STATE OF NEW YORK
NEW YORK STATE EDUCATION DEPARTMENT

In the Matter of Petitioner Aura Melgar, on behalf of C.M. from action of Respondent the Mamaroneck Union Free School District regarding the denial of admission	:	REPLY IN SUPPORT OF APPLICATION FOR STAY AND OTHER INTERIM RELIEF

INTRODUCTION

Petitioner Aura Melgar submits this reply in support of her request for interim relief permitting her son ("C.M.") to attend school in his home district pending the outcome of this appeal and to respond to the District's newly adopted rationale for opposing that request. Respondent Mamaroneck Union Free School District (the "District") now completely disavows as "irrelevant" and "erroneous[]" the only reason it previously articulated in denying C.M. enrollment—that he allegedly "previously graduated from the highest level of compulsory education offered in Guatamela." Aff. in Opp. to Request for Stay ("Opp." or "Opposition") ¶¶ 8-9. It substitutes an equally specious claim, one contradicted by its own research—that sixteen-year-old C.M. completed secondary education in Guatemala. *Id.* ¶ 9. In considering Petitioner's application for interim relief, the Commissioner should not countenance the District's attempt to justify its opposition through *post hoc* rationalization. That rationalization, moreover, is itself unsupported in fact and violates the Education Law and a host of anti-discrimination laws. For either of these reasons, the Commissioner should grant Petitioner's request.

POINT I

As a threshold matter, in making the equitable determination of whether to order the District to permit C.M. to attend school during the pendency of the appeal, the Commissioner should not permit the District to rely on a previously unarticulated rationale. It is axiomatic that

"[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based," *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943), "not some new record made initially in the reviewing [tribunal]." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam). *See also, e.g., Williams Gas Processing –Gulf Coast Co. v. FERC*, 373 F.3d 1335, 1345 (D.C. Cir. 2004) (holding that courts may not consider "*post hoc* rationalizations by agency counsel"). When denying enrollment, it is crucial that a school district accurately notify the student of its basis for the denial; otherwise, as here, the student may expend unnecessary resources fighting a phantom reason, only to miss additional school time pressing her case once the actual rationale is brought forward. Not only does this requirement safeguard fundamental notice and fairness concerns, but it minimizes the potential irreparable harm of denying a student days of education to which she is entitled. *See, e.g., J.A. v. Bd. of Educ. for Dist. of S. Orange & Maplewood*, 318 N.J. Super. 512, 723 A.2d 1270 (App. Div. 1999), *as amended on reconsideration* (Apr. 9, 1999) ("In excluding [the student] from its high school without informing her of the grounds of its decision, the [school board] violated the [student's] due process rights."). Whether a district may ultimately rely on a *post hoc* rationalization to defend a decision denying admission is a separate matter. But where, as here, the school fails to notify a student of its actual reason, it should not be heard to offer a new reason in opposing the student's request for interim relief permitting him to begin attending school during the pendency of the appeal. The Commissioner therefore should grant Petitioner's request for interim relief.[1]

[1] Moreover, upon information and belief, the District has employed the precise language used in the letter to deny C.M. enrollment ("previously graduated from the highest level of compulsory education offered in Guatamela") when it has denied other Guatemalan middle-school graduates enrollment at Mamaroneck High School. The need, in the public interest, to deter the further illegal misuse of this basis for denying admission also militates for granting Petitioner's request for interim relief.

POINT II

If the Commissioner considers the District's newly offered rationale—which, for the reasons in the foregoing paragraph, she should not—she should find that it has no greater basis in fact or law than the original, baseless rationale.[2] While using another term throughout its Opposition ("ciclo prevocacional"), the District agrees, as it must, that C.M. completed only the "Nivel de Educación Media, Ciclo de Educación Básica," Ex. A to Verified Petition, translated as "mid education level, basic education cycle," Ex. B to Verified Petition. The District mainly focuses, not on the level of education C.M. has obtained, but rather on what he has not obtained. Its main claim is that "ciclo diversificado"—a level of education in Guatemalan that the parties agree C.M. did not complete—is "[not] similar to a high school curriculum in New York State." Opp. ¶ 17. This argument completely misapprehends the proper inquiry. What form a Guatemalan high school education may take—for example, whether Guatemalan students begin to specialize at a younger age than New York students in anticipation of specific career paths prior to receiving a high school diploma—is irrelevant. Under the Education Law, what matters is that C.M. completed only middle school and "has not received a high school diploma." N.Y. Educ. Law § 3202(1); *see also Appeal of C.S.*, 54 Ed Dept Rep, Decision No. 16,697 (2015).[3]

C.M. has not received a high school diploma, a fact which the District does not dispute. Indeed, not only does the District not dispute this fact, but also the District's own submission—

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[2] To avoid redundancy, Petitioner will not here repeat the explanation in her Verified Petition for why the record in this appeal shows that her son completed only a middle school education.

[3] Moreover, by eschewing the law's "high school diploma" standard and imposing differential treatment on students based on the foreign country where they received primary schooling, the District's proffered methodology for determining enrollment eligibility would constitute impermissible discrimination on the basis of alienage and national origin in violation of several anti-discrimination laws." *See* N.Y. Educ. Law § 3201(1); N.Y. Civ. Rights Law § 40-c; N.Y. Const. art. 1, §11; U.S. Const. amend. XIV, § 1; 42 U.S.C. § 2000d.

which Petitioner does not hereby concede is an accurate description of the Guatemalan education system—supports this fact. The District includes as Exhibit C to its Opposition "a copy of the Guatemala Education System research [it] utilized" in arriving at the decision to deny C.M. admission. The left-hand column of that document labels "ciclo prevocacional," the level which C.M. has completed, as "Middle" education, followed by two routes for "Secondary" education: "Ciclo Diversificado (Diversified Secondary)" and "Technical Secondary School (Upper Secondary)." C.M. completed neither of these two secondary education paths. The column to the far right describes "Ciclo Diversificado"—which again, C.M. undisputedly did not attend—as "a prerequisite for access to university education." Thus, Exhibit C to the Opposition is consistent with the fact that C.M. has not completed high school. He therefore is entitled to do so in New York in the district in which he resides. N.Y. Educ. Law § 3202(1); *cf. Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 906 (2003) (observing that "high school level education is now all but indispensable" in order to prepare students to be able to support themselves and that "students require more than an eighth-grade education to function productively as citizens").

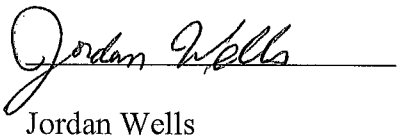
In a wan attempt to characterize C.M.'s Certificate of Studies, Exs. A & B to Verified Petition, as a high school transcript, the District notes that in his final year of middle school, C.M. completed "high school level coursework including, Chemistry, Physics, Artistic Expression and Appreciation, and Technology Education." Opp. ¶ 18. Completing a few courses, or even many courses, on subjects not typically covered in middle school cannot convert a middle school graduate into a high school graduate. Indeed, if enforced on a consistent, nondiscriminatory basis, such a policy would lead to the untenable result of depriving smart, enterprising native-born middle schoolers of their high school educations. The Commissioner

should reject the District's attempt to characterize the middle school education of a sixteen-year-old Guatemalan student as equivalent to that student having obtained a high school diploma.

CONCLUSION

For all of the foregoing reasons and those set out in the Verified Petition, and because C.M. and his family continue to experience immediate, continuing, and irreparable injury due to the District's denial of permission for him to attend school in the community in which they live, Petitioner urges the Commissioner to grant her request for interim relief forthwith, staying the refusal by the District to admit C.M. and directing the Respondent to permit C.M. to attend Mamaroneck High School during the pendency of this appeal.

Respectfully submitted,



Jordan Wells
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 19th Floor
New York, NY 10004
Telephone: (212) 607-3300
Facsimile: (212) 607-3318
jwells@nyclu.org

Counsel for Petitioner

Dated: May 11, 2016
New York, NY

VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Jordan Wells, being duly sworn, deposes and says that he is counsel to the petitioner in this proceeding; that he has authored and read the foregoing petition and knows the contents thereof; that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Jordan Wells

Dated: May 11, 2016
New York, NY

Subscribed and sworn to me

me this 11th day of May 2016

ROBERT ANDREW HODGSON
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 02HO6298810
Qualified in Kings County
Commission Expires 3/17//2018