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

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In the Matter of the Application of

LETITIA JAMES, in her official capacity as the Public Advocate for the City of New York,

Petitioner,

For an Order Convening a Summary Judicial Inquiry Pursuant to New York City Charter § 1109,

-against-

CARMEN FARIÑA, Chancellor of the New York City Department of Education; THE NEW YORK CITY DEPARTMENT OF EDUCATION; and THE CITY OF NEW YORK,

Respondents.

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AFFIDAVIT OF PETITIONER LETITIA JAMES IN SUPPORT OF HER APPLICATION FOR A SUMMARY JUDICIAL INQUIRY PURSUANT TO NEW YORK CITY CHARTER SECTION 1109

State of New York)
: ss.
County of New York)

LETITIA JAMES, as Public Advocate for the City of New York, hereby affirms under penalty of perjury, that the following is true:

1. The New York City Department of Education ("DOE") and Chancellor Carmen Fariña ("the Chancellor") have neglected and violated their duty to provide legally-mandated services to children with disabilities and to protect the city from wasteful contracts. The most recent data available suggests that DOE has spent over $130 million on design and implementation of a software system – the Special Education Student Information System, or SESIS – that fails to do what it was intended to do. It is my understanding that SESIS cannot produce data about the city's compliance with its obligation with students' legally mandated

individualized education programs (IEPs). SESIS also fails to provide the documentation needed by the city to seek Medicaid reimbursement for services provided to students with disabilities.

2. New York City is obligated to provide a free and appropriate public education to all children in the city, including the provision of services, such as occupational therapy, speech therapy, and mental health counselling, pursuant to each child's IEP. The city is failing to provide these services in a timely manner and SESIS – the software system that was supposed to ensure compliance and allow the city to gauge how well it has performed its duties – is unable to do either task. A survey undertaken by the Citywide Council on Special Education found that 28% of parents of children with IEPs reported that, six weeks into the school year, their children were not receiving IEP-mandated related services. The survey also revealed high levels of dissatisfaction with the related services provided. Other reports indicate that related services are less likely to be provided the city's poorest neighborhoods. Because it appears that DOE has no meaningful and comprehensive data about IEP compliance, it cannot gauge compliance with its state and federal requirements. The result of this lack of data is all too predictable: non-compliance that is concentrated in poor neighborhoods. This discriminatory and harmful outcome is a direct consequence of DOE and Chancellor Fariña's failure to monitor the contractor and to ensure that the city received the benefit for which it bargained.

3. Separately, it also appears that SESIS does not easily produce data and documentation that would enable the city to request Medicaid reimbursement for the services it has provided to children with disabilities. Prior to 2006, DOE typically received upwards of $100 million annually in Medicaid revenue for providing services to students with disabilities. However, beginning in 2009, the state government began requiring additional reimbursement

documentation. SESIS does not produce the documentation needed, and the result is that the city now receives only $40 million in a typical year.

4. I submit this affidavit in support of my request for a court-ordered summary judicial inquiry, pursuant to New York City Charter § 1109, into various acts by Chancellor Carmen Fariña and the New York City Department of Education that constitute violations and neglect of duty in relation to the property, government and affairs of the City of New York. Chancellor Fariña and DOE have failed to ensure that the City of New York is meeting their statutory obligations to monitor, record, track and report the provision of services to special education students and has failed to ensure that the contractor created a product that met all of the contract's requirements.

5. I make this request in my official capacity as Public Advocate for the City of New York and am fully familiar with the facts and circumstances set forth herein.

Legal Framework

6. I am a citywide elected official, the immediate successor to the Mayor, and an ex-officio member of the New York City Council. New York City Charter ("City Charter") §§ 10, 24. The City Charter requires that I monitor, investigate, and review the actions of City agencies. I am also responsible for identifying systemic problems, recommending solutions, and publishing reports concerning my areas of inquiry. Additionally, I have the power to introduce legislation and hold oversight hearings on legislative matters. *Id.*, at §24. Section 1109 of the Charter specifically grants me the authority to make this application to the court for a summary judicial inquiry "into any alleged violation or neglect of duty in relation to the property, government or affairs of the city."

7. The City of New York and DOE are responsible for providing a free and appropriate public education to children with disabilities in New York City. 20 U.S.C. § 1412, 29 U.S.C. § 701, *et seq*. DOE must develop IEPs for children with disabilities to ensure that they are getting needed services and that they are in the least restrictive environment possible. These "related services" include, but are not limited to, speech therapy, occupational therapy, physical therapy and mental health counseling services. The fundamental objective of providing these related services is to help maximize each student's ability to achieve his or her educational goals. Services are provided by licensed therapists and clinicians in their respective field. Students mandated to receive related services on their IEPs should begin receiving them on the first day of school. Chancellor Fariña is the head of the Department of Education and, as such, is responsible for ensuring DOE's compliance with applicable local, state, and federal law.

Factual Background

8. My office has concluded, after a lengthy and thorough investigation, that Chancellor Fariña and DOE have failed to meet their obligations under city, state and federal law to ensure that children with disabilities in New York City are receiving their IEP-mandated services. Although DOE has spent over $130 million for the system and its implementation, the software system delivered by that contractor is incapable of providing citywide data. The result is that DOE cannot monitor its own city-wide compliance with city, state, and federal law. Additionally, the system also often fails to record information entered into the system by service providers, which means that individual records within the system are often incomplete and inaccurate. On the ground, this means that children with disabilities fall "between the cracks." Without an effective way of monitoring IEP compliance in individual cases or on aggregate, children go without services. My office receives frequent complaints from parents of children

with disabilities who report that their children either do not receive IEP-mandated services or experience significant delays in receiving IEP-mandated services.

9. In early 2008, DOE issued a Request for Proposal ("RFP") "related to software, IT solutions and implementation and change management services to support its Special Education Student Information System (SESIS) Initiative." *See* Exhibit A (New York City Department of Education Request for Proposal RFP # R0587, Title: Special Education Student Information System (SESIS)). The RFP listed a number of objectives for SESIS, including: simplification of data entry; improving the quality of IEPs by improving the process for creation and review of IEPs; significantly reducing the "cost to manage paper-based records archival and retrieval systems"; improving data integrity allowing the agency to more easily "meet court-mandated, State and Federal reporting requirements including reporting activities that drive student funding."

10. The contract was awarded to Maximus Inc., a Virginia based company, and began on November 2, 2008. Maximus provides "business process services (BPS) to government health and human services agencies." *See* Exhibit B (Maximus, Inc., Excerpt of Form 10-K (Sep. 30, 2015), at 4). Estimates for the cost of the contract and the cost of implementing SESIS vary. The Independent Budget Office ("IBO") of the City of New York estimates that the cost of SESIS from 2011 to 2015 has totaled $68.9 million with an additional $62.8 million of capital funds spent for SESIS development between 2009 and 2012. News sources have pegged the cost of the SESIS contract and implementation at $79 million. *See* Exhibit C (Ruth Ford & Adrienne Day, *Beyond CityTime*, THE INVESTIGATIVE FUND (Nov. 14, 2011)); Exhibit D (Ben Chapman, *$79 million special ed program's technical difficulties blamed for delay in kindergarten seating*, N.Y. DAILY NEWS (June 18, 2011)).

11. A 2013 audit conducted by the Comptroller of the City of New York concluded that "SESIS is not meeting its overall goal, which is to provide its users with an efficient and reliable system that meets court-mandated State and Federal reporting requirements" and that "users are not satisfied SESIS" because of problems with "data integrity and system availability as well as timely resolution of technical problems associated with pre-identified bugs and basic user functions in SESIS." *See* Exhibit E (City of New York, Office of the Comptroller, Audit Report on the Department of Education's Special Education Student Information System (Jul. 22, 2013), at 7).

12. It is my understanding that these problems persist today. In particular, it is my understanding that SESIS cannot easily provide citywide data that would enable the Department of Education to track how many students are receiving all of the services that are required under their IEPs and how well specific schools and districts are performing at meeting these critical needs. For the 2014-2015 school year, DOE reported that over 204,000 students were receiving an IEP by the end of the school year. With so many children receiving related services and accommodations pursuant to IEPs, the city must have a way to track whether students are receiving IEP-mandated services in a timely and appropriate manner and whether there are delays, gaps, or other problems that are interfering with each child's right to a free and appropriate public education. This data is important for oversight agencies as well. It is my understanding that the IBO has requested citywide data demonstrating rates of compliance with IEPs and that DOE has, to date, been unable to provide this information to the IBO.

13. Additionally, it is my understanding, based on conversations with advocates, parents, and teachers, that the system remains difficult to use and is subject to malfunctions. In particular, SESIS is difficult to use for external service providers – i.e. those service providers

who are not based in schools but who provide IEP-mandated services. External service providers report that they often cannot access SESIS, with the result that sessions with external service providers are not recorded. Additionally, they report that information inputted into SESIS disappears even when saved and that the help desk often provides no assistance.

14. Finally, I have learned from advocates that SESIS does not function well when children transfer from one school to another. Often, the child's new school does not implement the IEP for several months after the transfer occurs. SESIS was intended to make school transfer less disruptive with respect to the provision of services to children with disabilities. *See* Exhibit A (New York City Department of Education Request for Proposal RFP # R0587, Title: Special Education Student Information System (SESIS)). The delays in IEP implementation for students who transfer from one school to another are particularly harmful for homeless children and children in the child welfare system, who often transfer schools with frequency as their shelter, housing, or foster placement changes and who are already under enormous stress.

15. Taken together, the problems with SESIS mean that the city has no way of effectively tracking its own performance in providing legally-mandated services to children with disabilities. Independent data, compiled by the New York Citywide Council on Special Education, suggests that without monitoring, many services that are required under a child's IEP are not being provided. The New York Citywide Council on Special Education surveyed parents of children with IEPs: "28 percent said that, more than six weeks into the school year, their children were not getting the services to which they were entitled. Another 31 percent said their child was receiving some services but that at least one or more of the services called for was not being provided." *See* Exhibit F (New York Citywide Council on Special Education, 2014-2015 Annual Report, at 16). Additionally, a report published in 2014 suggests that there are disparities

in providing IEP services, with children in many of the city's poorest neighborhoods faring the worst. *See* Exhibit G (Geoff Decker, *Special-ed students in some neighborhoods face longer odds when looking for help*, CHALKBEAT NEW YORK (Oct. 15, 2014)).

16. The impact on children who do not receive required services can be devastating. I have spoken with parents whose children have not received services mandated by their IEPs and they've described harm to their children in the form of increased difficulty in school and behavioral problems stemming from the frustration of not being able to communicate or function as they can. When children don't receive these services, they are not receiving the education to which they are entitled. *See* Exhibit H (Moses Aff., McHughes Aff.)

17. The city *also* appears to have lost millions of dollars in Medicaid revenue, in part because SESIS is unable to properly bill for Medicaid services. In 2004, the city received over $100 million in Medicaid revenue for services to students with special needs. Since 2006, however, the city has not received more than $40 million in a given year in Medicaid revenue for services to students with special needs. In 2012, Michael Mulgrew, President of the United Federation of Teachers, testified before the New York City Council Committees on Education and Finance that "[w]hile the vast majority of the city's 168,000 students with special needs reportedly qualify for Medicaid, the city hasn't been filing for reimbursement in a systematic or organized way." *See* Exhibit I (Michael Mulgrew, Testimony regarding Medicaid claims for special education services by the Department of Education (March 1, 2012)). At that time, Mulgrew estimated that the city should be claiming more than $500 million in Medicaid revenue each year, including $260 million for speech therapy, physical therapy, and occupational therapy. *Id.* Since 2012, Medicaid revenue for services to students with special needs has actually dropped significantly. In 2014, the Office of the New York City Comptroller estimated that

DOE "failed to recoup a cumulative $356 million in federal Medicaid dollars for eligible special education services between Fiscal Years 2012 and 2014." *See* Exhibit J (Office of the New York City Comptroller, Budget and Policy Brief: Money Left on the Table – A Review of Federal Medicaid Reimbursement to the New York City Department of Education (Aug. 2014)).

18. It is my understanding that much of this drop in Medicaid revenue dates to a 2009 change in the New York Medicaid State Plan, which requires that each time services are received, the encounter must be documented. SESIS is apparently unable to provide documentation that would meet the New York Medicaid requirements. The result of this oversight and neglect is that New York City appears to be foregoing millions of dollars of Medicaid revenue to which it is entitled.

Chancellor Fariña and DOE Have Failed to Ensure that the Provision of Services to Students with Special Needs is Being Monitored, Tracked and Recorded, In Violation of Their Duties Under State and Federal Law.

19. Chancellor Fariña and DOE have violated their duties in relation to the property, government, and affairs of the city. In particular, she has failed to ensure that DOE is monitoring, tracking and recording the provision of services to students with special needs, which is required pursuant to court order and under city, state and federal law.

20. The Individuals with Disabilities Education Act ("the IDEA") requires that children with disabilities be provided a "free appropriate public education" and that "[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is

such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(1), (5). School districts must develop and implement IEPs for children with disabilities upon request. 20 U.S.C. § 1414(a). The IDEA requires local educational authorities to monitor and maintain data about the educational achievement of children with disabilities and the children's needs for special education and related services. 20 U.S.C. § 1414(c)(2). Local educational agencies must also regularly review children's IEPs to ensure that the goals for each child are being met. 20 U.S.C. § 1414(d)(4). Thus, the IDEA imposes a duty on local educational agencies, including the DOE, to ensure compliance by monitoring and tracking the implementation of children's IEPs.

21. Chancellor Fariña and DOE have a duty under the IDEA to ensure that children are receiving a free appropriate public education, which includes those services that are necessary and provided for under children's IEPs. By failing to monitor the provision of services and by employing a system that is difficult to use, especially for providers of related services and that results in children going without IEP services, Chancellor Fariña and DOE have neglected and violated this duty.

22. The Rehabilitation Act of 1973 and its implementing regulations require that public schools provide a free, appropriate public education to students with disabilities, which requires "the provision of regular or special education and related aids and services that . . . are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met." 34 C.F.R. 104.33(b). As with the IDEA, Chancellor Fariña's and DOE's failure to track and monitor IEP compliance, coupled with strong evidence suggesting that the city's public schools are failing to provide all services required by IEPs in a timely fashion, is a violation and neglect of their duties.

23. Chancellor Fariña and DOE also violated their duty to comply with court-mandated reporting requirements. In particular, the settlement and stipulations in *Jose P. v. Mills et al.* imposed a number of reporting requirements on DOE. The 2003 and 1988 stipulations require that the city provide monthly reports on the special education system to the Plaintiffs' counsel so that they may monitor city compliance with the terms of the settlement in *Jose P. See 2003 Stipulation in Jose P annexed to James' Memorandum of Law as an Appendix.* To the extent that the city is unable to compile full and accurate monthly reports demonstrating its compliance with the terms of the *Jose P.* settlement, Chancellor Fariña and DOE have violated and neglected their duty to ensure compliance with the city's obligations under that settlement.

24. The New York Education Law requires that Chancellor Fariña "control and operate" the special education programs in New York City. N.Y. Educ. L. § 2590-h(1)(c). Implicit in this language is a requirement that the Chancellor monitor and ensure adequate performance. Chancellor Fariña has neglected this duty by failing to ensure that SESIS (or some other system within DOE) can provide her with the citywide data with which to gauge how well DOE provides services to students with disabilities.

Chancellor Fariña and DOE Have Failed to Enforce the Terms of the City's Contract with Maximus, Inc., In Violation of Their Duties Under City and State Law.

25. The New York City Charter imposes on each agency the obligation to "monitor the performance of every contractor." N.Y. City Charter § 333(a). Chancellor Fariña and DOE have violated and neglected their duties to monitor the performance of Maximus, Inc. Chancellor Fariña and DOE failed to monitor the performance of Maximus and failed to enforce the terms of the contract against Maximus, and the resulting system fails to meet the goals outlined in the RFP. Chancellor Fariña and DOE appear to have taken no steps to ensure that the

city was getting the benefit for which it had bargained. The city is now stuck with a computer system that is difficult to use, cannot produce citywide data, appears not to be capable of supporting billing for Medicaid-covered services, and does not track students movement from one school to the next.

26. New York State law establishes a similar policy that contracts should "assure the prudent and economical use of public moneys for the benefit of all inhabitants of the state to facilitate the acquisition of facilities and commodities of maximum quality at the lowest possible cost." N.Y. Gen. Mun. L. § 100-a. By failing to ensure that the contractor provided a product of quality that met the RFP and by allowing significant cost overruns, Chancellor Fariña and DOE have neglected their duty under Section 100-a of the General Municipal Law.

The Court Should Convene a Summary Inquiry to Investigate Chancellor Fariña's and DOE's Conduct.

27. In order to determine whether Chancellor Fariña and DOE have violated and neglected duties under city, state and federal law, I hereby request – in my official capacity as Public Advocate for the City of New York – that the Court issue an order for a summary inquiry of the matter, pursuant to N.Y. City Charter § 1109.

28. Section 1109 of the Charter authorizes this Court to conduct a summary judicial inquiry upon application by designated elected officials, including the Public Advocate for the City of New York. The subject of such a summary inquiry is an "alleged violation or neglect of duty in relation to the property, government or affairs of the city." *Id.* The justice who presides over the summary judicial inquiry controls the proceeding and may require witnesses to appear and be subject to examination. *Id.*

29. I respectfully request that the Court convene a hearing in which the Court seeks answers to the following questions:

- Does SESIS have any capacity to produce citywide data about DOE compliance with students' IEPs?
- In the absence of such data, how does DOE measure its own performance in providing services to children with special needs?
- In the absence of such data, how does DOE measure whether it is meeting the requirements of students' IEPs?
- What mechanisms does DOE have in place to ensure that IEPs are provided to a child's new school upon transfer?
- What mechanisms does DOE have in place to ensure that required services are provided to a child immediately or soon after transfer to a new school?
- What problems exist for service providers who are not based in schools who attempt to use SESIS?
- What explains the significant drop in Medicaid revenue for services to students with special needs?
- Did the DOE or Chancellor Fariña take any steps to enforce the contract with Maximus, including correspondence with the company, arbitration, or litigation?

30. A summary judicial inquiry will bring to light important information about how well Chancellor Fariña and DOE have met their obligations to provide a free, appropriate public education to children with disabilities. It will also make public information about whether Chancellor Fariña and DOE fulfilled their duty to ensure that public contracts do not waste

public money and whether they have undertaken efforts to ensure that the city is receiving the benefit for which it bargained.

31. For all the foregoing reasons, I respectfully request that this Court grant my application and order a summary judgment inquiry pursuant to Section 1109 of the New York City Charter into whether Chancellor Fariña and DOE have violated or neglected duties to the city in connection with SESIS and the city's special education services.

Dated: February 2, 2016
New York, N.Y.

Letitia James, Esq.

Sworn to before me this
2nd day of February, 2016.

Notary Public

Jennifer Laurel Levy
Notary Public - State of New York
No. 02LE6332571
Qualified In Kings
My Comm. Expires 11/2/2019