

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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J.T., Individually and On Behalf of D.T.;
K.M., Individually and On Behalf of M.M. and S.M.;
J.J., Individually and On Behalf of Z.J.;
C.N., Individually and On Behalf of V.N.; and
All Others Similarly Situated,

20 CV 5878 (CM)

**DECLARATION OF
CHRISTINA FOTI**

Plaintiffs,

-against-

BILL de BLASIO, in his official capacity as the Mayor of New York City; RICHARD CARRANZA, in his official capacity as the Chancellor of the New York City Department of Education; the NEW YORK CITY DEPARTMENT OF EDUCATION; the SCHOOL DISTRICTS IN THE UNITED STATES; and STATE DEPARTMENTS OF EDUCATION IN THE UNITED STATES,

Defendants.

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I, Christina Foti, declare pursuant to 28 U.S.C. § 1746, that the following statements are true and correct upon penalty of perjury.

1. I am the Deputy Chief Academic Officer, Specialized Instruction and Student Support, for Defendant New York City Department of Education (“DOE”). I have held this position since February 2020. I was previously the Chief Executive Director of DOE’s Special Education Office, a position I held beginning November 2014. I have also been a DOE Principal, Assistant Principal, Special Education Teacher, and Literacy and Behavioral Coach and Unit Supervisor. In sum, I have worked for DOE for over seventeen years, all in supervisory and pedagogical positions involving the provision of special educational services to students with disabilities.

2. In my current job, I oversee special education programs and services citywide. This declaration is based on my personal knowledge, discussions with DOE employees, and the books and records of DOE. It is submitted in opposition to Plaintiffs' application for preliminary injunctive relief in the above-captioned action.

3. There are over 1.1 million students enrolled in DOE public schools, of which approximately 200,000 are students with disabilities. Of these, approximately 25,000 are enrolled in programs operated by District 75, the DOE's citywide district that provides highly specialized support for students with disabilities with significant challenges.

4. The framework for the education of students with disabilities is set forth in the Individuals with Disabilities Education Act ("the IDEA"), 20 U.S.C. § 1400, *et seq.* and its State law counterpart, New York Education Law § 4400, *et seq.* These statutes provide that students with disabilities, as statutorily defined, are offered a free appropriate public education ("FAPE") by the student's Local Educational Agency ("LEA") – here, DOE. The recommendations for a student's FAPE are set forth in an individualized education program ("IEP"), which is a written document created by a team composed of certain education professionals and the student's parent. The IEP is updated at least annually by the IEP team, generally following an IEP team meeting at which the student's needs are discussed. The recommendations to address those needs are incorporated into the IEP as the student's special education program, i.e., the FAPE offer; however, the IEP does not specify the school at which the LEA offers to implement the program. The LEA has discretion as to the brick-and-mortar placement and the service delivery methods as long as the program and goals contained in the IEP are implemented.

5. Given the increasing crisis of the COVID-19 pandemic and the recognition that the virus is easily transmitted (see Declaration of **DEMETRE DASKALAKIS**, dated September 18,

2020), on or about March 16, 2020, Governor Cuomo issued Executive Order 202.3 closing all public school buildings in the State effective March 18. The preceding day, Mayor de Blasio and Chancellor Carranza had also announced that DOE's school buildings would be closed as of March 16, and that DOE staff would use that week to develop DOE's transition plan and train staff on remote learning, which would begin the following week for all of the City's school children attending DOE schools, including students with disabilities (i.e., students with IEPs). The Mayor further stated that the earliest the schools might reopen would be April 20, 2020, but that they might have to remain closed through the end of the school year. The decision to close New York City public school buildings followed decisions by school districts around the country to close their buildings in response to the pandemic. The safety of students, parents and staff demanded this action.

6. On Monday, March 23, 2020, one week after the initial closure of its school buildings, DOE commenced remote instruction and began the process of providing remote devices, principally iPads, to all students in the City who needed such devices. To date, over 320,000 iPads have been distributed, including 96,400 to students with IEPs. We also provided and continue to provide data plans and internet access for these devices when needed.

7. We realize the benefits and virtues of in-person learning opportunities and that such benefits may be particularly important to a number of our students with disabilities, depending on their individual needs. That does not mean, however, that our students with disabilities are being denied a FAPE simply because they are not receiving 100% in-person instruction. Thus, we continue to follow the instructions provided by the U.S. Department of Education ("U.S. DOE") and the New York State Education Department ("SED") as to best practices for implementing fully remote instruction and, for the current school year, blended instructional models where students

receive instruction both remotely and in-person. *See* Exhibits A-1, A-2 and B, annexed hereto. Both agencies have explicitly endorsed the use of remote and blended instruction during the pandemic and have stated that those modes of service delivery will enable school districts to provide FAPE to their students with disabilities.

8. Because all instruction beginning on March 23, 2020 was necessarily provided remotely for an indefinite period of time to all students with disabilities (as it was to all DOE students), we created a Special Education Remote Learning Plan (“RLP”) to tailor the remote instruction to each individual student’s needs in light of the constraints imposed by the pandemic. Staff were instructed to reach out to parents of students with disabilities to obtain their input regarding the RLP for their child. Remote learning plans were completed for more than 98.2% of students with disabilities. Additionally, the DOE instituted teletherapy for the on-going provision of related services (clinical and therapeutic services such as speech, occupational and physical therapy). For those related services where the DOE sought consent to provide services remotely via teletherapy, parents overwhelmingly consented (over 80%).

9. Despite all of the additional constraints and demands arising out of the pandemic and accompanying legal and social mandates, in addition to developing RLPs for all students with IEPs and establishing alternate means of providing instruction, DOE continued to meet its ongoing IDEA responsibilities for students with disabilities. Since mid-March, we have held IEP meetings remotely and developed and updated over 98,000 IEPs. We have done this even while also working to develop, refine, and adapt policies and procedures relating to evaluation and service delivery in this unique climate caused by the ever-evolving public health crisis.

10. Because COVID-19 infection rates in New York State and New York City had decreased by the end of May to sustained acceptable levels, the Governor loosened some of the

restrictions imposed on all New York schools, including City schools, for the summer of 2020.

See Executive Order 202.37.

<https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO202.37-new.pdf>.

11. This past summer, we were able to provide in-person related services to students with IEP recommendations for extended school year services (i.e., 12-month educational programs) including related services, where parents opted for in-person related services. Given the extensive safety issues involved in fully opening schools for instruction, we made the decision to utilize remote instruction this summer for students with 12-month IEPs. By contrast, related services are provided in a one-to-one or small group setting and could be safely accommodated more readily.

12. In anticipation of the possibility of reopening schools for some level of in-person learning, which was finally authorized by Executive Order 202.60, the DOE has been planning how teaching and learning will be implemented to account for the need for the safety of students and staff. Our experiences in Spring and Summer 2020, have informed our decisions about the education options that can safely be offered to the City's school children for the 2020-2021 school year, including our students with disabilities. Given the need to maintain at least six feet of social distancing between individuals in school settings, the DOE determined that it could not reopen schools for all students to attend on a full-time basis. The DOE established various models for schools to provide in-person instruction, generally based on whether one-half or one-third of the students could safely attend at one time. Depending on the capacity of the classrooms in the school, students who opted for in-person learning generally would be eligible to attend either five days out of every fifteen school days or five days out of every ten schooldays. On the remaining school days, they would receive remote learning. Different models were also

developed for District 75, recognizing that the smaller class size of its classes might allow for more students to attend on a more frequent or full-time basis. Each principal was required to select a model for their school. Schools were also permitted to submit requests for exceptions to the established models, each of which was individually reviewed. Any plans had to account for the need to maintain a minimum of six feet of social distancing and cleaning of classrooms on a regular basis. The models are explained at <https://www.schools.nyc.gov/school-year-20-21/return-to-school-2020/school-schedules>. Beginning in August, parents of all DOE students were contacted and afforded the opportunity to opt into full-time remote instruction. If a parent did not opt into full-time remote instruction, the student was scheduled for blended instruction (a mix of in-person and remote instruction). At this point, 42% of all families have opted for 100% remote instruction. The remaining families have been scheduled for blended learning. In terms of families of students with disabilities, 42.6% have opted for 100% remote instruction; while 57.4% have opted for or been assigned to blended learning. A child who is slated for blended learning can move at any time to 100% remote instruction, but the reverse can occur only at specified times during the school year.

13. For those students with disabilities whose families opt for blended learning, DOE schools will be providing special education programs and services according to each student's IEPs to the extent feasible through the DOE's blended learning models. These models include an in-person instructional component in school buildings and a remote component, generally composed of synchronous (i.e., in-person classroom instruction or live video instruction that permits interaction between the teacher and students) and asynchronous instruction (i.e., student directed projects, recorded lessons, etc.). Related services for these students will be provided both in-person and remotely. For students whose families have opted for remote learning only, DOE

will provide special education programs through a combination of synchronous and asynchronous instruction. Related services will largely be provided remotely, as they were done in the spring, although depending on demand and provider availability, some students may be able to receive in-person related services, if that is the family's preference. To ensure the health and safety of students with disabilities and those providing special education services, we have released detailed information concerning the protocols for delivery of in-person services and special education assessments. In addition, all teachers will have daily office hours during which students and Parents may discuss school work, the student's progress, and other issues of concern. Information on how students with disabilities will be educated this fall can be found at: <https://www.schools.nyc.gov/learning/special-education/special-education-in-blended-and-remote-settings>.

14. For certain students with more significant disabilities (i.e., students with severe autism with IEP recommendations for classes with particularly low student to staff ratios, e.g., six students to one special education teacher to one paraprofessional), in District 75 schools, we recognized that the small class size afforded the possibility for these students to access more days of in-person learning. Where classrooms are large enough to permit social distancing by students and staff, schools could permit these students to attend in person for 100% of the school day in a school building. Prioritizing a return to full-time, in-person learning for these small, intensive classes also makes sense because the students in these classes are among our highest need students and may have greater difficulty continuing to make meaningful educational progress in a remote environment than their peers, disabled or otherwise. Indeed, although the DOE has just announced a phased in approach for students to begin attending school in-person, District 75 schools are included in the first cohort, to start in-person instruction on Monday, September 21, 2020.

15. We hope to slowly and carefully enhance our blended learning opportunities as the school year progresses. This will, of course, be dependent on the rate of infection in the City and the ability to avoid outbreaks in school buildings.

16. Documentation of our blended learning and remote learning models is a key component of our approach to family engagement. To that end, schools will document and communicate to parents of students with disabilities how students' special education programs and services will be provided in-person and remotely during blended learning, including among other things, the delivery of any recommended related service, assistive technology, or paraprofessional support.

17. As we did in the spring, we have developed new forms to document and tailor the special education services offered to students with disabilities and capture parental preferences and input. They are the Special Education Program Adaptation Document ("PAD") and the Related Services Adaptation Document ("RAD"), for special education and related services respectively. I note that neither document changes the student's IEP. A sample PAD is annexed as Exhibit C.

18. Beginning last week, DOE staff have been reaching out to families of students with disabilities to discuss the instructional service choice (i.e., remote or blended instruction) made by the family and its ramifications, and the mode(s) of service delivery that will be utilized to provide the various components of the child's special education program. Finalization of the PAD and RAD require the DOE-parent discussion explained above, or three documented attempts to reach the family on at least two different days. This exceeds the IDEA's standards, which allow IEP team meetings to proceed without a parent who cannot be contacted after two attempts at outreach.

19. Additionally, DOE's Special Education Student Information System (SEGIS), our computer system for helping us manage the provision of special education in our schools, will be

used to record services offered and communications with parents regarding students' services during this time, and SESIS and other systems will be used to record service delivery.

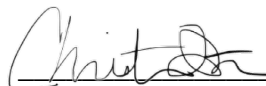
20. Although the issue was not raised in this litigation, I further note that schools will utilize NYCDOE's language supports to ensure communications are assisted by an interpreter, as needed, and materials are available to parents in their preferred language (for the nine most common languages other than English used by parents). NYCDOE has made available information for families on our website about how special education programs and services can be provided and how special education processes (e.g., evaluations and IEP meetings) can be conducted during this time, and the website is and continues to be updated and is available in languages other than English.

21. In addition, my division, the Division of Specialized Instruction and Student Support, has held a number of family webinars through its Beyond Access Series on topics relating to special education and remote learning. We will continue to hold these events as we move into blended learning to ensure parents have ready access to information regarding special education. We also regularly update the DOE's public-facing website to provide up-to-date information to parents about the provision of special education programs, services and supports.

22. Finally, families have a number of options available to have their IEPs revised to address students' current needs. They can request a review of the child's IEP, and the IEP team will hold an IEP meeting remotely to consider the parents' concerns and appropriate recommendations. If the most recent assessments of the child's disability no longer adequately address current concerns, the parent can request a reevaluation of the student, which DOE will perform. In both cases, an IEP meeting will be held and a discussion will take place about updating the IEP, to ensure that the student's needs are properly identified and that appropriate programs

and services are recommended, to meet those needs. And of course, while parent input is always considered and consensus sought whenever possible, a parent may utilize IDEA's administrative processes if there is a disagreement with the DOE's decisions. However, the foundation of the IDEA is that all decisions must be based on an individualized determination of each student's needs. Awarding vouchers or funding for privately provided services or tuition without a showing that DOE has failed to offer the student a FAPE is unfair and contrary to the IDEA scheme. For all these reasons, therefore, Plaintiffs' request for preliminary injunctive relief should be denied.

Dated: September 18, 2020
Brooklyn, New York



Christina Foti
Deputy Chief Academic Officer
Division of Specialized Instruction and Student Support
New York City Department of Education