COMPLAINT FILED BEFORE THE NEW YORK STATE EDUCATION DEPARTMENT BY ADVOCATES FOR CHILDREN OF NEW YORK, INC. AGAINST THE NEW YORK CITY DEPARTMENT OF EDUCATION, SUCCESS ACADEMY CHARTER SCHOOLS, INC., SUCCESS ACADEMY HARLEM EAST, SUCCESS ACADEMY BRONX 2, SUCCESS ACADEMY UPPER WEST, AND SUCCESS ACADEMY FORT GREENE

1. Advocates for Children of New York ("***AFC***") is filing this complaint because students with disabilities at schools managed by Success Academy Charter Schools, Inc. ("***Success Academy***") are not receiving the due process protections to which they are entitled under the Individuals with Disabilities Education Act ("***IDEA***") and New York Education Law.

2. Critical to the IDEA and New York Education Law are the rights of parents to participate in decision-making, and to use the administrative due process system to challenge decisions made, concerning their children's special education. At the heart of these rights are (1) the right to an individualized education program ("***IEP***") meeting prior to any change in placement, in which the parent has an equal voice to participate in the decision, and (2) the right to pendency in the student's last agreed upon placement while any challenges to the student's proposed placement proceed. Respondents Success Academy Harlem East ("***SA Harlem East***"), Success Academy Bronx 2 ("***SA Bronx 2***"), Success Academy Upper West ("***SA Upper West***"), and Success Academy Fort Greene ("***SA Fort Greene***" and, together with SA Harlem East, SA Bronx 2 and SA Upper West, the "***SA Schools***")—all taking direction from Respondent Success Academy, as the charter management organization in control of the SA Schools—have refused to comply with these important aspects of the IDEA's procedures and legal mandates. Success Academy schools have changed placements without IEP meetings or written notice and defied pendency orders, resulting in students with disabilities losing months of mandated instruction and

denying parents their rights to participate in decision-making concerning their child's special education that state and federal law mandate.

3. By refusing to comply with these mandates, Success Academy and its schools have effectively declared that they are not subject to the due process provisions of the IDEA and New York Education Law, and that students with disabilities at Success Academy schools do not have the same legal protections as students with disabilities at other public schools.

4. As described in this complaint, SA Schools changed students' special education placements without IEP meetings and without giving their parents the opportunity to participate in the decision-making process as required by the IDEA and New York Education Law. As the examples described in the complaint demonstrate, students have lost months and in some instances nearly entire school years of grade-level instruction because of Respondents' refusal to implement important protections in the IDEA and New York Education Law, all done at the direction and with the support of Success Academy.

5. The incidents described in this complaint are not isolated. AFC has received numerous phone calls from parents of students with disabilities at Success Academy schools whose placements were changed or threatened to be changed during the school year without IEP meetings. In addition, a Success Academy school psychologist admitted at a recent IEP meeting that a Success Academy school had placed a number of students with disabilities into classrooms that were not consistent with the students' IEPs. *See, e.g.,* **Affidavit of B.M.** dated October 24, 2018 ¶ 17 ("***B.M. Aff.***").

6. Although Respondent New York City Department of Education ("***DOE***") is the Local Education Agency ("***LEA***") of the SA Schools and the other schools in New York City that Success Academy manages, the DOE has no system to ensure that these schools comply with the

requirements for IEP meetings and notice before changes in placement or with pendency orders resulting from due process proceedings. The DOE did not hold IEP meetings or ensure that parents received written notice before the SA Schools changed students' placements and did not ensure that the SA Schools complied with pendency orders. To the contrary, the DOE has communicated in words and lack of action that a parent's only recourse to get a school managed by Success Academy to comply with a pendency order was for the ***parent who already was successful*** in obtaining a pendency order to file a federal court complaint for a preliminary injunction.

7. The IDEA and New York Education Law provide that parents of students with disabilities attending charter schools have the same procedural protections as parents of students with disabilities at traditional public schools. But that is not the current reality: parents of students with disabilities at schools managed by Success Academy, including the SA Schools, must now exhaust their administrative remedies by filing a due process request against the DOE to obtain a pendency order ***and,*** once obtained, file a federal complaint for a preliminary injunction to enforce the pendency order against the Success Academy school. This is an extra burden imposed only on the parents of students with disabilities in Success Academy schools that is inconsistent with the IDEA and New York Education Law.

8. AFC is therefore bringing this complaint (the "***Complaint***") as an organization on behalf of all parents and guardians of students with disabilities at schools managed by Success Academy to ensure that schools managed by Success Academy, including the SA Schools, comply with all procedural safeguards of the IDEA and New York Education Law, including holding IEP meetings and giving notice before any changes in placement and complying with pendency orders, without the additional burdens currently imposed upon students attending schools managed by Success Academy and their families.

PARTIES

9. AFC is a non-profit corporation that, among other things, assists New York City students in connection with their special education needs, including families of students attending charter schools in New York City. In addition to direct representation of families, AFC works on institutional reform of educational policies and practices through advocacy and litigation. Through its education helpline, AFC provides guidance and assistance to families, students, and providers regarding their education-related concerns and questions, including issues relating to the special education provided at New York City charter schools. AFC is located at 151 West 30th Street, New York, New York 1000l.

10. Success Academy is a non-profit corporation organized under the laws of the State of Delaware. Success Academy operates the largest public charter school network in New York City and manages the schools within its network, including the SA Schools. Admission into Success Academy schools is open to all New York State children. Success Academy operates 47 schools serving 17,000 students in Manhattan, Brooklyn, Queens, and the Bronx. *See* SUCCESS ACADEMY CHARTER SCHOOLS, https://www.successacademies.org/about/ (last visited Nov. 12, 2018). Success Academy receives federal and state funding to provide educational services to the students enrolled in its schools. Its principal place of business is located at 95 Pine Street, 6th Floor, New York, New York 10005.

11. The SA Schools are charter schools located throughout New York City managed by Success Academy. SA Harlem East is located at 141 East 111th Street, Floor 3, New York, New York 10029. SA Bronx 2 is located at 450 St. Pauls Place, Floor 5, Bronx, New York 10456. SA Upper West is located at 145 West 84th St, Floor 2, New York, NY 10024. SA Fort Greene is located at 101 Park Avenue, Floor 3, Brooklyn, NY 11205. To the extent that the SA Schools are

separate corporate entities, they are controlled and operated by Success Academy. Policies and practices concerning the provision of special education services are determined by Success Academy, and not individual schools. As the principal of SA Harlem East recently testified under oath, "[T]he job of the school is to implement the policies and procedures set by Success Academy Charter Network and approved by [the State University of New York]." *See* **Affidavit of B.M.L.** dated October 23, 2018 ("***B.M.L. Aff.***"), Ex. I, at 160:25–161:2 (testimony of Brooke Rosenkrantz, principal of SA Harlem East during the 2017–2018 school year); *see also id.*, at 151:6–10 ("Grade level decisions are housed within the charter management organization.").

12. Respondent DOE is the official body charged with the responsibility of developing policies with respect to the administration and operation of the public schools in the City of New York, including programs and services for students with disabilities. N.Y. EDUC. LAW §§ 2590, 2590-g. As the geographic school district in New York City, the DOE is the LEA for students with IEPs attending charter schools in New York City. *See* N.Y. EDUC. LAW § 2853(4)(a). The DOE is a branch of the municipal government in New York City, with its principal place of business located at 52 Chambers Street, New York, New York, 10007.

CHARTER SCHOOLS MUST ADHERE TO THE PROCEDURAL REQUIREMENTS SET FORTH IN THE IDEA AND NEW YORK EDUCATION LAW

13. In New York State, for purposes of the IDEA, the school district of residence is the LEA responsible for the evaluation, identification and placement of, and IEP development for, charter school students with disabilities, and a charter school is deemed a school of the school district of the student's residence. *See Charter Schools and Special Education*, NEW YORK STATE EDUCATION DEPARTMENT – CHARTER SCHOOL OFFICE ¶¶ 1–2 (Feb. 1, 2018), http://www.p12.nysed.gov/psc/Footer/specialeduc.html [hereinafter *Charter Schools & Special*

Education]. Formal guidance from the NYSED explicitly states that "both the school district of residence, as LEA, and the charter school are legally obligated to assure that the charter school student receives a free appropriate public education in accordance with the student's IEP." *Id.* ¶ 17.

14. The DOE, as the geographic school district in New York City, holds ultimate authority and responsibility for deciding the appropriate program and placement for students with IEPs attending charter schools in New York City. *See* N.Y. EDUC. LAW § 2853(4)(a). Charter schools have no authority to change the IEP, services, or placement of a student with a disability without an IEP meeting convened by the DOE. *See Charter Schools & Special Education* ¶ 11 (stating that charter schools must implement IEPs "as written"). If a charter school cannot implement the IEP as written, the charter school must notify the DOE as the LEA. *See* N.Y. EDUC. LAW § 2853(4)(a).

15. Under New York Education Law section 2853(4)(a), "[s]pecial education programs and services shall be provided to students with a disability attending a charter school in accordance with the individualized education program recommended by the committee or subcommittee on special education of the student's school district of residence." N.Y. EDUC. LAW § 2853(4)(a).

16. Furthermore, in accordance with guidance from the State Education Department, IDEA services and procedural safeguards for students with disabilities are to be provided "to the same extent as for a student enrolled in the school district." *See Charter Schools & Special Education* ¶ 11 ("Where the parents of a charter school student . . . raise issues concerning the provision of a free appropriate public education to their child, the school district of residence is responsible for providing mediation and/or conducting an impartial hearing to resolve the dispute, to the same extent as for a student enrolled in the school district.").

A. *By Changing the Placement of Students with Disabilities Without IEP Meetings, the DOE, Success Academy, and the SA Schools Are Denying to Students with Disabilities Protections Mandated in the IDEA and New York Education Law*

17. Under the IDEA, the IEP dictates the services and placement of a student with a disability. *See* 20 U.S.C. § 1414(d)(1)(A)(i)(IV), (VII); *see also* 34 C.F.R. § 300.327. Any change in placement must be made at an IEP meeting, by a student's IEP team, with parent participation. *See* 20 U.S.C. § 1415(b)(1), (3); *see also* 34 C.F.R. § 300.327; 20 U.S.C. § 1414(e). New York Education Law has these same requirements. N.Y. EDUC. LAW § 4402(1)(b)(1); 8 NYCRR § 200.5(a), (d).

18. A student's placement may not be changed without (i) providing the parent with written notice and (ii) the student's IEP team, including the parent, initiating the change on the IEP at an IEP meeting based upon the student's individualized learning needs. *See* 20 U.S.C. § 1415(b)(3)(B) & (b)(6)(A); N.Y. EDUC. LAW § 4402(1)(b)(1); 8 NYCRR § 200.5(a), (d). A student's placement may ***not*** be unilaterally changed by either the student's school or the school district outside of an IEP meeting. *See* 20 U.S.C. § 1415(b)(3)(B); 20 U.S.C. § 1415(b)(6)(A); 8 NYCRR §§ 200.4(e)(2); 200.5(a), (d).

19. Courts have found that a change in placement occurs when the change in question would impact the student's "learning experience." *Cronin v. Bd. of Educ. of E. Ramapo Cent. Sch. Dist.*, 689 F. Supp. 197, 202 (S.D.N.Y. 1988). Whether a change in placement has occurred is a fact-specific inquiry "focus[ing] on the importance of the particular modification involved." *Id.* at 202. Courts identify a "touchstone" factor in whether a change in placement has occurred as whether the change in question impacts the student's learning experience. *Id.*; *see also George A. v. Wallingford Swarthmore Sch. Dist.*, 655 F. Supp. 2d 546, 551 (E.D. Pa. 2009) ("The Third Circuit has instructed that what constitutes a "change in educational placement" is fact specific and

depends upon whether the change is "likely to affect in some significant way the child's learning experience."). The New York Court of Appeals has stated that a change of placement occurs, among other instances, when the student's "educational program is materially altered." *In re Beau II*, 95 N.Y.2d 234, 240 (N.Y. 2000). Notably, in finding that a change of placement did not occur in *In re Beau II*, the Court emphasized that the student's classes were not changed. *Id*. at 241. By contrast, changes to the student's classes, diploma track, academic requirements, and grade-level curriculum requirements have been found to be a change in placement. *See Middleton v. District of Columbia*, 312 F. Supp. 3d 113, 131 (D.D.C. 2018). Changes in placement altering a student's educational program can be made only by an IEP team, at an IEP meeting. *See* 34 C.F.R. §§ 300.116(a) & (b); 8 NYCRR § 200.5(a), (d).

20. The IDEA and New York Education Law are clear that the parent is a critical member of the IEP team and ***must*** be given an opportunity to participate in all decision-making concerning the placement of a student with a disability. *See* 34 C.F.R. § 300.501(b) & (c). As the implementing regulations of the IDEA state, the LEA, must "ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child." 34 C.F.R. § 300.327; *see also* 34 C.F.R. § 300.501; N.Y. EDUC. LAW § 4402(1)(b)(1); 8 NYCRR § 200.5(d).

21. In *R.E. v. New York City Department of Education*, the United States Court of Appeals for the Second Circuit explained that predetermination of a child's IEP without meaningful parental input constitutes a procedural violation of the IDEA that "can rise to the level of a substantive harm, and therefore deprive a child of a [Free Appropriate Public Education ("***FAPE***")]." *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 190 (2d Cir. 2012); *see also S.Y. v. New York City Dep't of Educ.*, 210 F. Supp. 3d 556, 576 (S.D.N.Y. 2016) ("[T]he IDEA provides

that the fact of the procedural violation, if it significantly impedes the parents' opportunity to participate in the decision making process, is a harm unto itself that results in the denial of a FAPE.") (internal quotations and citations omitted); *E.H. v. New York City Dep't of Educ.*, 164 F. Supp. 3d 539, 551 (S.D.N.Y. 2016) (finding that the DOE violated the IDEA when it "did not enter the IEP with an open-mind as to what was appropriate," and failed to take seriously the parent's concerns and suggestions regarding placement); *Cooper v. D.C.*, 77 F. Supp. 3d 32, 37 (D.D.C. 2014) (finding that the decision to change a child's placement before formulating an IEP violates the IDEA).

22. The IDEA and New York Education Law also require that a school district provide written notice to the parent "a reasonable time before" any change in where the student will receive IEP mandated services. 34 C.F.R. § 300.503(a)(1); 8 N.Y.C.R.R. § 200.1(oo). Courts have found that providing notice of one business day before the change does not constitute sufficient written notice. *See E.H.*, 164 F. Supp. 3d at 548. To allow a parent the opportunity to participate meaningfully in the decision-making process concerning a student's placement, as the IDEA and New York Education Law require, the school district must provide written notice of the proposed classroom teacher and resources available for the student before the change in placement occurs. *S.Y.*, 210 F. Supp. 3d at 574, 577. Significantly, this notice requirement in the IDEA and New York Education Law is separate from the recognition that the IEP itself need not specify the school location.

23. As described in the examples below, relying upon the advice of Success Academy, the SA Schools changed the placements of students with disabilities without regard to these

procedural safeguards of the IDEA and New York Education Law.[1] In addition to the five students described below as examples, AFC has learned of other students at Success Academy schools whose placements were changed without IEP meetings during the 2017–2018 and 2018–2019 school years as described in the affidavit of Harold Hinds.

1. M.L.

24. M.L. is a thirteen-year-old student who attended SA Harlem East during the 2017–2018 school year. B.M.L. Aff. ¶ 1. M.L. began attending SA Harlem East in 2010 as a kindergarten student. *Id.* ¶ 3. In 2014, when she was in 3rd grade, M.L. was evaluated for and began receiving special education services from the DOE in accordance with an IEP. *Id.* ¶ 4.

25. At the end of the 2016–2017 school year, on May 12, 2017, when M.L. was in 6th grade, M.L.'s mother attended an IEP meeting along with representatives from the DOE and SA Harlem East. *Id.* ¶ 5. At that time, M.L.'s most recent psychoeducational evaluations were from June 2, 2014. *Id.* ¶ 6. Based on that meeting, the DOE recommended that M.L. be placed in an integrated co-teaching ("***ICT***") class for all subjects combined with other related services. *Id.* ¶ 7. At the end of that school year, in June 2017, SA Harlem East promoted M.L. from 6th to 7th grade. *Id.* ¶ 8.

[1] Two hearing officers have found that the DOE failed to provide a FAPE to the students at SA Harlem East and SA Bronx 2 who are described in the complaint. No part of this Complaint is currently being addressed in an impartial hearing held pursuant to New York Education Law section 4404; nor have the issues in this complaint been previously decided in an impartial hearing held pursuant to New York Education Law section 4404. *See* 8 N.Y.C.C.R. § 200.5(l)(2)(vii)–(viii). The issues in this Complaint are not appropriate for the impartial hearing process because they address the policy of Success Academy's schools to not comply with the procedural safeguards in the IDEA and New York Education Law and the DOE's inability to enforce Respondents' compliance with procedural safeguards. As Complainant, AFC is bringing this complaint to correct the systemic problems, and not to seek individual relief for the students described as examples herein.

26. M.L. began the 2017–2018 school year in August 2017 at SA Harlem East in 7th grade ICT classes for all subjects. *Id.* ¶¶ 9–10. M.L. continued in her 7th grade ICT classes until the end of November 2017. *Id.* ¶ 10.

27. On November 29, 2017, while M.L.'s mother was at SA Harlem East to complete forms for her son, who also attended SA Harlem East, the principal of SA Harlem East informed M.L.'s mother that the school was changing M.L.'s placement from a 7th grade ICT class to a 6th grade 12:1:1 class, effective immediately. *Id.* ¶ 11. When M.L.'s mother protested the unilateral change in placement and requested that M.L. be permitted to remain in her then-current placement with additional supports, the principal informed M.L.'s mother that the decision was final and not up for discussion. *Id.* ¶ 12. Thus, on November 30, 2017, SA Harlem East unilaterally removed M.L. from her placement in a 7th grade ICT class and placed her in a 6th grade 12:1:1 class. *Id.* ¶ 13.

28. The DOE never convened an IEP meeting prior to the change from a 7th grade ICT class to a 6th grade 12:1:1 class. *Id.* ¶ 14.

29. The principal of SA Harlem East admitted that the school did not contact the DOE about this decision. *Id.* Ex. I, at 150:21–24. Rather than take the steps required by the IDEA and New York Education Law to contact the LEA for an IEP meeting, SA Harlem East consulted with, and took direction from, Success Academy in deciding to change M.L.'s placement without an IEP meeting. *Id.* at 150:21–151:5. As the principal of SA Harlem East testified when asked who decided to make the change: "I did, in consultation with my school manager and our charter management organization's legal team." *Id.* Ex. I, at 150:5–7. M.L. remained in the 6th grade 12:1:1 class until February 1, 2018. B.M.L. Aff. ¶ 13.

30. This change in placement upset M.L. because she was in a smaller class than her IEP recommended program, was placed with students who were at least one year younger than she was, and was learning material that she had previously learned during the 2016–2017 school year. *Id.* ¶ 16.

31. In late January 2018, M.L.'s mother retained AFC to assist her in addressing her concerns regarding SA Harlem East's decision to change M.L.'s placement. On January 29, 2018, M.L.'s mother, through counsel, emailed the DOE regarding concerns about M.L.'s special education services. *See id.* Ex. A.

32. On January 30, 2018, an AFC attorney spoke with the DOE's CSE chairperson concerning M.L. The AFC attorney informed the CSE chairperson that M.L.'s placement had been changed from a 7th grade ICT class to a 6th grade 12:1:1 class. The CSE chairperson stated that he was unaware of the change in placement. Hinds Aff. ¶ 7. The CSE chairperson did not commit to take any steps to undo the unilateral change in M.L.'s placement. *Id*. ¶ 8.

33. On January 31, 2018, M.L.'s mother sent an email to SA Harlem East's principal requesting that M.L. be permitted to return to her last agreed upon placement, her 7th grade ICT class. B.M.L. Aff. ¶ 18, Ex. B. The next day, on February 1, 2018, while M.L. was in class, an administrator from SA Harlem East pulled M.L. out of her 6th grade 12:1:1 class and told her that the school was changing her placement again: this time to a 6th grade ICT class. *Id.* ¶ 19. As with the November 2017 change in placement, the DOE never convened an IEP meeting prior to the change from a 6th grade 12:1:1 class to a 6th grade ICT class. *Id.* ¶ 20. There is no record that SA Harlem East consulted with the DOE before the change in placement.

34. On February 2, 2018, M.L.'s mother sent a letter to SA Harlem East and the DOE asserting pendency in M.L.'s last agreed upon special education placement, her 7th grade ICT

class. B.M.L. Aff. ¶ 21, Ex. C. Again, SA Harlem East refused to return M.L. to her 7th grade ICT class. Although the DOE's CSE chairperson was copied on the letter, the DOE did not convene an IEP meeting or respond to the letter. *Id*.

35. On February 20, 2018, M.L.'s mother filed an impartial hearing request against the DOE and SA Harlem East challenging the denial of FAPE based upon the unilateral changes to M.L.'s educational placement. *Id.* ¶ 22.

36. On March 27, 2018, the impartial hearing officer overseeing M.L.'s case issued a pendency order ("***M.L.'s Pendency Order***"), ordering that M.L. be reinstated in her last agreed upon placement—the 7th grade ICT class—pending the resolution of the hearing. *Id.* ¶ 23, Ex. D. Neither the DOE nor SA Harlem East appealed M.L.'s Pendency Order. *Id.* ¶ 37.

37. The following day, on March 28, 2018, M.L.'s mother, through her attorney, forwarded M.L.'s Pendency Order to Success Academy's legal counsel and the DOE demanding that M.L. be immediately reinstated in her 7th grade ICT class pursuant to the pendency order. B.M.L. Aff. ¶ 24, Ex. E. On March 29, 2018, counsel for Success Academy replied, refusing to comply with M.L.'s Pendency Order and stating that: (1) M.L.'s Pendency Order was "legally erroneous" and (2) the impartial hearing officer did not have the authority to order M.L.'s return to her prior placement. B.M.L. Aff. ¶ 25, Ex. F.

38. On April 5, 2018, M.L.'s mother, through her attorney, forwarded M.L.'s Pendency Order to the manager of the DOE's impartial hearing order implementation unit and requested that the DOE take action to implement the pendency order. B.M.L. Aff. ¶ 26, Ex. G. Neither that DOE representative nor any other DOE representative ever responded to the email, BML Aff. ¶ 26; however, on April 12, 2018, during the DOE's opening statement at the impartial hearing on the merits of M.L.'s case, the DOE acknowledged SA Harlem East's refusal to implement M.L.'s

Pendency Order and stated that "the Parent's only recourse [is] to file for a TRO, a temporary restraining order, in SDNY, the Southern District of New York, before a judge who has jurisdiction to enforce a pendency order, not the [impartial hearing officer]." B.M.L. Aff. Ex. H, at 97:7–21.

39. As a result of SA Harlem East's, Success Academy's, and the DOE's refusals to implement the pendency order, M.L. remained in a 6th grade ICT class until the end of the 2017–2018 school year. B.L.M. Aff. ¶ 36. In total, M.L. missed 7 months of 7th grade level academic instruction. *Id.* ¶ 38.

40. At the impartial hearing on the merits on April 12, 2018, the DOE conceded that it failed to provide a FAPE to M.L. when she was unilaterally placed in a 6th grade 12:1:1 class. *Id.* ¶ 29. The DOE, however, defended SA Harlem East's decision to change M.L.'s placement from a 6th grade 12:1:1 class to a 6th grade ICT class without an IEP meeting and up-to-date evaluations. *Id.* In addition, on May 16, 2018, at an IEP meeting that the DOE convened for M.L. while the impartial hearing was still pending, the DOE stated that the decisions to change M.L.'s placement were internal school matters over which the DOE had no control. *Id.* ¶ 34.

41. At the impartial hearing, Brooke Rosenkrantz, the principal of SA Harlem East during the 2017–2018 school year, testified as to her decisions to change M.L.'s placement in November 2017 and February 2018 and explained Success Academy's involvement in such decisions. Ms. Rosenkrantz testified that Success Academy's relationship to SA Harlem East is like a school district's relationship to a school, in that Success Academy performs for SA Harlem East "administrative duties, legal things, organization, curriculum, et cetera." B.M.L. Aff. Ex. I, at 160:20–24. She explained that "the job of the school is to implement the policies and procedures set by [Success Academy] and approved by [the State University of New York]." *Id.* at 160:25–161:2. Moreover, Ms. Rosenkrantz testified that Success Academy participated in the decisions to

change M.L.'s placement because decisions implicating a change in grade level reside with Success Academy. *Id.* Ex. I, at 151:6–10.

42. On June 12, 2018, the impartial hearing officer issued his findings of fact and decision. The impartial hearing officer found that the DOE denied M.L. a FAPE by allowing SA Harlem East to unilaterally change M.L.'s placement twice without convening an IEP meeting—first, unilaterally changing M.L.'s placement from a 7th grade ICT class to a 6th grade 12:1:1 class, and then unilaterally changing M.L.'s placement from a 6th grade 12:1:1 class to a 6th grade ICT class. B.M.L. Aff. ¶ 35, Ex. J. The impartial hearing officer found that the DOE and SA Harlem East acted twice in violation of the IDEA for the unilateral changes in M.L.'s placement without notice to M.L.'s mother or the CSE, and without an IEP meeting to consider the same. B.M.L. Aff. Ex. J, at 11. To compensate M.L. for the 7th grade instruction she lost from November through the end of the 2017–2018 school year, the impartial hearing officer ordered the DOE to fund 720 hours of compensatory tutoring. *Id.* at 14–15. The impartial hearing officer also ordered the CSE to convene a new IEP meeting within 30 days of the decision to consider an appropriate 8th grade placement for M.L. for the 2018–2019 school year. *Id.* Neither the DOE nor SA Harlem East appealed the decision. B.M.L. Aff. ¶ 37.

2. K.B.

43. K.B. is an eleven-year-old student who attended SA Bronx 2 during the 2017–2018 school year. *See* **Affidavit of S.G.** dated September 28, 2018 ¶ 3 ("***S.G. Aff.***"). K.B. began attending SA Bronx 2 in 2012 as a kindergarten student. S.G. Aff. ¶ 3. In 2013, K.B. was diagnosed with Attention Deficit Hyperactivity Disorder ("***ADHD***"), but his ability to learn was affected by the condition even before that initial diagnosis. *Id.* ¶ 2. As such, K.B. has had an IEP

since preschool and throughout his attendance at SA Bronx 2. *Id*.

44. At the end of the 2016–2017 school year, SA Bronx 2 promoted K.B. to the 4th grade. *Id.* ¶ 5.

45. K.B. began 4th grade at the start of the 2017–2018 school year. During the first four months of the school year, K.B.'s mother met with SA Bronx 2 school officials four times. *Id.* ¶ 6. At each meeting, K.B.'s mother expressed concerns about problems with the paraprofessional services being provided to K.B. by SA Bronx 2, even though K.B.'s IEP required such services as a critical component of his special education program. *Id*. K.B.'s mother expressed concern to SA Bronx 2 school officials about her inability to have direct contact with the paraprofessionals and over the rate at which the school changed his paraprofessionals—five times during the first four months of the school year. *Id.* ¶¶ 6, 17.

46. Over the course of the first four months of the 2017–2018 school year, when these meetings took place, SA Bronx 2 never requested that the DOE reevaluate K.B. to determine whether K.B. required additional or different special education services to accommodate his learning or behavior challenges in the 4th grade. *Id.* ¶ 7. Instead, during these meetings, SA Bronx 2 merely discussed sending school work home and the possibility of a change in placement if K.B. did not improve academically. *Id.* ¶ 8.

47. SA Bronx 2 also did not implement other requirements of K.B.'s IEP during that time. For example, even though his IEP required that K.B. receive extended time on all school assessments, the school did not provide this extended time during assessments. *Id.* ¶ 18.

48. On December 6, 2017, SA Bronx 2 principal, Angela Inslee, and Javeria Kahn, Managing Director of Success Academy, informed K.B.'s mother that SA Bronx 2 was changing K.B.'s placement from 4th grade to 3rd grade effective January 4, 2018. *Id.* ¶ 9. Because K.B.

had already successfully completed 3rd grade during the prior school year, K.B.'s mother objected to this change in placement and demanded to know how this change would help K.B. academically and socially. *Id.* ¶ 10. SA Bronx 2 school officials did not respond to this question. *Id*. SA Bronx 2 neither requested nor held an IEP meeting prior to the change in placement. *Id.* ¶ 11. K.B.'s mother did not have the benefit of an IEP meeting with the CSE and SA Bronx 2 school officials to discuss K.B.'s needs and services before SA Bronx 2 took the unilateral action of changing his placement. *Id.*

49. Upon learning that his placement was changing, K.B. was extremely upset and felt that he was being treated unfairly by SA Bronx 2 school officials. *Id.* ¶ 13. Initially, K.B. did not want to return to school, but he reluctantly returned to school in his inappropriate placement in the 3rd grade. *Id*. The change in placement upset K.B. because he was the oldest student in the 3rd grade class, and he was doing work that he had already done during the 2016–2017 school year. *Id.* ¶ 14. In addition, some students began to tease K.B. about his change in placement. *Id.* K.B.'s mother observed changes in her son's orientation to school, noting that he was pulling away from his academic work. *Id.* ¶ 19. SA Bronx 2's school psychologist also expressed concern to K.B.'s mother about his emotional well-being following the change in placement. *Id.*

50. On January 2, 2018, K.B.'s mother filed an impartial hearing request against the DOE challenging the change in placement as a violation of K.B.'s right to a FAPE. *Id.* ¶ 21. As part of the due process hearing, K.B.'s mother requested pendency for K.B. in his last agreed upon placement, his 4th grade class at SA Bronx 2. *Id.*

51. On February 9, 2018, the impartial hearing officer overseeing K.B.'s case issued a pendency order ("***K.B.'s Pendency Order***"), ordering that K.B. be reinstated in his last agreed

upon placement—his 4th grade class at SA Bronx 2—pending the resolution of the hearing. S.G. Aff. Ex. A. The DOE did not appeal the pendency order.

52. SA Bronx 2 refused to implement K.B.'s Pendency Order and his parent was forced to file a complaint in federal court against SA Bronx 2 to enforce the pendency order. Success Academy's legal counsel represented SA Bronx 2 in the enforcement action. In its papers, Success Academy took the position that the pendency order was unenforceable against Success Academy because it would "override the well-informed and good faith decision of KB's teachers and Principal." Mem. of Law in Supp. of Defs.' Opp'n to Pls.' Prelim. Inj. Mot. at 1, S.G. v. Success Academy Charter Schools, Inc., No. 18-CV-2484-KPF (S.D.N.Y. Mar. 30, 2018), ECF No. 15 (Attached hereto as **Exhibit A**). Success Academy further asserted that if the judge were to rule that the pendency order is subject to enforcement, the injunction would "handcuff local educators from promoting or demoting a student to their appropriate grade level." *Id.* The judge disagreed. On May 8, 2018, the district court judge issued a preliminary injunction against SA Bronx 2 compelling it to comply with K.B.'s Pendency Order to return him to the 4th grade. S.G. Aff. Ex. B.

53. Instead of implementing K.B.'s Pendency Order immediately, SA Bronx 2 forced K.B.'s mother to initiate federal court litigation depriving K.B. of his "mandated program for 75 school days until [his mother] successfully challenged the failure to implement the pendency order in U.S. District Court." S.G. Aff. Ex. C, at 16.

54. As a result of K.B. missing 4th grade instruction for so long, at the conclusion of the 2018–2019 school year, SA Bronx 2 informed K.B.'s mother that the school was retaining K.B. in 4th grade. S.G. Aff. ¶ 24.

55. On July 26, 2018, the impartial hearing officer issued its findings of fact and decision in the underlying due process request. The impartial hearing officer found that the DOE denied K.B. a FAPE by: (i) allowing SA Bronx 2 to unilaterally change K.B.'s placement without convening an IEP meeting and over his mother's objection; and (ii) failing to implement K.B.'s IEP as written. S.G. Aff. Ex. C. To compensate K.B. for the 4th grade instruction he lost for the 75 school days he was in the 3rd grade plus the "numerous hours of instruct[ion]" he was deprived "because he did not have the mandated support of a paraprofessional," the impartial hearing officer ordered the DOE to fund 375 hours of compensatory tutoring. S.G. Aff. Ex. C, at 18–19. The impartial hearing officer also ordered the CSE to convene prior to the 2018–2019 school year to determine K.B.'s appropriate placement, taking into account his skills at the end of the summer. *Id.* Neither the DOE nor SA Bronx 2 appealed the decision.

3. M.J.

56. M.J. is an eleven-year-old student who attended SA Upper West during the 2017–2018 school year. *See* B.M. Aff. ¶ 1.

57. M.J. began attending SA Upper West in 2013 as a 1st grade student. *Id*. ¶ 3.

58. The DOE and SA Upper West evaluated M.J. for special education services in February and March 2014 because of concerns M.J.'s mother had about M.J.'s academic progress. In June 2014, the DOE convened the first IEP meeting for M.J. At that meeting, the DOE found M.J. eligible for special education services, and created an IEP mandating that M.J. be placed in an ICT classroom and receive speech language therapy. *Id.* ¶ 4. M.J. did not receive any special education services in the 2013–2014 school year. *Id.* ¶ 5.

59. M.J. started 1st grade for a second time in August 2014 at SA Upper West, at which

time she began receiving special education services. *Id.* ¶ 5.

60. In June 2017, M.J. completed 3rd grade and was promoted to 4th grade at SA Upper West. *Id.* ¶ 6. Later that summer, in August 2017, the DOE convened an IEP meeting for M.J., after which the DOE created an IEP recommending that M.J. be placed in an ICT class for all subjects. *Id.* ¶ 7. That same month, M.J. began 4th grade at SA Upper West. *Id.* ¶ 8.

61. In April 2018, SA Upper West's principal gave M.J.'s mother an ultimatum. *Id.* ¶ 9. SA Upper West's principal told M.J.'s mother that M.J. would be retained in the 4th grade for the 2018–2019 school year unless she agreed to change M.J.'s placement from an ICT class at SA Upper West, to a 12:1:1 class at SA Harlem East. *Id.* Upon receiving this ultimatum, believing that she had no choice but to agree to this arrangement to place M.J. in a 5th grade 12:1:1 class for the upcoming 2018–2019 school year, M.J.'s mother accepted the principal's terms. *Id.* ¶ 11. The conversation at which the principal gave M.J.'s mother the ultimatum was not an IEP meeting: it was merely a conversation between the principal and M.J.'s mother, and no one from the DOE was present. *Id.* ¶ 12.

62. On June 14, 2018, the DOE convened an IEP meeting for M.J., which M.J.'s mother attended with her attorney. *Id.* ¶ 13. At the IEP meeting, an education manager for Success Academy stated that M.J.'s mother had agreed to place M.J. in a 12:1:1 class prior to the IEP meeting. An SA Upper West psychologist in attendance noted that M.J.'s mother accepted the change in placement only because the school had given her an ultimatum of either agreeing to place M.J. in a 12:1:1 class in another school, or risk M.J.'s promotion. *Id.* ¶ 14.

63. M.J.'s attorney asked why SA Upper West planned to change M.J.'s placement from an ICT class at SA Upper West to a 12:1:1 class at SA Harlem East without first convening an IEP meeting. *Id.* ¶ 16. The education manager claimed that SA Upper West changed M.J.'s

placement to the 12:1:1 class in anticipation of the DOE formally changing M.J.'s IEP to reflect the need for a 12:1:1 class. *Id*. The SA Upper West psychologist, however, responded to the education manager's statement by observing that there were several students in the 12:1:1 class at SA Harlem East whose IEPs did not recommend 12:1:1 classes. *Id.* ¶ 17.

64. M.J.'s mother's attorney asked why the DOE allows these unilateral changes in placement to occur, to which the DOE school psychologist conducting the IEP meeting responded that SA Upper West made these decisions. *Id.* ¶ 18. The DOE school psychologist further stated that these unilateral placement changes were internal school matters over which the DOE had no responsibility or control. *Id.*.

4. J.J.

65. J.J. is an 8 year-old student with a disability who attends SA Fort Greene. *See* **Affidavit of S.G.** dated November 8, 2018 ¶ 1 ("***S.G. Aff. Ft. Greene***"). He struggles with fluid reasoning, problem solving, logical reasoning, and understanding complicated concepts. He also has challenges with reading and writing, resulting in him needing longer amounts of time to complete assignments and tests. S.G. Aff. Ft. Greene ¶ 3.

66. In March 2018, the DOE created an IEP for J.J. that classified him as a student with a learning disability and mandated placement in a general education class with special education teacher support services ("***SETSS***") five times a week. J.J.'s March 2018 IEP recommended testing accommodations including time-and-a-half, testing in a separate location, verbal prompts every five minutes for all assessments longer than 60 minutes, and directions, test passages, questions, and multiple choice responses read aloud. *Id.* Ex. A.

67. In June 2018, J.J. completed 3rd grade and was promoted to 4th grade. *Id.* ¶ 5. J.J. Also passed his third grade state tests in English Language Arts and math during the 2017-2018

school year. *Id*. Ex. B.

68. In July 2018, SA Fort Greene accepted J.J. into the school as a 4th grader. *Id.* ¶ 6, Ex. C. J.J. began the 2018–2019 school year in August 2018 at SA Fort Greene in a 4th grade general education classroom with the March 2018 IEP that required placement in a general education classroom with SETSS five times a week. *Id.* ¶ 8.

69. In September 2018, J.J.'s mother asked J.J.'s teachers how the SETSS services mandated on J.J.'s IEP were being implemented. The teachers explained that at various times during the day, the class was divided up and a portion of the class was provided with additional instruction while sitting on a rug in the classroom. Based upon the teachers' description, J.J.'s mother did not believe that J.J. was receiving SETSS as his IEP mandated. *Id.* ¶ 9.

70. On September 27, 2018, J.J.'s mother received a text message from one of J.J.'s teachers asking her to come to the school to discuss J.J.'s performance on his most recent practice state assessment. *Id.* ¶ 10.

71. On September 28, 2018, J.J. went to SA Fort Greene for the meeting. She first met with J.J.'s 4th grade teachers, who informed her that they were recommending that J.J. be placed back into 3rd grade, effective October 1, 2018. *Id.* ¶ 11.

72. J.J.'s mother then met with SA Fort Greene's principal, an education manager for Success Academy, and the teachers from the 3rd grade class the school was recommending for J.J. *Id.* ¶ 12. The education manager explained that J.J. had not performed as well as the school wanted on his practice test, so the school was going to change his placement from a 4th grade class to a 3rd grade class. *Id.* ¶ 13. The representatives from the school and Success Academy stated that they believed J.J. should be changed to 3rd grade because J.J. took longer than they believed appropriate for him to complete tests and assignments. *Id.* When J.J.'s mother objected to the

change in placement, the education manager persisted, claiming that the change was best for J.J. *Id.* ¶ 14. The education manager then stated that J.J. would still receive 4th grade level work even if he were placed in a 3rd grade class. With that reassurance, J.J.'s mother again noted that she did not believe the change was appropriate, but relented, stating that she would allow the change in placement if the school thought that it was necessary for J.J.'s academic success. *Id.* ¶ 14.

73. No one from the DOE attended these meetings on September 28, 2018. *Id.* ¶ 12.

74. After thinking further about the decision to change J.J.'s placement, on Sunday, September 30, 2018, J.J.'s mother emailed SA Fort Greene's principal and the Success Academy education manager stating that she did not think the change in placement was appropriate. J.J.'s mother did not receive a response to the email. *Id.* ¶ 15.

75. On Monday, October 1, 2018, J.J.'s mother went to SA Fort Greene and spoke with SA Fort Greene's assistant principal. *Id.* ¶ 16. J.J.'s mother explained to the assistant principal that she did not want J.J.'s placement changed. The assistant principal explained that J.J.'s placement had already been changed and the school could not reinstate him in 4th grade. J.J.'s mother requested that J.J. be allowed to stay in 4th grade and offered to work with J.J. on better understanding 4th grade work. The assistant principal refused to keep J.J. in 4th grade, and called the Success Academy education manager into the meeting. The education manager also refused to keep J.J. in 4th grade. *Id.* ¶¶ 17-18. The education manager then informed J.J.'s mother that—contrary to what she had said at the meeting on September 28—J.J. would be doing only 3rd grade work. *Id.* ¶ 18.

76. On October 1, 2018, SA Fort Greene moved J.J. to a 3rd grade placement. *Id.* ¶ 20. The DOE did not convene a new IEP meeting for J.J. prior to the change in placement. *Id.* ¶

21.

77. On October 9, 2018, J.J.'s mother's attorney emailed the DOE that Success Academy had unilaterally changed J.J.'s placement without an IEP meeting and requested that the DOE take immediate action to ensure that J.J. is reinstated to his last agreement placement in 4th grade. *Id.* ¶ 22, Ex. E.

78. Also on October 9, 2018, J.J.'s mother's attorney emailed SA Fort Greene's principal and Success Academy's senior legal counsel, requesting that Success Academy reinstate J.J. in his 4th grade placement. *Id.* ¶ 23, Ex. F. Success Academy's senior legal counsel responded on October 10, 2018, refusing to reinstate J.J. in his 4th grade placement, even though SA Fort Greene and Success Academy had not offered J.J. any additional special education supports before changing J.J.'s placement. *Id.* ¶ 24. Disregarding J.J.'s mother's right to participate in decision-making concerning her child's special education services, Success Academy's legal counsel also claimed that J.J.'s mother was "prevent[ing Success] from doing what we know is best for him." *Id.* ¶ 24, Ex. G.

79. On November 7, 2018, after receiving the email from J.J.'s mother's attorney, the DOE convened an IEP meeting for J.J. During the meeting, the Success Academy education manager admitted that, since J.J. started at SA Fort Greene, neither the school nor the DOE had provided J.J. with the SETSS services his IEP mandates and that the school had not been providing the testing accommodations that his IEP mandates. *Id.* ¶ 25. When asked why the school was not providing the IEP-mandated testing accommodations, the education manager explained that the school did not generally provide these testing accommodations or deem them appropriate for many students. *Id.*

80. At the November IEP meeting, the DOE representative stated that the school had

not notified the DOE about the change in J.J.'s placement and that the DOE had no involvement in the decision to change J.J.'s placement. *Id.* ¶ 26.

81. To date, J.J. remains in his 3rd grade class. *Id.* ¶ 28. The change in placement has had a substantial impact on J.J., both emotionally and academically. *Id.* ¶ 29. J.J. has tried to avoid going to school since the change. In addition, J.J. is afraid to speak or raise his hand in class because he views the change in placement as a punishment, and he fears that he will get into further trouble by asking a question. *Id*.

5. A.K.

82. A.K. is a twelve year old student who attends SA Harlem East. He has several medical conditions, including sickle cell anemia and asthma, as well as serious food allergies. *See* **Affidavit of A.A.** dated November 7 2018 ¶ 1, 4 ("***A.A. Aff.***").

83. A.K. has attended Success Academy schools since he started kindergarten in 2011. A.A. Aff. ¶ 3.

84. A.K.'s medical conditions have caused him to be hospitalized and miss school. As a result, A.K. missed instruction and his academic progress fell behind his peers. *Id.* ¶ 4.

85. In May 2015, while A.K. was in 3rd grade, he was evaluated for special education services because he had not sufficiently progressed academically due to his repeated medical absences from school. *Id.* ¶ 5.

86. The DOE convened an IEP meeting for A.K. in June 2015, found him eligible for special education services, and created an IEP for him. *Id.* ¶ 6, Ex. A.

87. A.K. began receiving special education services at the start of the 2015–2016 school year, when A.K. began 4th grade. *Id.* ¶ 7. A.K. was promoted to 5th grade at the end of

the 2015–2016 school year. *Id.* ¶ 8.

88. A.K. began attending SA Harlem East in 5th grade at the start of the 2016-2017 school year. *Id.* ¶ 8.

89. In May 2017, the DOE created a new IEP for A.K., mandating that A.K. be placed in an ICT class setting and receive SETSS in English Language Arts twice per week and in math once per week in a separate location. *Id.* Ex. B.

90. In June 2017, SA Harlem East promoted A.K. to 6th grade. *Id.* ¶ 11.

91. In August 2017, shortly before the 2017–2018 school year began, an administrator from SA Harlem East called A.K.'s mother. The administrator informed A.K.'s mother that even though the school had promoted A.K. from 5th to 6th grade, the school intended to return A.K. to his previous 5th grade ICT placement for the 2017–2018 school year. *Id.* ¶ 12.

92. A.K.'s mother objected to the change in placement and stated that A.K. should start 6th grade with his special education services in place. The school administrator eventually agreed to place A.K. in his 6th grade class for the 2017–2018 school year. *Id.*

93. A.K. began the 2017–2018 school year in August 2017 in a 6th grade ICT class. Neither SA Harlem East nor the DOE provided A.K. with the SETSS services mandated on his IEP. *Id.* ¶ 13.

94. In November 2017, A.K. and his parents met with an education manager for Success Academy and the then-principal of SA Harlem East, Brooke Rosenkrantz. The education manager informed A.K.'s parents and A.K. that Success Academy and the school had decided to change A.K.'s placement to a 5th grade ICT class. No one from the DOE participated in the meeting and no one from the DOE contacted A.K.'s parents about this change in placement, either

before or after it was made. *Id.* ¶ 14.

95. A.K.'s mother objected to the change in placement, noting that SA Harlem East and the DOE were still not providing A.K. with the math SETSS services that his IEP mandated. The education manager confirmed that the school was not providing A.K. with SETSS. Nevertheless, SA Harlem East still changed A.K.'s placement to 5th grade. *Id.* ¶ 15.

96. In March 2018, the DOE convened an annual IEP meeting for A.K. A.K.'s mother expressed concerns about the change that had been made in A.K.'s placement, but the DOE representative stated that the DOE could not undo the change in placement. *Id.* ¶ 16.

97. Success Academy's change of A.K.'s placement had a deep impact on A.K. For several weeks, A.K. cried whenever he had to go to school, and he was teased about the change in placement. *Id.* ¶ 18.

6. The Policy of Success Academy to Change Placements Unilaterally

98. Upon information and belief, the failures of the SA Schools and Success Academy to comply with the procedural safeguards in violation of the IDEA and New York Education Law are not isolated or limited to the five examples described above. Since August 2017, AFC has received on its Education Helpline nine calls from parents of students with disabilities at Success Academy schools in addition to the five families described above. In each of the calls, the parent described how a Success Academy school threatened to—or did—change the placement of the student without an IEP meeting. *See* Hinds Aff. ¶22. Indeed, the school psychologist at SA Upper West admitted at M.J.'s IEP meeting that there are a number of students who are in classes inconsistent with the students' IEPs. *See* B.M. ¶ 17.

99. In one notable example, a Success Academy school kept a student in a 12:1:1 class setting despite the fact that the student's IEP mandated that the student be placed in an ICT class.

That IEP specified that a 12:1:1 setting was inappropriate. Hinds Aff. ¶ 23, Ex. I. That student's IEP noted that the Success Academy school had "reported that they have informally placed [the student] in a 12+1+1 setting." *Id.* Ex. I. The IEP team concluded on the IEP that a 12:1:1 class was inappropriate for the student and continued to recommend an ICT class for the student. *Id*. Despite the continued recommendation for an ICT class and the IEP's statement that a 12:1:1 class was inappropriate, the Success Academy school kept the student in a 12:1:1 class for months after the IEP meeting. *Id*. ¶ 23.

100. News media have reported on unilateral changes of placement of Success Academy students. *See, e.g.,* Anna Gronewold & Madina Touré, *Success Nixed Special Ed Class*, POLITICO (Aug. 22, 2018), https://www.politico.com/states/new-york/newsletters/politico-new-york-education/2018/08/22/success-nixed-special-ed-class-102796 (highlighting recent decision by Success Academy to stop offering 12:1:1 classes at one of its Brooklyn schools). Reporters also have written more generally about wide-spread changes in grade placement, affecting students with disabilities as well as their peers without IEPs. *See* Alex Zimmerman, *Behind the scenes, Success Academy's first high school spent last year in chaos. Can Eva Moskowitz turn it around?*, CHALKBEAT (August 20, 2018), https://www.chalkbeat.org/posts/ny/2018/08/20/success-academy-eva-moskowitz-high-school-chaos/ (reporting that at least 28 out of the school's 300 students had been "sent back to an earlier grade, some moving back to eighth grade after starting high school"); Leslie Brody, *Success Academy High School Sees Wave of Teacher Departures*, WALL STREET J. (July 24, 2018), https://www.wsj.com/articles/success-academy-high-school-sees-wave-of-teacher-departures-1532473339 ("Several teachers said they were upset that some bright, capable students were sent to a prior grade midyear when they felt the network should have found ways to

help them catch up on missed work.").

101. As the LEA for students with disabilities attending charter schools in New York City, the DOE is responsible for ensuring that all procedural safeguards for students with disabilities at charter schools are followed, including making sure that changes in placements occur only after duly constituted IEP meetings and prior written notice to the parent. The DOE, however, has not been holding IEP meetings prior to these changes in placements. Indeed, the DOE defended at hearing the unilateral changes of M.L.'s and K.B.'s placements without IEP meetings, and at M.J.'s IEP meeting, the DOE representative stated that these unilateral changes in placement by Success Academy schools were out of the DOE's control. B.M.L. Aff. ¶ 29; B.M. Aff. ¶ 17; S.G. Aff. ¶ 27, Ex. C. Likewise, the DOE did not respond when notified of J.J.'s change in placement. S.G. Aff. Ft. Greene ¶ 22. Likewise, the student described in paragraph 99 remained in the same 12:1:1 class after the IEP noted that the change in placement was "unofficially made," recommended the student for an ICT class, and noted that a 12:1:1 was inappropriate for the student. Hinds Aff. ¶ 23.

102. The DOE therefore needs direction from NYSED on steps it must take to ensure that charter schools do not change placements of students with disabilities in violation of the IDEA and New York Education Law.

B. *By Refusing To Comply with Pendency Orders, the DOE, Success Academy, and the SA Schools Are Failing to Comply with the IDEA and New York Education Law*

103. The IDEA and New York State Education Law require that "during the pendency of any proceedings [relating to the identification, evaluation or placement of a child with a disability], unless the State or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child . . . until all such proceedings have been completed." 20 U.S.C. § 1415(j); *accord* N.Y. EDUC. LAW §§ 4404(4)(a); 34 C.F.R.

§ 300.518(a); 8 N.Y.C.R.R. § 200.5(m).

104. Pendency has the effect of an automatic injunction, which is imposed without regard to such factors as irreparable harm, likelihood of success on the merits, and a balancing of the hardships. *Zvi D. v. Ambach*, 694 F.2d 904 (2d Cir. 1982); *see also Wagner v. Bd. of Educ.*, 335 F.3d 297 (4th Cir. 2003); *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859 (3d Cir. 1996). The purpose of the pendency provision is to provide stability and consistency in the education of a child with a disability. *Honig v. Doe*, 484 U.S. 305 (1988).

105. In *Honig v. Doe*, the Supreme Court concluded that the language of the IDEA's pendency provisions is "unequivocal" in its directive that students must be allowed to remain in their current educational placements pending any challenge to a change in placement. *Id.* at 306. The Court explained that the IDEA's pendency language is a "mandate" that the child "***shall*** remain in the then current educational placement," and "demonstrates a congressional intent to strip schools of the ***unilateral authority*** they had traditionally employed to exclude disabled students." *Id.* (Emphasis added). The pendency provision is but one provision within the IDEA's "comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any decisions with which those parents disagree." *Id.* at 308.

106. Under the pendency provisions of the IDEA and New York Education Law, a school district is required to maintain whatever educational placement was last agreed upon for the child until the relevant administrative and judicial proceedings are complete. *Mackey ex rel. Thomas M. v. Bd. of Educ.*, 386 F.3d 158, 163 (2d Cir. 2004), *supplemented sub nom. Mackey v. Bd. of Educ.*, 112 F. App'x 89 (2d Cir. 2004); *T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 170–71 (2d Cir. 2014). The pendency inquiry focuses on identifying the student's then current

educational placement at the initiation of the proceedings. *See Mackey*, 386 F.3d at 163.

107. The refusal of Success Academy and the SA Schools to implement the pendency orders in place for M.L. and K.B. violated the IDEA and New York Education Law and inflicted irreparable harm on these students.

108. In particular, M.L. was denied over 7 months of her ordered placement, from November 2017 to the end of the 2017–2018 school year. M.L.'s mother made multiple attempts to get SA Harlem East and the DOE to implement M.L's Pendency Order. After SA Harlem East refused to comply with the pendency order, M.L's mother requested that the DOE implement the order at the impartial hearing on the matter, made multiple phone calls to the DOE, and emailed representatives in the DOE's impartial hearing order implementation unit. B.M.L. Aff. ¶ 26; Hinds Aff. ¶¶ 17-19. The DOE took no action to enforce the order and at the impartial hearing, the DOE took the position that M.L.'s mother's only recourse to enforce the pendency order was to file a complaint in federal court, and that the DOE could not enforce the pendency order. B.M.L. Aff. Ex. H, at 97:7–21.

109. As a result of the refusal of Success Academy, SA Harlem East, and the DOE to comply with the pendency order, M.L. lost nearly an entire year of grade-level academic instruction and has to cope with the effects of this loss as she starts her 8th grade year.

110. In K.B.'s case, his mother filed an impartial hearing request on his behalf on January 2, 2018. The hearing officer ordered pendency in his 4th grade ICT class on February 9, 2018. Because of the DOE and SA Bronx 2's refusal to implement the pendency order, it did not go into effect until May 8, 2018, after K.B.'s mother had gone to court for an injunction and three months after the hearing officer's order. S.G. Aff. ¶ 22. Forcing parents to go to federal court to

enforce a pendency order makes the effect of a pendency order almost meaningless.

111. K.B. was denied more than four months of his ordered placement, from January to May. By the time he returned to his placement after the federal court issued an injunction to Success Academy, K.B. had missed almost half a year of 4th grade instruction and was far behind his classmates. *Id.* ¶ 24.

112. As the hearing officer presiding over M.L.'s impartial hearing emphasized in his decision issued in June 2018, after the school year had concluded with SA Harlem East succeeding in never returning M.L. to the ordered pendency placement:

> [SA Harlem East]'s disregard for the IDEA is also evident in its refusal to implement the pendency order in this case. If [SA Harlem East] believed the order was wrongly decided, it should have appealed: pendency orders are the only interim orders in these hearings that are appealable. The [DOE] wrongly casts the burden of pendency on the parent, by alleging that the parent's only recourse was to file a federal court action and seek an injunction to implement the pendency order. Pendency placements are meant to preserve the status quo during the hearing process, and are not necessarily the most appropriate placements. It is incumbent upon the parties to adhere to the pendency order; if a party disagrees, it should appeal the order. Failure to implement the order resulted in harm to M.L., who did not receive her mandated program and curriculum.

B.M.L. Aff. Ex. K, at 13.

113. Success Academy and the SA Schools, however, have taken the position that pendency orders do not apply to their schools. When the parents obtained pendency orders for the last agreed upon placements, the SA Schools—represented by a Success Academy attorney—took the position that they did not need to comply with the pendency orders because they disagreed with the order and the hearing officer's authority to issue the order, forcing parents to litigate further to obtain the ordered relief, and resulting in further delays in the students receiving ordered instruction. Articulating Success Academy's view of pendency orders issued for students at its schools, Success Academy attorneys argued in K.B.'s federal litigation to enforce the pendency

order that "These decisions were appropriately made by Success Academy's educators, and the 'stay-put' provision does not give Plaintiff or the IHO license to override them." Ex. A at 17.

114. On behalf of all students with disabilities at schools managed by Success Academy, including the SA Schools, AFC requests that NYSED mandate that Success Academy and the schools that Success Academy manages, including the SA Schools—like all other public schools—must comply with pendency orders.

115. As the LEA, the DOE is responsible for ensuring that all procedural safeguards for students with disabilities at charter schools are followed, including implementation of pendency orders. *Charter Schools & Special Education* ¶¶ 1-2, 17. The DOE, however, has taken the position that it cannot implement pendency orders for students at Success Academy schools. Indeed, after receiving and not appealing the pendency orders for M.L. and K.B., the DOE placed the burden on the parents to file in federal court for an injunction, contradicting the intent of the pendency provisions to serve as an automatic injunction. As a result of this lengthened process of first obtaining the pendency order at an impartial hearing and then needing to enforce the order in federal court, students with disabilities are losing ordered instruction time, solely because they attend a charter school.

116. Attending a charter school does not result in the forfeiting of federal and state special education protections. *See* N.Y. EDUC. LAW § 2853(4)(a). The IDEA and New York Education Law make clear that charter schools must comply with the IDEA, with the DOE as the LEA in New York City. *Id.*; *see also Charter Schools & Special Education* ¶ 17. As the LEA, the DOE therefore needs direction from NYSED on steps it must take when charter schools refuse to comply with the procedural safeguards of the IDEA and New York Education Law, including

pendency orders.

NOTICE

117. AFC has provided a copy of this Complaint to Respondents (a) DOE; (b) Success Academy; (c) SA Harlem East; (d) SA Bronx 2; (e) SA Upper West; and (f) SA Fort Greene.

RELIEF REQUESTED

118. We request that NYSED find that Success Academy, SA Schools, and the DOE are failing to comply with IDEA and New York Education Law procedural safeguards requiring IEP meetings and written notice before changes in placement for students with disabilities and compliance with pendency orders in Success Academy schools.

119. AFC requests that NYSED order the SA Schools to:

a. comply with all procedural safeguards in the IDEA and New York Education Law;

b. develop a plan to ensure that they follow procedural safeguards whenever required, including holding IEP meetings and written notice prior to any changes in placement for students with IEPs;

c. halt any current changes in placement of students with disabilities when the procedural safeguards required by the IDEA and New York Education Law have not been followed; and

d. comply with all mandates of the IDEA and New York Education Law, including complying with orders of impartial hearing officers and following students' procedural safeguards.

120. AFC also requests that NYSED order Success Academy to:

a. develop an accountability structure to ensure that its schools comply with all procedural safeguards in the IDEA and New York Education Law;

b. identify those of its schools that are not providing the procedural safeguards required by the IDEA and New York Education Law, specifically written notice and an IEP meeting before changes in placement of students with disabilities, and develop a plan to ensure that those schools provide procedural safeguards when required;

c. direct its schools to halt changes in placement of students with disabilities when the procedural safeguards required by the IDEA and New York Education Law have not been followed; and

d. direct its schools to comply with all mandates of the IDEA and New York Education Law, including complying with orders of impartial hearing officers and following students' procedural safeguards.

121. AFC requests that NYSED order the DOE to:

a. develop an accountability structure to ensure that all charter schools, including SA schools and all other schools within the Success Academy network, comply with all procedural safeguards for students with disabilities under the IDEA and New York law;

b. identify those SA schools and all other schools within the Success Academy network that are not providing the procedural safeguards required by the IDEA and New York Education Law and develop a plan to ensure that those schools provide procedural safeguards when required;

c. direct SA schools and all other schools within the Success Academy network, to halt changes in placement of students with disabilities when the procedural safeguards required by the IDEA and New York Education Law have not been followed; and

d. direct SA Schools and all other schools within the Success Academy network to comply with all mandates of the IDEA and New York Education Law, including complying with orders of impartial hearing officers and following students' procedural safeguards.

122. AFC also requests that NYSED provide to the DOE guidance on how to ensure that the SA Schools and all other schools within the Success Academy network are complying with all requirements of the IDEA and New York Education Law for students with disabilities, including IEP meetings and written parental notice prior to any changes in program or placement for students with IEPs and compliance with impartial hearing orders.

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Dated: November 29, 2018
New York, New York

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