

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,

INDEX NO.

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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**BRIEF FOR PETITIONER, PUBLIC ADVOCATE LETITIA JAMES,  
IN SUPPORT OF HER APPLICATION FOR A SUMMARY JUDICIAL INQUIRY  
UNDER SECTION 1109 OF THE CITY CHARTER**

Respectfully submitted by,

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## PRELIMINARY STATEMENT

We bring this petition for a Summary Judicial Inquiry under Section 1109 of the New York City Charter by alleging a violation or neglect of duty by the New York City Department of Education (“DOE”) and Chancellor Carmen Fariña (“the Chancellor” or “Chancellor Fariña”). The goal of this proceeding is to shine a light on the failure of DOE and Chancellor Fariña to provide legally-mandated services to children with disabilities.

DOE and Chancellor Fariña have failed to ensure that New York City is in compliance with its obligations to provide a free and appropriate public education for children with disabilities and have failed to recover millions of dollars in lost Medicaid revenue. The most recent figures suggest that DOE spent over \$130 million on the 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. SESIS cannot produce citywide 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.

The result has been a waste of public money and a failure to undertake the basic steps that will allow New York City children with disabilities to thrive and learn. There is an ongoing public policy discussion about the city’s use of contractors without adequate oversight and the resulting waste of public money. At a time when the public schools are under additional scrutiny and when New York State is considering whether to extend mayoral control of the New York City schools, it is all the more important to examine how well the school district is meeting its legal obligations to provide a free and appropriate public education to all students, including children with disabilities.

## STATEMENT OF FACTS

Federal law requires that school districts provide all children with a free and appropriate public education. In practice, this means developing an IEP for children with disabilities to ensure that they are receiving the adaptations and services they need to maximize their ability to achieve their educational goals. (James Aff., at para. 7). There are over 204,000 students in New York City with IEPs. (Ex. F to James Aff., at P. 2). However, many of these children do not receive the services that are mandated by their IEPs and to which they are entitled. (Ex. F to James Aff., at P. 15-16).

In 2008, the New York City Department of Education issued a request for proposals (RFP) to develop and implement a software system to replace the existing paper-based IEP system. (Ex. A to James Aff., at P. 1). The RFP explained the complicated logistics of the undertaking, known as SESIS:

Due to the sheer size of NYCDOE, the management of paperwork for instruments such as the Individualized Education Program (IEP) presents tremendous logistical challenges to the district. Paper-based IEPs and other essential documents are at risk of being misplaced or may not follow a student in a timely manner as he/she transfers throughout the District. In addition, students receiving Special Education services may be enrolled in any of NYCDOE's approximately 1,453 elementary, middle, and high schools. . . . Special education services may also be delivered at home, in a hospital, in private schools, Non-Public Schools (NPS), center-based or alternatively-placed locations. As such, application access must accommodate these variances.

(Ex. A to James Aff., at P. 1). Six years later, DOE has spent over \$130 million to develop and implement SESIS, but the system does not meet the basic objectives outlined in the RFP. (James Aff., at para. 8). Much of that money was paid to the company that won the contract to develop SESIS, Maximus, Inc. (James Aff., at para. 10).

The RFP listed a set 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”; and improving data integrity, allowing the agency to more easily “meet court-mandated, State and Federal reporting requirements including reporting activities that drive student funding.” (Ex. A to James Aff., at p. 2-3). SESIS has failed to meet many of these objectives and a result is that children are going without the services that they need in order to learn.

In particular, SESIS does not appear to be capable of producing citywide data about IEPs, including how many children are receiving the related services that are mandated by their IEPs. (James Aff., at para. 12). SESIS also remains difficult for service providers to use and is subject to malfunctions, including deleting saved data. (James Aff., at para. 13). SESIS also fails to ensure that children who transfer schools receive their IEP-mandated services promptly in their new school. (James Aff., at para. 14). This is particularly harmful for some of New York City’s most vulnerable children: those who transfer schools more frequently because their families are homeless or because they are in foster care. (James Aff., at para. 14).

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.” (Ex. F to James Aff., at P. 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. (Ex. G. to James Aff.). This failure to provide services that are mandated by students’ IEPs is a predictable consequence of the problems with SESIS, including the lack of citywide data from which DOE could gauge its compliance.

A child's IEP spells out what the child needs in order to learn, develop and thrive, including classroom accommodations and the provision of related services. The objective of providing services to a child with a disability is to help maximize each student's ability to achieve his or her educational goals. (James Aff., at para. 7). Children with IEPs receive may receive any or a combination of services that address their individualized needs. (James Aff., at para. 7). Put simply, IEP-mandated services are the foundation upon which a child's developmental and educational progression depends. When children go without their IEP-mandated services, they are denied the free and appropriate public education to which they are entitled to and they may suffer serious consequences, including developmental delays and educational setbacks.

In addition to the above problems, SESIS is often unable to produce documentation that is required for Medicaid billing. (James Aff., at para. 17). Following the imposition of new documentation requirements in 2009, the city's Medicaid revenue for providing services to students with disabilities has dropped significantly. (James Aff., at para. 18); (Ex. I to James Aff.); (Ex. J to James Aff.). Although estimates of lost revenue vary, the city has likely foregone tens of millions of dollars of Medicaid revenue each year since 2009. (James Aff., at para. 17); (Ex. I to James Aff.); (Ex. J to James Aff.). The Comptroller has estimated that, for Fiscal Year 2012 through Fiscal Year 2014, the city has failed to recoup \$356 million in Medicaid revenue, and notes that "By way of comparison, \$356 million in lost revenues is more than the entire universal pre-kindergarten budget for FY 2015." (Ex. I to James Aff., at P. 1).

## ARGUMENT

### I. **The Unique Remedy of a Section 1109 Hearing is Established by City Charter To Bring Oversight to Issues That Might Not Otherwise Be Litigated.**

Section 1109 of the City Charter sets forth the following:

A summary inquiry into any alleged violation or neglect of duty in relation to the property, government or affairs of the city may be conducted under an order to be made by any justice of the supreme court in the first, second or eleventh judicial district on application of the mayor, the comptroller, the public advocate, any five council members, the commissioner of investigation or any five citizens who are taxpayers, supported by affidavit to the effect that one or more officers, employees or other persons therein named have knowledge or information concerning such alleged violation or neglect of duty. Such inquiry shall be conducted before and shall be controlled by the justice making the order or any other justice of the supreme court in the same district. Such justice may require any officer or employee or any other person to attend and be examined in relation to the subject of the inquiry. Any answers given by a witness in such inquiry shall not be used against such witness in any criminal proceeding, except that for all false answers on material points such witness shall be subject to prosecution for perjury. The examination shall be reduced to writing and shall be filed in the office of the clerk of such county within the first, second or eleventh judicial district as the justice may direct, and shall be a public record.

The Section 1109 summary inquiry provision was initially enacted by the New York legislature in 1873 and has remained in every City Charter since then. The constitutionality of a predecessor provision was upheld in 1917 in *Mitchel v. Cropsey*, 164 N.Y.S. 336 (N.Y. App. Div. 1917). *See also, Matter of Leich*, 31 Misc. 671, 672 (N.Y. Sup. Ct. 1900); *Green v. Giuiliani*, 721 N.Y.S.2d 461, 465-70 (N.Y. Sup. Ct. 2000).

The statutory language is plain; it is not necessary to show a violation of a law, but rather violation of a duty. *Cf.* N.Y. City Charter § 1116 (speaks of willful violation of law and neglect of duty). Here, the only requirement is breach or neglect of duty. Thus, the statute creates a unique opportunity to bring justice to issues that might not otherwise be amenable to litigation. For example, there was an action to find out precisely *how* details about a dead man's criminal

records had been improperly transmitted, which “focused on the facts underlying the Public Advocate's allegations that in publicizing Mr. Dorismond's criminal and juvenile record” the Mayor had violated his duty to comply with confidentiality law. *Green v. Giuliani*, 721 N.Y.S.2d at 469.

At its core, Section 1109 creates a method for the Public Advocate and others to question the performance of public officials, without having to resort to the voting booth or legislative process for oversight. It is unique this way. It has been challenged on constitutional grounds for this reason, but has survived because the essence of what the judiciary does in an 1109 proceeding is properly a judicial inquiry. *Matter of Leich*, 31 Misc. at 672; *Mitchel v. Cropsey*, 164 N.Y.S. 336; *Green v. Giuliani*, 721 N.Y.S.2d at 465-470.

## **II. The New York City Department of Education and Chancellor Carmen Fariña Have Breached Their Duties to the Residents of New York City.**

DOE and Chancellor Fariña 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 the Individuals with Disabilities Education Act (IDEA), the Rehabilitation Act of 1973, the city-wide settlement in *Jose P. v. Mills*, and New York Education Law. The result of their dereliction of these oversight duties is that New York City children go without the services that enable them to learn and that are legally required. Separately, DOE and Chancellor Fariña’s failure to enforce the terms of the City’s contract with Maximus violates and neglects their duties to prevent waste under the City Charter and the New York General Municipal Law.

### **A. 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 an IEP for children with disabilities upon request. 20 U.S.C. § 1414(d). 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 individual and, ultimately, system-wide compliance by monitoring and tracking the implementation of children’s IEPs.

DOE and Chancellor Fariña have violated the IDEA’s requirement that they monitor and review IEP goals. The failure to maintain citywide data which would enable the DOE and Chancellor Fariña, as well as oversight agencies such as IBO and the Office of the Public Advocate, to review compliance with the IDEA appears to have led to an all too predictable result: children are not receiving the services that are required by their IEPs or are receiving them only after lengthy waits. (Ex. F to James Aff., at P. 16). Over 200,000 children in DOE schools have IEPs – any meaningful attempt to oversee and manage this system thus must rely upon comprehensive citywide data showing levels of IDEA compliance. *See, e.g. Jamie S. v. Milwaukee Pub. Sch.*, 519 F. Supp. 2d 870, 903-04 (E.D. Wis. 2007) (concluding that, where systemic violations of the IDEA occurred, data was needed to determine compliance levels prior to crafting remedy that would bring the local school district into compliance with the IDEA)

(“Next, since the violations were systemic in nature, what sanctions should be imposed to bring [the school district] into satisfactory compliance with the IDEA? Is satisfactory compliance considered something less than the 100% required by law? In order to address these questions, the present level of compliance for MPS must be determined.”). By failing to ensure that SESIS can gather citywide data that will be useful in establishing compliance levels and identifying problems or systemic failures, DOE and Chancellor Fariña have neglected their duty to actively monitor the provision of services to children with disabilities and to oversee and ensure compliance with the IDEA.

Further, DOE and Chancellor Fariña have violated the IDEA by not implementing a system to ensure that when children transfer from one school to another, their IEP services are resumed promptly upon transfer. While the IDEA does not specify a time frame for implementation of a student’s IEPs, it requires that services be provided “as soon as possible.” 34 C.F.R. 300.323(c)(2); *D.D. v. N.Y. City Bd. of Educ.*, 465 F.3d 503, 508 (2d Cir. 2006). In considering a class action brought by preschool children who were alleging delays in the provision of IEP services, the Second Circuit Court of Appeals explained the timing requirements:

States must implement a student's IEP “as soon as possible” after it has been developed. In other words, Plaintiffs’ right to a free appropriate public education requires that their IEPs be implemented as soon as possible. “As soon as possible” is, by design, a flexible requirement. It permits some delay between when the IEP is developed and when the IEP is implemented. It does not impose a rigid, outside time frame for implementation. . . . Nonetheless, just because the as-soon-as-possible-requirement is flexible does not mean it lacks a breaking point. “It is no doubt true that administrative delays, in certain circumstances, can violate the IDEA by depriving a student of his right to a ‘free appropriate public education.’” *D.D.*, 465 F.3d at 514 (quoting *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 381 (2d Cir. 2003)).

Thus, to the extent that DOE and Chancellor Fariña have failed to develop an effective system for ensuring that children receive IEP services “as soon as possible” – i.e. without unnecessary

delay – after transferring schools, they have also violated and neglected their duties under the IDEA.

### **B. Rehabilitation Act of 1973**

The Rehabilitation Act of 1973 provides that “No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a). This requirement applies to local school districts that receive money from the federal government. The Department of Education has issued implementing regulations that require that public schools provide a free, appropriate public education to students with disabilities, defined as “the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.34 CFR 104.33.” 34 C.F.R. 104.33(b)(1). “Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act [the predecessor statute to the IDEA] is one means of meeting the standard” required under the Rehabilitation Act regulations. 34 C.F.R. 104.33(b)(2).

The regulations apply to any recipient, defined as “any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.” 34 C.F.R. 104.3(f). The

New York City Department of Education receives numerous streams of federal funding<sup>1</sup> and is thus subject to the Rehabilitation Act's requirements.

Litigation under the Rehabilitation Act has imposed additional reporting requirements to the existing statutory and regulatory obligations to oversee compliance and the provision of services to children with disabilities. The plaintiffs in *Jose P. v. Ambach* brought claims under the Rehabilitation Act of 1973 and the Education for All Handicapped Children Act (the predecessor to the IDEA).<sup>2</sup> A judgment was issued in 1979 which required the City to periodically report to the plaintiffs' counsel on its compliance with relevant laws.<sup>3</sup> Subsequent stipulations have expanded and refined the reporting requirements, which remain in effect.<sup>4</sup>

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 under the Rehabilitation Act. Additionally, to the extent that DOE and Chancellor Fariña fail to meet their reporting obligations under the *Jose P.* stipulations, they have neglected or violated their duty to ensure that the City is in compliance with its court-ordered obligations. The failure to oversee and monitor compliance has resulted in far too many New York City children being denied the free and appropriate public education to which they are entitled.

### **C. New York Education Law**

The New York Education Law grants Chancellor Fariña certain "powers and duties as the superintendent of schools and chief executive officer for the city district, which the chancellor

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<sup>1</sup> See, e.g. Department of Education School Allocation Memorandum No. 08, FY 2015, available at: [http://schools.nyc.gov/offices/d\\_chanc\\_oper/budget/dbor/allocationmemo/fy14\\_15/FY15\\_PDF/sam08.pdf](http://schools.nyc.gov/offices/d_chanc_oper/budget/dbor/allocationmemo/fy14_15/FY15_PDF/sam08.pdf); Department of Education School Allocation Memorandum No. 83, FY 2015, available at: [http://schools.nyc.gov/offices/d\\_chanc\\_oper/budget/dbor/allocationmemo/fy14\\_15/FY15\\_PDF/sam83.pdf](http://schools.nyc.gov/offices/d_chanc_oper/budget/dbor/allocationmemo/fy14_15/FY15_PDF/sam83.pdf).

<sup>2</sup> Complaint, *Jose P. v. Ambach* (E.D.N.Y. 1979) (No. 79 Civ. 270).

<sup>3</sup> Judgment at 24-27, *Jose P. v. Ambach* (E.D.N.Y. 1979) (No. 79 Civ. 270).

<sup>4</sup> See, e.g., Stipulation at 4-5, *Jose P. v. Mills* (E.D.N.Y. 2003) (No. 96 Civ. 1834).

shall exercise to promote an equal educational opportunity for all students in the schools of the city district, promote fiscal and educational equity, increase student achievement and school performance and encourage local school-based innovation, including the power and duty to . . . 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 so that students are able to meet their educational goals in an equitable and fair manner. The Education Law further requires that the Chancellor monitor the performance of the community districts that fall within the DOE by requiring “each community superintendent to make an annual report covering all matters relating to schools under the district’s jurisdiction including, but not limited to, the evaluation of the educational effectiveness of such schools and programs connected therewith,” and requiring “such community district education council or superintendent to make such number of periodic reports as may be necessary to accomplish the purposes of this chapter.” N.Y. Educ. L. § 2590-h(10)-(11). The Chancellor is further required to “[e]stablish uniform procedures for record keeping, accounting and reporting throughout the city district, including pupil record keeping, accounting and reporting.” N.Y. Educ. L. § 2590-h(22).

Chancellor Fariña has neglected and violated her 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. The Education Law requires both that the Chancellor “control and operate” the special education system and that she have in place numerous measures for gathering and reporting data. Taking the first requirement, the Merriam-Webster Dictionary defines “control” as “to exercise restraining or directing influence over” or “to have power over.” The Merriam-Webster Dictionary defines “operate” as “to cause to

function” or “to put or keep in operation.” Taken together, the “control and operate” language requires that the Chancellor direct and maintain the operations of the DOE. To do so well in a district as large as New York City requires data with which to measure how well the schools are meeting various objectives, including compliance with IEP requirements. The number of parents reporting that children with IEPs are not receiving the services to which they are entitled – 28% according to a survey conducted by the Citywide Council on Special Education – indicates that Chancellor Fariña is not doing what she must do to ensure the functional operation of the special education system. The fact that these problems may be concentrated in some of the city’s poorest neighborhoods suggests that she has violated or neglected her duty to “promote an equal educational opportunity for all students in the schools of the city district.” N.Y. Educ. L. § 2590-h(1)(c). Additionally, to the extent that SESIS does not enable the community districts to fully report on the educational outcomes of their students and the effectiveness of the educational outcomes, Chancellor Fariña is not fulfilling her duty to require such reporting and to establish procedures for record keeping and reporting, as required under subsections (10), (11), and (22) of Section 2590-h of the New York Education Law.

#### **D. New York City Charter**

The New York City Charter imposes on each agency the obligation to “monitor the performance of every contractor.” N.Y. City Charter § 333(a). This provision embodies an obligation to prevent waste and to ensure that the City is receiving the benefit for which it has bargained in its contractual relationships.

Chancellor Fariña and DOE have violated and neglected their duties to monitor the performance of Maximus, Inc. Although DOE has spent over \$130 million to develop and implement SESIS, the City has not received a finished product that meets the objectives outlined

in the RFP. SESIS is also unable to produce documentation that would enable the City to recoup Medicaid funding which is owed to the City, thus compounding the monetary losses caused by this contract. The ongoing drain on the City's resources likely could have been avoided with strong oversight and enforcement of the terms of the contract. Had Chancellor Fariña and DOE required that Maximus deliver what it had agreed to deliver – a functional software system that allowed the City to determine compliance levels, that produced requisite documentation to meet court-mandated reporting requirements, and that produced documentation to enable the City to recoup Medicaid revenues – the resulting system would enable DOE and Chancellor Fariña to ensure compliance with their duties under city, state, and federal law. Instead, 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.

#### **E. New York General Municipal Law**

The General Municipal Law establishes a policy that contracts should “assure the prudent and economical use of public moneys for the benefit of all inhabitants of the state and to facilitate the acquisition of facilities and commodities of maximum quality at the lowest possible cost.” N.Y. Gen. Mun. L. § 100-a. Like Section 333 of the New York City Charter, this section is intended to prevent the waste and mismanagement of public funds that occurs when contractors are not subject to oversight and when public agencies do not enforce the terms of contracts to ensure that the public agency receives the benefit for which it bargained.

As with Section 333 of the New York City Charter, by failing to ensure that the contractor provided a product that met the RFP objectives and by allowing significant cost

overruns, Chancellor Fariña and DOE have violated and neglected their duty under Section 100-a of the General Municipal Law.

**III. The Provision of Services to Children with Disabilities in New York City Schools Affects “The Property, Government, Or Affairs of the City.”**

The provision of IEP-mandated services to children in New York City and the failure of the city to recoup Medicaid revenues are matters that affect city “property, government, or affairs” and thus are an appropriate topic for a Section 1109 summary judicial inquiry. State law vests control of the New York City Department of Education with a Chancellor who is appointed by the Mayor of the City of New York. N.Y. Educ. L. § 2590-h. The Chancellor is tasked with overseeing every aspect of the schooling of New York City children, from underperforming schools to procurement policy to special education programs. *Id.* State education law contemplates city oversight of the operations and budget of DOE, and now provides that “[t]he comptroller of the city of New York shall have the authority to conduct operational and programmatic audits, in addition to financial audits, of the city district to the same extent that such comptroller has such authority for agencies of the city of New York.” N.Y. Educ. L. § 2590-t. DOE and Chancellor Fariña have a duty to provide children with IEPs with the services that they need to fulfill their educational objectives, as discussed further below. The Department of Education’s provision of services to children with IEPs, and Chancellor Fariña’s oversight thereof, are thus matters that affect the property, government, and affairs of the city.

Likewise, the failure of Chancellor Fariña and DOE to ensure that the city receives reimbursement from Medicaid for services to children with IEPs is a matter that touches upon the property, government and affairs of the city, inasmuch as Medicaid revenue for these services is paid directly to the city. (Ex. I to James Aff.). DOE and Chancellor Fariña owe the citizens of New York a duty to ensure that the city receives the revenue to which it is entitled.

#### **IV. The Public Advocate Is Authorized By The New York City Charter to Bring this Action.**

The Public Advocate is an independently elected official charged with “review[ing] complaints of a recurring and multiborough or city-wide nature relating to services and programs, and mak[ing] proposals to improve the city's response to such complaints.” N.Y. City Charter § 24 (f)(2). The Office of the Public Advocate was created to serve as a “watchdog” against the inefficient or inadequate operation of city government. *Green v. Safir*, 664 N.Y.S.2d 232, 234-35 (N.Y. Sup. Ct. 1997), aff'd 679 N.Y.S.2d 383 (1st Dep't 1998), lv. denied 93 N.Y.2d 882 (N.Y. 1999). The Public Advocate for the City of New York, Letitia James, is a citywide elected official, the immediate successor to the Mayor, and an ex-officio member of the New York City Council. N.Y. City Charter §§ 10,24. The Public Advocate is charged with monitoring, investigating, and reviewing the actions of city agencies. She is also responsible for identifying systemic problems, recommending solutions, and publishing reports concerning her areas of inquiry. She has the power to introduce legislation and hold oversight hearings on legislative matters.

The Public Advocate's duties at times require the Public Advocate to bring suits against city agencies and other governmental authorities. *Green v. Safir*, 664 N.Y.S.2d at 235 (discussion of capacity and standing); *Green v. Giuliani*, 721 N.Y.S.2d at 467. The New York City Charter also expressly grants the Public Advocate the authority to make this application to the court for a summary inquiry “into any alleged violation or neglect of duty in relation to the property, government, or affairs of the city.” N.Y. City Charter § 1109. “The authority of the Public Advocate to petition for a summary inquiry pursuant to section 1109 exists in tandem with his mandate under New York City Charter § 24 (f), (g) and (h) to investigate and report on

complaints of mismanagement or misfeasance by City agencies.” *Green v. Giuliani*, 721 N.Y.S.2d at 467.

**V. DOE and Chancellor Fariña’s Breach of Duty is Particularly Suitable for an 1109 Summary Inquiry.**

At issue here are two questions: (1) whether DOE and Chancellor Fariña have failed to take the steps needed to oversee a large and complex school system and to ensure that children with IEP are receiving the services to which they are entitled, and (2) whether DOE and Chancellor Fariña have allowed waste of city funds. These are precisely the types of issues that are suitable for a summary inquiry under Section 1109 of the City Charter. *Green v. Giuliani* is instructive, as Justice Gans thoroughly explained the roots of section 1109 and its applicability to situations such as this. Former Mayor Rudolph Giuliani was ordered to submit to a summary inquiry pursuant to section 1109 so that he could be questioned about how information was kept and transmitted which led to public statements about the victim of a police shooting. Justice Gans explained: “Although inquiries into financial corruption may have been a primary reason for enacting the summary inquiry provision, the language of the current section 1109 could hardly be broader. It applies to all forms of official misconduct and easily encompasses the unauthorized release of the contents of sealed court records.” *Green v. Giuliani*, 721 N.Y.S.2d at 471 (citations omitted).

The issue of financial mismanagement and failing to ensure that the city receives the benefit of contracts it has bargained is a proper issue and was, in fact, the concern that led to the promulgation of this statute in 1873. *Matter of Leich*, 31 Misc. at 671. The question of whether DOE and Chancellor Fariña are fulfilling their obligations to children with disabilities and are exercising sufficient control over the special education system also fits squarely within the scope of Section 1109 in that it relates directly to whether city officials and agencies are fulfilling one

of the core functions of New York City's government: educating children. Moreover, the Court should exercise its discretion to conduct a summary judgment inquiry because, while it is apparent that DOE and Chancellor Fariña have neglected their duties, it is unclear when the failures occurred, whether the agency has plan in place to gauge city-wide compliance and to ensure that there are no lengthy delays in providing services to children, and what steps could have been taken to ensure that the contractor delivered a software product that met contract specifications. DOE and Chancellor Fariña have not acknowledged that SESIS has failed at meeting its core objectives, nor has there been any indication that any entity is investigating this matter. *See Riches v. New York City Council*, 899 N.Y.S.2d 177, 181 (N.Y. App. Div. 2010) (“The Supreme Court Justice here furnished several legitimate reasons for denying the application. First, the practice of reserving funds in the name of nonexistent organizations had been acknowledged and had received extensive publicity. Second, . . . the court found that the ongoing investigation of the practice by two governmental agencies was sufficient to safeguard the public interest.”).

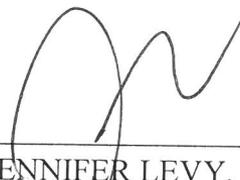
A summary inquiry pursuant to section 1109 will answer the questions about how we got here, precisely what mechanisms need to be changed, and how DOE and Chancellor Fariña have breached the duties owed to children with disabilities and to the public purse.

## CONCLUSION

For all of the foregoing reasons, this Court should order a summary inquiry, pursuant to Section 1109 of the New York City Charter, into the violation and neglect of duty by DOE and Chancellor Fariña. Whether the Court uses only its power of subpoena *duces tecum* or prefers live testimony as well, we respectfully suggest the following questions:

- Does SESIS have any capacity to produce citywide data about DOE compliance with students' IEPs?
- In the absence of such citywide data, how does DOE measure its own performance in providing services to children with special needs?
- In the absence of such citywide 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?

Dated: New York, New York  
February 1, 2016



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