UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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RAY M., a minor under the age 21 years, by his mother JUANA D.; JACKEY S., a minor under the age 21 years, by his mother YIN JIANG S.; MIGUEL F., a minor under the age 21 years, by his mother ANATALIA F.; JOSE P., a minor under the age 21 years, by his mother EVELYN Q.; KATIE B., a minor under the age 21 years, by her mother CARRIE B.; ANGEL C., a minor under the age 21 years, by his mother MARGARITA V.; BENJAMIN L., a minor under the age 21 years, by his mother ANGELA L.: individually and on behalf of themselves and all other persons similarly situated,

Plaintiffs,

-against-

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK; RAMON CORTINES, Chancellor of the Board of Education of the City School District of the City of New York; HOWARD S. TAMES, Executive Director of the Division of Special Education of the Board of Education of the City School District of the City of New York; NEW YORK STATE EDUCATION DEPARTMENT; THOMAS SOBOL, Commissioner of Education of the State of New York; NEW YORK CITY TRANSPORTATION DEPARTMENT; and MARIO M. CUOMO, Governor of the State of New York,

Defendants.

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CIVIL NO. ___

CLASS ACTION
COMPLAINT

I

PRELIMINARY STATEMENT

1. Plaintiffs, preschool children with disabilities who reside in New York City, aged three through five, bring this class action against, the Board of Education of the City School District of the City of New York, Chancellor Ramon Cortines, Division of Special Education Executive Director Howard Tames, the New York State Education Department, New York State Education Commissioner Thomas Sobol, the New York City Department of Transportation, and Governor Cuomo. All individuals are sued in their official capacity. Plaintiffs seek declaratory and injunctive relief to redress defendants' violations of plaintiffs' right to a free appropriate preschool public education in the least restrictive environment that meets their individual needs, including language needs, as guaranteed by federal and state statutes and the regulations promulgated thereunder.

II

JURISDICTION

2. Jurisdiction is conferred upon this Court by the Individuals with Disabilities Education ACT ("IDEA"), 20 U.S.C. § 1400-1485, 42 U.S.C. § 1983, and 28 U.S.C. §§ 1331 and 1343(a)(3) and (4). Plaintiffs' claims for declaratory relief are authorized by 28 U.S.C. §§ 2201 and 2202, and Rule 57 of the Federal Rules of Civil Procedure.

3. This Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over plaintiffs' claims of violations of the New York Education Law §§ 4401-4410 guaranteeing plaintiffs' right to a free appropriate preschool public education in the least restrictive environment.

III

PARTIES

Named Plaintiffs

4. Plaintiff RAY M., age four, lives in New York City. Ray M. is Latino. He speaks Spanish and is limited English proficient (hereinafter referred to as a "LEP" child). The consent for evaluation form for Ray M. was completed on February 1993. In April 1993, Ray M. was determined to need bilingual speech therapy services, but defendants have not yet provided these services to him. Ray M. will age-out of the preschool program in September 1994.

5. Plaintiff JACKEY S., age five, resides in New York City. Jackey S. is Chinese and is a Cantonese-speaking LEP child. The consent for evaluation form for Jackey S. was completed in February 1993. In May 1993, he was recommended and approved for bilingual speech therapy services, but defendants have not yet provided him with appropriate bilingual speech therapy services. Jackey S. will age-out of the preschool program in September 1994.

6. Plaintiff MIGUEL F., age five, lives in New York City. Miguel F. is Latino and is a Spanish-speaking

LEP child. The consent for evaluation form for Miguel F. was completed in October 1993 and, in December 1993, Miguel F. was determined to need full-time bilingual preschool special education services and intensive bilingual speech therapy. Defendants, however, have not yet provided the authorized services. Miguel F. will age-out of the preschool program in September 1994.

7. Plaintiff JOSE P., age four, lives in New York City. The consent for evaluation form for Jose P. was completed in October 1993 and, in January 1994, Jose P. was approved for speech and language therapy twice a week, individual counseling twice a week, and special education itinerant services. Jose P. did not start speech therapy until the first week in March 1994, and he has yet to receive counseling services. Jose P. will age-out of the preschool program in September 1994.

8. Plaintiff KATIE B., age three, resides in New York City. The consent for evaluation form for Katie B. was completed in February 1993. In May 1993, Katie B. was determined to need speech therapy, physical therapy and counseling. In July 1993, Katie B. was placed in a self-contained special education program, even though the CPSE, in concert with Katie B.'s parents, agreed that Katie B. should have been placed in an integrated program. Further, Katie B. did not receive physical therapy and counseling services until October 1993.

9. Plaintiff ANGEL C., age three, resides in New York City. The consent for evaluation form for Angel C. was completed in August 1993 and, in October 1993, Angel C. was determined by the CPSE to need speech therapy services twice a week. Angel C. has not yet received these approved special education services.

10. Plaintiff BENJAMIN L., age three, resides in New York City. The consent for evaluation form for Benjamin L. was signed on or about January 11, 1993. In May 1993, Benjamin L. was determined to need a full time center-based preschool program and, because of his fragile condition, he was authorized to receive transportation to and from the preschool program in an ambulette. Benjamin L., however, did not receive transportation services until September 1993 and in February 1994, the transportation services were discontinued, depriving him of his educational and related services.

Defendants

11. Defendant BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK ("Board of Education") is responsible for the municipal public education system, including special education services. The Board of Education receives federal funds under IDEA and must therefore comply with the requirements of IDEA. The Board of Education was at all relevant times acting under color of state law.

12. Defendant RAMON CORTINES is the Chancellor of the defendant Board of Education. He is responsible for the general management and supervision of the municipal public education system, including special education services. Chancellor Cortines was at all relevant times acting under color of state law.

13. Defendant HOWARD S. TAMES is the Executive Director of the Division of Special Education of the defendant Board of Education. He is responsible for the management and supervision of the provision of special education services, including evaluations and recommendations for, and the provision of, special education services. Director Tames was at all relevant times acting under color of state law.

14. Defendant NEW YORK STATE EDUCATION DEPARTMENT ("State Education Department") is a recipient of federal funds under IDEA and is mandated by IDEA to ensure the administration of special education and related services to all children with disabilities between the ages of three and twenty-one who reside in the State of New York, including the disbursement of IDEA funds to local school districts. All allegations herein against the State Education Department relate to conduct affecting students in the New York City Public Schools. The State Education Department was at all relevant times acting under color of state law.

15. Defendant THOMAS SOBOL is the Commissioner of Education of the State of New York. Having been appointed

by the Board of Regents of the University of the State of New York, he is the chief administrative officer of the defendant State Education Department and, in that capacity, is responsible for the general management and supervision of the state public education system, including special education services. He is also responsible for securing the lawful exercise of all authority delegated to defendant Board of Education. Commissioner Sobol was at all relevant times acting under color of state law.

16. Defendant NEW YORK CITY DEPARTMENT OF TRANSPORTATION ("NYCDOT") has been designated by the municipality of New York City pursuant to New York State Education Law § 4410(8) as responsible for ensuring the appropriate transportation of children aged three through five requiring transportation to benefit from special education services. NYCDOT was at all relevant times acting under color of state law.

17. Defendant MARIO M. CUOMO, Governor of the State of New York, is responsible for enforcing the laws of the State of New York, including the New York State Education Law. Governor Cuomo was at all relevant times acting under color of state law.

18. All persons named as defendants are employed within the State of New York and are sued in their official capacities.

IV

CLASS ACTION ALLEGATIONS

19. Plaintiffs bring this action for declaratory and injunctive relief on behalf of themselves and all other similarly situated preschool children with disabilities. Plaintiffs' class consists of all preschool students with disabilities living in New York City, aged three through five, who are entitled to a free appropriate public education in the least restrictive environment, but who were not, have not been, or will not be timely and/or appropriately evaluated, recommended for, and/or provided appropriate special education services in the least restrictive environment that meet their individual needs, including language needs.

20. Plaintiffs meet all the prerequisites to maintenance of a class action set forth in Rules 23(a) and 23(b)(2):

(a) The class is so numerous that joinder of all members is impracticable. There are hundreds of preschool students in New York City who are disabled, and who did not, have not, or will not receive timely, appropriate evaluations, recommendations, and/or preschool special education services in the least restrictive environment that meet their individual needs, including language needs. The exact number of preschool students with disabilities is unknown to plaintiffs, but should be known to defendants. Moreover, the class includes the hundreds of children with

disabilities who in the near future will be subject to defendants' policies that systematically violate federal and state statutory requirements during the short time span in which these preschool special education services must be provided.

(b) There are questions of law and fact common to the class, such as whether defendants' repeated and continuing failure to timely and appropriately evaluate, recommend, and provide plaintiffs with appropriate preschool special education services in the least restrictive environment that meet their individual needs, including language needs, denies plaintiffs a free appropriate public education.

(c) The claims of the representative plaintiffs are typical of the claims of the class. Each named plaintiff has been determined to have a disability under IDEA § 1401(a)(1)(A); each named plaintiff has been recommended and approved for preschool special education services; and each named plaintiff has not been provided timely and/or appropriate preschool special education services. In addition, the named plaintiffs' claims arise from the same course of conduct by defendants -- the repeated and continued failure to provide timely and/or appropriate special education services.

(d) Plaintiffs will fairly and adequately protect the interests of the class. As preschool students with disabilities, the named plaintiffs have a personal interest

in issues of public education for preschool students with disabilities in New York City, and counsel for plaintiffs knows of no conflicts of interest among class members. Plaintiffs also are represented by counsel experienced in litigation concerning civil rights in general and education rights in particular.

(e) Defendants have acted, with regard to preschool public education, on grounds generally applicable to the plaintiff class, thereby making appropriate final preliminary injunctive relief or corresponding declaratory relief with respect to the class as a whole.

21. In addition to meeting the requirements of Rule 23, a class action is necessary in this case to avoid problems of mootness during the course of litigation and to insure future enforceability of judgment for plaintiffs.

22. Because of the extremely short time-frame during which plaintiffs are entitled to receive preschool special education services, named plaintiffs may age-out of the preschool population before this litigation is completed. Additionally, defendants may provide appropriate preschool services to all named plaintiffs, thus mooting their individual cases, yet continue with a pattern and practice that consistently violates the law -- namely, excessive delay and/or inappropriate, overly-restrictive policies and practices in evaluation, recommendation, and provision of special education services to children with disabilities.

V

STATUTORY SCHEME

Individuals with Disabilities Education Act

23. The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1485, and the regulations promulgated thereunder, provide children with disabilities a substantive right to a "free appropriate public education," in the least restrictive environment, in those states that receive federal assistance provided under IDEA. 20 U.S.C. § 1400(c); 34 C.F.R. §§ 300.550 - 300.556.

24. The State Education Department and the Board of Education receive funds appropriated under IDEA and, therefore, are subject to its requirements. See 20 U.S.C. § 1419(b).

25. IDEA defines "children with disabilities" as children with "mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and who, by reason thereof, need special education and related services." 20 U.S.C. § 1401(a)(1)(A).

26. IDEA defines "free appropriate public education" to mean "special education and related services that . . . have been provided at public expense, under public supervision and direction, and without charge" and that "include an appropriate preschool, elementary, or

secondary school education in the State involved . . . provided in conformity with the individualized education program . . . ." 20 U.S.C. § 1401(a)(18) (emphasis added).

27. IDEA defines "special education" as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings." 20 U.S.C. § 1401(a)(16)(A).

28. IDEA defines "related services" as "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling; and medical services . . .) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children." 20 U.S.C. § 1401(a)(17).

29. The term "individualized education program" includes, inter alia, "a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular education programs . . . ." 20 U.S.C. § 1401(a)(20).

30. In order to receive federal assistance under IDEA, each State must develop a plan that assures a free appropriate public education to all children with disabilities, aged three through twenty-one. 20 U.S.C. § 1412(2)(B). The plan must, inter alia, delineate a comprehensive system of personnel development in connection with the program. The plan must include a description of the procedures and activities the State will undertake to ensure an adequate supply of qualified special education and related services personnel and a description of the procedures and activities the State will undertake to ensure that all personnel are appropriately and adequately prepared. 20 U.S.C. § 1413(a)(3)(A) and (B).

31. In connection with that plan, the State must establish "procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities will be selected and administered so as not to be racially or culturally discriminatory" and that the "materials or procedures shall be provided and administered in the child's native language or mode of communication . . . ." 20 U.S.C. § 1412(5)(C).

32. The State must also establish procedures to assure that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled, and that 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 is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.550.

33. The State plan must ensure that children with disabilities in private schools and facilities will be provided special education and related services at no cost to their parents, if such children are placed in or referred to such schools as the means of carrying out the requirements of IDEA. 20 U.S.C. § 1413(a)(4)(B)(i).

34. The State must also demonstrate that the State educational agency is responsible for assuring that these requirements are carried out by the State or local education agency. 20 U.S.C. § 1412(6).

New York Education Law

35. New York Education Law §§ 4401-4410 require the State and the City of New York to provide a free appropriate preschool special education, in the least restrictive environment, for children with disabilities. Regulations promulgated by the Commissioner of Education, pursuant to New York State Education Law §§ 4401-4410 and in accordance with the requirements of IDEA, specify methods, procedures and criteria, with accompanying timetables, to ensure that each child with a disability is provided a free appropriate public education. 8 N.Y.C.R.R. §§ 200.1 - 200.20.

36. The New York Education Law further requires that a Committee on Preschool Special Education ("CPSE") be established in each New York City school district to coordinate the process of assuring that preschool children with disabilities residing in its district receive a free appropriate public education in the least restrictive environment. N.Y.E.L. §§ 4410(3),(4),(5); 8 N.Y.C.R.R. § 200.16.

37. Upon receipt of a written referral indicating that a student is suspected of having an educationally disabling condition, New York Education Law requires the CPSE to immediately issue the parent a Notice of Preschool Referral, a Notice of Parental Due Process Rights in the parent's dominant or preferred language, the approved list of evaluation sites/preschool providers, and the Consent for Initial Preschool Evaluation. (Parent or legal guardian will hereinafter be referred to as "parent"). If the parent consents to have the student evaluated, s/he must choose an evaluation site from the official list of approved evaluators. N.Y.E.L. § 4410(4); 8 N.Y.C.R.R. § 200.16(b). Currently in New York, only preschool program providers are approved to conduct evaluations. N.Y.E.L. §§ 4410(1)(a) and (9)(b); 8 N.Y.C.R.R. § 200.16(g)(2)(i).

38. The New York Education law further requires that within 30 school days of the parent's consent, the evaluation site must conclude a multidisciplinary assessment and develop an Individualized Education Plan ("IEP")

identifying appropriate services for the student that meet the student's individual needs, and address the manner in which the preschool student can be provided with instruction in the least restrictive environment. N.Y.E.L. § 4410(4). Furthermore, the school districts must ensure that tests and other assessment procedures are administered in the student's dominant language and so as not to be racially or culturally discriminatory. 8 N.Y.C.R.R. §§ 200.4(b)(14), 200.1(ee), 200.16(c)(2).

39. The New York Education Law further requires that the CPSE schedule a Preschool Special Education Review Meeting to be held within 30 school days of the original parental consent, N.Y.E.L. § 4410(3); 8 N.Y.C.R.R. § 200.16(d), and that the CPSE provide a written report of the recommendation, including the results of the evaluation, to the Board of Education, the parent and the municipality regarding the eligibility for services and recommended services, including the extent to which the preschool student will participate in programs in the least restrictive environment appropriate to the student, within 30 school days of the date of receipt of the parental consent. 8 N.Y.C.R.R. § 200.16(d).

40. The New York Education Law and Commissioner's Regulations define available service options to include special classes; in-state residential programs; or related services and/or itinerant services of a certified special education teacher to be provided at an approved or licensed

prekindergarten or head start program, the work site of the provider, the student's home, a hospital, a state facility, or a child care location. N.Y.E.L. §§ 4410(1)(j), (k), 4410(5)(b); 8 N.Y.C.R.R. § 200.16(h).

41. The New York Education Law further requires that, upon receipt of the recommendation, the Board of Education arrange for the preschool student with a disability to receive the recommended programs or services no later than 30 days from the recommendation of the CPSE. N.Y.E.L. §§ 4410(5)(b),(e); 8 N.Y.C.R.R. § 200.16(e)(i).

42. The New York Education Law provides that if a parent disagrees with the CPSE's recommendation, the parent can request a hearing before an Impartial Hearing Officer ("IHO"). N.Y.E.L. § 4410(7). Once the hearing has been conducted, the IHO must render a decision within 30 days after receipt by the Board of Education of a request for a hearing or after the initiation of such a hearing. If the parent disagrees with the decision of the IHO, s/he may appeal to the New York State Review Office, and that state agency must render a decision not later than 30 days after receipt of the request for review. N.Y.E.L. §§ 4410(7)(b),(d).

43. The New York Education Law provides that the municipality in which a preschool child resides must provide, either directly or by contract, suitable transportation, beginning with the first day of delivery of special education services, up to 50 miles to and from

special services or programs. The municipality of a city with a population of one million or more may delegate the authority to provide such transportation to board of education. N.Y.E.L. § 4410(8).

Title VI of the 1964 Civil Rights Act

44. Title VI of the 1964 Civil Rights Act ("Title VI"), 42 U.S.C. § 2000d, provides that:

> no person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

45. The federal regulations implementing Title VI prohibit a State from directly or through contractual or other arrangements "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program . . . ." 45 C.F.R. § 80.3(b)(2).

46. Title VI and its implementing regulations, therefore, require defendants to provide bilingual-bicultural evaluations and preschool special education services to Latino, Asian and other minority children.

42 U.S.C. § 1983

47. 42 U.S.C. §198 ("Section 1983" provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

48. Section 1983 provides a federal cause of action for violations of federal rights, and Section 1983 may be used to remedy constitutional and federal statutory violations by state agents.

VI

FACTUAL BACKGROUND

Systemic Violations in the Provision of Special Education Services

49. Plaintiff class members are entitled to a free appropriate preschool public education in the least restrictive environment that meet their individual needs, including language needs. However, as a result of defendants' pervasive, entrenched patterns and practices, hundreds of preschool children were, have been, or will be, denied such special education services. Some plaintiffs have not received any of the special education services. Other plaintiffs have or will receive: (i) special education

services only after considerable delay; (ii) inappropriate special education services; and/or (iii) special education services in the most restrictive environment. These systemic, pervasive violations by defendants have irreparably harmed named plaintiffs and will continue to irreparably harm present and future class plaintiffs.

Delays in Evaluation and Provision of Services

50. As required by § 1413(a)(11) of IDEA, the State Education Department's Office for Special Education Services has conducted compliance audits of CPSE practices. Upon information and belief, these audits have uncovered systemic procedural defects, lengthy delays, and inappropriate recommendations which have resulted in the failure of defendants to provide plaintiffs with a free appropriate public education in the least restrictive environment that meet their individual needs, including language needs.[1]

(a) Numerous preschool students are waiting to be evaluated well in excess of the state-mandated maximum period of 30 days. The actual delay in many instances is considerably longer due to defendants' pattern and practice of requiring the parent to find first a proper evaluation

[1] Plaintiffs allege certain facts based upon information and belief. Plaintiffs believe and hereby allege that each fact so identified is likely to have evidentiary support after plaintiffs are given a reasonable opportunity for further investigation through discovery.

site before having the parent sign the consent for evaluation form.

(b) Hundreds of preschool students have been approved for special education services, but are waiting to receive such services. The majority of these students have been waiting to be placed well in excess of the state-mandated period of 30 days.

51. Representatives of the State Education Department are aware that the Board of Education has failed to meet the mandated time-lines related to evaluations and provision of services that meet the students' language needs and that are in the least restrictive environment. Despite awareness of these failures, the State Education Department has not compelled the Board of Education to comply with the applicable statutory requirements.

52. Currently, New York State statutory restrictions allow only preschool program providers to conduct evaluations. N.Y.E.L. §§ 4410(1)(a) and (9)(b). This limitation unnecessarily restricts the availability of qualified evaluators and also creates an inherent conflict of interest for program providers. As a result, many students wait in excess of the state-mandated 30 days to be evaluated, and/or are not evaluated by a bilingual clinician where necessary, and/or are recommended for self-contained, segregated, center-based programs -- often the program of the provider performing the evaluation -- when such

restrictive settings are not necessary to meet the individual needs, including language needs, of the child.

LEP Students

53. Defendants' systemic, pervasive violations are more acute for students who are LEP:

(a) A disproportionate number of Latino, Asian and other minority students who are LEP are and have been waiting for evaluations in excess of the state-mandated 30 days. This violates Title VI and its implementing regulations. 42 U.S.C. § 2000d; 45 C.F.R. § 80.3(b)(2). This disproportionate violation with respect to Latino, Asian and other minority students who are LEP has a long history, and will continue in the future.

(b) Numerous preschool students who are LEP can be evaluated appropriately only through the use of bilingual personnel. Because of state legislation limiting potential evaluation sites, the resources presently utilized by defendants are not sufficient to meet the particular needs of the plaintiff class students who are LEP. As a result, numerous preschool students who are LEP are being evaluated inappropriately through the use of monolingual clinicians, or through the use of untrained translators, in violation of IDEA and state law regulations that require the evaluation to be conducted in the student's native language. 20 U.S.C. § 1412(5)(C), 8 N.Y.C.R.R. §§ 200.4 (b)(14), 200.1(ee), 200.16(c)(2).

(c) Numerous preschool students who are LEP have been evaluated and determined to be in need of bilingual-bicultural preschool special education services, but are receiving inappropriate English-only preschool special education services or no services at all.

(d) Once a parent is referred to the CPSE, the CPSE sends the parent a list of approved evaluation sites. The list of approved evaluation sites does not indicate whether an evaluation site can conduct evaluations in any language other than English. As a result, students who are LEP are especially likely to suffer delays in the provision of services because the inability of the evaluation site to conduct a bilingual evaluation often is not determined until the day of the scheduled evaluation. This forces the parent to reschedule the evaluation to some point in the future.

(e) Upon information and belief, numerous evaluations of students who are LEP are conducted through the use of a translator on the same day that the consent for evaluation form is signed, without any attempt to locate or secure the services of a bilingual evaluator. As a result, in many instances when a bilingual evaluator is required, the CPSE does not fulfill its obligation to seek and to obtain an appropriate bilingual evaluator.

(f) Upon information and belief, when defendants cannot find a self-contained program that fits the needs of an individual student, defendants also generally fail to provide the student with related services even though such

services have been recommended and would benefit the student. This failure is more acute for students who are LEP.

54. State Education Department representatives are aware that the current program providers do not seek to utilize sufficient bilingual special education services to meet current needs. Nevertheless, the State Education Department has not compelled the Board of Education to establish and implement procedures and practices designed to meet those needs and to comply with statutory requirements.

Least Restrictive Environment

55. Upon information and belief, the majority of preschool students with disabilities receive either related services only or are placed in self-contained, center-based, segregated preschool programs offering few, if any, opportunities to interact with non-disabled students. These same children with disabilities are typically not first considered for fully-integrated preschool programs that provide related services and support as required by law. This violates IDEA and New York State Education Law provisions that require procedures to assure that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should occur only when the nature or severity of the disability is such that education in regular classes

with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.550; 20 U.S.C. § 1412(5)(B); N.Y.E.L § 4410(4)(c).

56. The State Education Department has refused to order local education agencies to initiate alternative method(s), at no charge to parents, to comply with the least restrictive environment requirements of state and federal law. Such methods may include but are not limited to: (i) providing opportunities for the participation (full or part-time) of preschool children with disabilities in other preschool programs operated by public agencies (such as Head Start); (ii) placing preschool children with disabilities in private school programs for non-disabled preschool children or private school programs that integrate children with disabilities and non-disabled children; and (iii) locating classes for preschool children with disabilities in regular elementary schools to increase opportunities for educational interaction between children with disabilities and children without disabilities. 20 U.S.C. § 1412(5)B; 34 C.F.R. § 300.552.

Transportation

57. The New York City Department of Transportation, designated by the municipality of New York City to provide transportation services pursuant to the New York Education Law, has implemented practices that unnecessarily delay the provision of transportation services to eligible preschool children and thus delay the provision

of any appropriate special education services to such children.

58. Further, the New York City Department of Transportation has refused to comply with individualized education plans and impartial hearing officer decisions mandating the provision of transportation services as of the first day of provision of any special education service.

Effect of Systemic Violations on Named Plaintiffs

59. Defendants' policies and practices have deprived each of the named plaintiffs of his or her right to a free appropriate preschool special education in the least restrictive environment that meet their individual needs, including language needs.

60. Plaintiff Ray M. is Latino and is a Spanish-speaking LEP child. Juana D., Ray M.'s mother, completed the consent for evaluation form on February 2, 1993, and Ray M. was evaluated on that same day. The CPSE review meeting was not held until April 5, 1993, approximately two months from the date of parental consent. The CPSE recommended itinerant teacher services and bilingual speech therapy twice a week, but the Board of Education did not approve these services until May 24, 1993, causing a delay of six additional weeks. Despite the CPSE's determination that Ray M. needed bilingual speech services, the initial contract for the provision of speech services specified monolingual services. No bilingual services have yet been provided. Over one year from the date of consent, Ray M. still has not

received bilingual speech therapy services. Defendants have denied and continue to deny Ray M. an appropriate preschool special education that meet his needs. This failure is the direct result of defendants' pattern and practice of not hiring, training or utilizing sufficient numbers of bilingual evaluators and educational personnel. Defendants' policies of delay may have irreparably harmed the mental and emotional development of Ray M. Moreover, Ray M. will age-out of the program in September 1994 and defendants have significantly increased the likelihood that Ray M. will be recommended for a segregated self-contained special education class upon entering the public school system.

61. Plaintiff Jackey S. is Chinese, and is a Cantonese-speaking LEP child. Yin Jiang S., Jackey S.'s mother, signed a consent for evaluation form on February 18, 1993; Jackey S. was evaluated on that same day. Although Jackey S.'s native language is Cantonese, Jackey S. was evaluated, in part, in English through the use of a translator. The Summary of Evaluation form was not completed until April 1, 1993; the review meeting was not held until May 11, 1993; and the approval to receive services was not issued until June 30, 1993, well over four months from the date of consent. The CPSE recommended and the Board of Education approved bilingual speech therapy two days per week. Despite the recommendation, no services were provided. An impartial hearing was scheduled for January 26, 1994, but the hearing was postponed after the CPSE

indicated that a Cantonese-speaking evaluator had been located. Unfortunately, the evaluator located by the CPSE spoke Mandarin, not Cantonese. After this error was brought to the CPSE's attention, the CPSE indicated that a proper evaluator had been found. However, still no services have been forthcoming. Despite the CPSE's representations and despite invocation of the administrative hearing process, it has been over one year since the date of parental consent and Jackey S. has not yet received any bilingual speech therapy services. Defendants have denied and continue to deny Jackey S. timely, appropriate special education services. This failure is the direct result of defendants' pattern and practice of not hiring, training or utilizing sufficient numbers of bilingual evaluators and educational personnel. Defendants' policies of delay may have irreparably harmed the mental and emotional development of Jackey S. Jackey S. will age-out of the program in September 1994 and defendants have significantly increased the likelihood that Jackey S. will be recommended for a segregated self-contained special education class upon entering the public school system.

62. Plaintiff Miguel F. is Latino and is a Spanish-speaking LEP child. The parental consent for evaluation form was completed October 7, 1993. Miguel F. was evaluated on that same day. At the review meeting held on December 27, 1993, the CPSE determined Miguel F. needed full-time bilingual preschool special education services and

intensive bilingual speech therapy. However, the IEP developed at this same review meeting failed to consider whether Miguel F.'s needs could be met in a full-time general education preschool program, provided at Board of Education expense, through the use of supplementary aids and services. Further, despite the CPSE's determination that Miguel F. needed a full-time, bilingual program, Miguel F. was referred to a full-time monolingual program with a bilingual para-professional. It has been over five months since the date of consent, and Miguel F. has yet to be placed in an appropriate, full-time bilingual preschool special education program; nor has he been provided intensive bilingual speech therapy or bilingual counseling. Defendants have denied, and continue to deny, Miguel F. an appropriate preschool special public education that meet his special needs, as mandated by federal and state statutes. This failure is the direct result of defendants' pattern and practice of not hiring, training or utilizing sufficient numbers of evaluators and education personnel. Defendants' policies of delay may have irreparably harmed the mental and emotional development of Miguel F. He will age-out of the preschool program in September, 1994. Defendants' conduct has significantly increased the likelihood that Miguel F. will be recommended for a segregated self-contained special education class upon entering the public school system.

63. Jose P. is Latino. Evelyn Q., Jose P.'s mother, signed the parental consent for evaluation form on

October 18, 1993, and Jose P. was evaluated on that same day, as well as several other days. The CPSE review meeting to determine the need for services was not held until January 4, 1994, over 30 days from the date of parental consent. At that meeting, the CPSE determined that Jose P. needed speech and language therapy twice a week, individual counseling twice a week, and special education itinerant services. Notwithstanding this recommendation, the CPSE attempted to pressure Evelyn Q. to place Jose P. in a full-time, special education program. Evelyn Q. refused. On January 14, 1994, the Board of Education approved the recommended services. Itinerant services finally commenced on or about January 18, 1994. Speech therapy services, however, were not started until the first week of March 1994, and to date no counselling services have been provided to Jose P. Defendants have denied and continue to deny Jose P. appropriate preschool special education services that meet his special needs as mandated by federal and state law. This failure is the direct result of defendants' pattern and practice of not hiring, training or utilizing sufficient numbers of evaluators and education personnel. Defendants' policies of delay may have irreparably harmed the mental and emotional development of Jose P. Jose P. will age-out of the preschool program in September 1994 and defendants' conduct has significantly increased the likelihood that Jose P. will be recommended for a segregated self-contained

special education class upon entering the public school system.

64. Plaintiff Katie B., age three, has a cleft lip and palate, a speech problem, hypotonia and arrested hydrocephalus. On February 16, 1993, Katie B.'s mother, Carrie B., signed a parental consent form to have Katie B. evaluated, and she was evaluated on February 16, 17 and 24, 1993. The CPSE review meeting was held on May 26, 1993, over three months from the date of Carrie B.'s consent. At the review meeting, the CPSE recommended that Katie B. receive speech therapy twice a week, physical therapy twice a week and English language counseling once a week. The appropriate placement for Katie B. was in an integrated program, but none was available at the time. As a result, the CPSE did not recommend a program, leaving this part of Katie B.'s IEP incomplete, and the CPSE placed the burden of finding an integrated program or other appropriate program on the parents of Katie B. Unable to find an integrated program in Katie B.'s district, Katie B.'s parents were forced to enroll her in a self-contained special education program in July 1993 and Katie B. remains in that program. Katie B. started receiving speech therapy services in July 1993, but she did not receive any counseling services throughout the summer of 1993 and she received only one physical therapy session during that summer. It was not until October 1993 that Katie B. received physical therapy and counseling services on a regular basis. Defendants have

denied Katie B. her right to a free appropriate preschool education in the least restrictive environment, as mandated by law. This failure is the direct result of defendants' pattern and practice of not hiring, training or utilizing sufficient numbers of evaluators and education personnel. Defendants' policies of delay may have irreparably harmed the mental and emotional development of Katie B.

65. Angel C. is three years old and is Latino. Margarita V., Angel C.'s mother, signed the consent for evaluation form on August 4, 1993. On August 12, 1993, the East Bronx Day Care Center completed the evaluation of Angel C. On October 1, 1993, nearly two months from the date of parental consent, the CPSE held a review meeting, where it determined that Angel C. needed speech therapy services twice a week. On that same day, Margarita V. was provided with an "Awaiting Placement Notification" letter stating that, despite Angel C.'s need for such services, a final recommendation could not be made because no related service provider was available. In subsequent conversations with Margarita V., the CPSE informed her that they were unable to locate a provider who would be willing to provide services in the neighborhood in which Angel C. received mainstream preschool services. An impartial hearing was scheduled for March 2, 1994. The hearing, however, was postponed after the CPSE indicated that a service provider had been located and that services would start "soon." Despite the CPSE's representations and despite invocation of the administrative

process, it has been over seven months since the date of parental consent and Angel C. still has not received the required speech therapy services. Defendants have denied and continue to deny Angel C. free appropriate preschool special education services, in the least restrictive environment, as mandated by federal and state law. This failure is the direct result of defendants' pattern and practice of not hiring, training or utilizing sufficient numbers of evaluators and education personnel. Defendants' policies of delay may have irreparably harmed the mental and emotional development of Angel C.

66. Benjamin L. is three years old. He is orthopedically impaired, visually and audiologically impaired and mentally retarded. He also suffers from a seizure disorder and has hydrocephalus, requiring a shunt to be permanently placed in his skull to drain spinal fluid. Angela L., Benjamin L.'s mother, completed a consent for evaluation form in January 11, 1993 and Benjamin L. was evaluated. On May 9, 1993, nearly four months since the date of parental consent, the Hard of Hearing Vision Impaired CPSE determined that Benjamin L. needed a full-time segregated educational setting. The CPSE also determined that, because of Benjamin L.'s fragile physical condition, he required transportation to and from the preschool program in an ambulette with a registered nurse and a special seat. The transportation services, however, were not provided until September 1993, and only after Advocates for Children

of New York intervened and scheduled an administrative hearing. In February 1994, transportation services were terminated and, as a result, Benjamin L. is once again being deprived of his education program and related services. An impartial hearing was held on February 14, 1994. The hearing officer ordered the Board of Education to provide Benjamin L. with the appropriate transportation services. Despite invocation of the administrative hearing process and despite the order of the hearing officer, the Department of Transportation still has not provided Benjamin L. with the appropriate transportation services. Defendants have failed to provide Benjamin L. with a free appropriate public preschool education. This failure is the direct result of defendants' pattern and practice of not hiring, training or utilizing sufficient numbers of evaluators and education personnel. Defendants' policies of delay may have irreparably harmed the mental and emotional development of Benjamin L.

Futility of Exhaustion

67. Both IDEA and the New York Education Law provide administrative procedures by which plaintiffs can seek to perfect their right to a free appropriate preschool education in the least restrictive environment. However, these procedures are inadequate and futile in the instant circumstances.

68. Resort to the administrative process is futile because the administrative hearing officers, in many

if not most instances, cannot provide the relief requested. For example, administrative hearing officers cannot create integrated settings in which to place plaintiffs who require such settings. Furthermore, defendants have failed to hire, train and utilize adequate numbers of educational personnel to service the needs, including language needs, of the plaintiff class, in violation of federal and state law. Even where the administrative officer agrees that the sought-after services must be provided, s/he cannot mandate the provision of preschool special education services that many plaintiffs need and are entitled by law, but which do not exist, as a result defendants' pattern and practices of failing to hire, train or utilize sufficient numbers of education personnel. The educational personnel do not exist in the numbers needed by plaintiffs, and it is the lack of adequately trained personnel that in many instances creates the intolerable delays, leads to inappropriate evaluations, and leads to the provision of inappropriate services.

69. Further, defendants' pattern and practice of using the administrative hearing process as a tool to further delay provision of services makes resort to administrative hearings futile. When services are recommended but not provided, many parents request an impartial hearing. Before the hearing date, however, the parties often negotiate a settlement whereby defendants generally agree to provide the required services. Despite the agreement, defendants often fail to provide the services

entirely or provide the services only after further considerable delay. This pattern and practice has been used to delay services to two of the named plaintiffs in this case, Jackey S. and Angel F.

70. Upon information and belief, resort to the administrative process is also futile because of defendants' pattern and practice of not timely abiding by the orders of administrative hearing officers. For example, an administrative hearing officer ordered defendants to provide transportation services to Benjamin L. Despite this order, Benjamin L. still has not received appropriate transportation services.

71. Moreover, the administrative process is inadequate because otherwise eligible students will age-out of the preschool population before exhausting their administrative remedies, due to the extremely short time-frame during which plaintiffs are entitled to receive preschool special education services and the extreme delay that has accompanied the provision of services. For instance, four of the seven named plaintiffs, Ray M., Jackey S., Miguel F., and Jose P., will age-out of the preschool program in September of this year. Plaintiffs cannot perfect their rights by pursuing administrative remedies within the extremely brief window of opportunity available to them.

VII

CLAIMS FOR RELIEF

First Claim for Relief for Violation of Plaintiffs' Rights Under IDEA against All Defendants

72. Plaintiffs restate paragraphs 1-71, as if fully set forth herein.

73. By depriving plaintiffs of timely, free appropriate public preschool education programs and services, including transportation services, in the least restrictive environment that meet their individual needs, including language needs, defendants have violated plaintiffs' rights secured by IDEA, 20 U.S.C. §§ 1401-1485, and the regulations promulgated thereunder, 34 C.F.R. §§ 300.1 - 300.754.

Second Claim for Relief for Violation of Plaintiffs' Rights Under 42 U.S.C. § 1983 against the Board of Education, Chancellor Cortines, Executive Director Tames, Commissioner Sobol, NYCDOT and Governor Cuomo

74. Plaintiffs restate paragraphs 1-73, as if fully set forth herein.

75. By depriving plaintiffs of timely, free appropriate public preschool education programs and services, including transportation services, in the least restrictive environment that meet their individual needs, including language needs, defendants have violated plaintiffs' rights secured by IDEA, 20 U.S.C. §§ 1401-1485, and the regulations promulgated thereunder, 34 C.F.R. §§ 300.1 - 300.754, thereby violating 42 U.S.C. § 1983.

Third Claim for Relief for Violation of Plaintiffs' Rights Under Title VI against all Defendants

76. Plaintiffs restate paragraphs 1-75, as if fully set forth herein.

77. By failing to provide Latino, Asians and other minority preschool students with appropriate preschool special education programs and services in the least restrictive environment that meet their individual needs, including language needs, defendants prevent minority plaintiffs from effectively participating in the educational process to the same extent as English speaking students, and discriminate against these plaintiffs based on their national origin, in violation of Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, and its implementing regulations, 45 C.F.R. § 80.3 et seq.

Fourth Claim for Relief for Violation of Plaintiffs' Rights Under 42 U.S.C. § 1983 against the Board of Education, Chancellor Cortines, Executive Director Tames, Commissioner Sobol and Governor Cuomo

78. Plaintiffs restate paragraphs 1-77, as if fully set forth herein.

79. By failing to provide Latino, Asian and other minority preschool students with appropriate preschool special educational programs and services in the least restrictive environment that meet their individual needs, including language needs, defendants prevent minority plaintiffs from effectively participating in the educational process to the same extent as English speaking students, and

discriminate against these plaintiffs based on their national origin, in violation of Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, and its implementing regulations, 45 C.F.R. § 80.3 et seg., thereby violating 42 U.S.C. § 1983.

Fifth Claim for Relief for Violation of Plaintiffs' Rights under the New York State Education Law against the Board of Education, Chancellor Cortines, Executive Director Tames and NYCDOT

80. Plaintiffs restate paragraphs 1-79, as if fully set forth herein.

81. By denying plaintiffs timely, free appropriate special preschool education programs and services, including transportation, in the least restrictive environment that meet their individual needs, including language needs, defendants have violated the New York State Education Law §§ 4401-4410, and the regulations promulgated thereunder, 8 N.Y.C.R.R. §§ 200.1 - 200.20.

VIII

REQUEST FOR RELIEF

82. Plaintiffs request that this Court enter judgment:

(a) declaring that defendants' failure to promptly and appropriately evaluate and provide plaintiffs with appropriate preschool special education services in the least restrictive environment that meet their individual needs, including language needs, violates IDEA, 20 U.S.C. §§ 1401-1485, Title VI of the

1964 Civil Rights Act, 42 U.S.C. § 2000d, 42 U.S.C. § 1983, and the New York Education Law §§ 4401-4410, and enjoining continued violations of these provisions;

(b) declaring that the New York State statutory restriction that allows only preschool program providers to conduct evaluations, N.Y.E.L. §§ 4410(1)(a) and (9)(b), is violative of plaintiffs' rights under IDEA, 20 U.S.C. §§ 1401-1485, Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, and 42 U.S.C. § 1983, and conflicts with the New York State Education Law §§ 4401-4410, and enjoin enforcement of the statutory restrictions;

(c) requiring defendants to identify immediately those class plaintiffs who have not been provided timely and/or appropriate preschool special education services in the least restrictive environment that meet their individual needs, including language needs, and ordering defendants to immediately provide to the identified plaintiffs the appropriate preschool special education services guaranteed to them by law;

(d) requiring defendants to provide immediately compensatory special education services in those instances where future services will not remedy the harm already incurred, or where plaintiffs would otherwise age-out of the system before the harm incurred can be rectified,

to compensate for defendants' past conduct of failing to provide appropriate services;

(e) requiring defendants to design, to submit to plaintiffs and the Court for approval, and to implement an effective plan to assure that preschool children with disabilities in New York City will be timely and appropriately evaluated and/or provided appropriate preschool special education services in the least restrictive environment that meet their individual needs, including language needs. This necessitates a continuum of services that includes provision of related and/or itinerant services in conjunction with placement in a regular preschool, daycare or Head Start Center, at no cost to the parent, and that such children are not placed in segregated, self-contained center-based programs;

(f) appointing a Special Master to monitor defendants' implementation of the plan required by this order;

(g) retaining jurisdiction of this action for all purposes, including the entry of such additional orders as may be necessary or proper;

(h) requiring defendants to submit to counsel for plaintiffs and the Court regular periodic reports on the implementation of the plan;

(i) awarding plaintiffs reasonable attorneys' fees, costs and disbursements in this litigation; and

(j) granting plaintiffs such other and further relief as is just, proper and equitable.

Dated: New York, New York
March 11, 1994

DAVIS POLK & WARDWELL

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