

October 1, 2013

Ms. Nadya Chinoy Dabby  
Acting Assistant Deputy Secretary for Innovation and Improvement  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, DC 20202

Re: *“Weighted lotteries” and New York State Charter Schools*

Dear Ms. Dabby:

The undersigned advocates are primarily New York City-based advocates working to promote diversity and equitable access to schools. We write to express serious concerns with the US Department of Education’s (US ED’s) prohibition on “weighted lotteries” for New York State charter schools seeking Charter School Program (CSP) funds.<sup>1</sup> Preventing covered charter schools that use set-aside plans from receiving these funds will compromise their ability to serve diverse student bodies and comply with applicable state law, as well as encourage expansion-minded networks such as Success Academy to relinquish existing set-asides plans even for established charter schools.<sup>2</sup> We find it impossible to reconcile this policy with the spirit of US ED’s excellent 2011 guidance on achieving diversity in K-12 schools.

*Legal analysis*

We fully endorse the analysis and reasoning of section II of the April 20, 2013 legal memorandum from Emily A. Kim, Chief Legal Officer for Success Academy Charter Schools.<sup>3</sup> Consistent with the logic of the memorandum, we further believe that US ED should permit all charter schools in New York State to use set-aside plans to benefit students eligible for free and reduced-price lunch and students with disabilities under the grant program.

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<sup>1</sup> US ED Charter Schools Program Non-regulatory Guidance, April 2011, at <http://www2.ed.gov/programs/charter/nonregulatory-guidance.html>.

<sup>2</sup> See NYC DOE Notice of Public Hearing, September 12, 2013: *“As directed by the United States Department of Education, all schools listed have proposed to revise their Admissions Policies to remove a lottery preference for a set-aside percentage of ELL students.”* [emphasis added; most of the schools listed were not new schools], [http://schools.nyc.gov/NR/rdonlyres/9A79DC14-188A-43B0-BE76-1C66319BD AFF/0/NoticeofPublicHearing\\_ManhattanSuccessAcademies\\_09122013\\_FINAL.pdf](http://schools.nyc.gov/NR/rdonlyres/9A79DC14-188A-43B0-BE76-1C66319BD AFF/0/NoticeofPublicHearing_ManhattanSuccessAcademies_09122013_FINAL.pdf).

<sup>3</sup> <http://www.scribd.com/doc/165774637/Success-Academy-Legal-Memorandum-to-U-S-DOE>.

Specifically, we agree with the memorandum that set-asides plans for ELLs are unquestionably legal under Title VI of the Civil Rights Act of 1964 and hope that no further debate on this point is required. Second, we agree that such plans should not be treated as “weighted lotteries” for the purposes of the grant program. Third, even if they are treated as “weighted lotteries,” we agree that such plans are nevertheless exempt from the prohibition because they are “necessary to comply with applicable state law.”

*Abolishing set-aside plans will frustrate New York State Department of Education policy*

The New York State Department of Education and State Education Commissioner John King have made clear that charter schools form an important prong of the state’s school reform efforts and plans to serve “at risk” students. Preventing new charter schools that receive CSP grants from using set-asides for students eligible for free and reduced-price lunch and students with disabilities undermines this state education policy and hamstring the ability of many new charter schools to enroll such students. Furthermore, established schools with existing set-aside plans that are seeking CSP expansion grants, like the Success Academies, may feel pressure to abolish such plans to be competitive, compromising their ability to effectively serve at risk populations.

Therefore, New York State charter schools receiving or seeking CSP funding must be allowed an exception to utilize set-aside plans to make effective the New York State Department of Education’s policy of using charter schools as a strategy to better serve at risk students. Finally, creating this exception would not create unfavorable precedent opening the door for other charters to use set-asides for excluding at risk students, because the use of set-asides for exclusion purposes would *never* be necessary to effectuate a state’s education policy goals.

*Set-aside plans: effective only when “necessary”*

Although we are not directly familiar with the facts surrounding the Success Academy schools mentioned in the memorandum, the description of the difficulties faced by these schools in recruiting ELLs is consistent with the experiences of other schools. Some further explanation of how the set-aside plans actually work may be useful to supplement the memorandum: Unlike a straightforward admissions preference in a weighted lottery, set-aside plans do the most work when the target population is inadequately represented in the applicant pool. In the simple example of a school with 100 seats and 200 applicants using a 30% set-aside, it is possible to see how the effect of the set-aside decreases as it is rendered unnecessary by greater representation of the target population in the applicant pool:

If, for example, 15% of the applicants (30 students) are in the target population, all 30 will be admitted through the set-aside. The chance of admission for a student in the

target population has increased 100%, and the effect of the set aside on the student population is significant (a 15% leap).

If 30% of the applicant population (60 students) are in the target population, 30 will be admitted through the set aside, and an additional 12 will likely be admitted through the random lottery for the remaining 60 seats. The chance of admission for a student in the target population has increased 40% and the percentage of target population students (42%) in the school has increased 12%.

If 60% of the application population (120 students) are in the target population, 30 will be admitted through the set aside, and an additional 37 will likely be admitted through the random lottery for the remaining 60 seats. The chance of admission for a student in the target population has increased only 11.7%, and the effect of the set-aside on the school population is small (67% in the target population rather than 60%).

The pattern continues as the number of students in the target population increases in the applicant pool until the effect of the set aside is negligible. Thus, set-aside plans are essentially backstops against recruitment problems and the kinds of geographic issues described in the Success Academy memorandum. By design, set-aside plans only have significant influence at the moment that they are “necessary to comply with applicable state law” (that is when recruitment efforts have been insufficient) and diminish in significance as the applicant pool becomes more diverse.

Finally, any concern about use of set-asides to exclude, rather than include, students at risk or those with special needs are unfounded, as set-asides for the purpose of excluding such populations would never be “necessary to comply with applicable state law.” To the contrary, such provisions would in fact generally *run afoul* of state – as well as federal - laws. In other words, there is no reason for concern, since such set-asides would by definition never fall within the exception.

#### *Effects on incipient diversity efforts in traditional public schools*

Last year, in response to the demands of parents and local stakeholders the NYC DOE crafted a set-aside plan benefitting students eligible for free and reduced-price lunch and ELLs for a traditional public school in Brooklyn – the first time the Bloomberg administration has allowed any kind of pro-diversity student-assignment plan. NYC DOE was guided almost entirely by set-aside plans used by charter schools in New York City and undoubtedly drew comfort from these established and accepted models. The Chancellor of Schools has stated that the plan will be a model for other traditional public schools.

The US ED's apparent disapproval of such set-aside plans, however, could threaten the progress we have made toward greater school diversity in New York City. Although the Department's position does not technically affect traditional public schools, we fear that it will create a stigma of uncertainty around these innovative student-assignment plans with far reaching negative effects.

For the reasons stated in section II of the Success Academy memorandum and the additional reasons we have presented, we respectfully request that US ED reconsider its position with regard to New York State charter schools and charter school networks seeking to employ set-aside plans for ELLs, students eligible for free and reduced-price lunch, and students with disabilities. At a minimum we urge the Department immediately to clarify that set-asides for ELLs do not present a Title VI violation.

Yours sincerely,

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