SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, LOCAL 2; ADVOCATES FOR JUSTICE LEGAL FOUNDATION; COREY HAMILTON, individually and on behalf of his minor child L.H.; ERICA NAIRNE-HAMILTON, individually and on behalf of her minor child L.H.; ELIZABETH WEINERT; and AUDRA FOX, individually and on behalf of her minor child J.F., Petitioners, v. THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK and DAVID C. BANKS, as Chancellor of the City School District of the City of New York, Respondents.	Case No. 2023-02304 Motion No. 2155 New York County Clerk's Index No. 152847/2023 **AFFIRMATION OF DINA KOLKER IN OPPOSITION TO APPELLANT SUCCESS ACADEMY'S CPLR §5519 MOTION FOR A STAY PENDING APPEAL**

DINA KOLKER, an attorney duly admitted to practice before the courts of the State of New York, hereby affirms the following to be true under penalty of perjury:

1. I am a member of the firm Stroock & Stroock & Lavan LLP, co-counsel for Petitioners-Appellees the United Federation of Teachers, Local 2 ("UFT"), by its President Michael Mulgrew; Advocates for Justice Legal Foundation; Corey Hamilton, individually and on behalf of his minor child L.H.;

Erica Nairne-Hamilton, individually and on behalf of her minor child L.H.; Elizabeth Weinert; and Audra Fox, individually and on behalf of her minor child J.F. (collectively, "Petitioners").

2. I respectfully submit this affirmation in opposition to the motion of non-party Success Academy Charter School ("Success Academy"), pursuant to CPLR §5519, for a stay of the proceeding captioned Mulgrew et al v. The Board of Education of the City School District of the City of New York et al, currently before the Supreme Court of the State of New York, New York County, pending appeal of the lower court's denial of intervention.

PRELIMINARY STATEMENT

3. Put plainly, Appellant's intervention motion, the instant §5519 stay application, and this appeal, are unnecessary procedural gambits designed to delay resolution of Petitioners' Article 78 proceeding, such that irreparable renovations will be performed at the affected public schools—which would result in harm to the 1,280 students and their teachers at those locations.

4. This dispute is not questioning the wisdom of the decisions to co-locate the schools. The claims require pure statutory interpretation and center on whether Respondents (not intervenors) complied with the statutorily required public process to identify, analyze, and vet the impact of the proposed co-location

on the existing students and schools *prior* to considering whether to approve the co-locations.

5. Success Academy—a non-party and failed intervenor—hollowly asserts that this action is about the supposed 300 charter school students who will "lose their schools of choice" should these co-location determinations be overturned.

6. While it is true that the two Success Academy schools may be delayed or prevented from having their location of choice depending on the outcome of this proceeding, the claims here are not about Success Academy.

7. Success Academy's tunnel vision focus on the potential burden of finding replacement space for the planned opening of a new elementary school, and the logistical challenges of the second Success Academy school having to stay in its current location and delay its planned expansion, while real, (1) distort what this proceeding is about; and (2) present arguments and considerations fully within Respondents' ability to zealously advocate.

STATEMENT OF FACTS

8. As set out in the Verified Petition, Petitioners—parents of affected public school students, Advocates for Justice, a public interest legal services organization that advocatess for disabled children, and the United Federation of

Teachers—commenced the underlying Article 78 proceeding on March 27, 2023[1] to vacate and annul the actions taken by Respondents to co-locate two charter schools in Queens and Brooklyn, respectively, because of their failure to adequately adhere to the statutory requirements of Education Law §2590-h and -g, §2853, and their own related regulations.

9. The Chancellor and his administrative arm, the NYC Department of Education (together "DOE"), have not complied with Education Law §2590-h and -g and §2853 in substance or procedure, and have failed to uphold the law's purpose: to provide the impacted students, parents, community, and members of the City Board of Education, referred to by Respondents as the Panel for Educational Policy (the "PEP"), with adequate specific information about major changes to their school's space and how these changes will impact the education of the existing and prospective students. Mulgrew, et al vs. The Board of Education of the City School District of the City of New York et al, NYSCEF Doc. No. 1 (152847/2023) (Sup. Ct, New York Cnty., 2023) (the "Verified Petition") at ¶1.

10. These claims raise issues of pure statutory interpretation and center on the adequacy of the information and analysis provided by DOE pursuant to a

[1] As detailed in the Verified Petition, Petitioners seek review of administrative decisions made on November 30, 2022 and December 21, 2022. Verified Petition, NYSCEF Doc. No. 1 (152847/2023) at ¶144. Contrary to Success Academy's baseless assertion that Petitioners "waited more than four months to file the Verified Petition," Petitioners were well within the four-month Article 78 statute of limitations.

detailed statutorily required process. No challenge is made to any action taken by Success Academy.

I. Application for Preliminary Injunction; Construction Concerns

11. Petitioners have also applied to the Supreme Court for a preliminary injunction due to concerns that Respondents would allow construction to occur in the schools prior to resolution of this matter on the merits. Verified Petition at ¶¶148-149; NYSCEF Doc. No. 27 (152847/2023) ("Kolker Affirmation in Support of Preliminary Injunction") at ¶¶4-5; NYSCEF Doc. No. 37 ("Kolker Intervention Opp.") (152847/2023) at ¶5.

12. Success Academy has consistently asserted, including in the instant motion, that it "has already started preparing the space for [the students'] arrival," and that "[a]n adverse decision by the Court will directly require Success Academy to cease these preparations[.]" Mulgrew et al v. The Board of Education of the City School District of the City of New York et al, NYSCEF App. Div. Doc. No. 3 (2023-02304) (1st Dep't, 2023), ("SA Stay Papers") at 18.

13. Petitioners were not aware of any imminent work and, in light of the statutory restriction that proposed co-locations not commence until the end of the school year, sought only a Preliminary Injunction in this proceeding.

14. To ensure that further emergency relief was not needed, Petitioners' counsel wrote to Respondents' counsel on March 29, 2023 seeking confirmation

that no work would be commenced prior to the court hearing this matter. Kolker Intervention Opp., Ex. B, NYSCEF Doc No. 39 (152847/2023) at 1.

15. Petitioners relied upon that representation, and have specifically refrained from seeking a temporary restraining order based on that representation. Kolker Intervention Opp., NYSCEF Doc. No. 37 (152847/2023) at ¶15.

16. In light of the delays procured by Success Academy, on May 12, 2023, Petitioners again sought confirmation from Respondents that no construction would be commenced at the challenged locations until the Supreme Court return date. Attached hereto as Exhibit A is a true and correct copy of emails between myself and Corporation Counsel attorneys, dated May 12, 2023, through May 18, 2023, confirming that "there is currently no work scheduled before the end of the school year." Exhibit A at 1. The 2022-2023 DOE school year is scheduled to end on June 27, 2023.

17. The instant motion will not even be fully submitted until May 30, 2023.

18. With the end of the school year weeks away, all this delay exacerbates the threat that the at-issue schools will be irreversibly altered prior to the Supreme Court ruling on the merits below.

19. In fact, a stay pending appeal may enable Success Academy to circumvent Petitioners' application for interim relief, allowing Success Academy

to commence construction during the pendency of the appeal while the Supreme Court is stayed from hearing the application for preliminary injunction.

II. Relevant Procedural History

20. On May 8, 2023, Judge Frank denied Success Academy's motion to intervene because of Success Academy's failure to assert its posture in opposition to the underlying Article 78 proceeding or provide proposed pleadings.

21. Indeed, Judge Frank stated that:

> [w]hile the Court agrees that the Proposed Intervenor has an interest in the outcome of the litigation, the motion is *silent* as to what position they will advance that will address the underlying petition and for which the respondents cannot adequately represent. To this Court, to allow the Proposed Intervenor to intervene would be repetitive, and would delay this litigation, which the parties all agree is time sensitive.

May 8, 2023 Order, NYSCEF Doc. No. 42 (152847/2023) at 2 (emphasis added).

22. Success Academy's actions have already delayed this proceeding by at least twenty days and will likely result in significant further delay.

23. Under the initial schedule, the Supreme Court would have held the preliminary injunction hearing on May 10th and likely made a decision by now. NYSCEF Doc. No. 29 (152847/2023).

24. Instead, upon the lower court's denial of Success Academy's motion to intervene on May 8, 2023, it provided a briefing schedule whereby Respondents were to submit an opposition by May 15, 2023, Petitioners were to submit a reply

by May 22, 2023, and the parties were to appear for argument in this matter on May 25th. NYSCEF Doc. No. 42 (152847/2023) at 2.

25. Success Academy's current application has ensured that Respondents did not submit their opposition on May 15th, rendering the Supreme Court's amended briefing schedule on the underlying proceeding void.

26. Their repeated argument now, that they were prepared to proceed "under the exact schedule for briefing,"[2] rings especially hollow.

27. The instant motion for a stay pending appeal will be fully submitted on May 30, 2023, and—if a stay is granted, which we urge the Court to deny—even an expedited timeline for this interlocutory, non-party appeal will prevent the Supreme Court from hearing this matter before the end of this school year—and, perhaps, even before the beginning of the next.

28. This extended delay will allow Success Academy to commence construction before the Supreme Court may hear Petitioners' application for preliminary relief.

[2] SA Stay Papers, NYSCEF App. Div. Doc. No. 3 (2023-02304) at 16; 21.

ARGUMENT

I. THE APPEAL IS MERITLESS

29. The Court should deny Success Academy's motion to stay the underlying proceeding. CPLR §5519(c) provides that "[t]he court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal…" CPLR §5519(c).

30. Under CPLR §5519, there is no entitlement to a stay. This is because courts have the inherent power to control their calendars and to supervise the course of litigation before them.

31. Indeed, a stay is an exercise of judicial discretion. A party requesting a stay bears the burden of showing that the circumstances justify an exercise of the court's discretion.

32. Stays pending appeal will not be granted where the appeal is meritless or used for the purpose of delay.

33. As detailed herein, and in the accompanying memorandum of law, Success Academy's stay application is a meritless litigation tactic intended to frustrate the timely resolution of Petitioners' claims. Accordingly, the Court should deny Appellant's §5519 motion.

34. Petitioners demonstrated to the court below that (a) Success Academy's motion to intervene was deficient; (b) intervention would needlessly delay the proceeding; (c) Success Academy's rights were already adequately represented; and (d) Petitioners—as well as the students in both the traditional public schools and the charter schools—would be prejudiced by Success Academy's unnecessary intervention and aforementioned concomitant issues.

35. Success Academy now seeks to delay these proceedings even further by seeking appeal.

36. The Supreme Court was well within its discretion to deny Success Academy's motion to intervene, and this Court should not disturb that determination.

37. Although Success Academy argues that New York appellate courts have "routinely reversed" the Supreme Court's intervention denials, appellate courts—including the Court of Appeals—have held that the Supreme Court's discretion is to be respected vis-à-vis intervenor.

38. Indeed, the cases Success Academy cites for "routine" reversals of Supreme Court intervention denials are each highly distinguishable from the matter at hand, or undermine their arguments.

39. Petitioners have demonstrated, and the Supreme Court has already ruled, that Respondents can adequately represent Success Academy. Petitioners

have further demonstrated that they will be substantially prejudiced if Success Academy is permitted to intervene.

40. Success Academy is actively stymying—as opposed to facilitating—the timely resolution of this matter. Indeed, Success Academy has not even articulated its legal or factual positions in the underlying proceeding, and seeks to exacerbate delay through frivolous motion practice both below and before this Court.

41. Accordingly, while Success Academy asks this Court to substitute its wisdom for that of the Supreme Court, it presents no basis on which to find that Supreme Court abused its discretion.

A. Supreme Court Properly Found That Success Academy Does Not Meet CPLR §1012's Standard for Intervention as of Right

42. CPLR §1012(a)(2) provides that intervention may be permitted "when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment." See CPLR §1012(a)(2).

43. Petitioners successfully demonstrated below that Success Academy's interests would be adequately represented by Respondents, a conclusion not disputed by Respondents here. Now, Success Academy repeats its invented dichotomy that it has a purportedly "practical" interest in the proceeding—asserting that this interest is different from Respondents' "procedural interest." SA Stay Papers at 17. The underlying court considered and rejected this assertion and

stated that it did not find this argument persuasive. NYSCEF Doc. No. 42 (152847/2023) at 2.

44. Now, Success Academy newly argues, citing an article from February 2023—which it confoundingly chose not to present in its motion to intervene—that Respondents "have been quite ambivalent about charter schools in general and co-locations in particular." See SA Stay Papers, NYSCEF App. Div. Doc. No. 3 (2023-02304) at 17.

45. But Appellant's conclusion does not logically flow from its so-called evidence. That DOE takes certain policy positions (such as those regarding future changes being considered by the Legislature) does not indicate that it will not adhere to its current obligations to Success Academy and the students impacted by the proposed co-locations.

46. Moreover, Success Academy makes this assertion despite the fact that DOE supported Success Academy's Order to Show Cause below, and expressed the same concerns that Success Academy asserted (and currently asserts) that DOE "would have to try to find new school buildings for the two Success Academy schools in a very short timeframe." Corporation Counsel Affirmation in Support

of Success Academy's Motion to Intervene, NYSCEF Doc. No. 40 (152847/2023).[3]

47. This Court should view this for what it is: a last-ditch attempt to distinguish Success Academy's interests from those of Respondents in an argument Success Academy failed to articulate below.

48. Success Academy has also failed to recognize that DOE (a) has a constitutional responsibility to ensure all students have access to education; and (b) plays a statutory role in the process of finding physical space for City Charter schools. See N.Y. Const. art. XI, §1; N.Y. Educ. Law §2853(3).

49. Thus, Respondents have the same "practical interest" as Success Academy.

50. To deflect from its superficial arguments, Success Academy purposefully mischaracterizes the Supreme Court's decision to hold that intervention was denied because Success Academy "failed to prove definitively that its substantial interest in this litigation would not be adequately protected by Respondents." SA Stay Papers, NYSCEF App. Div. Doc. No. 3 (2023-02304) at 16.

[3] It is telling, now that the parties are even more pressed for time, that Respondents no longer support Success Academy's §5519 application on appeal, instead taking "no position on the motion for a stay pending appeal." NYSCEF App. Div. Doc. No. 6 (2023-02304).

51. The Order says no such thing. Rather, it explains that Success Academy's "motion is *silent* as to what position they will advance that will address the underlying petition and for which the respondents cannot adequately represent." May 8, 2023 Order, NYSCEF Doc. No. 42 (152847/2023) at 2 (emphasis added).

52. As explained below, this "silence" not only continues before this Court, but is a byproduct of Success Academy's failure to supply a proposed pleading—let alone substantive factual or legal arguments—that it intends to present should intervention be granted.

53. Cases relied upon by Success Academy are not to the contrary.

54. Moreover, as explained *supra*, an appellate court should not disturb a lower court's ruling on intervention, provided that—as here—there is no abuse of discretion as a matter of law.

55. To the extent that Success Academy wants to present facts about its schools that are different from those within DOE's knowledge and set forth in the challenged Educational Impact Statements ("EISs") (which they have not done in connection with this motion or their motion below), this proffer would not support intervention either.

56. In fact, the primary assertion of Success Academy's stay application is the entirely obvious fact that if the co-location approvals are reversed, the

schools will not be co-located in the coming school year. Success Academy provides no alternate viewpoint that would be useful to the Supreme Court or this Court. Instead, DOE is more than capable of presenting these considerations and defending its alleged statutory compliance. As such, this Court should deny the stay.

57. Finally, Success Academy conveniently avoids any mention of the interests of more than 1,000 existing students at the affected schools. This proceeding is about their rights, and the rights of school and community stakeholders that DOE was supposed to safeguard. These illegal co-locations would significantly violate those rights, given that the limited physical (and other) resources at these schools would be permanently altered.

58. Accordingly, the Supreme Court did not abuse its discretion in declining to allow intervention as of right.

B. Supreme Court Correctly Concluded That Success Academy Does Not Meet The Criteria For CPLR §1013's Permissive Intervention

59. CPLR §1013 provides for intervention by permission "when the person's claim or defense and the main action have a common question of law or fact." CPLR §1013.

60. Importantly, the statute also provides that "[i]n exercising its discretion, the court shall consider whether the intervention will unduly delay the

determination of the action or prejudice the substantial rights of any party." CPLR §1013.

61. Petitioners dispute Success Academy's claim, repeated in this motion, that the facts at issue "are facts about Success Academy, of which Success Academy has the most knowledge." Success Academy Motion to Intervene, NYSCEF Doc. No. 31 (152847/2023) at 7; SA Stay Papers, NYSCEF App. Div. Doc. No. 3 (2023-02304) at 19; Lefkowitz Stay Affirmation, NYSCEF App. Div. Doc. No. 3 (2023-02304) at ¶21.

62. This assertion is a distortion of the issues presented and an example of the confusion the Supreme Court was cautious to avoid.

63. Indeed, Success Academy's papers reveal its intention to make this proceeding not about DOE's compliance with law, but about "the City's most powerful teacher's union" and Success Academy. See SA Stay Papers, NYSCEF App. Div. Doc. No. 3 (2023-02304) at 9, 18, 26, 32.

64. Further, Appellant completely excludes the advocacy groups, parents, and educators who brought this challenge to protect their rights.

65. As explained at length in Petitioners' Opposition to Intervention, NYSCEF Doc. No. 36, (152847/2023), Verified Petition, NYSCEF Doc. No. 1, (152847/2023), and Memorandum of Law, NYSCEF Doc. No. 26 (152847/2023), the facts at issue all regard DOE's and PEP's compliance with statutorily

prescribed requirements to propose and approve co-locations. These requirements were designed to safeguard the quality of the education and services provided to New York students.

66. Here, Petitioners seek to safeguard those rights—the rights of the 1,280 students currently at the implicated schools—which are in jeopardy of being undermined permanently.

67. To the extent some facts about the specific Success Academy schools to be co-located are included in the challenged EIS's, they include basic items like the grades and expected enrollment of the schools and space allotments. Aside from cryptic promises of special knowledge, Success Academy has not identified a single specific fact that is different than or expands upon those in DOE's possession and contained in the official public documents.

68. Nevertheless, if this Court should reverse the Supreme Court's decision on intervention, it would prejudice Petitioners by further delaying and unnecessarily complicating these proceedings, which require swift resolution for the benefit of all.

C. Intervention Is Not Warranted Under CPLR §7802(D), Which Provides For Judicial Discretion

69. The Supreme Court also did not abuse its discretion in finding that intervention was not warranted under CPLR §7802(d). This catchall provision does not support Appellants' application for intervention.

70. Section 7802(d) provides that a court "may allow other interested persons to intervene" in an Article 78 proceeding. As such, courts have held that intervention is always a matter of judicial discretion.

71. Courts utilize a balancing test to assess Article 78 interventions.

72. They weigh the benefit to be gained by intervention, including the extent to which the proposed intervenor may be harmed if it is refused, against other factors, such as the degree to which the proposed intervention will delay and unduly complicate the litigation and whether any party would be prejudiced.

73. As the Supreme Court determined, there is no affirmative reason to grant intervention; rather, there are only reasons to deny it, including, *inter alia*: (a) unnecessarily complicating and delaying a proceeding when it is in the best interest of all that it be resolved expeditiously; (b) failing to articulate interests that are separate from those of existing Respondents; and (c) prejudicing Petitioners.

74. Indeed, lower courts have rejected intervention applications under CPLR §7802(d) when the proposed intervenors' motion fails to meet the standards of CPLR §§1012 and 1013—including when the proposed intervenors' position can be adequately articulated by the dispute's existing respondents.

75. Despite Success Academy's mischaracterizations of the opinion below—erroneously arguing that it purported to require Success Academy to "prove definitively" that Respondents did not adequately represent their interests—

the Supreme Court's decision instead found that Success Academy had failed to proffer any unique position in this proceeding. Compare May 8, 2023 Order, NYSCEF Doc. No. 42 (152847/2023) at 2, with SA Stay Papers, NYSCEF App. Div. Doc. No. 3 (2023-02304) at 16.

76. Accordingly, "to allow the Proposed Intervenor to intervene would be repetitive, and would delay this litigation, which the parties all agree is time sensitive." See id.

77. Nor does Success Academy cite to any authority for the proposition that "CPLR 1012 merely requires some uncertainty" regarding the adequacy of representation of interest by a pre-existing party. See SA Stay Papers, NYSCEF App. Div. Doc. No. 3 (2023-02304) at 17.

78. In fact, Success Academy failed to provide any meaningful grounds for intervention, besides a flimsy, manufactured dichotomy between the "procedural" and "practical" interests ostensibly held by Success Academy and Respondents, respectively.

79. Regardless, this shallow would-be distinction, elaborated on for the first time on appeal, does not suffice to vitiate the Supreme Court's ruling. The decision below considered all of Success Academy's arguments and concluded that they were unconvincing.

80. Accordingly, the Supreme Court properly exercised its discretion by denying Success Academy's motion below.

II. Petitioners Will be Prejudiced By a Stay Pending Appeal

81. Success Academy argues that Petitioners' concerns about delay are "baseless." SA Stay Papers, NYSCEF App. Div. Doc. No. 3 (2023-02304) at 21. This is incorrect at best and gaslighting at worst.

82. Success Academy's actions have already delayed this proceeding by at least twenty days. Under the initial schedule, the underlying court would have held the preliminary injunction hearing on May 10th and likely would have made a decision by now. NYSCEF Doc. No. 29 (152847/2023).

83. With the end of the current school year mere weeks away—and the rights of some 1,280 students and teachers on the line—time is of the essence.

84. Yet, Success Academy seeks to run out the clock so that they can begin construction before the Supreme Court can consider the matter, while simultaneously crying foul that they have no time to make alternate plans for the start of the school year in the fall.

85. Success Academy claims that their participation will "clarify the issues," when in reality Success Academy has failed, and continues to fail, to submit proposed pleadings to help the underlying court determine whether its participation is necessary.

86. Indeed, as noted *supra*, Judge Frank made clear that Success Academy's "motion is *silent* as to what position they will advance that will address the underlying petition and for which the respondents cannot adequately represent," thereby rendering intervention "repetitive" and resulting in unnecessary delay. See NYSCEF Doc. No. 42 at 2 (emphasis added).

87. Even now, Success Academy fails to articulate, let alone submit, what arguments they will make aside from their desire to move ahead with the co-locations, and the alleged harm to them if they do not.

88. For all of Success Academy's bluster about not delaying these proceedings, they have consistently failed to deliver the required information to allow first the Supreme Court—and now this Court—to weigh and determine their motion for intervention.

89. Instead they distort the issues, focusing the lens entirely on themselves. Petitioners did not include Success Academy in this proceeding because they are neither a necessary party nor a necessary intervenor. While they may be impacted by an ultimate decision, it is not their actions or rights that are at issue, as they have no right to an illegally granted co-location.

90. While Success Academy may point to instances where an appellate court disagreed with a lower court's decision regarding intervention, this is the exception, not the rule. Rather, the rule respects the discretion of lower courts.

91. That a spectrum of caselaw exists both upholding and overturning intervention speaks only to the fact that courts—in their discretion—consider a specific case's facts and procedural posture in making their determination. This is exactly what the Supreme Court did when it denied intervention here.

92. Success Academy failed (a) to submit a proposed pleading; (b) to articulate the legal and factual issues it intends to raise in this proceeding; (c) to address the rights of the students and teachers currently at the affected school locations; and (d) to speak to Respondents' violations of their obligations under the law. Rather, they frame their intervention as faceoff between Success Academy and the UFT, and—in so doing—blatantly try to run out the clock to the detriment of all parties.

93. Apart from the questionable merit of this appeal, the imminence of the actual parties' hearing renders a stay unwarranted.

94. For the reasons stated in this Affirmation, Success Academy's application for a temporary stay should be denied.

Dated: May 22, 2023
New York, New York

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Exhibit A

From:	Kolker, Dina
To:	Riddleberger, Kendra (Law); Frank, Philip (Law)
Cc:	Masiuk, Elizabeth F.
Subject:	RE: [EXTERNAL] RE: UFT Co-location matter
Date:	Thursday, May 18, 2023 4:13:06 PM

Thank you.

Dina Kolker
Partner
(she | her | hers)

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From: Riddleberger, Kendra (Law) <KRiddleb@law.nyc.gov>
Sent: Thursday, May 18, 2023 4:11 PM
To: Kolker, Dina <dkolker@stroock.com>; Frank, Philip (Law) <pfrank@law.nyc.gov>
Cc: Masiuk, Elizabeth F. <emasiuk@stroock.com>
Subject: RE: [EXTERNAL] RE: UFT Co-location matter

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Good Afternoon Dina,

Thank you for my email, there is currently no work scheduled before the end of the school year.

Best,
Kendra

From: Kolker, Dina <dkolker@stroock.com>
Sent: Wednesday, May 17, 2023 11:23 PM
To: Frank, Philip (Law) <pfrank@law.nyc.gov>; Riddleberger, Kendra (Law) <KRiddleb@law.nyc.gov>; Cho, Min Kyung (Michelle) (Law) <mcho@law.nyc.gov>
Cc: Masiuk, Elizabeth F. <emasiuk@stroock.com>
Subject: [EXTERNAL] RE: UFT Co-location matter

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Following up on my email below from last week.

Thanks,
Dina

Dina Kolker
Partner
(she | her | hers)

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From: Kolker, Dina
Sent: Friday, May 12, 2023 3:27 PM
To: Frank, Philip (Law) <pfrank@law.nyc.gov>; Riddleberger, Kendra (Law) <KRiddleb@law.nyc.gov>; Cho, Min Kyung (Michelle) (Law) <mcho@law.nyc.gov>
Cc: Masiuk, Elizabeth F. <emasiuk@stroock.com>
Subject: UFT Co-location matter

I hope this email finds everyone well. I am writing to follow up regarding our understanding that no construction will be commenced at the challenged locations until the Supreme Court return date. In light of the various delays, including today's order from the Appellate Division, we wanted to confirm that no construction will commence at either school during this period. As I mentioned before, we had not previously sought a TRO because there were no indications that work was being done and you had represented that none would be commenced before the return date. Should work be anticipated to commence prior to the Supreme Court hearing the matter, we ask that you let us know in advance.

Thanks,
Dina

Dina Kolker
Partner
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, LOCAL 2; ADVOCATES FOR JUSTICE LEGAL FOUNDATION; COREY HAMILTON, individually and on behalf of his minor child L.H.; ERICA NAIRNE-HAMILTON, individually and on behalf of her minor child L.H.; ELIZABETH WEINERT; and AUDRA FOX, individually and on behalf of her minor child J.F., Petitioners, v. THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK and DAVID C. BANKS, as Chancellor of the City School District of the City of New York, Respondents.	Case No. 2023-02304 Motion No. 2155 New York County Clerk's Index No. 152847/2023

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MEMORANDUM OF LAW IN OPPOSITION TO SUCCESS ACADEMY CHARTER SCHOOL'S MOTION FOR STAY PENDING APPEAL

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Petitioners-Appellees ("Petitioners") submit this memorandum of law in opposition to the motion of non-party Appellant Success Academy ("Success Academy" or "Appellant") to stay further proceedings in the litigation captioned Mulgrew et al v. The Board of Education of the City School District of the City of New York et al, currently pending in the Supreme Court of the State of New York, New York County, in order to appeal the denial of Success Academy's motion to intervene.

PRELIMINARY STATEMENT

Petitioners—parents of affected public school students, Advocates for Justice, a public interest legal services organization that advocates for disabled children, and the United Federation of Teachers—brought the underlying Article 78 proceeding before the Supreme Court to safeguard the rights of some 1,280 children[1] attending various schools at two public school facilities, as well as the rights of their families, educators and communities under the Education Law. The Petition alleges that Respondents failed to adequately satisfy a statutory process requiring them to identify, disclose and vet the impact of the challenged co-locations on those students and communities. Once the co-locations go forward, Petitioners and those they represent will lose their statutory rights to a public

[1] NYSCEF Doc. No. 2 (152847/2023) at 6; NYSCEF Doc. No. 3 (152847/2023) at 7.

process and will be permanently impacted by the illegal co-locations, including increased class sizes, the permanent renovation and repurposing of school spaces like middle school science laboratory classrooms, and the loss of important summer or afterschool programs, to name but a few.

Success Academy—a non-party and failed intervenor—hollowly asserts that this action is about the supposed 300 charter school students who will "lose their schools of choice" should these co-location determinations be overturned.[2] While it is true that two Success Academy schools may be delayed or prevented from having their *location* of choice depending on the outcome of this proceeding, the claims—as explained above—are not about Success Academy.

Success Academy's tunnel vision focus on the potential burden of finding replacement space for the planned opening of a new elementary school, and the logistical challenges of the second Success Academy school having to *stay in its current location* and delay its planned expansion, while real, (1) distort what this proceeding is about; and (2) present arguments and considerations fully within Respondents' ability to zealously advocate.

After considering Success Academy's superficial arguments below, the Supreme Court reached precisely these conclusions when it properly exercised its

[2] NYSCEF App. Div. Doc. No. 3 (2023-02304) (1st Dep't, 2023), ("SA Stay Papers") at 28.

discretion to deny intervention on grounds that intervention would add confusion to the issues and be repetitive of Respondents' position. May 8, 2023 Order, NYSCEF Doc. No. 42 (152847/2023) at 2.

Indeed, Success Academy is so intent on making this proceeding about itself that it has not articulated a single legal argument addressed to the Petition. Instead, it simply repeats in various ways that it will be impacted and that its students will be forced (potentially) to seek other placements.

In addition, the Supreme Court reasonably found that Success Academy's intervention would cause unnecessary delay in a time-sensitive proceeding. This is especially true given that, as explained herein, approved co-locations may commence under the Education Law at the end of the school year.[3]

That end date is mere weeks away, on June 27, 2023. At the same time, schools need time to plan and prepare for next school year, which begins in a few short months. Thus, to avoid irreparable harm to the existing students of the public schools to be co-located by the planned construction and alterations to the facilities—but to still allow all schools and parties to adequately plan for the coming school year—the Supreme Court must be allowed to hear and rule on

[3] Pursuant to N.Y. Educ. Law §2590-h(2-a)(e), proposed co-locations "shall not take effect until all the provisions of this subdivision have been satisfied *and the school year in which such city board approval was granted, has ended*." (emphasis added)).

Petitioners' application for a preliminary injunction before June 27, 2023 (when the school year ends) and address the merits immediately thereafter.

Despite this looming emergency, non-party Success Academy seeks to further delay and upend this Article 78 proceeding, such that irreversible physical changes will be made to these schools as soon as June 28th for the school year *beginning in August 2023*. Despite assertions that Success Academy is not seeking to frustrate the timeliness of the parties' proceeding, it has thus far sought *only* to do just that.

Success Academy's failed motion to intervene—the subject of this appeal—already delayed the Supreme Court's proceeding timetable once, resulting in an amended briefing schedule for the parties, where the opposition of Respondents-Appellees Board of Education of the City School District of the City of New York and Chancellor David C. Banks ("Respondents") to the petition was due on May 15, 2023, and Petitioners' reply was due May 22, 2023—with argument set for May 25, 2023.

Now, Success Academy has further delayed the Supreme Court's proceedings—and seeks to frustrate timing even more—through this unnecessary appeal and the instant CPLR §5519 application. This significantly prejudices Petitioners, who seek to enjoin Respondents from making substantial structural

changes to various public school locations, unless and until Respondents fully comply with the Education Law.

Furthermore, the Supreme Court properly exercised its discretion and issued a well-reasoned opinion denying Appellant's motion. That other courts, as Appellant contends, found intervention warranted under entirely different facts and procedural postures does not mandate the same result here, for that is the definition of judicial discretion.

Here—and differentiating this case from those cited by Appellant—non-party Success Academy presented no factual or legal arguments below to support intervention, instead relying only on cryptic and unsupported statements about their ostensible special knowledge, and the obvious fact that, if the challenged co-locations are invalidated, alternate arrangements will potentially need to be made by the two schools seeking co-location. Now, Success Academy seeks to salvage its deficient intervention motion by proffering to this Court new explanations and citations—all of which could have been asserted before the Supreme Court in their original application and which are still insufficient.

Regardless, Success Academy's arguments about the potential impact on its students are completely within the ability of Respondent DOE to address. In fact, DOE has the ultimate constitutional obligation to provide an adequate public education to all students in its district—with specific statutory roles in both placing

students generally, and in assisting charter schools with regard to obtaining physical space. The Supreme Court denied intervention accordingly, properly reasoning that Success Academy's interests are adequately represented by Respondent DOE.

Success Academy ignores, *inter alia*, that the 1,000+ preexisting students and teachers at these two schools will suffer should this illegal co-location commence. Indeed, Success Academy did not even submit the required proposed pleading outlining its position relative to the Petition—instead, offering only the aforementioned vagaries. While Success Academy *attempts* to better explain its position before this Court, it still fails to explain what legal arguments it may raise.

This omission evidences a bare attempt to needlessly delay a ruling on the Petition in order to run out the clock on the current school year.

This Court should deny the motion and vacate the temporary stay.

STATEMENT OF FACTS

As set out in the Verified Petition, Petitioners commenced this Article 78 proceeding on March 27, 2023,[4] to vacate and annul the actions taken by Respondents to co-locate two charter schools in Queens and Brooklyn,

[4] As detailed in the Verified Petition, Petitioners seek review of administrative decisions made on November 30, 2022 and December 21, 2022. Verified Petition, NYSCEF Doc. No. 1 (152847/2023) at ¶144. Contrary to Success Academy's baseless assertion that Petitioners "waited more than four months to file the Verified Petition," Petitioners were well within the four-month Article 78 statute of limitations.

respectively, because of their failure to adequately adhere to the statutory requirements of Education Law §2590-h and -g, §2853, and their own related regulations. The Chancellor and his administrative arm, the NYC Department of Education (together "DOE"), have not complied with Education Law §2590-h and -g and §2853 in substance or procedure, and have failed to uphold the law's purpose: to provide the impacted students, parents, community, and members of the City Board of Education, referred to by Respondents as the Panel for Educational Policy (the "PEP"), with adequate specific information about major changes to their school's space and how these changes will impact the education of the existing and prospective students. Mulgrew et al vs. The Bd. of Educ. of the City Sch. District of the City of New York et al., NYSCEF Doc. No. 1 (152847/2023) (Sup. Ct, New York Cnty., 2023) (the "Verified Petition") at ¶1.

I. APPLICATION FOR PRELIMINARY INJUNCTION; CONSTRUCTION CONCERNS

Petitioners have also applied to the Supreme Court for a preliminary injunction due to concerns that Respondents would allow construction to occur in the schools prior to resolution of this matter on the merits. Verified Petition at ¶¶148-149; NYSCEF Doc. No. 27 ("Kolker Affirmation in Support of Preliminary Injunction") (152847/2023) at ¶¶4-5; NYSCEF Doc. No. 37 ("Kolker Intervention Opp.") (152847/2023) at ¶5. Success Academy has consistently asserted,

including in the instant motion, that it "has already started preparing the space for [the students'] arrival," and that "[a]n adverse decision by the Court will directly require Success Academy to cease these preparations[.]" Mulgrew et al v. The Bd. of Educ. of the City Sch. Dist. of the City of New York et al., NYSCEF App. Div. Doc. No. 3 (2023-02304) (1st Dep't 2023), ("SA Stay Papers") at 18. Petitioners were not aware of any imminent work and, in light of the statutory restriction that proposed co-locations not commence until the end of the school year, sought only a Preliminary Injunction in this proceeding. See N.Y. Educ. Law §2590-h(2-a)(e).

To ensure that further emergency relief was not needed, Petitioners' counsel wrote to Respondents' counsel on March 29, 2023 seeking confirmation that no work would be commenced prior to the court hearing this matter. Kolker Intervention Opp, Ex. B, NYSCEF Doc. No. 39 (152847/2023) at 1. Petitioners relied upon that representation, and have specifically refrained from seeking a temporary restraining order based on that representation. Kolker Intervention Opp., NYSCEF Doc. No. 37 (152847/2023) at ¶15. In light of the delays procured by Success Academy, on May 12, 2023, Petitioners again sought confirmation from Respondents that no construction would be commenced at the challenged locations until the Supreme Court return date. See Affirmation of Dina Kolker in Opposition to Appellant Success Academy's CPLR §5519 Motion For a Stay Pending Appeal, at ¶16. Respondents have indicated that no construction is

planned before the end of the school year, which is quickly approaching on June 27, 2023. See id. The instant motion will not even be fully submitted until May 30, 2023. With the end of the school year weeks away, all this delay exacerbates the threat that the at-issue schools will be irreversibly altered prior to the Supreme Court ruling on the merits below. In fact, a stay pending appeal may enable Success Academy to circumvent Petitioners' application for interim relief, allowing Success Academy to commence construction during the pendency of the appeal while the Supreme Court is stayed from hearing the application for preliminary injunction.

II. RELEVANT PROCEDURAL HISTORY

On May 8, 2023, Judge Frank denied Success Academy's motion to intervene because of Success Academy's failure to assert its posture in opposition to the underlying Article 78 proceeding or provide proposed pleadings. Indeed, Judge Frank stated that:

> [w]hile the Court agrees that the Proposed Intervenor has an interest in the outcome of the litigation, the motion is *silent* as to what position they will advance that will address the underlying petition and for which the respondents cannot adequately represent. To this Court, to allow the Proposed Intervenor to intervene would be repetitive, and would delay this litigation, which the parties all agree is time sensitive.

May 8, 2023 Order, NYSCEF Doc. No. 42 (152847/2023) at 2 (emphasis added).

Success Academy's actions have already delayed this proceeding by at least twenty days and will likely result in significant further delay. Under the initial schedule, the Supreme Court would have held the preliminary injunction hearing on May 10th and likely made a decision by now. NYSCEF Doc. No. 29 (152847/2023). Instead, upon the lower court's denial of Success Academy's motion to intervene on May 8, 2023, it provided a briefing schedule whereby Respondents were to submit an opposition by May 15, 2023, Petitioners were to submit a reply by May 22, 2023, and the parties were to appear for argument in this matter on May 25th. NYSCEF Doc. No. 42 (152847/2023) at 2.

Success Academy's current application has ensured that Respondents did not submit their opposition on May 15th, rendering the Supreme Court's amended briefing schedule on the underlying proceeding void.[5] Their repeated argument now, that they were prepared to proceed "under the exact schedule for briefing,"[6] rings especially hollow. The instant motion for a stay pending appeal will be fully

[5] Additionally, having failed to procure intervention through its vague and non-specific motion to intervene to the Supreme Court, non-party Success Academy has added new facts to its appeal that it did not present to the court below. Since it failed to assert any facts or arguments regarding its interests and how they differentiate from Respondents', Success Academy now asserts that "Respondents have been quite ambivalent about charter schools in general and co-locations in particular, going so far as to criticize the Governor for proposing authorization for additional charter schools, and specifically pointing to the cost of co-locations on Respondents' budget." NYSCEF App. Div. Doc. No. 3 (2023-02304) at 17. Success Academy cites to an article from February 8, 2023 to make this point, despite failing to include it in their April 17, 2023 motion for intervention.

[6] SA Stay Papers, NYSCEF App. Div. Doc. No. 3 (2023-02304) at 16; 21

submitted on May 30, 2023, and—if a stay is granted, which we urge the Court to deny—even an expedited timeline for this interlocutory, non-party appeal will prevent the Supreme Court from hearing this matter before the end of this school year—and, perhaps, even before the beginning of the next. This extended delay will allow Success Academy to commence construction before the Supreme Court may hear Petitioners' application for preliminary relief.

ARGUMENT

The Court should deny Success Academy's motion to stay the underlying proceeding. CPLR §5519(c) provides that "[t]he court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal…" CPLR §5519(c). Under CPLR §5519(c), there is no entitlement to a stay: this is because "courts have the inherent power, and indeed responsibility, so essential to the proper administration of justice, to control their calendars and to supervise the course of litigation before them." Matter of Grisi v. Shainswit, 119 A.D.2d 418, 421 (1st Dep't 1986). Indeed, a stay is "an exercise of judicial discretion. The party requesting a stay bears the burden of showing that the circumstances justify an exercise of the court's discretion." Jenack v. Goshen Operations LLC, No. 008129-2018, 2021 WL 5847237, at *3, (Sup. Ct. Orange

Cnty. May 11, 2021) (denying stay pending appeal, and citing Nken v. Holder, 556 US 418, 433-34 (2009)).

Moreover, the First Department has stated in Herbert v. City of New York—precedent endorsed by Appellant—that "stays pending appeal will not be granted or, where the stay is automatic, continued, in cases where the appeal is meritless or taken primarily for the purpose of delay." See Herbert v. City of New York, 126 A.D.2d 404, 407 (1st Dep't 1987).

As detailed herein, Success Academy's stay application is a meritless litigation tactic intended to frustrate the timely resolution of Petitioners' claims. Accordingly, the Court should deny Appellant's §5519 motion.

I. THE APPEAL IS MERITLESS

Petitioners demonstrated to the court below that (a) Success Academy's motion to intervene was deficient; (b) intervention would needlessly delay the proceeding; (c) Success Academy's rights were already adequately represented; and (d) Petitioners—as well as the students in both the traditional public schools and the charter schools—would be prejudiced by Success Academy's unnecessary intervention and aforementioned concomitant issues. Success Academy now seeks to delay these proceedings even further by seeking appeal. The Supreme Court was well within its discretion to deny Success Academy's motion to intervene, and this Court should not disturb that determination.

Although Success Academy argues that New York appellate courts have "routinely reversed" the Supreme Court's intervention denials, appellate courts—including the Court of Appeals—have held that the Supreme Court's discretion is to be respected vis-à-vis intervenor. See, e.g., Vantage Petroleum v. Bd. of Assessment Rev. of Town of Babylon, 61 N.Y.2d 695, 697 (1984) ("To the extent that the application sought intervention by permission under CPLR 1013, the exercise of discretion by the courts below is, absent an abuse of discretion as a matter of law, not here present, beyond our review"); New York City Health & Hospitals Corp. v. City of New York, 43 A.D.2d 513 (1st Dep't 1973) (affirming determination denying intervention because the interests of the proposed intervenors were adequately represented); Pace-O-Matic, Inc. v. New York State Liquor Authority, 72 A.D.3d 1144, 1145 (3d Dep't 2010) ("Supreme Court did not err in denying RGA's motion to intervene. Courts 'may allow other interested persons to intervene' in special proceedings (CPLR 7802[d]), but this permissive determination lies within the court's discretion. The court did not abuse that discretion here, where RGA failed to substantiate its interests in the proceeding, having introduced only speculative proof regarding potential financial effects to its members if Moxie Mania is permitted." (citations omitted)); see also In re HSBC Bank U.S.A., 135 A.D.3d 534, 534 (1st Dep't 2016) (affirming denial of

intervention and noting that distinctions between intervention as of right and discretionary intervention are no longer sharply applied).

Indeed, the cases Success Academy cites for "routine" reversals of Supreme Court intervention denials are each highly distinguishable from the matter at hand, or undermine their arguments.[7] For instance, Success Academy cites Estate of Ungar ex rel. Strachman v. Palestinian Auth., 44 A.D.3d 176, 179 (1st Dep't 2007)—a case involving neither intervention nor a stay application—for the proposition that the Court "is vested with the power to substitute its own discretion of the motion court, even in the absence of abuse"; yet, Success Academy omits the very next clause in that same sentence, which states that such is "*a power [the First Department] rarely and reluctantly invoke[s.]*" See id. (emphasis added).

[7] The vast majority of cases cited by Appellant are unavailing, as they merely stand for the proposition that courts have discretion to rule based on differing facts and procedural postures. See, e.g., Norris v. Walcott, 36 Misc. 3d 711 (Sup. Ct. N.Y. Cnty. 2012) (parents of charter school students—not the charter school itself—affected by intervention); Steglich v. Bd. of Educ. of City Sch. Dist. of City of N.Y., 32 Misc. 3d 1203(A), at *2 (Sup. Ct. N.Y. Cnty. 2011) (parents of charter school students who submitted affidavits stating the "pertinent and material facts showing the grounds of the respondent[s'] action complained of").

Accordingly, there is a spectrum of decisions upholding or overturning intervention determinations. Here—as recognized by the Supreme Court—the facts and procedural posture of this proceeding unequivocally weigh against intervention.

Tower Nat'l Ins. Co. v. Lugo, 199 A.D.3d 502 (1st Dep't 2021), similarly concerns entirely inapplicable subject matter—*i.e.*, the denial of a motion for renewal.[8]

Even Success Academy's cases concerning intervention are inapposite. In Matter of Romeo v. New York State Dep't of Educ., 39 A.D.3d 916 (3d Dep't 2007), the proposed intervenor (a school district) moved to intervene *after a judgment had been issued*. The Third Department, recognizing the "unusual circumstances of this case," allowed the district to intervene as an appellant on the appeal of the judgment in part because—though the petitioners argued that the respondents adequately represented the district's interests—the circumstances demonstrated that the respondents had not made the proposed intervenors aware of the proceeding and had sought to withdraw their appeal of the case. See id.; see also R.C. Diocese of Brooklyn v. Christ the King Reg'l High Sch., 164 A.D.3d 1394, 1396-1397 (2d Dep't 2018) (holding that where party, a Roman Catholic high school, *leased space* to proposed intervenor schools and therefore had a commercial relationship with those two schools, the pre-existing party Catholic school could not fully represent their interests, and no prejudice would result from intervention).

[8] Both cases cite to Brady v. Ottaway Newspapers, 63 N.Y.2d 1031 (1984), which involves a discovery dispute--the disclosure of confidential investigative reports—which like the other cases Appellant cited, is inapposite here.

Here, there has been no judgment and no demonstration that Respondents cannot adequately represent Success's interests. Instead, Success Academy seeks to thwart and drag out the determination of Petitioners' preliminary injunction application.

Furthermore, in Halstead v. Dolphy, 70 A.D.3d 639, 639 (2d Dep't 2010), the Second Department granted intervention because the proposed intervenor was willing to stipulate to foregoing additional discovery in the action, which would have resulted in unnecessary delay. Id. at 640. Notwithstanding the fact that discovery is rare is Article 78 proceedings, Success Academy is actively stymying—as opposed to facilitating—the timely resolution of this matter. Indeed, Success Academy has not even articulated its legal or factual positions in the underlying proceeding, and instead seeks to exacerbate delay through frivolous motion practice both below and before this Court.

Accordingly, while Success Academy asks this Court to substitute its wisdom for that of the Supreme Court, it presents no basis on which to find that Supreme Court abused its discretion.

A. Supreme Court Properly Found That Success Academy Does Not Meet CPLR §1012's Standard For Intervention as of Right

CPLR §1012(a)(2) provides that intervention may be permitted "when the representation of the person's interest by the parties is or may be inadequate and

the person is or may be bound by the judgment." See CPLR §1012(a)(2). Courts have clarified that intervention "should be restricted where the outcome of the matter to be determined will be needlessly delayed, the rights of the prospective intervenors are already adequately represented, and there are substantial questions as to whether those seeking to intervene have any real present interest in the property which is the subject of the dispute." See Osman v. Sternberg, 168 A.D.2d 490, 490-91 (2d Dep't 1990) (denying intervention where "inclusion of the proposed intervenors in the dissolution proceeding would contribute nothing to the resolution of that controversy and would only serve to delay the outcome of the matter"); Messner v. Messner, 42 A.D.2d 889, 889–90 (1st Dep't 1973) ("Apart from the questionable merit of the appeal, imminence of the trial, at which all issues can be disposed of, makes a stay unwarranted"). Such is the case here.

Petitioners successfully demonstrated below that Success Academy's interests would be adequately represented by Respondents, a conclusion not disputed by Respondents here. Now, Success Academy repeats its invented dichotomy that it has a purportedly "practical" interest in the proceeding—asserting that this interest is different from Respondents' "procedural interest." SA Stay Papers, NYSCEF App. Div. Doc. No. 3 (2023-02304) at 17. The underlying court considered and rejected this assertion and stated that it did not find this argument persuasive. NYSCEF Doc. No. 42 (152847/2023) at 2.

Now, Success Academy newly argues, citing an article from February 2023—which it confoundingly chose not to present in its motion to intervene—that Respondents "have been quite ambivalent about charter schools in general and co-locations in particular." See SA Stay Papers, NYSCEF App. Div. Doc. No. 3 (2023-02304) at 17. But Appellant's conclusion does not logically flow from its so-called evidence. That DOE takes certain policy positions (such as those regarding future changes being considered by the Legislature) does not indicate that it will not adhere to its current obligations to Success Academy and the students impacted by the proposed co-locations. Moreover, Success Academy makes this assertion despite the fact that DOE supported Success Academy's Order to Show Cause below, and expressed the same concerns that Success Academy asserted (and currently asserts) that DOE "would have to try to find new school buildings for the two Success Academy schools in a very short timeframe." Corporation Counsel Affirmation in Support of Success Academy's Motion to Intervene, NYSCEF Doc. No. 40 (152847/2023).[9] This Court should view this for what it is: a last-ditch, frivolous attempt to distinguish Success Academy's

[9] It is telling, now that the parties are even more pressed for time, that Respondents no longer support Success Academy's §5519 application on appeal, instead taking "no position on the motion for a stay pending appeal." NYSCEF App. Div. Doc. No. 6.

interests from those of Respondents in an argument Success Academy failed to articulate below.

Success Academy has also failed to recognize that DOE (a) has a constitutional responsibility to ensure all students have access to education; and (b) plays a statutory role in the process of finding physical space for City Charter schools. See N.Y. Const. art. XI, §1; N.Y. Educ. Law §2853(3). Thus, Respondents have the same "practical interest" as Success Academy.

To deflect from its superficial arguments, Success Academy purposefully mischaracterizes the Supreme Court's decision to hold that intervention was denied because Success Academy "failed to prove definitively that its substantial interest in this litigation would not be adequately protected by Respondents." SA Stay Papers, NYSCEF App. Div. Doc. No. 3 (2023-02304) at 16. The Order says no such thing. Rather, it explains that Success Academy's "motion is *silent* as to what position they will advance that will address the underlying petition and for which the respondents cannot adequately represent." May 8, 2023 Order, NYSCEF Doc. No. 42 (152847/2023) at 2 (emphasis added). As explained below, this "silence" not only continues before this Court, but is a byproduct of Success Academy's failure to supply a proposed pleading—let alone substantive factual or legal arguments—that it intends to present should intervention be granted.

Cases relied upon by Success Academy are not to the contrary. While Success Academy points to Roman Catholic Diocese of Brooklyn to argue that intervention is required here, as Petitioners explained above, that case is inapposite. There, the respondent was an unrelated private entity that had subleased space to a charter school, rendering the relationship purely commercial. See 164 A.D.3d at 1395. Here, the relationship between Success Academy and Respondent DOE is categorically different. Indeed, in a prior instance where DOE was a respondent in a matter related to co-location (as opposed to a commercial lease), the Supreme Court acknowledged that when a charter school does not present anything different, it fails to show "how their interests and the interests of defendants are so divergent where the representation by defendants would prove inadequate." Mulgrew v. Bd. of Educ. of City Sch. Dist. of City of New York, No. 156561/13E, 2014 WL 1495628, at *5 (Sup. Ct. N.Y. Cnty., Apr. 14, 2014).[10] In such an instance, as here, intervention should be denied.

Moreover, as explained *supra*, an appellate court should not disturb a lower court's ruling on intervention, provided that—as here—there is no abuse of discretion as a matter of law. See, e.g., Vantage Petroleum, 61 N.Y.2d at 697

[10] This 2014 co-location decision involved other aspects of the EIS law that are not at issue in the present case. While the court there dismissed the underlying Article 78 petition, Petitioners note that recent changes in the law render that aspect of the case inapplicable to the claims currently before the Supreme Court.

(holding that denial of intervention was beyond the Court of Appeals' review because it was "the exercise of discretion by the courts below is, absent an abuse of discretion as a matter of law, not here present"); New York City Health & Hospitals Corp., 43 A.D.2d at 513 (affirming intervention denial); Pace-O-Matic, Inc., 72 A.D.3d at 1145 (affirming denial, and holding that "this permissive determination lies within the court's discretion.").

To the extent that Success Academy wants to present facts about its schools that are different from those within DOE's knowledge and set forth in the challenged Educational Impact Statements ("EISs") (which they have not done in connection with this motion or their motion below), this proffer would not support intervention either. In fact, the primary assertion of Success Academy's stay application is the entirely obvious fact that if the co-location approvals are reversed, the schools will not be co-located in the coming school year. Success Academy provides no alternate viewpoint that would be useful to the Supreme Court or this Court. Instead, DOE is more than capable of presenting these considerations and defending its alleged statutory compliance. As such, this Court should deny the stay.

Finally, Success Academy conveniently avoids any mention of the interests of more than 1,000 existing students at the affected schools. This proceeding is about their rights, and the rights of school and community stakeholders that DOE

was supposed to safeguard. These illegal co-locations would significantly violate those rights, given that the limited physical (and other) resources at these schools would be permanently altered.

Accordingly, the Supreme Court did not abuse its discretion in declining to allow intervention as of right.

B. Supreme Court Correctly Concluded That Success Academy Does Not Meet The Criteria For CPLR §1013's Permissive Intervention

CPLR §1013 provides for intervention by permission "when the person's claim or defense and the main action have a common question of law or fact." See CPLR §1013. Importantly, the statute also provides that "[i]n exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party." See id.; see also Quality Aggregates v. Century Concrete Corp., 213 A.D.2d 919, 921 (3d Dep't 1995) (denying intervention on the basis that "[t]he benefit to be gained by the intervention sought in this case is outweighed by the delay and confusion which would result from permitting the intervenors to duplicate the defense to the counterclaim that should be presented by plaintiff").

Petitioners dispute Success Academy's claim, repeated in this motion, that the facts at issue "are facts about Success Academy, of which Success Academy has the most knowledge." Success Academy Motion to Intervene, NYSCEF Doc.

No. 31 (152847/2023) at 7; SA Stay Papers, NYSCEF App. Div. Doc. No. 3 (2023-02304) at 19; Lefkowitz Stay Affirmation, NYSCEF App. Div. Doc. No. 3 (2023-02304) at ¶21. This assertion is a distortion of the issues presented and an example of the confusion the Supreme Court was cautious to avoid. Indeed, Success Academy's papers reveal its intention to make this proceeding not about DOE's compliance with law, but about "the City's most powerful teacher's union" and Success Academy.[11] Further, Appellant completely excludes the advocacy groups, parents, and educators who brought this challenge to protect their rights. As explained at length in Petitioners' Opposition to Intervention, NYSCEF Doc. No. 36, (152847/2023), Verified Petition, NYSCEF Doc. No. 1, (152847/2023), and Memorandum of Law, NYSCEF Doc. No. 26 (152847/2023), the facts at issue all regard DOE's and the PEP's compliance with statutorily prescribed requirements to propose and approve co-locations. These requirements were designed to safeguard the quality of the education and services provided to New York students. Here, Petitioners seek to safeguard those rights—the rights of the 1,280 students currently at the implicated schools—which are in jeopardy of being undermined permanently.

[11] See SA Stay Papers at 9, 18, 26, 32.

To the extent some facts about the specific Success Academy schools to be co-located are included in the challenged EIS's, they include basic items like the grades and expected enrollment of the schools and space allotments. Aside from cryptic promises of special knowledge, Success Academy has not identified a single specific fact that is different than or expands upon those in DOE's possession and contained in the official public documents.

Nevertheless, if this Court should reverse the Supreme Court's decision on intervention, it would prejudice Petitioners by further delaying and unnecessarily complicating these proceedings, which require swift resolution for the benefit of all.

C. Intervention Is Not Warranted Under CPLR §7802(d), Which Provides For Judicial Discretion

The Supreme Court also did not abuse its discretion in finding that intervention was not warranted under CPLR §7802(d). This catchall provision does not support Appellant's application for intervention. Section 7802(d) provides that a court "may allow other interested persons to intervene" in an Article 78 proceeding. As such, courts have held that "intervention is *always* a matter of judicial discretion—never of right." See Doe v. Westchester Cnty., 45 A.D.2d 308, 312 (2d Dep't 1974) (emphasis added) (denying intervention). Courts utilize a balancing test to assess Article 78 interventions, weighing "the benefit to

be gained by intervention, and the extent to which the proposed intervenor may be harmed if it is refused, against other factors, such as the degree to which the proposed intervention will delay and unduly complicate the litigation and whether any party would be prejudiced." See People by James v. Schofield, 199 A.D.3d 5, 9 (3d Dep't 2021) (internal citations and quotation marks omitted) (granting intervention where proposed intervenors demonstrated that the proceeding would *not* be delayed because they had *not* sought an adjournment or to file a separate brief, but instead had adopted the petitioner's brief and arguments, and would not file separate pleadings).

As the Supreme Court determined, there is no affirmative reason to grant intervention; rather, there are only reasons to deny it, including, *inter alia*: (a) unnecessarily complicating and delaying a proceeding when it is in the best interest of all that it be resolved expeditiously; (b) failing to articulate interests that are separate from those of existing Respondents; and (c) prejudicing Petitioners. Indeed, lower courts have rejected intervention applications under CPLR §7802(d) when the proposed intervenors' motion fails to meet the standards of CPLR §§1012 and 1013—including when the proposed intervenors' position can be adequately articulated by the dispute's existing respondents. See N.Y.C. Org. of Pub. C.I.R. Retirees Inc. v. Campion, No. 158815/2021, 2021 WL 4920705, at *1 (Sup. Ct. N.Y. Cnty. Oct. 21, 2021) ("The Court finds that allowing this entity to

intervene is not appropriate, as the current respondents are more than capable of articulating the position of why the awarding of the retirees' health insurance went to the Alliance.").

Despite Success Academy's mischaracterizations of the opinion below—erroneously arguing that it purported to require Success Academy to "prove definitively" that Respondents did not adequately represent their interests—the Supreme Court's decision *instead* found that Success Academy had failed to proffer any unique position in this proceeding. Compare May 8, 2023 Order, NYSCEF Doc. No. 42 (152847/2023) at 2, with SA Stay Papers, NYSCEF App. Div. Doc. No. 3 (2023-02304) at 16. Accordingly, "to allow the Proposed Intervenor to intervene would be repetitive, and would delay this litigation, which the parties all agree is time sensitive." See id.

Nor does Success Academy cite to any authority for the proposition that "CPLR 1012 merely requires some uncertainty" regarding the adequacy of representation of interest by a pre-existing party. See SA Stay Papers, NYSCEF App. Div. Doc. No. 3 (2023-02304) at 17. In fact, Success Academy failed to provide any meaningful grounds for intervention, besides a flimsy, manufactured dichotomy between the "procedural" and "practical" interests ostensibly held by Success Academy and Respondents, respectively. Regardless, this shallow would-be distinction, elaborated on for the first time on appeal, does not suffice to vitiate

the Supreme Court's ruling. The decision below considered all of Success Academy's arguments and concluded that they were unconvincing.

Accordingly, the Supreme Court properly exercised its discretion by denying Success Academy's motion below.

II. PETITIONERS WILL BE PREJUDICED BY A STAY PENDING APPEAL

Success Academy argues that Petitioners' concerns about delay are "baseless." SA Stay Papers, NYSCEF App. Div. Doc. No. 3 (2023-02304) at 21. This is incorrect at best and gaslighting at worst.

Success Academy's actions have already delayed this proceeding by at least twenty days. Under the initial schedule, the underlying court would have held the preliminary injunction hearing on May 10th and likely would have made a decision by now. NYSCEF Doc. No. 29 (152847/2023). With the end of the current school year mere weeks away—and the rights of some 1,280 students and teachers on the line—time is of the essence. Yet, Success Academy seeks to run out the clock so that they can begin construction before the Supreme Court can consider the matter, while simultaneously crying foul that they have no time to make alternate plans for the start of the school year in the fall.

Success Academy claims that its participation will "clarify the issues,"[12] when in reality Success Academy has failed and continues to fail to submit proposed pleadings to help the underlying court determine whether its participation is necessary. Indeed, as noted *supra*, Judge Frank made clear that Success Academy's "motion is silent as to what position they will advance that will address the underlying petition and for which the respondents cannot adequately represent," thereby rendering intervention "repetitive" and resulting in unnecessary delay. See NYSCEF Doc. No. 42 at 2 (emphasis added).

Even now, Success Academy fails to articulate, let alone submit, what arguments they will make aside from their desire to move ahead with the co-locations, and the alleged harm to them if they do not. For all of Success Academy's bluster about not delaying these proceedings, they have consistently failed to deliver the required information to allow first the Supreme Court—and now this Court—to weigh and determine their motion for intervention. Instead they distort the issues, focusing the lens entirely on themselves. Petitioners did not include Success Academy in this proceeding because they are neither a necessary party nor a necessary intervenor. While they may be impacted by an ultimate

[12] SA Stay Papers, NYSCEF App. Div. Doc. No. 3 (2023-02304) at 21.

decision, it is not their actions or rights that are at issue, as they have no right to an illegally granted co-location.

While Success Academy may point to instances where an appellate court disagreed with a lower court's decision regarding intervention, this is the exception, not the rule. Rather, the rule respects the discretion of lower courts. See, e.g., Vantage Petroleum, 61 N.Y.2d at 697. That a spectrum of caselaw exists both upholding and overturning intervention speaks only to the fact that courts—in their discretion—consider a specific case's facts and procedural posture in making their determination. This is exactly what the Supreme Court did when it denied intervention here.

Success Academy failed (a) to submit a proposed pleading; (b) to articulate the legal and factual issues it intends to raise in this proceeding; (c) to address the rights of the students and teachers currently at the affected school locations; and (d) to speak to Respondents' violations of their obligations under the law. Rather, they frame their intervention as a faceoff between Success Academy and the UFT, and—in so doing—blatantly try to run out the clock to the detriment of all parties.

CONCLUSION

For the foregoing reasons, this Court should deny the stay.

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