit students on the basis of their score on the high school admissions test (or, in the case of LaGuardia High School, an audition).

disproportionate manner while, in effect, ensuring that white students run a much smaller risk of attending schools with a large percentage of students with high needs.

II. DOE CONTINUES TO ASSIGN HIGH CONCENTRATIONS OF STUDENTS WITH HIGH-NEEDS TO PREDOMINANTLY MINORITY HIGH SCHOOLS

33. Students are assigned to high schools in New York through a convoluted admissions process that begins with students ranking their top 12 high school preferences in December of their 8th grade year. Students are not assigned to their neighborhood high school, but purportedly have the opportunity to choose from a wide array of over 400 high schools. While in theory this process should lead to more diverse schools, it does not. Some of the City's high schools and programs require students to have certain grades or test scores in order to be admitted. As a result, students with grades or scores lower than what these schools want are automatically excluded from these schools. For these so-called "screened" high schools, not only must a student select the school, but the school must also select the student. For the remainder of the schools there are a variety of admissions methods, the most common of which is known as the "limited screen" process, which is used for the new high schools that are not screened. In the "limited screen" process, students are given preferential treatment if they become known to the school (*e.g.*, through school visits or siblings who attend the school). Regardless of the screening method, DOE utilizes some mysterious process to match students with seats in a purportedly equitable manner, an assertion that is belied by the data presented below.

34. For example, despite this centralized system of so-called school choice, a 2009 review by the Center for New York City Affairs found that approximately 14,000 high school

students each year are assigned to schools they did not choose.<sup>6</sup> Some 7,000 students are rejected from all of their ranked choices. Another 7,000 students who enter the system after the assignment process is complete (so-called “over-the-counter students”) do not have a choice as to which high school they attend; rather, they are assigned by the DOE. Similarly, a report presented at the 2011 Association for Education Finance and Policy Conference found that in 2008 over 15% of 8th grade students were not matched with a high school after the main round matching process and almost half of these student (or 6.7% of the 8th grade students) remained unmatched with a high school after the supplemental round.<sup>7</sup>

35. This combination of student and school selection, the DOE’s unexplained matching process and direct DOE assignment constitutes the entirety of the DOE high school admission process. There are, apparently, no controls to ensure a distribution of students that will not overwhelm certain schools with high concentrations of students with high needs. Rather, the implementation of this process results in high concentrations of students with high needs (*e.g.*, OA-UC, low-performing) in some Minority Schools, in complete disregard of the Parthenon recommendations and of Title VI and its implementing regulations.

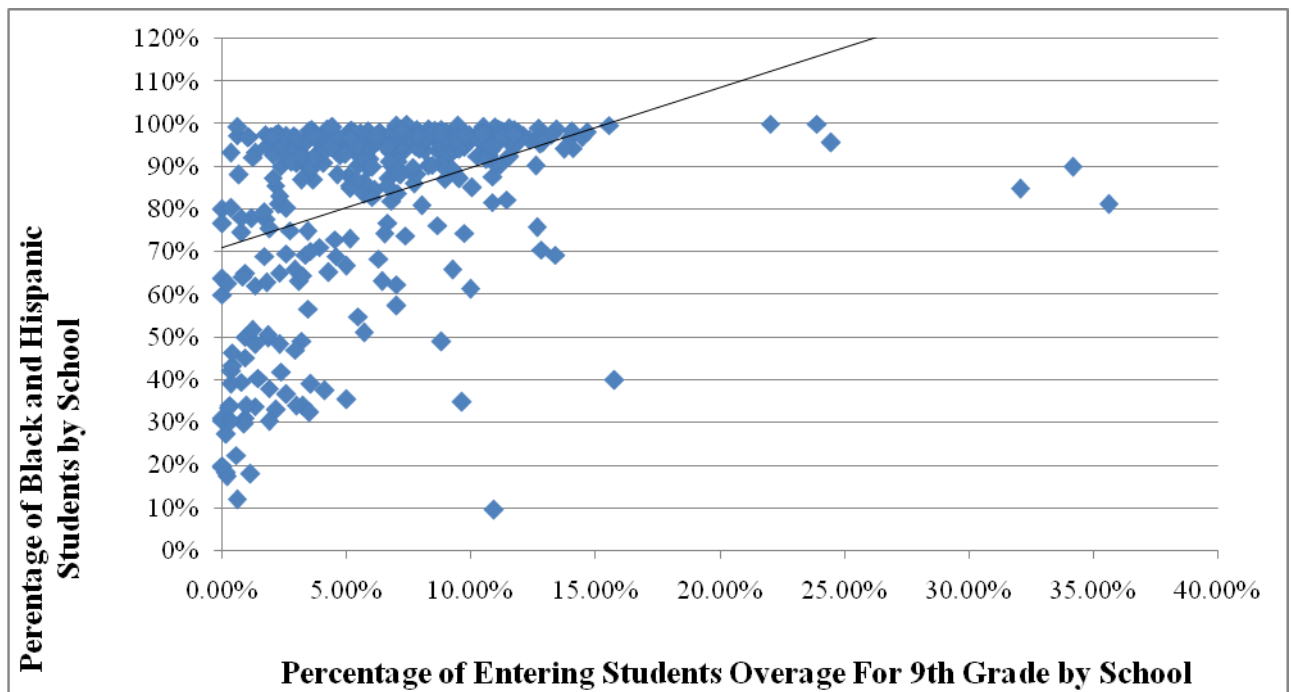
36. For example, one of the high-needs populations identified in the Parthenon reports is students who are overage and under-credited. The DOE Data demonstrates that those schools with the highest percentage of students entering high school overage are typically

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<sup>6</sup> See Clara Hemphill and Kim Nauer, [The New Marketplace: How Small-School Reform and School Choice Have Reshaped New York City’s High Schools](#), Center for New York City Affairs (2009), a copy of which is available at [http://www.newschool.edu/milano/nyc affairs/publications\\_schools\\_thenewmarketplace.aspx](http://www.newschool.edu/milano/nyc affairs/publications_schools_thenewmarketplace.aspx)

<sup>7</sup> See Sean Corcoran and Henry Levin, [School Choice and Competition in New York City Schools](#), AEFPP, Seattle, WA (March 6, 2011), a copy of which is available at [http://www.newschool.edu/milano/nyc affairs/documents/corcoran\\_levin\\_report\\_March2011.pdf](http://www.newschool.edu/milano/nyc affairs/documents/corcoran_levin_report_March2011.pdf)

Minority Schools.<sup>8</sup> Of the 40 high schools with the highest concentration of overage students (the top 10% of reported schools), 32 (or 80%) are Minority Schools. Alternatively, of the 42 high schools with the lowest concentration of overage students (the bottom 10% of reported schools), only 6 (or 14%) are Minority Schools while half of these 42 schools are Disproportionately White Schools.<sup>9</sup> Indeed, as the graph below demonstrates, there is a positive correlation between a school's percentage of overage students and a school's combined African American/Latino population. The higher the concentration of overage students the more likely the school is to be a Minority School:



<sup>8</sup> The DOE has published data regarding students entering high school overage for only 382 of the 386 high schools included in this Complaint.

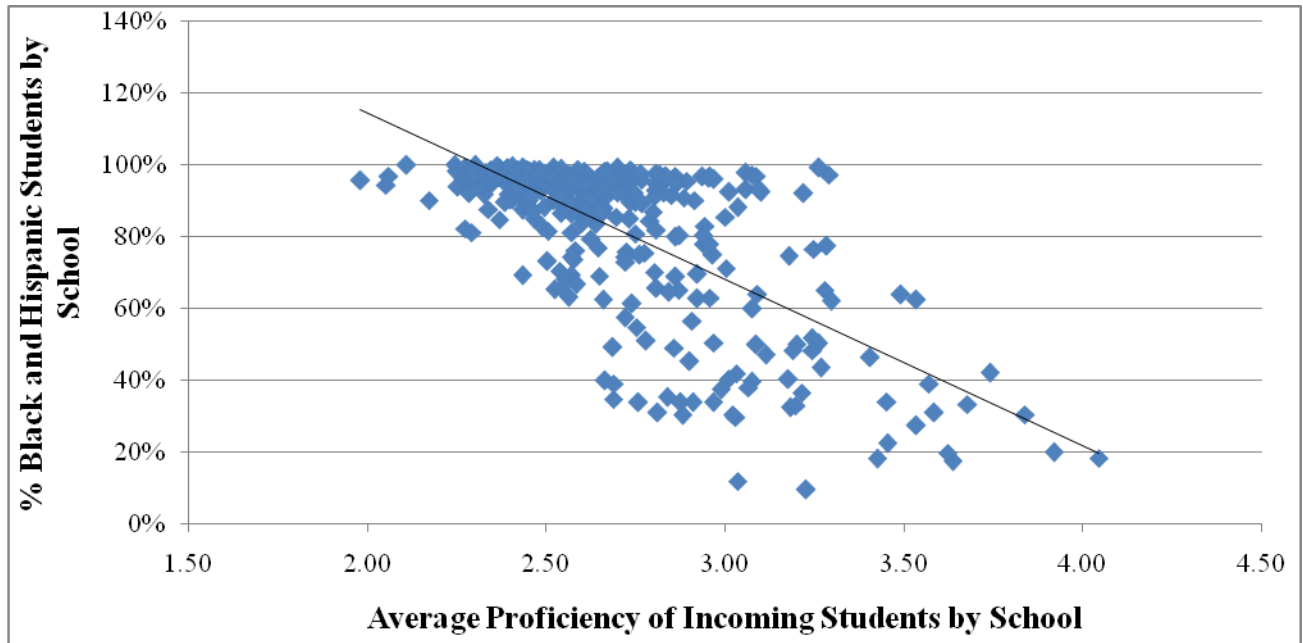
<sup>9</sup> The 40<sup>th</sup>, 41<sup>st</sup>, and 42<sup>nd</sup> schools had the same concentration of overage students, so all three were included in this analysis.

37. A similar analysis can be done for low-performing students, another high-need population identified in the Parthenon reports.<sup>10</sup> DOE Data demonstrates that those schools with the lowest average scores on entering students' 8th grade state exams are almost exclusively Minority Schools.<sup>11</sup> Of the 40 high schools with the highest concentration of the lowest performing students (the top 10% of reported schools), 37 schools (or 93%) are Minority Schools. Alternatively, of the 40 high schools with the lowest concentrations of low performing students (the bottom 10% of reported schools), only 6 (or 15%) are Minority Schools. In contrast, 15 of these 40 schools (or 38%) are Disproportionately White Schools. Indeed, as the graph below demonstrates, there is a statistically significant strong negative correlation between the average scores of incoming 9th grade students and a school's combined African American/Latino population. The lower the average entering score the more likely the school is to be a Minority School:

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<sup>10</sup> Because individual student performance data is not publicly available, for purposes of this Complaint the concentration of low performing students is identified using each school's average 8<sup>th</sup> grade math and ELA scores of entering students.

<sup>11</sup> The DOE has published data regarding the average scores for entering students for only 390 high schools.



38. Although a concentration of any one of these populations would have a negative impact on the performance of all students in a school, there are 15 high schools that are in the top 10% for highest concentration of average students *and* the top 10% for highest concentration of low-performing students. Of these 15 high schools, 13 schools (or 87%) are Minority Schools. In contrast, there are 26 high schools that are in the bottom 10% for concentration of average students *and* the bottom 10% for concentrations of low-performing students. Of these 26 high schools, 12 schools (or 46%) are Disproportionately White Schools.

39. Notably, white students are more than twice as likely as one would expect (based on the percentage of white students enrolled in the high schools City-wide) to attend a school that falls in the bottom 10% for concentrations of average students *and* low-performing students. African American and Latino students are almost 1.5 times *less* likely to attend such academically diverse schools. Indeed, there are 13 high schools in New York City that are predominantly white (with a student enrollment that is more than 50% white). This represents

just over 3% of all the high schools included in this analysis. Of these 13 high schools, however, 4 schools are in the bottom 10% for concentrations of low performing students *and* overage students (representing 15% of the schools in this category, almost 5 times the expected rate). Simply stated, although predominantly white schools represent only 3% of the high schools City-wide, they represent 5 times that proportion in the schools with the lowest concentrations of students with high needs. In contrast, African American and Latino students are slightly more likely (1.3 times) to attend a high school that falls in the top 10% for highest concentration of overage *and* highest concentration of low-performing while white students are 5 times less likely to attend such a school.

40. The concentration of students with high needs is particularly relevant when one examines high school graduation rates, as Parthenon predicts.<sup>12</sup> NYSED has determined the City-wide graduation rate for August 2010 to be 65.1%.<sup>13</sup> In August 2010, Minority Schools, in the aggregate, had a graduation rate of 67%, somewhat higher than the City-wide average. When the schools are sorted by concentration of high needs students, however, a very different picture emerges. The 40 high schools with the highest concentration of overage students (the top 10% of reported schools) have a graduation rate of 55% (almost 1.2 times lower than the City-wide average). The 40 high schools with the highest concentration of low performing students have a graduation rate of 52.7% (more than 1.2 times lower than the City-wide average). The 15 schools that are in the top 10% for concentration of both overage and concentration of low-

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<sup>12</sup> High school graduation rates are available on the DOE's website at <http://schools.nyc.gov/Accountability/data/GraduationDropoutReports/default.htm>

<sup>13</sup> NYSED has not yet calculated the City-wide graduation rate for 2011, but there is no expectation that it will have increased significantly.

performing students have a graduation rate of 47.5% (almost 1.4 times lower than the City-wide average). In contrast, the 42 high schools with the lowest concentration of overage students (the bottom 10% of reported schools) have a graduation rate of 95% (almost 1.5 times greater than the City-wide average). The 40 schools with the lowest concentration of low-performing students have a graduation rate of 93.4% (almost 1.4 times greater than the City-wide average). The 26 schools that are in the bottom 10% for concentration of both overage and low-performing students have a graduation rate of 83.5% (1.3 times greater than the City-wide average).

41. As set forth in the 2006 and 2008 Parthenon Reports, all of the students in schools with high concentrations of overage students or struggling students are significantly more likely to fail to graduate. Notably, not only do the students with high-needs in these schools have low graduation rates, but the graduation rates for *all* students suffer. As the data above demonstrates, the DOE high school admissions process sets-up Minority Schools for failure, by concentrating overage and low performing students in these schools while the opposite is true for Disproportionately White Schools. Indeed, as recently recognized by the Schott Foundation for Public Education, African American and Latino students are nearly four times more likely to be enrolled in one of the city's poorest performing high schools as is a white student.<sup>14</sup> While the implementation of the high school admissions process does not adversely impact every Minority School, it is clear from the data set forth below that it has an adverse impact on Minority Schools *only* (as opposed to Disproportionately White Schools).

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<sup>14</sup> A Rotting Apple. Education Redlining in New York City, Schott Foundation for Public Education (2012)



### III. THE DOE'S PRACTICE IS TO CLOSE MINORITY HIGH SCHOOLS WITH HIGH CONCENTRATIONS OF STUDENTS WITH HIGH NEEDS

42. Since 2008, after the second Parthenon Report was released, the DOE has closed 29 large high schools and opened 50 smaller high schools. At the time of the DOE's decision to close the schools, the closing high schools enrolled 26,620 students. Of these, 11,287 students (or 42%) were African American, 13,374 students (or 50%) were Latino, and 554 students (or 2%) were white. The remaining 1,405 students (or 5%) were either Asian or multi-racial. Notably, 92% of the students in the closing high schools were African American or Latino (as compared to only 71% of the high school students City-wide). The closing schools, combined, served 3,374 students (or 13%) who were overage upon entry to 9th. The three-year average entering 8th grade math and English language arts scores for students in these schools was 2.37; i.e. below grade level.

43. A report recently released by the New York City Independent Budget Office has revealed similar findings. (See Statistical Profile of Schools on DOE's 2012 Closure List, Independent Budget Office, Education Research Team, February 2012 ("IBO Report"), a copy of which is annexed hereto as Ex. D). The IBO Report reveals that the high schools on the 2012 closure list had a student enrollment that was over 95% African American/Latino (almost 1.4 times greater than that of the City-wide high school average). The closing schools had a higher percentage of overage students than high schools City-wide (approximately 1.7 times greater) and over 50% of their incoming 9th grade students scored in the lowest third City-wide on state exams. In a related report, the IBO found that "all other things being equal, a school with a higher percentage of African American and Latino students ... is likely to have lower progress report scores" – significant given that this is the assessment the DOE typically turns to when deciding whether or not to close a school. (See Assessing School Progress Reports'

Measurement of Annual Academic Performance, April 2012, a copy of which is annexed hereto as Ex. E).

44. In contrast, the new schools opened by the DOE since 2008 enrolled only 10,210 students in the 2011 school year (less than half the number of students enrolled in the closing schools). Of these, 3,626 students (or 36%) were African American, 4,616 students (or 45%) were Latino, and 968 students (or 9%) were white. The remaining 1,000 (or 10%) were either Asian or multi-racial. Although the new schools would not qualify as Disproportionately White Schools under the Complainant's analysis, it is notable that the percentage of white students attending these schools is more than 4 times that of the closing schools. The new schools, combined, served only 584 students (or 6%) who were overage upon entry to 9th grade (less than 1/2 of the proportion of those served by the closing schools).

45. While it may appear, on its face, that the DOE is doing that which Parthenon suggests — namely, taking schools with large concentrations of students with high needs and creating smaller schools with smaller concentrations of these students — it is clear from the data detailed above that many of the high needs students served by the closing schools are just not enrolled in the new schools. It is also clear from the student concentration data discussed *supra* that these students with high needs are also not being placed in Disproportionately White Schools. Instead, the DOE is concentrating these high needs students in other Minority Schools, thereby effectively dooming more Minority Schools to close.

46. Statistical analyses prove that the replacement schools, in aggregate, *do not* serve comparable numbers of high needs students. As shown in the table below, an “Independent test” comparing the populations of the closing schools when the decision to close was announced with that of the new schools in 2011 indicates to a 99% certainty that, in the aggregate, the closing schools have greater concentrations of overage students. In addition, it would appear, based on the mean of the average 8th grade ELA and math test scores for entering students, that the closing schools also had a higher concentration of low performing students than do the new schools:

Closing/New School Status	N	Mean Percentage of Overage Students		Mean of Average 8 <sup>th</sup> Grade ELA/Math Test Scores	
		Mean %	StdDev	Mean Score	StdDev
New Schools	49	6.2%	0.7%	2.78	0.3
Closing Schools	29	11.5%	0.5%	2.31	0.1

47. This very phenomenon was discussed by Commissioner King in a letter dated July 21, 2011 (a copy of which is annexed hereto as Ex. F), in which he approves the DOE’s decision to close 11 so-called “Persistently Low Achieving” high schools, 9 of which (or 92%) are Minority Schools. Specifically, the Commissioner recognizes that “many of the schools that will be phased out serve high concentrations of students with disabilities, English language learners, low-income students and students who are overage and under-credited and/or enter the school not proficient in English language arts and/or mathematics.” He further acknowledges that this could be problematic “if the replacement schools in aggregate do not serve comparable numbers of such students.” Commissioner King reiterated this concern in 2012 when he refrained from approving New York City’s School Improvement Grant application until the DOE could “[p]rovide information about changes that will be made to the admissions process at the

proposed Turnaround schools and/or district enrollment policies in response to concerns that [NY]SED has raised to NYCDOE regarding disproportionate numbers of students with disabilities, English language learners, and students that are performing below grade level being admitted to these schools.” (May 31, 2012 King Letter).

48. The 2006 Parthenon Report also included recommendations regarding this issue. In order to improve graduation rates for all students, one of the key recommendations in the 2006 Parthenon Report was that the DOE change the concentration of students with high needs by capping the concentration of these students in large comprehensive high schools and striving to create more equitable concentrations across the New York City high schools through the high school admissions process. (See 2006 Parthenon Report, at 40). Indeed, according to Parthenon, dispersing the concentration of high needs students would have a greater positive impact on student results than would simply creating smaller schools. (*Id.* at 29).

49. The DOE, however, has ignored both the recommendations included in the Parthenon report and the requests of Commissioner King.

50. Recognizing the demographic realities of the New York City Public Schools, the Complainants are not suggesting that the DOE is overwhelming *all* Minority Schools with high concentrations of students with high needs, but that these students are only found in high concentrations in Minority Schools. Stated otherwise, there exist Minority Schools, Disproportionately White Schools and schools in between these extremes that are not affected by high concentrations of students with high needs. As demonstrated above, this is particularly true for the new schools being opened by the DOE. In order to improve the educational opportunities for all students, those with high needs and those without, the DOE should be dispersing this

population more evenly across the City's high schools. It is not and, as a result, African American and Latino students are disproportionately harmed.

### **LEGAL BASIS FOR COMPLAINT**

51. Title VI provides, in relevant part, “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

52. Title VI Regulations prohibit recipients of Federal financial assistance from utilizing “criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.” 29 CFR §42.104(b)(2).

53. Although no private right of action exists for claims of disparate impact under Title VI (Alexander v. Sandoval, 523 U.S. 275, 289 (2001)), the United States Department of Education may redress, by regulation, actions that have unjustifiable disparate impact on minorities, regardless of any intent to discriminate. See Alexander v. Choate, 469 U.S. 287, 293 & n. 9 (1985). Accordingly, OCR has promulgated regulations containing a disparate impact provision, which states that it is prohibited for a program receiving Federal financial assistance to develop and implement “criteria or methods of administration” for determining the types of benefits or services to provide that have the effect of discriminating on the basis of race. 34 CFR § 100.3 (2011); see also Grimes v. Sobol, 832 F.Supp. 704, 709 (S.D.N.Y. 1993), *aff’d* 37 F.3d 857 (2d Cir. 1994). When there exists a causal relationship between the recipient’s conduct and the harm on members within a protected class, discriminatory impact can be found. See Grimes, 832 F. Supp. at 709.

54. To establish a *prima facie* case of disparate impact discrimination, a plaintiff must show that a “facially neutral practice has a racially disproportionate effect.” Georgia State Conf. of Branches of NAACP v. State of Ga., 775 F.2d 1403, 1417 (11th Cir. 1985). The DOE’s own Demographic and Accountability data, as detailed in the Factual Allegations above, demonstrate that the DOE is administering policies that fail to provide equal educational opportunity for New York City’s African American and Latino students. Even given New York City’s predominantly minority high school student population, the resulting inequities still fall disproportionately upon African American and Latino students and should be corrected.

55. Once the plaintiff has demonstrated discriminatory impact, the burden then shifts to the defendant to prove “a substantial legitimate justification for its practice.” Id. Under Title VI, courts have deemed this an “educational necessity” test, meaning the defendant must show “that any given requirement has a manifest relation to the education in question.” Larry P. by Lucille P. v. Riles, 793 F.2d 969, 982, n. 9 (9th Cir. 1984) (citing Bd. of Educ. of New York v. Harris, 444 US 130, 151 (1979)). Here, the DOE’s high school admissions policies, which allow for high concentrations of students with high needs solely in Minority Schools, not only have an adverse educational effect on those students with high needs but on *all* of the students. This has been demonstrated by the DOE’s own Parthenon Reports. Accordingly, there can be no “educational necessity” for the current high school admissions policies. See Larry P., 793 F.2d at 982 (finding no educational necessity under Title VI for administering I.Q. tests which disproportionately place minorities in classes for retarded children where defendants own witnesses testified it would be “clearly damaging to a non-retarded student to be placed in those classes”).

56. Lastly, even if there did exist an “educational necessity” for the high school admissions policies, which there does not, the Complainants have offered an “equally effective alternative practice which results in less racial disproportionality.” Georgia State Conf. of Branches of NAACP, 775 F.2d at 1417. Specifically, the Complainants posit the DOE can implement a controlled choice high school admissions policy, which limits the concentration of students with high needs in *every* high school, thereby preventing any one school from shouldering the effects of enrolling a high concentration of these students.

## **RELIEF REQUESTED**

57. Complainants request that OCR:
- investigate the DOE to determine whether its high school assignment and/or school closing policies and procedures are creating a disparate impact on African American and Latino students;
  - take all necessary steps to remedy any unlawful conduct by DOE identified in OCR's investigation or otherwise, as required by Title VI and its implementing regulations;
  - secure assurances of compliance with Title VI and its implementing regulations from the DOE, as well as full remedies for any violations found; and
  - monitor any resulting agreements with the DOE to ensure compliance with Title VI and its implementing regulations is achieved;
  - secure assurance from the DOE that it will promulgate regulations regarding the high school admissions process, in order to ensure transparency.

Respectfully Submitted,

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