

SUMMARY STATEMENT ON APPLICATION FOR EXPEDITED SERVICE AND/OR INTERIM RELIEF

(SUBMITTED BY MOVING PARTY)

Date: May 10, 2023

Case # 2023-02304

Title Index/Indict/Docket # 152847/2023

of

Matter Michael Mulgrew et al v. The Board of Education of the City School District of the City of New York et al

Appeal Order Judgment of Supreme Surrogate's Family County New York Court entered on May 8, 2023

Non-party Success Academy Charter Schools

Name of Judge Hon. Lyle E. Frank Notice of Appeal filed on May 9, 2023

If from administrative determination, state agency

Nature of action or proceeding Article 78 proceeding re Board of Education's decision to approve the co-location of two Success Academy charter schools; declaratory and injunctive relief

Provisions of order judgment decree appealed from Order denying non-party Success Academy's motion to intervene in the above-captioned action.

This application by appellant respondent is for a stay of further proceedings on the Order pending appeal of the denial of Success Academy's motion to intervene in the above-captioned litigation.

If applying for a stay, state reason why requested Petitioners have requested an injunction that would prevent Success Academy schools from opening in just a few months. A briefing schedule has been set and a hearing is scheduled for May 25, 2023.

Has any undertaking been posted No. If "yes", state amount and type

Has application been made to court below for this relief No. Has there been any prior application here in this court No. If "yes", state Disposition and nature

Has adversary been advised of this application Yes. Does he/she consent No.

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DISPOSITION

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Justice

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Date

Motion Date \_\_\_\_\_ Opposition \_\_\_\_\_ Reply \_\_\_\_\_

EXPEDITE \_\_\_\_\_ PHONE ATTORNEYS \_\_\_\_\_ DECISION BY \_\_\_\_\_

ALL PAPERS TO BE SERVED PERSONALLY.

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Court Attorney

**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

New York County Clerk's

Index No. 152847/2023

**NOTICE OF MOTION**

**PLEASE TAKE NOTICE** that upon the Affirmation of Jay P. Lefkowitz, dated May 10, 2023, the exhibits annexed thereto, the annexed Application for Interim Relief, the Memorandum of Law in Support of the Application, and upon all prior pleadings and proceedings in connection with the above-captioned action and appeal, the undersigned on behalf of Non-Party-Appellant Success Academy Charter Schools (“Success Academy”), will move this Court at the Courthouse located at 27 Madison Avenue, New York, New York 10010, on the \_\_\_\_ **day of May, 2023** at \_\_\_\_ **a.m.** of that day or as soon thereafter as counsel can be heard for an Order:

- (a) pursuant to CPLR § 5519(c), staying all proceedings relating to the Decision and Order (the “Order”) by the Honorable Lyle Frank, of the New York Supreme

Court, County of New York, entered on May 8, 2023, pending the resolution of Success Academy's appeal of the Order;

(b) temporarily staying any and all underlying proceedings in the litigation, including Respondent's May 15, 2023 deadline to oppose Motion Seq. No. 1, Petitioners' May 22, 2023 deadline to submit a reply, and the May 25, 2023 hearing, pending determination of the instant motion, pursuant to the Application for interim relief filed herewith; and

(c) granting such further and different relief which this Court deems just and proper

**PLEASE TAKE FURTHER NOTICE** that the motion schedule for Success Academy's motion for a stay pending appeal shall be set by the Court.

Dated: New York, New York  
May 10, 2023

Respectfully submitted,



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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.,

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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

New York County Clerk's  
Index No. 152847/2023

**MEMORANDUM OF LAW IN SUPPORT OF  
SUCCESS ACADEMY CHARTER SCHOOL'S MOTION FOR  
EXPEDIATED, INTERIM RELIEF: STAY PENDING APPEAL**

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Non-party movant-appellant Success Academy Charter Schools (“Success Academy”) respectfully submits this memorandum of law in support of its motion to stay further proceedings on the Decision and Order entered by the Supreme Court on May 3, 2023 (“Order”) ([NYSCEF Doc. No. 42](#)) pending appeal of the denial of Success Academy’s motion to intervene in the litigation captioned *Michael 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.<sup>1</sup> Success Academy requests an expedited appeal because the Supreme Court has set a briefing schedule for a preliminary injunction requested by Petitioners, and a show cause hearing has been scheduled for May 25, 2023.<sup>2</sup>

### **PRELIMINARY STATEMENT**

Success Academy operates public charter schools in New York City, including two that the City’s Board of Education has authorized to be co-located with public schools in under-resourced neighborhoods in Brooklyn and Queens. Petitioners, led by New York City’s most powerful teacher’s union, filed an Article 78 proceeding to enjoin the co-locations and prevent Success Academy’s schools from opening in the fall. Despite the undeniable fact that this litigation poses enormous stakes for Success Academy and for hundreds of its students and teachers, the Supreme Court denied Success Academy’s motion to intervene in the litigation—in an extraordinary decision with less than one page of analysis. This decision is manifestly contrary to law and produces the intolerable result that Success Academy will be shut out from the very proceedings that will determine whether two of its schools can operate in the coming

<sup>1</sup> A copy of the Order is annexed to the accompanying affirmation of Jay Lefkowitz, dated May 10, 2023 as Exhibit 1.

<sup>2</sup> Per the Order, oppositions to Petitioners’ application for a preliminary injunction are due May 15, 2023, and Petitioners reply brief is due May 22, 2023. The parties are scheduled to appear before the court for argument on May 25, 2023.

school year. The Supreme Court’s decision must be reversed: it would be ironic and profoundly unjust, not to mention contrary to law, if the teacher’s union—which has at best a tangential interest in this matter since its members have no direct involvement with Success Academy—were allowed to be heard on the fate of Success Academy’s schools while Success Academy itself must remain on the sidelines. And time is of the essence, because the Supreme Court has set a schedule under which Petitioners’ request for a preliminary injunction will be fully briefed and argued by May 25. It is therefore imperative that the litigation be stayed pending appeal of the Supreme Court’s intervention decision.

Michael Mulgrew (President of the United Federation of Teachers, Local 2), Advocates for Justice Legal Foundation, and certain individuals on behalf of minor children (collectively, “Petitioners”) commenced the pending Article 78 proceeding in the Supreme Court to vacate the decision of the Board of Education of the City School District of the City of New York and the City School District Chancellor (together, “Respondents”) to co-locate two Success Academy charter schools (Success Academy Charter School – Far Rockaway and Success Academy Charter Elementary School – Sheepshead Bay) in Queens and Brooklyn.<sup>3</sup> Petitioners allege certain procedural deficiencies in Respondents’ authorization of the re-siting and opening of the Success Academy schools and co-locating each alongside existing New York City public schools. Petitioners seek a preliminary injunction, enjoining Respondents from implementing the co-locations and opening the schools for the 2023-2024 school year.

The at-issue schools in the Article 78 proceeding are Success Academy charter schools that Respondents authorized to share space in public school buildings alongside traditional public schools. The two schools, which will serve hundreds of students in low-income neighborhoods,

<sup>3</sup> “Co-location” means that two or more school organizations are located in the same building and typically share common spaces.

are currently scheduled to open in just three months. Petitioners’ claims and requested relief directly threaten the Success Academy charter schools and their students. If the co-locations are enjoined, the schools will likely be unable to open this August for the 2023-2024 school year. This would mean that over 300 New York City students will lose their schools of choice and will be forced to scramble to find placement in an alternate school.<sup>4</sup> Additionally, teachers and staff will be plunged into uncertainty.

Notwithstanding Success Academy’s direct and substantial interest in the outcome of this litigation, the Supreme Court denied its motion to intervene in a decision with barely a page of analysis. That decision cannot stand. And to make matters worse, the Supreme Court is poised to decide the merits of Petitioners’ request for a preliminary injunction in as little as two weeks—without ever affording Success Academy an opportunity to be heard. Accordingly, for the reasons set forth below, pursuant to CPLR 5519(c), a stay pending appeal is warranted.

### **FACTUAL BACKGROUND**

On November 30, 2022, the Panel for Educational Policy (“PEP”) approved the re-siting and co-location of Success Academy Charter School Far Rockaway alongside the Waterside Leadership School in Rockaway Park, New York. Success Academy Charter School – Far Rockaway serves students in grade 5-8 and is set to open in August for the 2023-2024 school year.<sup>5</sup> The following month, on December 21, 2022, PEP approved the opening and co-location of a brand-new Success Academy charter elementary school to open for the 2023-2024 school year in Brooklyn, New York. The new elementary school would share space with district

<sup>4</sup> This number reflects only the approximate number of students currently enrolled in both schools. It does not include the projected authorized enrollments for the next charter term of five years, which would be an additional approximately 200 students.

<sup>5</sup> Although the school year begins in mid-August, Success Academy will need additional time to prepare the space and the classrooms for the students.

schools in the Sheepshead Bay building. Following PEP's authorization, Success Academy proceeded to prepare both schools to open in August 2023.

Petitioners filed the Verified Petition to commence an Article 78 proceeding on March 27, 2023. ([NYSCEF Doc. No. 1.](#)) For reasons Petitioners have never explained, they did not name Success Academy as a Respondent, despite the fact that charter school networks (including Success Academy), interested teachers, students, and parents, and the like, frequently participate as parties in Article 78 proceedings just like this one. *See, e.g., New York State United Teachers v. State University of New York*, 2022 WL 3370016, at \*1 (N.Y. Sup. Ct. Aug. 16, 2022) (dismissing Article 78 petition, to which Success Academy was a party, that sought to invalidate two charter revisions approved by the State University of New York); *Steglich v. Board of Educ. of City School Dist. of City of New York*, 2011 WL 2535054 (Sup. Ct. May 20, 2011) (allowing prospective students of Success Academy to intervene in Article 78 proceeding challenging approval of co-location); *Norris v. Walcott*, 950 N.Y.S.2d 535, 540-41 (Sup. Ct. 2012) (granting intervention of students' parents in Article 78 proceeding seeking to uphold grant of charter to charter school).

On March 30, 2023, the lower court scheduled a show cause hearing for May 10, 2023 and set a briefing schedule regarding Petitioners' requested relief. ([NYSCEF Doc. No. 29.](#)) On April 17, 2023, non-party Success Academy filed a motion to intervene and requested that the court adjourn the pending show cause hearing for no more than two to three weeks so that Success Academy could be heard on the merits. ([NYSCEF Doc. Nos. 30-32.](#)) Petitioners filed their opposition briefing on April 28, 2023. ([NYSCEF Doc. Nos. 36-39.](#)) Respondents filed an affirmation in support of Success Academy's motion on April 28, 2023. ([NYSCEF Doc. No. 40.](#)) The motion was fully submitted on April 30, 2023. On May 3, 2023, the court issued the

Order denying Success Academy’s motion to intervene and setting a briefing schedule for Petitioners’ pending request for a preliminary injunction. ([NYSCEF Doc. No. 42.](#)) Under that schedule, Respondents’ opposition to the petition are due May 15, Petitioners’ reply is due May 22, and the petition will be argued on May 25.

## **ARGUMENT**

### **I. THE COURT SHOULD STAY ENFORCEMENT OF THE ORDER AND ALL PROCEEDINGS BELOW PENDING APPEAL**

This Court has discretion to grant a stay pending appeal pursuant to CPLR 5519(c). *See* CPLR 5519(c) (“The court from or to which an appeal is taken ... may stay all proceedings to enforce the judgment or order appealed from pending an appeal.”); *see also Matter of Grisi v. Shainswit*, 119 A.D.2d 418, 421 (1st Dep’t 1986) (“[T]he granting of stays pending appeal ... is, for the most part, a matter of discretion.”). In deciding whether to issue a stay, courts consider the following factors: (i) whether the appeal appears to have merit, (ii) whether any prejudice would result from granting or denying a stay, and (iii) whether the stay is designed merely to delay proceedings. *See Herbert v. New York*, 126 A.D.2d 404, 407 (1st Dep’t 1987); *see also Tax Equity Now NY LLC v. City of New York*, 2018 N.Y. Misc. LEXIS 5727, at \*7-9 (Sup. Ct. N.Y. Cty. Nov. 30, 2018). Success Academy respectfully submits that each of these factors weigh in favor of granting a stay to preserve the status quo pending appeal.

#### **A. The Appeal Has a Strong Likelihood of Success on the Merits.**

A stay of enforcement of the Order—and all proceedings below—is appropriate because Success Academy’s appeal is meritorious. In reviewing a determination made by the Supreme Court on a matter within its discretion, an Appellate Court “may review [the] determination for abuse of discretion; moreover, since it is vested with the same power and discretion as Special Term, the Appellate Division may also substitute its own discretion even in the absence of

abuse.” *Brady v. Ottaway Newspapers*, 63 N.Y.2d 1031, 1032 (N.Y. 1984); *see also Estate of Ungar ex rel. Strachman v. Palestinian Auth.*, 44 A.D.3d 176, 179 (1st Dept 2007) (“This Court is vested with the power to substitute its own discretion for that of the motion court, even in the absence of abuse”); *Tower Nat’l. Ins. Co. v. Lugo*, 154 N.Y.S.3d 423, 424 (1st Dept 2021) (exercising independent discretion to grant motion for renewal where “motion court improvidently exercised its discretion to deny defendants’ motion”).

New York appellate courts have routinely reversed a Supreme Court’s denial of a party’s motion to intervene. *See, e.g., Matter of Romeo v. New York State Dept. of Educ.*, 39 AD3d 916 (3d Dept 2007) (reversing Supreme Court’s denial of school district’s motion to intervene in Article 78 proceeding); *R.C. Diocese of Brooklyn v. Christ the King Regional High School*, 164 AD3d 1394 (2d Dept 2018) (reversing Supreme Court’s denial of charter school’s motion to intervene in proceeding that would determine the validity of their lease and the location of their school); *Halstead v. Dolphy*, 70 AD3d 639 (2d Dept 2010) (reversing Supreme Court’s denial of motion to intervene in proceeding involving real property on which proposed intervenor held mortgage). The Court should do the same here. Although the lower court agreed that “[Success Academy] has an interest in the outcome of the litigation,” the Order incorrectly held (with only the most cursory elaboration) that allowing Success Academy to intervene would be repetitive, confusing, and would delay the proceedings. (Order at 2.) As explained below, that threadbare rationale is illogical and entirely unsupported.

Under the New York Civil Practice Law and Rules, Success Academy is allowed to intervene as of right or, alternatively, by permissive intervention. *See* CPLR 1012, 1013. Success Academy’s motion to intervene should have been easy. The law is clear that “whether intervention is sought as a matter of right under CPLR §1012(a) or as a matter of discretion

under CPLR §1013 is of little practical significance and . . . ***intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings.***” *R.C. Diocese of Brooklyn v Christ the King Regional High School*, 164 AD3d 1394 (2d Dep’t 2018) (emphasis added). It is well-settled that “[i]ntervention is liberally allowed by courts” where proposed intervenors “have a bona fide interest in an issue involved in that action.” *Yuppie Puppy Pet Prod., Inc. v. St. Smart Realty, LLC*, 77 A.D.3d 197, 201 (1st Dep’t 2010); see also *Agostino v. Soufer*, 284 A.D.2d 147, 148, 726 N.Y.S.2d 635, 636 (1st Dep’t 2001) (granting motion to intervene where intervenor possessed a “real and substantial interest in the outcome” of litigation); *George v. Grand Bay Assocs. Enter. Inc.*, 21 Misc. 3d 1114A, 873 N.Y.S.2d 233 (Sup. Ct. Bx. Cty. 2006) (stating “[c]ase law prescribes that irrespective of what kind of intervention is sought, the relevant inquiry is whether the party seeking to intervene has a real and substantial interest in the outcome of the litigation”), *aff’d*, 45 A.D.3d 451, 846 N.Y.S.2d 136 (1st Dep’t 2007). Success Academy should have been permitted to intervene in the underlying litigation either as of right or with the lower court’s permission.

*First*, under CPLR 1012(a)(2), a party is permitted to intervene as of right, “upon timely motion . . . 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 judgement.” CPLR 1012(a)(2). There is no question that Success Academy’s motion to intervene was timely. Timeliness depends upon “whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party.” *Yuppie Puppy Pet Prod.* 77 A.D.3d at 201. Success Academy did not delay in making its motion. Petitioners filed the Verified Petition on March 27, 2023. Success Academy’s motion to intervene came three weeks later. There is no evidence that the timing of the motion prejudiced any named party. By its motion Success Academy sought an adjournment

of the pending show cause hearing regarding Petitioners’ request of a preliminary injunction for a matter of weeks—and Success Academy *specifically represented* to the court below that Success Academy was prepared to follow *the exact schedule* that the court has now set for briefing and argument on Petitioners’ request for a preliminary injunction, including Success Academy’s representation that it would file its opposition to the petition by May 15 and appear for argument as early as May 24. Success Academy repeatedly explained that it has no interest in delaying these proceedings as it has a strong interest in opening the two charter schools at issue in just a few months. Courts have permitted intervention and found no undue prejudice in cases in which movants sought intervention many months—even *years*—after they became aware of their stake in the case. *See, e.g., Jones v. Town of Carroll*, 158 A.D.3d 1325, 1328 (4th Dep’t 2018) (intervention permitted even though intervenor waited “several years” after it knew its interest was implicated); *Moon v. Moon*, 6 A.D.3d 796, 798-799 (3d Dep’t 2004) (five-month delay in seeking intervention not prejudicial). In light of these facts, there is no credible basis whatsoever to suggest that Success Academy’s intervention was in any way untimely or could possibly delay these proceedings in any material respect. Nevertheless, the lower court held—without a word of explanation—that Success Academy’s intervention “would delay this litigation.” ([NYSCEF Doc. No. 42 at 2.](#)) That bald assertion is plainly wrong.

Equally wrong is the Supreme Court’s denial of Success Academy’s motion on the ground that Success Academy had failed to prove definitively that its substantial interests in this litigation would not be adequately protected by Respondents, or that Success Academy’s participation would somehow be repetitive or confusing. (*Id.* at 2.) As an initial matter, the law is clear that in asserting the right to intervene, Success Academy does not need to prove definitively that Respondents or counsel in the ongoing action are incapable of adequately



representing its interest. Rather, CPLR 1012 merely requires some uncertainty about adequacy under the circumstances, as reflected in the “may be” standard articulated by the statute.

Here, Success Academy’s interests are not fully protected by Respondents. Respondents have a procedural interest in seeking to ratify approval of the co-location of both Success Academy schools. Success Academy, however, has a much more practical and concrete interest related to the placement of the over 300 students currently enrolled in and expecting to attend the two schools that Success Academy operates. Respondents have authorized the co-location of two Success Academy Schools in part because they have a legal obligation to do so. *See* New York Education Law 2853(e)(1). However, mere compliance with the law by providing Success Academy with a co-location does not necessarily mean that Respondents are strongly incentivized to see that co-location upheld. To the contrary, 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.<sup>6</sup>

The school year begins in August 2023. Success Academy has an interest, apart from those of Respondents, to clarify the legal and factual issues present in this action and determine whether or not the two schools will be functional for the upcoming schools year. Respondents are not situated to speak to the harm Success Academy, its students, and its teachers will suffer if the co-locations are enjoined. Nor are Respondents’ incentives identical to Success Academy’s; although Respondents have a strong interest in defending the lawfulness of the co-locations, even setting aside Respondents’ ambivalence about charter schools and co-locations in general,

<sup>6</sup> *See, e.g.*, Jorgensen, Jillian, *Charter Schools “Present Challenge” for City, Chancellor Says*, SPECTRUM NEWS, (Feb 8, 2023), <https://www.nyl.com/nyc/all-boroughs/education/2023/02/09/charter-schools--present-a-challenge--for-city--chancellor-says>.

Respondents do not have the same interest in seeing the petition denied in time for the upcoming school year, and Respondents will not feel the impact of an adverse judgment as directly as Success Academy will if the co-locations are enjoined, Success Academy teachers resign, Success Academy students must scramble to find other options, and Success Academy's image and reputation are damaged if the City's most powerful teacher's union can throw up a roadblock to Success Academy's own schools while Success Academy must sit idly by and watch this high-stakes litigation proceed without it.

These circumstances are more than sufficient to raise legitimate questions about whether Success Academy's interests will be adequately protected by Respondents. They more than suffice to warrant intervention and make plain that the lower court was wrong to suggest (without explanation) that Success Academy's participation here might lead to repetition or confusion. *See e.g., R.C. Diocese of Brooklyn*, 164 A.D.3d. at 185 (finding that nonparty charter school had "real and substantial interest in the outcome of the litigation" over validity of covenant in lease of sublessor and sublessor could not fully represent charter school's interest). Further, it is undisputed that Success Academy will inescapably be bound by the lower court's judgement in the underlying proceeding. Any decision the court makes will directly affect the Success Academy students for the upcoming school year. Hundreds of students are already enrolled for the upcoming school year, and Success Academy has already started preparing the space for their arrival. An adverse decision by the Court will directly require Success Academy to cease these preparations and find a new suitable location for two school—with no more than two months' notice. *See R.C. Diocese of Brooklyn*, 164 A.D.3d. at 185 (finding that nonparty charter school should have been allowed to intervene as of right where decision against party in interest would have forced nonparty charter school to break its sublease). Accordingly, Success

Academy should have been permitted to intervene in the litigation as of right pursuant to CPLR 1012.

*Second*, under CPLR 1013, a court may, in its discretion, permit intervention when “the person’s claim or defense and the main action share a common question of law or fact,” and “the intervention will [not] unduly delay the determination of the action or prejudice the substantial rights of any party.” CPLR 1013. “If the threshold requirement of a common question of law or fact is met, the court may then exercise its discretion in deciding whether to permit intervention.” *In re UBS Fin. Servs. Inc.*, 851 N.Y.S.2d 75, 75 (Sup. Ct. N.Y. Cty. 2007). “In exercising their discretion under this section, trial courts should consider whether the intervenor’s claim would be adversely affected without intervention, whether there are common issues of law and fact, and the extent of prejudice to the existing parties if intervention is allowed.” *Id.* As explained in its motion to intervene, Success Academy’s claim will be adversely affected if it is not permitted to intervene. Any judgment on Petitioners’ requested relief action will directly impact Success Academy and its students. Furthermore, the facts at issue—those that the Board of Education considered in approving the co-location—are facts about Success Academy. Therefore, there clearly are common questions of law and fact. And as discussed above, there is no basis whatsoever to suggest that Success Academy’s intervention would prejudice any of the existing parties. On the contrary, it is Success Academy that will be prejudiced if intervention is denied and the litigation proceeds with Success Academy stuck on the sidelines.

*Third*, even if the lower court did not agree that Success Academy was a proper intervenor under either CPLR 1012 or 1013, the court should have granted Success Academy’s motion pursuant to CPLR 7802(d), which provides that a court “may allow other interested persons” to intervene in an Article 78 proceeding. CPLR 7802(d) grants the Court “broader

authority to allow intervention in an Article 78 proceeding than is provided pursuant to CPLR 1013 in an action, which requires a showing that the proposed intervenor's claim or defense and the main action have a common question of law or fact or CPLR 1012, concerning intervention as of right." *Steglich*, 2011 WL 2535054, at \*5; *see also Ferguson v. Barrios-Paoli*, 279 A.D.2d 396, 398-399, 720 N.Y.S.2d 43 (1st Dep't 2001) (CPLR § 7802(d) confers "upon the court greater latitude in allowing intervention than CPLR 1013"). "It has been also held that a party may be permitted to intervene ... if the proposed intervenor's claim and that of the original petitioner are based on the same transaction or occurrence." *Steglich*, 2011 WL 2535054, at \*5.

It would be difficult to imagine a party more ideally suited for intervention under CPLR 7802(d) than Success Academy is here. Success Academy is undoubtedly an interested party under this standard. Success Academy seeks to ratify the Board of Education's approval of their co-locations. An adverse determination "by the Court ... would directly affect and prevent [Success Academy] from co-locating." *Id.* at \*6. And Success Academy's claim that the approval was proper arises from the precise Board of Education action that petitioners challenge. *Id.* Private parties are routinely permitted to intervene in Article 78 proceedings to defend government decisions that directly affect them even when, as here, the relevant government agency is a respondent and is actively litigating in defense of its challenged action. *See, e.g., id.* (granting intervention of non-party prospective students of Success Academy in Article 78 proceeding challenging approval of co-location); *Norris*, 950 N.Y.S.2d at 540-41 (granting intervention of students' parents in Article 78 proceeding seeking to uphold grant of charter to charter school); *Matter of Romeo v. New York State Dept. of Educ.*, 39 AD3d 916, 917-18 (3d Dept 2007). Success Academy should have been given the same right. The Supreme Court's refusal to do so cannot stand.

The lower court had three avenues by which Success Academy’s motion to intervene should have been granted. Each standard, CPLR 1012, 1013, 7802(d), is broad and permissive. Additionally, New York jurisprudence generally favors intervention absent any prejudice to the parties. Thus, there is a strong likelihood that the appeal will be successful, which weighs heavily in favor of staying the proceedings below pending appeal.

**B. Neither Party Will Be Prejudiced by a Stay Pending Appeal.**

Petitioners claim that they would be prejudiced by adding Success Academy to the Article 78 proceeding due to “unnecessary complication of the case and muddying of the issues.” ([NYSCEF No. 36.](#)) Petitioners also raise concerns about delay in the proceedings. Petitioners’ arguments are baseless.

The underlying litigation is focused on Respondents’ decision to approve the co-location of two Success Academy schools. Those two schools are Success Academy charter schools. Allowing Success Academy to join the action will not complicate the issues—on the contrary, Success Academy’s participation will clarify the issues by bringing to bear an essential perspective that would otherwise be missing and that would help to educate the court on the facts, the law, and the stakes for all involved. It is imperative that Success Academy be able to protect its interests and present the court with a clear understanding of what the downstream effects of granting Petitioners’ claims would be. Moreover, Petitioners’ claim that they will be prejudiced by a slight delay in the proceedings does not pass the straight-face test. Success Academy requested only a brief, two- to three-week adjournment of the show cause hearing on Petitioners’ application for a preliminary injunction—and, as noted above, Success Academy *specifically represented* that it was prepared to proceed under *the exact schedule* for briefing and argument that the Supreme Court has now set for Petitioners’ request for a preliminary

injunction. To the extent there is a risk of some further delay as a result of a stay pending appeal, the fault lies with Petitioners, not Success Academy—for it was Petitioners who waited more than four months to file the Verified Petition, opted not to include Success Academy as a necessary party, and then strenuously opposed intervention, with the entirely predictable result that litigation has ensued over Success Academy’s motion to intervene.

Furthermore, any potential prejudice in this action would be suffered by Success Academy—not Petitioners—if the stay is denied. In that scenario, the lower court will decide an issue with extraordinarily high stakes for Success Academy, without hearing from Success Academy at all. Success Academy would have no rights to challenge the decision or to represent its interests. The balance of equities thus firmly tilts in Success Academy’s favor and supports granting a stay pending appeal.

**C. The Stay Is Not Designed to Delay Proceedings.**

Success Academy has no interest in further delaying the proceedings, as Success Academy repeatedly represented to the lower court. Success Academy’s only interest is in being heard on the merits of this extremely important dispute. Indeed, of any of the parties, Success Academy is likely the most motivated to resolve the dispute as quickly as possible as Success Academy’s students, teachers, and staffs will be directly, adversely impacted the longer this litigation remains pending as a cloud over their futures. Accordingly, the request for a stay is not designed to delay proceedings; rather, it is designed to resolve the question of whether Success Academy may intervene in the underlying litigation, and to ensure that any relief Success Academy obtains is meaningful by ensuring that Success Academy can intervene in time to oppose Petitioners’ request for a preliminary injunction. This factor also supports granting a stay.


Notably, in the absence of a stay, the parties will submit briefing on Petitioners' application for a preliminary injunction, and the parties will appear before the lower court on May 25, 2023 for oral argument. Time is therefore of the essence. This Court should grant Success Academy's motion for a stay pending appeal.

### **CONCLUSION**

For the foregoing reasons, Success Academy respectfully requests that the Court stay further proceedings in the court below until Success Academy's appeal of the Order is decided.

Dated: New York, New York  
May 10, 2023

KIRKLAND & ELLIS LLP

By:  \_\_\_\_\_

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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

New York County Clerk's  
Index No. 152847/2023

**AFFIRMATION IN SUPPORT OF  
SUCCESS ACADEMY CHARTER SCHOOL'S MOTION FOR  
EXPEDIATED, INTERIM RELIEF: STAY PENDING APPEAL**

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**JAY P. LEFKOWITZ**, an attorney duly admitted to practice law in the Courts of the State of New York, affirms the following under penalty of perjury pursuant to CPLR 2106:

1. I am a partner with the law firm Kirkland & Ellis LLP, counsel for non-party appellant Success Academy Charter Schools (“Success Academy”).

2. I submit this affirmation in support of Success Academy’s application for stay of all further proceedings pending appeal of the Supreme Court’s Order, dated May 3, 2023 (“Order”) (NYSCEF Doc. No. 42) pending appeal of the denial of Success Academy’s motion to intervene in the litigation captioned *Michael 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.

3. Success Academy requests an expedited appeal because the Supreme Court has set a briefing schedule for a preliminary injunction requested by Petitioners. Per the schedule, Respondents’ opposition to the petition are due May 15, 2023, Petitioners’ reply is due May 22, 2023, and the petition will be argued on May 25, 2023.

4. Success Academy has appealed to this Court from the Order. A true and correct copy of Success Academy’s notice of appeal (NYSCEF Doc No. 44), which includes a copy of the Order from the lower court from which the appeal is taken, is attached here to as Exhibit 1.

### **PRELIMINARY STATEMENT**

5. Success Academy operates public charter schools in New York City, including two that the City’s Board of Education has authorized to be co-located with public schools in under-resourced neighborhoods in Brooklyn and Queens. Petitioners, led by New York City’s most powerful teacher’s union, filed an Article 78 proceeding to enjoin the co-locations and prevent Success Academy’s schools from opening in the fall.

6. Petitioners and Respondents agree that this litigation poses enormous stakes for Success Academy, including the hundreds of students and teachers who are currently expecting to begin the school year at the two schools at the center of this litigation. Nonetheless, the Supreme Court denied Success Academy’s motion to intervene in the litigation—in an extraordinary decision with less than one page of analysis. This decision is manifestly contrary to law and produces the intolerable result that Success Academy will be shut out from the very proceedings that will determine whether two of its schools can operate in the coming school year.

7. Michael Mulgrew (President of the United Federation of Teachers, Local 2), Advocates for Justice Legal Foundation, and certain individuals on behalf of minor children (collectively, “Petitioners”) commenced the pending Article 78 proceeding in the Supreme Court to vacate the decision of the Board of Education of the City School District of the City of New York and the City School District Chancellor (together, “Respondents”) to co-locate two Success Academy charter schools (Success Academy Charter School – Far Rockaway and Success Academy Charter Elementary School – Sheepshead Bay) in Queens and Brooklyn.<sup>1</sup> Petitioners allege certain procedural deficiencies in Respondents’ authorization of the re-siting and opening of the Success Academy schools and co-locating each alongside existing New York City public schools. Petitioners seek a preliminary injunction, enjoining Respondents from implementing the co-locations and opening the schools for the 2023-2024 school year.

8. The at-issue schools in the Article 78 proceeding are Success Academy charter schools that Respondents authorized to share space in public school buildings alongside traditional public schools. The two schools, which will serve hundreds of students in low-

<sup>1</sup> “Co-location” means that two or more school organizations are located in the same building and typically share common spaces.

income neighborhoods, are currently scheduled to be operable in just three months. Petitioners' claims and requested relief directly threaten the Success Academy charter schools and their students. If the co-locations are enjoined, the schools will likely not be able to open this August for the 2023-2024 school year. This would mean that over 300 New York City students will lose their schools of choice and will be forced to scramble to find placement in an alternate school.<sup>2</sup> Additionally, teachers and staff will be plunged into uncertainty and reassigned to different schools, which will likely lead to resignations.

9. Notwithstanding Success Academy's direct and substantial interest in the outcome of this litigation, the Supreme Court denied Success Academy's motion to intervene, with barely a page of analysis to explain its decision.

10. The Supreme Court's decision must be reversed. And time is of the essence, because the Supreme Court has set a schedule under which Petitioners' request for a preliminary injunction will be fully briefed and argued by May 25. It is therefore imperative that all further proceedings in this underlying litigation be stayed pending appeal of the Supreme Court's intervention decision.

### **FACTUAL BACKGROUND**

11. On November 30, 2022, the Panel for Educational Policy ("PEP") approved the re-siting and co-location of Success Academy Charter School – Far Rockaway alongside the Waterside Leadership School in Rockaway Park, New York. Success Academy Charter School – Far Rockaway serves students in grade 5-8 and is set to open in August for the 2023-2024

<sup>2</sup> This number reflects only the approximate number of students currently enrolled in both schools. It does not include the projected authorized enrollments for the next charter term of five years, which would be an additional approximately 200 students.

school year.<sup>3</sup> The following month, on December 21, 2022, PEP approved the opening and co-location of a brand-new Success Academy charter elementary school to open for the 2023-2024 school year in Brooklyn, New York. The new elementary school would share space in the Sheepshead Bay building along with Origins High School, Professional Pathways High School, and New Visions Charter High School for Advanced Math and Science III. Following PEP's authorization, Success Academy proceeded to prepare both schools to open in August 2023.

12. Petitioners filed the Verified Petition to commence an Article 78 proceeding on March 27, 2023. (NYSCEF Doc. No. 1.) Petitioners failed to name Success Academy as a Respondent, despite the fact that charter school networks (including Success Academy), interested teachers, students, and parents, and the like, frequently participate as parties in Article 78 proceedings just like this one.<sup>4</sup>

13. On March 30, 2023, the lower court scheduled a show cause hearing for May 10, 2023 and set a briefing schedule regarding Petitioners' requested relief. (NYSCEF Doc. No. 29.) On April 17, 2023, non-party Success Academy filed a motion to intervene and requested that the court adjourn the pending show cause hearing for no more than two to three weeks so that Success Academy could be heard on the merits. (NYSCEF Doc. Nos. 30-32.) Petitioners filed their opposition briefing on April 28, 2023. (NYSCEF Doc. Nos. 36-39.) Respondents filed an affirmation in support of Success Academy's motion on April 28, 2023. (NYSCEF Doc. No.

<sup>3</sup> Although the school year begins in mid-August, Success Academy will need additional time to prepare the space and the classrooms for the students.

<sup>4</sup> See, e.g., *New York State United Teachers v. State University of New York*, 2022 WL 3370016, at \*1 (N.Y. Sup. Ct. Aug. 16, 2022) (dismissing Article 78 petition, to which Success Academy was a party, that sought to invalidate two charter revisions approved by the State University of New York); *Steglich v. Board of Educ. of City School Dist. of City of New York*, 930 N.Y.S.2d 177 (Sup. Ct. 2011) (allowing prospective students of Success Academy to intervene in Article 78 proceeding challenging approval of co-location); *Norris v. Walcott*, 950 N.Y.S.2d 535, 540-41 (Sup. Ct. 2012) (granting intervention of students' parents in Article 78 proceeding seeking to uphold grant of charter to charter school).

40.) The motion was fully submitted on April 30, 2023. On May 3, 2023, the court issued the Order denying Success Academy’s motion to intervene and setting a briefing schedule for Petitioners’ pending request for a preliminary injunction. (NYSCEF Doc. No. 42.) Under that schedule, Respondents’ opposition to the petition are due May 15, Petitioners’ reply is due May 22, and the petition will be argued on May 25.

### **ARGUMENT**

14. This Court has discretion to grant a stay pending appeal pursuant to CPLR 5519(c). In deciding whether to issue a stay, courts consider the following factors: (i) whether the appeal appears to have merit, (ii) whether any prejudice would result from granting or denying a stay, and (iii) whether the stay is designed merely to delay proceedings. *See Herbert v. New York*, 126 A.D.2d 404, 407 (1st Dep’t 1987). Each of these factors weigh in favor of granting a stay to preserve the status quo pending appeal.

15. A stay of enforcement of the Order—and all proceedings below—is appropriate because Success Academy’s appeal is meritorious. Although the lower court agreed that “[Success Academy] has an interest in the outcome of the litigation,” the Order incorrectly held (with only the most cursory elaboration) that allowing Success Academy to intervene would be repetitive, confusing, and would delay the proceedings. (NYSCEF Doc. No. 42 at 2.) That rationale is unsupported.

16. Under the New York Civil Practice Law and Rules, Success Academy is allowed to intervene as of right or, alternatively, by permissive intervention. *See* CPLR 1012, 1013. Success Academy did not delay in making its motion. Petitioners filed the Verified Petition on March 27, 2023. Success Academy’s motion to intervene came three weeks later.

17. There is no evidence that the timing of the motion prejudiced any named party. By its motion Success Academy sought an adjournment of the pending show cause hearing regarding Petitioners' request of a preliminary injunction for a matter of weeks—and Success Academy *specifically represented* to the court below that Success Academy was prepared to follow *the exact schedule* that the court has now set for briefing and argument on Petitioners' request for a preliminary injunction, including Success Academy's representation that it would file its opposition to the petition by May 15 and appear for argument as early as May 24. Success Academy repeatedly explained that it has no interest in delaying these proceedings as it has a strong interest in opening the two charter schools at issue in just a few months. In light of these facts, there is no credible basis whatsoever to suggest that Success Academy's intervention was in any way untimely or could possibly delay these proceedings in any material respect. Nevertheless, the lower court held—without a word of explanation—that Success Academy's intervention “would delay this litigation.” (*Id.*) That conclusion is not supported by the facts.

18. Equally wrong is the Supreme Court's denial of Success Academy's motion on the ground that Success Academy had failed to prove definitively that its substantial interests in this litigation would not be adequately protected by Respondents, or that Success Academy's participation would somehow be repetitive or confusing. (*Id.*)

19. Success Academy's interests are not fully protected by Respondents. Respondents have a procedural interest in seeking to ratify approval of the co-location of both Success Academy schools. Success Academy, however, has a much more practical and concrete interest related to the placement of the over 300 students currently enrolled in and expecting to attend the two schools that Success Academy operates. The school year begins in August 2023. Success Academy has an interest, apart from those of Respondents, to clarify the legal and

factual issues present in this action and determine whether or not the two schools will be functional for the upcoming schools year. Respondents are not situated to speak to the harm Success Academy, its students, and its teachers will suffer if the co-locations are enjoined. Nor are Respondents' incentives identical to Success Academy's; although Respondents have a strong interest in defending the lawfulness of the co-locations, Respondents do not have the same interest in seeing the petition denied in time for the upcoming school year, and Respondents will not feel the impact of an adverse judgment as directly as Success Academy will if the co-locations are enjoined, Success Academy teachers resign, Success Academy students must scramble to find other options, and Success Academy's image and reputation are damaged if the City's most powerful teacher's union can throw up a roadblock to Success Academy's own schools while Success Academy must sit idly by and watch this high-stakes litigation proceed without it. These interests, specific to Success Academy, are more than sufficient to warrant intervention, and they make plain that the lower court was wrong to suggest (without explanation) that Success Academy's participation here might lead to repetition or confusion.

20. Additionally, it is undisputed that Success Academy will inescapably be bound by the lower court's judgement in the underlying proceeding. Any decision the court makes will directly affect the Success Academy students for the upcoming school year. Hundreds of students are already enrolled for the upcoming school year, and Success Academy has already started preparing the space for their arrival. An adverse decision by the Court will directly require Success Academy to cease these preparations and find a new suitable location for two school—with no more than two months' notice. Success Academy should have been permitted to intervene in the litigation as of right pursuant to CPLR 1012.



21. Likewise, the lower court should have used its discretion to permit Success Academy to intervene in the litigation under CPLR 1013. As explained in its motion to intervene, Success Academy's claim will be adversely affected if it is not permitted to intervene. Any judgment on Petitioners' requested relief action will directly impact Success Academy and its students. Furthermore, the facts at issue—those that the Board of Education considered in approving the co-location—are facts about Success Academy. Therefore, there clearly are common questions of law and fact. And as discussed above, there is no basis whatsoever to suggest that Success Academy's intervention would prejudice any of the existing parties. On the contrary, it is Success Academy that will be prejudiced if intervention is denied and the litigation proceeds with Success Academy stuck on the sidelines.

22. Even if the lower court did not agree that Success Academy was a proper intervenor under either CPLR 1012 or 1013, the court should have granted Success Academy's motion pursuant to the broad standards of CPLR 7802(d), which provides that a court broad authority to allow any interested person to intervene in an Article 78 proceeding. Success Academy is clearly an interested party under this standard. Success Academy seeks to ratify the Board of Education's approval of their co-locations. An adverse determination by the Court would directly affect Success Academy and prevent the opening of two of its schools for the 2023-2024 school year, which begins in just a few months. Success Academy's claim that the approval was proper arises from the precise Board of Education action that petitioners challenge.

23. Petitioners claims that they would be prejudiced by adding Success Academy to the Article 78 proceeding due to "unnecessary complication of the case and muddying of the issues" are unsupported. (NYSCEF No. 36.) The underlying litigation is focused on Respondents' decision to approve the co-location of two Success Academy schools. Those two

schools are Success Academy charter schools. Allowing Success Academy to join the action will not complicate the issues—on the contrary, Success Academy’s participation will clarify the issues by bringing to bear an essential perspective that would otherwise be missing and that would help to educate the court on the facts, the law, and the stakes for all involved. It is imperative that Success Academy be able to protect its interests and present the court with a clear understanding of what the downstream effects of granting Petitioners’ claims would be.

24. Petitioners’ claim that they will be prejudiced by a slight delay in the proceedings is baseless. Success Academy requested only a brief, two- to three-week adjournment of the show cause hearing on Petitioners’ application for a preliminary injunction—and, as noted above, Success Academy *specifically represented* that it was prepared to proceed under *the exact schedule* for briefing and argument that the Supreme Court has now set for Petitioners’ request for a preliminary injunction.

25. To the extent there is a risk of some further delay as a result of a stay pending appeal, the fault lies with Petitioners, not Success Academy—as it was Petitioners who waited more than four months to file the Verified Petition, opted not to include Success Academy as a necessary party, and then strenuously opposed intervention, with the entirely predictable result that litigation has ensued over Success Academy’s motion to intervene. Any potential prejudice in this action would be suffered by Success Academy—not Petitioners—if the stay is denied. In that scenario, the lower court will decide an issue with extraordinarily high stakes for Success Academy, without hearing from Success Academy at all. Success Academy would have no rights to challenge the decision or to represent its interests. The balance of equities thus firmly tilts in Success Academy’s favor and supports granting a stay pending appeal.

26. Success Academy has no interest in further delaying the proceedings, as Success Academy repeatedly represented to the lower court. Success Academy's only interest is in being heard on the merits of this extremely important dispute. Indeed, of any of the parties, Success Academy is likely the most motivated to resolve the dispute as quickly as possible as Success Academy's students, teachers, and staffs will be directly, adversely impacted the longer this litigation remains pending as a cloud over their futures. Accordingly, the request for a stay is not designed to delay proceedings; rather, it is designed to resolve the question of whether Success Academy may intervene in the underlying litigation, and to ensure that any relief Success Academy obtains is meaningful by ensuring that Success Academy can intervene in time to oppose Petitioners' request for a preliminary injunction. This factor also supports granting a stay.

27. In the absence of a stay, the parties will submit briefing on Petitioners' application for a preliminary injunction, and the parties will appear before the lower court on May 25, 2023 for oral argument. Time is therefore of the essence.

28. Accordingly, for the foregoing reasons and those set forth in the accompanying memorandum of law, Success Academy respectfully requests that the Court stay further proceedings in the court below until Success Academy's appeal of the Order is decided.

29. I hereby affirm that no previous application has been made to this or any other court for the relief requested herein.

Dated: New York, New York  
May 10, 2023

By:   
\_\_\_\_\_

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**Exhibit 1**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

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.

Index No. 152847/2023

I.A.S. Part: 11

Hon. Lyle E. Frank

Motion Seq. No. 002

**NOTICE OF APPEAL**

**PLEASE TAKE NOTICE** that Non-Party Success Academy Charter Schools hereby appeals to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, from each and every part of the Decision and Order of the Supreme Court, New York County (the Honorable Lyle E. Frank) dated May 3, 2023, and duly entered in the Office of the Clerk of New York County on May 8, 2023 (NYSCEF Doc. No. 42). Notice of Entry of which was served on May 9, 2023 (NYSCEF No. 43).

A true and correct copy of the Order from which this appeal is taken, with the Notice of Entry thereof (served on May 9, 2023), is attached hereto as **Exhibit A**. A copy of the Defendants' Information Statement pursuant to 22 NYCRR § 1250.3(a) is attached hereto as **Exhibit B**.

Dated: New York, New York  
May 9, 2023

Respectfully submitted,

/s/ Jay P. Lefkowitz

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**Exhibit A**



**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

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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.

Index No. 152847/2023

I.A.S. Part: 11

Hon. Lyle E. Frank

Motion Seq. No. 002

**NOTICE OF ENTRY**

**PLEASE TAKE NOTICE** that the attached is a true and correct copy of a Decision and Order of the Honorable Lyle E. Frank (NYSCEF No. 42) denying non-party Success Academy’s Motion to Intervene, dated May 3, 2023 and duly entered in this action on May 8, 2023, in the office of the Clerk of the Supreme Court, New York County.

Dated: New York, New York  
May 9, 2023

Respectfully submitted,

/s/ Jay P. Lefkowitz

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*Co-Counsel for Petitioners United Federation of Teachers*

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 11M

*Justice*

-----X

MICHAEL MULGREW, ADVOCATES FOR JUSTICE  
LEGAL FOUNDATION, COREY HAMILTON, ERICA  
NAIRNE-HAMILTON, ELIZABETH WEINERT, AUDRA FOX,

Petitioner,

INDEX NO. 152847/2023

MOTION DATE 04/19/2023

MOTION SEQ. NO. 002

- v -

THE BOARD OF EDUCATION OF THE CITY SCHOOL  
DISTRICT OF THE CITY OF NEW YORK, DAVID C.  
BANKS,

Respondent.

**DECISION + ORDER ON  
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 36, 37, 38, 39, 40, 41

were read on this motion to/for PARTIES - ADD/SUBSTITUTE/INTERVENE.

Non-party, Success Academy Charter Schools “Proposed Intervenor”, moves this Court for an order pursuant to CPLR § 1012 and CPLR § 1013, and in the alternative pursuant to CPLR § 7802, allowing the Proposed Intervenor to intervene in the instant action for the purpose of opposing the instant petition. Petitioners oppose the instant application, while respondents submit an affirmation in support of intervention. For the reasons set forth below, the instant application is denied.

The underlying petition arises out of allegations that respondents arbitrarily, capriciously and in violation of the law, allowed the co-location<sup>1</sup> to two Success Academy Charter Schools, one in Brooklyn and one in Far Rockaway, Queens.

The crux of the arguments set forth by the Proposed Intervenor is that its interest in

<sup>1</sup> The parties and non-parties define “co-location” as the existence of two or more school organizations located in the same building and typically share common spaces.

defending respondents' actions *may be* inadequately represented by respondents. Proposed Intervenor contends that while respondents have a procedural interest in ratification of its co-location plan, proposed intervenors interests are more practical. The Court however does not find this argument persuasive. Further, Proposed Intervenor contends that they should be permitted to intervene as a matter of right as they are interested parties and "ha[ve] a real and substantial interest in the outcome of the litigation".

In opposition, petitioners contend that Proposed Intervenor's interests are irrelevant to the ultimate issue at hand, that being whether respondents acted arbitrarily, capriciously, or unlawfully. The Court agrees. While 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.

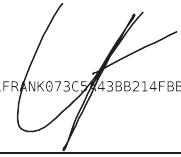
It is well established that the right to intervene is within the court's discretion. The Court having determined that the movant's arguments in favor of intervention are not persuasive and that intervention by the movant will likely unduly delay the determination of the action, and may cause confusion as the issues in this petition are limited to the conduct of the respondents.

Accordingly, it is hereby

ADJUDGED that the motion to intervene is denied; and it is further

ORDERED that respondents shall file any opposition to the underlying order to show cause on or before May 15, 2023; the petitioners shall submit any reply on or before May 22, 2023, and the parties are to appear for argument in this matter on May 25 at 10am.

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5/3/2023

DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

**Exhibit B**

# Supreme Court of the State of New York

## Appellate Division: First Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

**Case Title:** Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

Michael Mulgrew et al

- against -

The Board of Education of the City School District of the City of New York et al

For Court of Original Instance

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Date Notice of Appeal Filed

For Appellate Division

Case Type		Filing Type	
<input type="checkbox"/> Civil Action <input type="checkbox"/> CPLR article 75 Arbitration	<input checked="" type="checkbox"/> CPLR article 78 Proceeding <input type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding	<input checked="" type="checkbox"/> Appeal <input type="checkbox"/> Original Proceedings <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Labor Law 220 or 220-b <input type="checkbox"/> Public Officers Law § 36 <input type="checkbox"/> Real Property Tax Law § 1278	<input type="checkbox"/> Transferred Proceeding <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Executive Law § 298 <input type="checkbox"/> CPLR 5704 Review

**Nature of Suit:** Check up to three of the following categories which best reflect the nature of the case.

<input type="checkbox"/> Administrative Review	<input type="checkbox"/> Business Relationships	<input type="checkbox"/> Commercial	<input type="checkbox"/> Contracts
<input checked="" type="checkbox"/> Declaratory Judgment	<input type="checkbox"/> Domestic Relations	<input type="checkbox"/> Election Law	<input type="checkbox"/> Estate Matters
<input type="checkbox"/> Family Court	<input type="checkbox"/> Mortgage Foreclosure	<input type="checkbox"/> Miscellaneous	<input type="checkbox"/> Prisoner Discipline & Parole
<input type="checkbox"/> Real Property (other than foreclosure)	<input type="checkbox"/> Statutory	<input type="checkbox"/> Taxation	<input type="checkbox"/> Torts

Appeal	
Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.
<input type="checkbox"/> Amended Decree <input type="checkbox"/> Amended Judgement <input type="checkbox"/> Amended Order <input type="checkbox"/> Decision <input type="checkbox"/> Decree	<input type="checkbox"/> Determination <input type="checkbox"/> Finding <input type="checkbox"/> Interlocutory Decree <input type="checkbox"/> Interlocutory Judgment <input type="checkbox"/> Judgment
<input checked="" type="checkbox"/> Order <input type="checkbox"/> Order & Judgment <input type="checkbox"/> Partial Decree <input type="checkbox"/> Resettled Decree <input type="checkbox"/> Resettled Judgment	<input type="checkbox"/> Resettled Order <input type="checkbox"/> Ruling <input type="checkbox"/> Other (specify):
Court: <b>Supreme Court</b>	County: <b>New York</b>
Dated: <b>05/03/2023</b>	Entered: <b>05/08/2023</b>
Judge (name in full): <b>Hon. Lyle E. Frank</b>	Index No.: <b>152847/2023</b>
Stage: <input checked="" type="checkbox"/> Interlocutory <input type="checkbox"/> Final <input type="checkbox"/> Post-Final	Trial: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> Non-Jury
Prior Unperfected Appeal and Related Case Information	
Are any appeals arising in the same action or proceeding currently pending in the court? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.	
Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case: N/A	
Original Proceeding	
Commenced by: <input checked="" type="checkbox"/> Order to Show Cause <input type="checkbox"/> Notice of Petition <input type="checkbox"/> Writ of Habeas Corpus	Date Filed: <b>03/27/2023</b>
Statute authorizing commencement of proceeding in the Appellate Division: <b>CPLR §7803(1)</b>	
Proceeding Transferred Pursuant to CPLR 7804(g)	
Court: <b>Choose Court</b>	County: <b>Choose County</b>
Judge (name in full):	Order of Transfer Date:
CPLR 5704 Review of Ex Parte Order:	
Court: <b>Choose Court</b>	County: <b>Choose County</b>
Judge (name in full):	Dated:
Description of Appeal, Proceeding or Application and Statement of Issues	
<p>Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.</p> <p>Non-party Success Academy Charter Schools seeks to stay further proceedings on the Order entered by the lower court pending appeal of the Order denying Success Academy's motion to intervene in the litigation captioned Michael 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. The lower court's Order denied Success Academy's motion to intervene and set a briefing and hearing schedule for Petitioners' request for a preliminary injunction, enjoining the opening and operating of two Success Academy charter schools for the 2023-2024 school year.</p>	

Informational Statement - Civil



Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

On appeal, non-party Success Academy Charter School seeks review of the lower court's denial, for abuse of discretion, of Success Academy's motion to intervene under CPLR 1012, 1013, or 7802(d).

Success Academy seeks a stay of the underlying litigation pending appeal.

**Party Information**

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	Michael Mulgrew, as President of the UNITED FEDERATION OF TEACHERS, LOCAL 2	Petitioner	Respondent
2	Advocates for Justice Legal Foundation	Petitioner	Respondent
3	Corey Hamilton , individually and on behalf of his minor child L.H.	Petitioner	Respondent
4	Erica Nairne-hamilton , individually and on behalf of her minor child L.H.	Petitioner	Respondent
5	Elizabeth Weinert	Petitioner	Respondent
6	Audra Fox , individually and on behalf of her minor child J.F.	Petitioner	Respondent
7	The Board of Education of the City School District of the City of New York	Respondent	Respondent
8	David C. Banks , as Chancellor of the City School District of the City of New York	Respondent	Respondent
9	Success Academy Charter Schools	Nonparty	Appellant
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			

**Attorney Information**

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: Strook & Strook & Lavan LLP; Dina Kolker, Alan Klinger, Elizbaeth Masiuk

Address: 180 Maiden Lane

City: New York State: New York Zip: 10038 Telephone No: 212-806-5400

E-mail Address: dkolker@stroock.com

Attorney Type:  Retained  Assigned  Government  Pro Se  Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): Petitioners

Attorney/Firm Name: Advocates for Justice; Laura Barbier

Address: 225 Broadway, Suite 1902

City: New York State: New York Zip: 10007 Telephone No:

E-mail Address: lbarbieri@advocatesny.com

Attorney Type:  Retained  Assigned  Government  Pro Se  Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): Petitioners

Attorney/Firm Name: New York City Law Department; Kendra Riddleberger

Address: 100 Church Street, 2nd Floor

City: New York State: New York Zip: 10007 Telephone No: 212-356-4377

E-mail Address: KRiddleb@law.nyc.gov

Attorney Type:  Retained  Assigned  Government  Pro Se  Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): Respondents (Board of Education, David E.

Attorney/Firm Name: Kirkland & Ellis LLP; Jay Lefkowitz Banks, Chancellor)

Address: 601 Lexington Avenue

City: New York State: New York Zip: 10022 Telephone No: 212-446-4800

E-mail Address: lefkowitz@kirkland.com

Attorney Type:  Retained  Assigned  Government  Pro Se  Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): Non-party Success Academy Charter Schools

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No:

E-mail Address:

Attorney Type:  Retained  Assigned  Government  Pro Se  Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No:

E-mail Address:

Attorney Type:  Retained  Assigned  Government  Pro Se  Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):



# NYSCEF Confirmation Notice

## New York County Supreme Court



The NYSCEF website has received an electronic filing on 05/09/2023 02:15 PM. Please keep this notice as a confirmation of this filing.

**152847/2023**

**Michael Mulgrew et al v. The Board of Education of the City School District of the City of New York et al**

**Assigned Judge: Lyle E. Frank**

### Documents Received on 05/09/2023 02:15 PM

<b>Doc #</b>	<b>Document Type</b>
44	NOTICE OF APPEAL, Motion #002
45	EXHIBIT(S) A, Motion #002
46	EXHIBIT(S) B, Motion #002

### Filing User

Jay Philip Lefkowitz | lefkowitz@kirkland.com  
601 Lexington Ave, New York, NY 10022

### E-mail Notifications

An email regarding this filing has been sent to the following on 05/09/2023 02:15 PM:

**LAURA D. BARBIERI - lbarbieri@advocatesny.com**

**DINA KOLKER - dkolker@stroock.com**

**JAY P. LEFKOWITZ - lefkowitz@kirkland.com**

**KENDRA E. RIDDLEBERGER - kriddleb@law.nyc.gov**

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**Hon. Milton A. Tingling, New York County Clerk and Clerk of the Supreme Court**

Phone: 646-386-5956 Website: [http://www.nycourts.gov/courts/1jd/suptctmanh/county\\_clerk\\_operations.shtml](http://www.nycourts.gov/courts/1jd/suptctmanh/county_clerk_operations.shtml)

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