

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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**DECLARATION OF
JOSHUA WALLACK**

CHRISTA McAULIFFE INTERMEDIATE SCHOOL
PTO, Inc. et al,

Plaintiffs,

18 CV 11657 (ER)(OTW)

-against-

BILL DE BLASIO, in his official capacity as Mayor of
New York, et ano.,

Defendants.

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JOSHUA WALLACK declares, pursuant to 28 U.S.C. §1746, under penalty of perjury, that the following is true and correct:

1. I am Deputy Chancellor for Early Childhood Education and Student Enrollment in the New York City Department of Education (“DOE”). As such, the DOE Office of Student Enrollment, which among other things is responsible for enrollment in the Specialized High Schools, reports to me. I have overseen the Office of Student Enrollment since 2015, and I have been employed at the DOE since 2014. This declaration is based on my personal knowledge, discussions with DOE employees, and the books and records of DOE.

2. I make this declaration in opposition to the Plaintiffs’ motion for a preliminary injunction in the above-captioned case and to apprise the Court of the history of DOE’s efforts to foster diversity in the eight Specialized High Schools, and the reasons for the changes to the Discovery Program that are being challenged by Plaintiffs. Those changes, namely, the expansion of the program and the adoption of different selection criteria, were announced by the Mayor and the Chancellor on June 3, 2018.

3. I led the decision-making group that decided to expand the Discovery Program and adopt the criteria for eligibility to participate in the Discovery Program that are currently in effect and are being challenged (the “current criteria”). After reviewing data and options developed by the Office of Student Enrollment concerning the expansion of the Discovery Program and the revision of such criteria, the decision-making group recommended to the Chancellor that the Discovery Program be gradually expanded during the 2019-2020 and 2020-2021 school years and that the Chancellor adopt the current criteria. Specifically, the current criteria define how to determine whether a student is “disadvantaged” for the purposes of eligibility for the Discovery Program. The Chancellor adopted these recommendations, and I believe that the decision-making group’s recommendation was decisive in the Chancellor’s decision to expand the Discovery Program and to adopt the revised criteria.

4. The Chancellor, the decision-making group, and I were in no way motivated by a desire to harm Asian-American students or to limit the enrollment of Asian-American students in the eight Specialized High Schools. Instead, the Chancellor, the decision-making group, and I were trying to increase the ethnic, racial, geographic, and socio-economic diversity of the student bodies of those high schools, which we believe will be beneficial to all students enrolled in those schools. The expansion of the Discovery Program and the current Discovery Program criteria, which are race-neutral, should better identify disadvantaged students, account for the impact of attending a school with a high percentage of economically disadvantaged students, and also expand the number of intermediate schools that send students to the eight Specialized High Schools, and thereby motivate other students and their families, as well as teachers and administrators in these intermediate schools, to pursue the entry of more students from these schools to the Specialized High Schools.

History of Efforts to Maintain Diversity in the Specialized High Schools

5. I have learned the facts set forth in the following history from discussions with DOE employees and the books and records of DOE, and I believe them to be true.

6. Specialized High Schools have existed in New York City for more than 100 years. The Specialized High Schools have consistently provided rigorous instruction to academically gifted students in a challenging environment. The three original Specialized High Schools were Stuyvesant High School, Brooklyn Technical High School, and Bronx High School of Science. Stuyvesant opened in 1904, Brooklyn Tech in 1922, and Bronx Science in 1938. In 1934, Stuyvesant began using an entrance exam developed in conjunction with Columbia University. The use of an entrance exam then expanded to Bronx Science and Brooklyn Tech.

7. It is my understanding that in the late 1960s, the Specialized High Schools were offering admission based upon the scores of an entrance examination and a Discovery Program that extended offers of admission to disadvantaged students who showed potential for success at the Specialized High Schools. In 1971, New York enacted legislation, the Hecht-Calandra Act, to codify the requirement that a competitive achievement examination be the main criterion for admission to the Specialized High Schools but expressly provided for a Discovery Program that was unlimited in size to admit disadvantaged students with great potential to the Specialized High Schools. See Laws of 1971, chap. 1212, Roberts Dec. at Ex. 1 (Dkt. no. 48-1)

8. Enactment of the Hecht-Calandra Act did not end debate about the fairness of the use of a single test for admission to the Specialized High Schools. In 1977, the federal Office of Civil Rights opened an investigation into whether the single test as an admission standard constituted a form of discrimination against members of minority groups and females. See Marcia Chambers, *U.S. Inquiry Into Bias Is Opposed At Prestigious New York*

Schools, N.Y. TIMES, November 7, 1977, available at <https://www.nytimes.com/1977/11/07/archives/us-inquiry-into-bias-is-opposed-at-prestigious-new-york-schools-us.html> (last visited January 12, 2019). According to that news article, Board of Education data from the 1975-1976 school year showed that 23 percent of the students then enrolled at the Specialized High Schools were African-American, 9 percent Latino, 12 percent Asian-American, and 56 percent White. The Board of Education and the Office of Civil Rights reached an agreement that did not change the admissions criteria. See Ari Goldman, *On The Right Track*, N.Y. TIMES, June 17, 1978, available at www.nytimes.com/1978/06/17/archives/on-the-right-track.html (last visited January 12, 2019).

9. It appears, however, from newspaper articles that the percentage of African-American and Latino students at Stuyvesant declined significantly from the 1970s. See, Pam Belluck “More Minority Students Enter Elite Schools,” *New York Times*, May 8, 1997 (percentage of African-American students at Stuyvesant was 12.9% in 1979 but 4.3 % in 1995; and 5.5% in 1997); and Maria Newman, “For Poor but Talented, A Shot at Opportunity; Helping Pupils Qualify for Top Exams,” *New York Times*, August 4, 1995 (4.8% of students at Stuyvesant are African-American and 4.3% are Latino).

10. There has been concern for decades about the declining and/or low percentages of African-American and Latino students in the Specialized High Schools. This concern was shared by previous DOE Chancellors. In 2002, former Chancellor Joel Klein created additional Specialized High Schools in, I believe, an effort to expand opportunities for admission to the Specialized High Schools and to increase diversity in the student body of those schools. Between the 2002-2003 and 2007-2008 school years, DOE added a new specialized high school in each borough. The High School for Mathematics, Science and Engineering at

City College (“Math, Science and Engineering”) in Manhattan, the High School of American Studies at Lehman College (“American Studies”) in the Bronx, and the Queens High School for the Sciences at York College (“Sciences at York”) opened for the 2002-03 school year. Staten Island Technical High School (“Staten Island Tech”) became a testing Specialized High School in the 2006-2007 school year, and Brooklyn Latin became the eighth testing Specialized High School in the 2007-2008 school year.

11. In addition, in an effort to have greater numbers of disadvantaged students score well on the SHSAT, for more than two decades, DOE has instituted citywide extra-curricular programs to help prepare disadvantaged students for the test. The Citywide programs include the Specialized High School Institute (“SHSI”), which began in the mid-1990s and ended in 2012, and its replacement, Dream-SHSI (“DREAM”), which began during the 2011-12 school year. The purpose of both of these programs was to prepare disadvantaged students for the SHSAT, which among other things would increase diversity at the Specialized High Schools. SHSI was an intensive 15-month program that provided students with a range of supports, including coursework in literature, writing, mathematics, and science, as well as group guidance activities and test preparation skills. SHSI began in June of the sixth-grade year and continued until October of eighth grade, when students took the SHSAT. The structure of DREAM is similar to that of SHSI, except that students begin participating in DREAM in the spring semester of sixth grade. DREAM requires that a student be economically disadvantaged as defined by Title I Free Lunch status. Both SHSI and DREAM were conducted at multiple sites throughout the City. In 2016, DOE added the DREAM Intensive program, which runs during the summer and fall immediately preceding administration of the SHSAT in the fall of eighth grade.

12. Notwithstanding these efforts, the combined percentage of African-American and Latino students enrolled at the Specialized High Schools continued to decline. See Specialized High Schools Demographics from NYC Department of Education, 1995-2015, attached hereto as Exhibit 1.

13. In 2012, the NAACP Legal Defense and Education Fund, Inc., Latino Justice PRLDEF, and the Center for Law and Social Justice at Medgar Evers College filed a complaint with the Office for Civil Rights of the United States Department of Education (OCR) against DOE, alleging that the use of the SHSAT for admission to the Specialized High Schools violated Title VI of the Civil Rights Act of 1964, because the test had a large disparate impact on African-American and Latino students. See *Complaint re The admissions process for New York City's elite public high schools violates Title VI of the Civil Rights Act of 1964 and its implementing regulations*, September 27, 2012, attached to the Declaration of Thomas B. Roberts as Exhibit 4. (Dkt. no. 48-4) Four Asian-American advocacy groups filed letters supporting the NAACP LDF's complaint, which stated that those groups supported the NAACP LDF's efforts to force DOE to further diversify the student bodies at the Specialized High Schools. See, statements attached to the Declaration of Thomas B. Roberts as Exhibits 5-8. (Dkt. no. 48-5, -6, -7, -8) In that complaint, the NAACP LDF asserted that DOE's failure to employ the Discovery Program as a means to increase diversity was evidence of intentional discrimination against minority students. *Complaint* at p. 28, n. 23. (Dkt. no. 48-4) OCR opened an investigation of the complaint, and DOE produced documents and witnesses for interviews in response to OCR's requests. This investigation is ongoing.

14. In 2016, DOE initiated additional efforts to build awareness of the Specialized High Schools, ease the burden of weekend testing, and increase middle school

teachers' capacity to prepare their students for the SHSAT. DOE engaged in targeted outreach to students from underrepresented groups to increase awareness of the Specialized High Schools and the steps that must be taken to prepare and take the SHSAT. See, <https://www.schools.nyc.gov/about-us/news/announcements/contentdetails/2016/06/09/city-announces-new-initiatives-to-increase-diversity-at-specialized-high-schools>. In the fall of 2017, DOE commenced SHSAT testing during the school day in 15 schools serving students from underrepresented groups in an effort to facilitate test-taking for students for whom testing on the weekend might be a burden. DOE expanded this program to 50 schools in 2018. DOE also launched a Capacity Building Initiative in the spring of 2018 to train middle school teachers on the best practices to prepare their students for the SHSAT. In addition to expanding the DREAM program by adding DREAM Intensive as noted above, DOE offered other test preparation opportunities through partnerships with after-school programs and test prep agencies.

15. In addition, DOE took steps to invigorate the Discovery Program, which, by the early years of this decade, was not operating in all of the Specialized High Schools. By the 2011-2012 school year, for example, only four of the eight Specialized High Schools had a Discovery Program, and each Program was small. The schools that then had Discovery Programs were Brooklyn Tech, Brooklyn Latin, Sciences at York, and Math Science and Engineering. In recent years, American Studies, Staten Island Tech, Bronx Science, and Stuyvesant have all launched Discovery Programs. As of the summer of 2018, all eight testing Specialized High Schools participated in the Discovery Program.

16. Consistent with the Hecht-Calandra Act, the Discovery Program, as implemented in recent years up through and including the class admitted in September 2018, required that, in addition to scoring below the cut-off score for admission based solely on the

SHSAT, a student be disadvantaged. The criteria DOE established for this requirement provided that a student either: qualify for free lunch; attend a Title I school and qualify for reduced price lunch; receive assistance from the New York City Human Resources Administration; be a foster child, ward of the state or in temporary housing; or have entered the United States within the last four years and live in a home where the primary language is not English. For the 2017-2018 school year, approximately 70% of DOE students qualified for free lunch under the National School Lunch Program.

17. Despite all these efforts to increase diversity, only 30 of the approximately 650 intermediate schools provided 50% of the students admitted to the Specialized High Schools, and the combined percentage of African-American and Latino students enrolled in the Specialized High Schools continued to decline. The lack of racial and ethnic diversity has become so pronounced that at Stuyvesant High School in the 2017-2018 school year, only 0.7% of the students were African American and 2.8% of the students Latino. Similarly, at the Bronx High School of Science in the 2017-2018 school year, only 2.5 % of the students were African-American and 6.2% of the students Latino. The same is true at Staten Island Technical High School, where in the 2017-2018 school year, 0.8 % of the students were African-American and 2.7 % Latino. See, New York City Demographic Snapshot at http://infohub.nyced.org/docs/default-source/default-document-library/demographicsnapshot201314to201718public_final.xlsx.

18. Increasing equity and excellence for all is a cornerstone of DOE's approach to education and the Chancellor's priorities. Efforts to increase diversity, inclusion, and access have taken many forms, including in admissions. DOE believes that diversity comes in many forms, and that all students benefit from diverse and inclusive schools and classrooms.

In June 2017, DOE released “Equity and Excellence for All: Diversity in New York City Public Schools,” a comprehensive plan for increasing school diversity in the school system across a variety of measures. See, <https://www.schools.nyc.gov/about-us/news/announcements/contentdetails/2017/06/06/chancellor-fari%C3%B1a-releases-equity-and-excellence-for-all-diversity-in-new-york-city-public-schools>. Analyzing and expanding the Specialized High Schools diversity initiatives was one of the proposals in the plan and remains a priority under this Chancellor. See Press Release at: <https://www.schools.nyc.gov/docs/default-source/default-document-library/diversity-in-new-york-city-public-schools-english>.

19. Against this historical backdrop, and with the goal of taking steps to promote racial, ethnic, geographic, and socio-economic diversity in the Specialized High Schools, the above mentioned decision-making group recommended in the spring of 2018 that the Chancellor exercise his discretion to expand the Discovery Program and modify the Discovery Program eligibility criteria. That recommendation was designed to advance the purpose the State Legislature intended when authorizing the Discovery Program – i.e., to ensure that disadvantaged students residing in the City of New York have an opportunity to enroll in, and benefit from, the Specialized High Schools. The Chancellor adopted the recommendation and announced the changes on June 3, 2018.

The Current Criteria for Admission through the Discovery Program

20. The current criteria for admission to a Specialized High School through the Discovery Program are (i) that the student take the SHSAT, score below the cut-off score for admission based only on the SHSAT, and have a score within the range of scores that will be required to fill the available Discovery Program seats, (ii) that the student receive a recommendation from her current school stating that she will benefit from a Specialized High

School education; (iii) that the student currently attend a school with a 2017-18 Economic Need Index (“ENI”) of 60% or more, and (iv) one of the following:

- 1) The student’s family income qualifies the student for free lunch or reduced price lunch based on the student’s meal form (<https://www.myschoolapps.com/>);
- 2) The student’s family receives assistance from the NYC Human Resources Administration (welfare or SNAP benefits);
- 3) The student is in foster care, a ward of the state, or is a Student in Temporary Housing as defined by McKinney-Vento (<http://www.nysteachs.org/info-topic/eligibility.html>); or
- 4) The student is an English Language Learner or a former English Language Learner within the previous 2 school years, and enrolled in a DOE school for the first time within the last four years.

21. A student who receives an offer of admission through the Discovery Program must also successfully complete a summer school program before being admitted to a Specialized High School.

22. The ENI is a measure of economic need that DOE has created and which it utilizes in many contexts to measure economic disadvantage. DOE has found the ENI to be a more effective measure of economic disadvantage in many contexts than other measures of poverty. A school’s ENI estimates the percentage of students facing economic hardship and is based upon the average of the Economic Need Values (“ENV”) of the students attending the school.

23. A student’s ENV is calculated as follows: the ENV is 1.0 if: (i) the student lives in a household that is eligible for public assistance from the NYC Human Resources Administration; (ii) the student lived in temporary housing in the past four years; or (iii) the student has a home language other than English and enrolled in a DOE school for the first time within the last four years. Otherwise, a student’s ENV is based on the percentage of families

with school-age children in the student's census tract whose income is below the poverty level, as estimated by the American Community Survey Five-Year estimate. The student's Economic Need Value equals the decimal value of this percentage (for example, if 62% of families in the census tract have income below the poverty line, the student's Economic Need Value is 0.62). See, New York City Demographic Snapshot at http://infohub.nyced.org/docs/default-source/default-document-library/demographicsnapshot201314to201718public_final.xlsx; see also Equity and Excellence for All: Diversity in New York City Public Schools, p. 4 FN 1, available at <https://www.schools.nyc.gov/docs/default-source/default-document-library/diversity-in-new-york-city-public-schools-english>.

24. The gradual expansion of the Discovery Program and the use of the current criteria are race-neutral policies that make no school assignments based upon race and are designed to more effectively identify disadvantaged students than the old criteria, because the current criteria place an emphasis upon schools with high ENI scores, while also seeking to advance geographic, socio-economic, racial and ethnic diversity. Students who are both from low-income families and attending schools that have students with higher economic hardship face more disadvantages than students who are from low-income families but attend schools with higher-income students. See, <https://www.nytimes.com/roomfordebate/2012/05/20/is-segregation-back-in-us-public-schools/integrating-rich-and-poor-matters-most>.

25. In addition, the ENI factor, more than the previously used Title I measure, allows for a more specific assessment of the level of economic hardship at a school, because the ENI factor is on a scale and because the chosen threshold is 0.60 or greater, which includes approximately 50% of the intermediate schools. (A Title I school is defined by the federal Title I statutory scheme, which provides that at least 40% of families must be low-income for the school

to be eligible for remedial education assistance through Title I. In New York City, more than 50% of the intermediate schools meet the Title I standard.) In other words, using the ENI factor and a 0.60 threshold allows DOE to more precisely target schools where the majority of students are facing economic hardship and the disadvantages that accompany it. The fact that many of the schools with an ENI of 0.60 or above have recently not sent students to the eight Specialized High Schools further speaks to the level of disadvantage these students face. The gradual expansion of the Discovery Program is designed to increase the diversity of the Specialized High School across these dimensions - racial, ethnic, geographic and socio-economic - in an orderly fashion, while ensuring that the scholastic achievement of the student bodies at the Specialized High Schools will remain excellent.

26. I want to emphasize to the Court the lack of certainty as to what the precise effects of the current criteria for eligibility in the Discovery Program will be concerning racial and ethnic diversity. The decision-making group and I believed that the current criteria will expand the geographic and socio-economic diversity of the students attending the Specialized High Schools, because only students attending an intermediate school with an ENI of 0.60 or greater will be considered for the Discovery Program, and many of those schools have sent few or no students to the Specialized High Schools in recent years.

27. However, with regard to race and ethnicity, there are several factors beyond DOE's control that will affect the racial and ethnic composition of the students admitted through the challenged Discovery Program criteria. Based on past experience, many students who may qualify for the Discovery Program will indicate that they are not interested in receiving an offer, because the Discovery Program requires them to attend and successfully complete an intensive summer school program. These students may choose, for example, to instead attend

one of DOE's many excellent, selective screened high schools, which screen applicants based on multiple factors. These screened schools attract academically gifted students and provide a rigorous education, without necessarily requiring summer school preparation. At this time, DOE simply does not know which students are qualified for the Discovery Program or how many of them will be interested in participating in the Discovery Program.

28. Moreover, I note that there are many Asian-American students in the intermediate schools with ENIs of 0.60 or greater. I understand that for the class admitted in September 2018, of the students offered admission to a Specialized High School from an intermediate school with an ENI of 0.60 or greater, 70% were Asian-American, and that this constituted 1,060 Asian-American students. In addition, approximately thirty percent of the students who take the SHSAT and attend an intermediate school with an ENI of 0.60 or greater are Asia-American. Accordingly, I believe there is no basis for the Plaintiffs' assertion that the expansion of the Discovery Program and the use of the current criteria will limit or reduce the enrollment of Asian-American students in the Specialized High Schools. We simply do not know, and the existing data do not suggest that.

Modeling the Challenged Discovery Program

29. With regard to the modeling the Office of Student Enrollment showed me and the other decision-makers in the spring of 2018, I want to emphasize that we knew then that the modeling was a rough prediction and could not precisely predict the future ethnic and racial composition of the students enrolling in the Specialized High Schools through the Discovery Program. Indeed, there was - and is - significant uncertainty about the predictive accuracy of the modeling because it necessarily employed assumptions that may not reflect reality. Specifically, the modeling made the assumption that the students who are potentially eligible to participate in

the Discovery Program would respond to offers of admission to the Discovery Program the same way as students offered admission to a Specialized High School based solely upon their SHSAT score. The model did not account for the higher percentage of students eligible for the Discovery Program who would likely turn it down because of the summer school requirement. Nor did the model attempt to predict which groups of students might be more or less inclined to participate in the Discovery Program and attend summer school. Accordingly, we did not – and do not – believe the modeling can exactly predict the racial composition of the students who will be admitted through the Discovery Program.

30. At any rate, even though there is uncertainty surrounding the predictive validity of the modeling, it did influence our decision to recommend that the current criteria be adopted, and therefore warrants discussion. The Office of Enrollment sent the decision-making group and me statistics predicting the ethnic composition of the combined student bodies of the eight Specialized High Schools if the current criteria had been used to fill 20% of the seats that were filled in the fall of 2017 and comparing those numbers to the demographics of the students actually admitted. A copy of those statistics is attached to the Declaration of Nadiya Chadha as Exhibit 1.

31. The model indicates the possibility of increasing racial and ethnic diversity at the Specialized High Schools. But, the modeling rebuts the Plaintiffs' contention that DOE sought to limit Asian-American enrollment. DOE's April 2018 modeling indicated that in the 2020-2021 school year, when 20% of the enrollment in the eight Specialized High Schools will be reserved for students participating in the Discovery Program, the racial and ethnic diversity of students enrolled in the Specialized High Schools might be somewhat

increased, in that the combined percentage of African-American and Latino students in the eight schools might increase from approximately 9% to approximately 16%.

32. The model further showed that if this occurred it would have limited impact upon students of other ethnicities. Indeed, it was projected that the total enrollment of Asian-American students in the eight Specialized High Schools would decline by approximately 2.1%, from 53% to 50.9%. The total enrollment of students whose race or ethnicity was unknown to DOE would decline by approximately 1.2%, from 9% to 7.8%. And the total enrollment of White students would decline by approximately 2.5%, from 27.2% to 24.7%.

33. Far from seeking to limit the enrollment of Asian-American students, the modeling predicted that the current criteria would result in limited impact upon the enrollment of other groups, including Asian-Americans, while increasing diversity and providing all the students in the Specialized High Schools the advantages of learning and socializing in a more diverse student body.

34. What the impact of the current criteria and expansion of the Discovery Program will be for the class to be enrolled in September 2019 is even more uncertain. There was no modeling performed for the 2019-2020 school year (when approximately 13% of the total enrollment in the eight Specialized High Schools will be reserved for students participating in the Discovery Program). The modeling was based upon 20% of the class receiving admission through the Discovery Program. However, given that the Discovery Program will be smaller in the 2019-2020 school year than in the following year, if any assumption are made, it would be reasonable to assume that the impacts will be smaller in 2019-2020 than in the following year.

35. As stated in paragraph 4 above, in recommending that the current criteria be adopted, one of my goals was to increase the ethnic, racial, geographic, and socio-economic diversity of the student bodies of the Specialized High Schools, which I believe will be beneficial to all students enrolled in those schools. The expanded and revised Discovery Program criteria, which are race-neutral, should expand the number of intermediate schools that send students to the eight Specialized High Schools. I believe that this can have a ripple effect, inspiring and incentivizing other students, families, teachers and administrators from intermediate schools that historically have not sent students to a Specialized High School to apply to the Specialized High Schools. This in turn helps attract a broader range of talented, high performing students from throughout New York City to the Specialized High Schools. This is consistent with DOE's overall goal to expand access and opportunity for all of our students, and promote equity and excellence for all.

Dated: New York, New York
January 17, 2019


JOSHUA WALLACK