UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LV, RC, AD, NA, ADJ, YG, LO, AP, RLB, RD, and JYW, individually; and VSG, HR, CW, SS, MG, MS, ST, RZ, MC, and JP, on behalf of themselves and all others similarly situated, Plaintiffs, v. NEW YORK CITY DEPARTMENT OF EDUCATION; NEW YORK CITY BOARD OF EDUCATION; Richard A. Carranza, in his individual and official capacity as Chancellor of the New York City School District, Defendant.	ECF CASE No. 03 Civ. 9917 (LAP) **REDACTED**

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PRELIMINARY STATEMENT

The New York City Department of Education (the "DOE")[1] has a long history of failing to provide students with disabilities the individualized, specialized educational services they need and deserve. In 2003, Plaintiffs sued the DOE for its systemic failure to implement Impartial Hearing Orders ("Orders") in a timely manner. In 2007, the DOE settled and voluntarily entered into a Stipulation and Agreement of Settlement that required it to improve the rate at which it implemented these Orders (the "Stipulation"). Under the Stipulation, Orders must be implemented within 35 days (unless the Order sets a different deadline for implementation) and the DOE must meet and maintain certain implementation performance benchmarks to exit the Stipulation. Since voluntarily entering the Stipulation, however, the DOE has consistently failed to meet even the first (and lowest) benchmark. The DOE also (i) refused to create a corrective action plan required by the Stipulation to prevent such repeated failures, (ii) denied responsibility for its shortcomings, and (iii) rejected virtually all of Plaintiffs' attempts to assist the DOE in finding solutions to their implementation problems.

Under the Stipulation, the DOE's failure to meet the benchmarks allows Plaintiffs to return to Court and seek any remedy Plaintiffs deem appropriate. In 2010, Plaintiffs moved for the appointment of a Special Master to identify the systemic changes that would be necessary for the DOE to meet the benchmarks and compel the DOE to take the steps necessary to meet the benchmarks.

When considering the 2010 motion, [redacted]

[redacted]

[1] Plaintiffs refer to the DOE alone among the defendants because it is the agency immediately charged with implementing Orders.

[redacted] In 2011, foreseeing the likely imminent appointment of a Special Master, the DOE created a new Orders Implementation Unit (the "Implementation Unit") that would purportedly allow the DOE to meet its benchmarks. The Court dismissed Plaintiffs' 2010 motion *without prejudice to renew* if the Implementation Unit did not produce the promised results. Eight years later, the DOE has still never met the third benchmark and is currently falling far short of the very first benchmark.

The DOE's timely implementation failures continue to impose extreme hardship on students with disabilities, parents, service providers, and schools. Parents either cannot get their children the services they need, or must bear the burden of paying for these services and waiting months and sometimes close to a year for reimbursement. Service providers have been forced to stop providing services, and those that continue to provide services can have hundreds of unpaid invoices waiting for payment processing by the DOE. At least one school has had to borrow money to pay for its students' services because the DOE's delays are so extreme. This situation is untenable for Plaintiffs and unmanageable by the DOE.

Courts have repeatedly appointed Special Masters in similar situations in which New York City ("NYC") agencies failed to abide by the terms of stipulations — particularly in situations like this one where the NYC agency is: (i) frustrating the purpose of the stipulation, (ii) resistant to making the types of structural changes needed to comply with the stipulation, (iii) intransigent about complying with its obligations under the stipulation, or (iv) simply unable to fully comply with the stipulation. Whether the DOE is incapable or unwilling, however, is irrelevant. The DOE is not fulfilling its obligations under the Stipulation. The DOE has never

[2] *See* Declaration of Erik L. Wilson in Supp. of Pls.' Mot. for Appointment of Special Master (Sept. 3, 2019) ("Wilson Decl.") [redacted]

been in compliance with the Stipulation, and nearly sixteen years after this lawsuit was filed, students with disabilities are still not receiving the services they need, deserve, and are entitled to receive. Plaintiffs have attempted to work with the DOE and its Implementation Unit for nearly a decade to create lasting improvements to its systems and structure — but the DOE's performance is now worse now than it was before the Implementation Unit was created. The Implementation Unit has undeniably failed. Outside intervention is the only viable option. Plaintiffs hereby renew their motion for the appointment of a Special Master.

I. RELEVANT FACTS

A. The Litigation That Led to the Stipulation

1. Class Plaintiffs Filed Suit in 2003 Due to the DOE's Persistent Failure to Implement Orders in a Timely Manner

Plaintiffs are students with disabilities who (i) require individualized, specialized educational services under the Individuals with Disabilities Education Act ("IDEA") and (ii) have received final administrative orders requiring the DOE to provide or pay for those services. In 2003 — more than fifteen years ago — Plaintiffs filed suit against the DOE for its systemic and ongoing failure to provide, or assist in providing, these ordered services. These orders are often awarded only after a protracted administrative process. The DOE's refusal or inability to implement these orders in a timely manner denies these students the benefits and accommodations to which they are legally entitled.

A student with a disability does not automatically receive individualized or specialized services as a result of his or her diagnosis. Instead, the student must first be found eligible for an

Individualized Education Program ("IEP") tailored to the student's particular needs.[3] This process can take months. If the student is denied an IEP, or issued an IEP that fails to meet the student's needs, the parent may initiate, on behalf of the student, an administrative action to compel the DOE to provide the appropriate services. The administrative action culminates in a hearing before an Impartial Hearing Officer ("IHO")[4] who adjudicates, via an Order,[5] that (i) the student is legally entitled to certain services, and (ii) the DOE must implement (*i.e.*, facilitate) the provision and/or payment of such services.

This administrative process can be extraordinarily burdensome, as it requires students and their families to navigate a bureaucratic web of regulations and legal procedures. They often hire counsel. Families must often participate in numerous proceedings before any hearings on the merits, including settlement conferences, pendency hearings, status conferences, and prehearing conferences.[6] The process can also be extended unexpectedly due to hearing officer

[3] An IEP is a written statement of the programs and services the DOE must provide for a student with a disability to receive a Free and Appropriate Public Education ("FAPE") in the Least Restrictive Environment ("LRE"). The LRE is the environment that allows the student be in schools and classrooms with non-disabled peers for as much of the day as appropriate according to the student's needs. *See* https://www.schools.nyc.gov/special-education/the-iep-process/the-iep. Examples of services on IEPs include specialized classroom settings, specific student/teacher ratios, arrangements to transport students to and from school or service providers, receipt of specialized therapy, and one-on-one tutoring.

[4] An Impartial Hearing Officer is an individual who conducts hearings pursuant to 20 U.S.C. § 1415(f)(1)(A), Section 504 of the Rehabilitation Act, and any successor statutes.

[5] Orders are "a decision, determination, order or statement of agreement and order (in its entirety, including all Action Items contained therein) issued by an impartial hearing officer in New York City" under the relevant laws. *See* Wilson Decl. Ex. 2, Stipulation ¶ 1(t).

[6] Wilson Decl. Ex. 3, Deusdedi Merced, *Report: External Review of the New York City Impartial Hearing Office* (Feb. 22, 2019) at 11-19.

unavailability,[7] deadline extensions,[8] and recusals.[9] New York Education Law contemplates a total timeline of approximately 75 days[10] from the filing of the administrative due process complaint to the issuance of an Order to prevent students with disabilities from being left "in an administrative limbo while adults maneuver over the aspect of their lives that would, in large measure, dictate their ability to function in a complex world."[11] Under the DOE's current system, it takes an average of ***225 days*** for these students to receive an Order.[12]

Receipt of an Order, however, does not end the process. The student cannot begin to receive services until the DOE subsequently *implements* that Order. When the DOE fails to implement Orders as required, students with disabilities do not receive their needed services unless parents, service providers, and/or schools provide or pay for them up front and wait for the DOE to eventually reimburse them for the costs. These costs, and the delays in the DOE's implementation and reimbursement, can be extreme — thereby making it impossible for families (particularly families with limited financial means) to provide their children the education to which they are entitled.

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[7] "As of Friday, June 14, 2019, there were nine impartial hearing officers in rotation with over 9,000 due process claims filed for school year 2018-2019." Wilson Decl. Ex. 4, Letter from Karin Goldmark, DOE, to Ass't Comm'r Christopher Suriano, New York State Educ. Dep't at 1 (June 17, 2019).

[8] For the 2017-18 school year, over 35,000 extensions were granted. Wilson Decl. Ex. 3 at 17.

[9] There were 6,968 recusals in approximately the first half of the 2018-19 school year. Combined with the high number of extensions, this resulted in a "growing number of cases having multiple recusals and extending out by several months." *Id.* at 43.

[10] 8 N.Y.C.R.R. § 200.5(j)(5). The statute sets a strict **45-day** deadline from the date of filing for a hearing on the merits to be held and an Order issued, but the 45-day requirement typically begins after the completion of a separate 30-day period for settlement discussions.

[11] Wilson Decl. Ex. 3 at 19, n.52 (citing *Engwiller v. Pine Plains Cent. Sch. Dist.*, 110 F. Supp. 2d 236 (S.D.N.Y. 2000)).

[12] *See* Wilson Decl. Ex. 3 at 19.

The DOE has systematically failed to implement Orders in a timely manner since at least the 2001-02 school year.[13] At the time Plaintiffs commenced this litigation, the DOE was not implementing Orders for up to ***19 months*** after they were issued. Plaintiffs hired counsel, who attempted for several months to get the DOE to implement the Orders without resorting to legal action. Those attempts failed. Plaintiffs then filed a class action lawsuit on December 12, 2003, which asserted, on behalf of themselves and all similarly-situated students, violations of Plaintiffs' rights: (i) to due process under the Fourteenth Amendment to the Constitution of the United States; (ii) to a free and appropriate public education under IDEA, 20 U.S.C. § 1400(c); (iii) to due process under IDEA, 20 U.S.C. § 1415; and (iv) secured by 42 U.S.C. § 1983.

The Complaint alleged that (i) Orders were not enforced or implemented in a timely, effective, or comprehensive manner and (ii) the DOE had not developed or maintained systems to track and monitor Orders to verify whether Orders had been enforced or implemented.[14]

In September 2005, the Court certified a class under Federal Rule of Civil Procedure 23(b)(2).[15] In December 2007, the Court amended the Class to include an Injunctive Relief Subclass and a Compensatory Relief Subclass.[16]

2. The DOE Voluntarily Settled With Class Plaintiffs in 2007 and Agreed to Meet Mandatory Performance Benchmarks Measured by an Independent Auditor

Discovery quickly confirmed Plaintiffs' allegations: the DOE had no system to track or implement Orders ***at all*** — much less implement them in a timely manner.[17] In short, the DOE

[13] *See* Second Amended Complaint ¶¶ 59-64 (Dec. 12, 2003) (ECF No. 46).

[14] *See* Complaint ¶¶ 3, 61-65 (Dec. 12, 2003) (ECF No. 1).

[15] *See* Memorandum & Opinion at 15-16 (Sep. 19, 2005) (ECF No. 80).

[16] *See* Preliminary Order (Dec. 28, 2007) (ECF No. 113).

[17] *See* Wilson Decl. Ex. 5 (Letter from Plaintiffs to Court dated Apr. 9, 2007 detailing the DOE's lack of Order implementation policies, systems, and procedures).

not only failed to implement Orders on time, it could not even track whether Orders had been implemented. Within a month of the Court setting a date for a trial, the DOE agreed to settle. On December 11, 2007, the parties voluntarily entered the Stipulation, which required the DOE to substantially improve its implementation performance and meet mandatory benchmarks for the timely implementation of Orders (the "Mandatory Benchmarks"). On April 10, 2008, the Court approved the Stipulation.[18]

Mandatory Performance Benchmarks Set by Agreement of the Parties

The Stipulation set Mandatory Benchmarks for the timely implementation of two objective criteria: (i) Orders and (ii) Action Items.[19] Each Order contains one or more specific, identifiable actions (*e.g.*, payments to be made; services to be provided) that the DOE must implement ("Action Items"). If any Action Item in an Order is not implemented, the Order has not been complied with.

Under the Stipulation, Orders (and thus Action Items) are divided into two categories: (i) **Payments** and (ii) **Services**. This results in a total of four categories of Orders and Action Items:

- **Payment Order:** An Order requiring the DOE to make payment to a parent, private service provider, evaluator, or private school. A payment can be a direct payment to the provider or a reimbursement.[20]
- **Payment Action Item(s):** Specific payment(s) detailed in a Payment Order that the DOE is required to make.[21]

[18] *See* Order and Final Judgment at 3 (Apr. 10, 2008) (ECF No. 120).
[19] *See* Wilson Decl. Ex. 2 ¶¶ 4-5.
[20] *See id.* ¶ 1(v).
[21] *See id.* ¶¶ 1(b), 1(dd).

- **Service Order:** An Order requiring the DOE to take any action other than making a payment to a parent, private service provider, evaluator, or private school.[22]
- **Service Action Item(s):** Specific action(s) listed in a Service Order that the DOE must perform or cause to be performed.[23]

The Stipulation defined "Timely Implementation" of these Orders and Action Items as implementation (i) *within the time period specified in the Order or Action Item*, or (ii) if no time period is specified, *within 35 days after the Order was issued*.[24]

The Stipulation also set forth a set of three gradually escalating Mandatory Benchmarks (the "First Mandatory Benchmark," Second Mandatory Benchmark," and "Third Mandatory Benchmark") which ultimately required, for the Stipulation to sunset, approximately 90% of Orders and Action Items to be timely implemented on an ongoing basis:

- **First Mandatory Benchmark —** Required the DOE to have timely implemented *either* (i) 75% of total Orders and 70% of total Action Items *or* (ii) 75% of total Action Items and 70% of total Orders, in each case on an aggregate basis over the six-month period of June 1, 2008 through November 30, 2008 (this period started nearly six months after the DOE entered into the Stipulation);[25]

[22] *See id.* ¶ 1(dd).

[23] *See id.* ¶¶ 1(b), 1(dd).

[24] *See id.* ¶ 1(ii).

[25] *See id.* ¶ 4(a); *see also id.* ¶ 7 (sample calculation protocol for determining if Mandatory Benchmarks were met).

- **Second Mandatory Benchmark —** Required the DOE to have timely implemented *either* (i) 85% of total Orders and 80% of total Action Items *or* (ii) 85% of total Action Items and 80% of total Orders, in each case on an aggregate basis over the six-month period of December 1, 2008 through May 31, 2009;[26]
- **Third Mandatory Benchmark —** Required the DOE to have timely implemented *either* (i) 91.5% of total Orders and 88% of total Action Items *or* (ii) 91.5% of total Action Items and 88% of total Orders, in each case on an aggregate basis over a two-year period of June 1, 2009 through June 1, 2011.[27]

Failure to meet a Mandatory Benchmark required the DOE to "formulate and implement a Corrective Action Plan to correct the problems that caused the DOE to miss the benchmark at issue."[28] A Corrective Action Plan ("CAP") was defined as "a plan devised by Defendants to address their past failure to implement Orders fully and timely and to increase the full and timely implementation of Orders following implementation of the [CAP]."[29] The DOE would have three months after learning it had failed the Mandatory Benchmark (approximately nine months after the end of that Mandatory Benchmark period) to create the CAP. The DOE was required to enter into a six-month post-CAP monitoring period in which the DOE simply had to meet *the same Mandatory Benchmark it failed the year prior* (the "Last Chance Period"). This allowed the DOE almost a year-and-half after failing a Mandatory Benchmark to meet that same Mandatory Benchmark. If the DOE still could not meet that original Mandatory Benchmark

[26] *See id.* ¶ 4(b); *see also id.* ¶ 7.
[27] *See id.* ¶ 4(c); *see also id.* ¶ 7.
[28] *See id.* ¶ 10(a).
[29] *See id.* ¶ 1(k).

during the Last Chance Period, Plaintiffs could return to court to seek "any remedy they deem[ed] appropriate."[30]

Compliance with Mandatory Benchmarks Measured by the Independent Auditor

The Stipulation also provided for the appointment of an "unbiased," jointly selected Independent Auditor that would objectively monitor and evaluate the DOE's progress toward meeting the Mandatory Benchmarks.[31] The Independent Auditor was empowered to determine the DOE's implementation rates based on a variety of information from different sources, including data received from the DOE, samples of individual students' records, and interviews with staff from a variety of agencies and departments within the DOE involved with implementing Orders and Actions Items. Once the Independent Auditor was satisfied it had reliable and accurate information on the DOE's implementation rates each quarter, it would prepare a quarterly progress report setting forth the DOE's implementation rates for all Orders and Action Items.[32]

Because the parties could not agree on an Independent Auditor, the Court appointed one — the DOE's proposed candidate, Daylight Forensic & Advisory LLC ("Daylight").[33] On June 24, 2010, Daylight was acquired by Navigant Consulting, Inc. ("Navigant").[34] Navigant is expected to be acquired and replaced as Independent Auditor by Guidehouse LLP in late 2019.

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[30] *See id*. ¶ 10.

[31] *See* Wilson Decl. Ex. 2 ¶ 12. The Independent Auditor evaluates and makes determinations on timely implementation pursuant to the Stipulation. The parties may submit comments on the Independent Auditor's draft conclusions for that quarter, but the Independent Auditor's decisions are final.

[32] *See id.* ¶ 16(a).

[33] *See* Order at 1 (Mar. 26, 2008) (ECF No. 114).

[34] Order at 3 (June 29, 2010) (ECF No. 140).

B. The DOE Failed to Meet the Stipulation's Mandatory Benchmarks and Subsequently Failed to Create a Corrective Action Plan as Required

On June 11, 2009, Daylight issued its report on the DOE's implementation rates for the First Mandatory Benchmark period (covering June 1, 2008 through November 30, 2008).[35] The DOE's implementation rate fell far short of the First Mandatory Benchmark.[36] The DOE timely implemented just **51.6%** of total Orders (including just 33.1% of Payment Orders) and **64.0%** of total Action Items (including only 35.4% of Payment Action Items).[37] The DOE's timely implementation rate for Payment Action Items was particularly striking given that Payment Action Items are not difficult to implement — they simply require making a payment.

Under the Stipulation, the DOE's failure to meet the First Mandatory Benchmark required it to (i) identify the problems that led to the failure and (ii) create and implement a CAP specifically designed to fix those problems. Plaintiffs repeatedly met with the DOE to help identify problems and develop a CAP. The DOE discarded virtually every suggestion.[38] The

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[35] *See* Wilson Decl. Ex. 6, Daylight, *Independent Auditor's First Benchmark Report* (June 11, 2009).

[36] The First Mandatory Benchmark required the DOE to have a timely implementation rate of *either* (i) 75% of Orders and 70% of Action Items *or* (ii) 75% of Action Items and 70% of Orders. *See id.* at 5; Wilson Decl. Ex. 2 ¶ 4(a).

[37] In total, the DOE timely implemented (i) 33.1% of Payment Orders, (ii) 66.1% of Service Orders, (iii) 35.4% of Payment Action Items, and (iv) 75.6% of Service Action Items. *See* Wilson Decl. Ex. 6 at 6.

[38] *See* Decl. of Rebecca Shore in Supp. of Pls.' Mot. for Appointment of Special Master ¶ 6 (Nov. 5, 2010) (ECF No. 147) ("Shore 2010 Decl."). With respect to the DOE's general practices, Plaintiffs suggested that the DOE add flags or "ticklers" to the DOE's computer system to indicate when the deadline to implement an Order or Action Item was approaching or had passed, and that the DOE save exhibits introduced at the impartial hearing onto the DOE's computer system so that the DOE would not need to ask parents to re-submit the same documents submitted at the hearing to implement the Order. *Id*. Plaintiffs also suggested a variety of changes to the DOE's practices relating to implementation of Payment Orders. *Id*.

CAP was required to be completed and implemented no later than September 7, 2009. When Plaintiffs requested a copy of the DOE's CAP, they learned that the DOE ***never created one***.[39]

The DOE's Last Chance Period[40] to meet the First Mandatory Benchmark ran from September 8, 2009 through January 31, 2010.[41] Despite the fact that the DOE should have been meeting the *Third* Mandatory Benchmark during this time, the DOE once again failed to meet even the First Mandatory Benchmark. During the Last Chance Period, the DOE timely implemented just **65.8%** of total Orders and **75.6%** of total Action Items.[42] Thus, nearly three years after it helped design the Mandatory Benchmark system, and one-and-a-half years since the First Mandatory Benchmark period began, the DOE still could not meet even the lowest introductory standard and had made only nominal progress towards meeting it.

That nominal progress was short-lived. The next quarter saw the DOE's implementation rate rapidly retreat: it implemented just **51.5%** of total Orders and **60.2%** of total Action Items.[43]

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[39] Shore 2010 Decl. ¶¶ 5-8; Decl. of Rebecca Shore in Supp. of Pls.' Mot. for Appointment of Special Master ¶ 5 (Sept. 3, 2019) ("Shore 2019 Decl.").

[40] The six month period after the CAP was required to be implemented.

[41] *See* Wilson Decl. Ex. 7, Navigant, *Independent Auditor's Post Corrective Action First Benchmark Report* at 1, 4 n.4 (Aug. 13, 2010).

[42] *Id*. at 8. In total, the DOE timely implemented (i) 62.3% of Payment Orders, (ii) 68.7% of Service Orders, (iii) 62.8% of Payment Action Items, and (iv) 81.5% of Service Action Items.

[43] *See* Wilson Decl. Ex. 8, Email from Sal La Scala, Navigant, to DOE and Advocates for Children (Sept. 16, 2010). In total, the DOE timely implemented (i) 51.4% of Payment Orders (down from 62.3%), (ii) 53.0% of Payment Action Items (down from 62.8%), (iii) 51.6% of Service Orders (down from 68.7%), and (iv) 64.0% of Service Action Items (down from 81.5%).

C. The DOE's Continued Systemic Failure to Meet the First Mandatory Benchmark Caused Plaintiffs to Request the Appointment of a Special Master in 2010

Plaintiffs were in regular contact with the DOE to monitor compliance with the Mandatory Benchmarks, inform the DOE of unimplemented Orders and Action Items, and offer recommendations on how to improve the DOE's systems, procedures, and timely implementation rates. From Plaintiffs' perspective, the DOE's repeated failures to meet the First Mandatory Benchmark, refusal to create or implement an effective CAP, and continued rejection of Plaintiffs' common-sense recommendations[44] indicated that the DOE was too resistant to systemic change and too recalcitrant in taking responsibility for its failures to fix its problems on its own. Accordingly, on November 5, 2010, Plaintiffs exercised their rights under the Stipulation and moved to appoint a Special Master to lead the DOE through the types of systemic changes required for the DOE to achieve — and sustain — implementation rates consistent with the Third Mandatory Benchmark.[45]

The DOE's Opposition to Plaintiffs' motion argued that they were essentially close enough to meeting the First Mandatory Benchmark that no intervention and no meaningful improvements to their system or processes were required.[46] The DOE then argued that Navigant needed to change ***its*** measurement criteria to make the DOE's implementation rates appear higher than they actually were.[47]

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[44] *See supra* n.38.

[45] *See* Pls.' Mot. for Appointment of Special Master (Nov. 5, 2010) (ECF No. 145).

[46] *See, e.g.*, Defs.' Opp. to Pls.' Mot. for Appointment of Special Master at 2 (Jan. 24, 2011) (ECF No. 160).

[47] *See id.* at 8-11.

Briefing on the Special Master motion was completed in February 2011, after which the Court held multiple formal and informal hearings. [redacted] The DOE — likely foreseeing the imminent appointment of a Special Master — created an "Implementation Unit" dedicated to increasing the DOE's implementation rates and remedying its now-acknowledged shortcomings.[49] The Court did not want to appoint a Special Master without first evaluating the impact of the Implementation Unit on the DOE's implementation rates, but because Navigant did not release such data until approximately nine to twelve months after the end of the reporting period, the Court was unable to assess the effectiveness of the Implementation Unit in real time or over the long term.[50] In September 2011, the Court denied Plaintiffs' motion to appoint a Special Master *without prejudice to renew* so that Plaintiffs could re-petition the Court for a Special Master if the Implementation Unit did not cause the DOE to meet the Mandatory Benchmarks.[51]

D. Despite Creating the Implementation Unit, the DOE is Still Failing to Meet the Mandatory Benchmarks

During the 2011 Special Master motion hearings described above, the Court encouraged the DOE to meet with Plaintiffs to find new ways to improve the DOE's implementation rates.

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[48] [redacted]

[49] Order at 1 (Sept. 30, 2011) (ECF No. 186) ("In response to [Plaintiffs' Special Master] motion, the DOE has created an Implementation Unit to address its failure to meet the benchmarks set forth in the parties' settlement agreement.").

[50] *See id.* at 1.

[51] *See id.*; Shore 2019 Decl. ¶ 9.

[redacted]

During this time, Plaintiffs' counsel also continued to monitor the DOE's implementation rates and, through its hotline, responded to class members and providers who called with problems and questions regarding implementation of Orders and Action Items. Plaintiffs' counsel continued to escalate implementation problems to the Implementation Unit and, when that was unsuccessful, to the DOE's legal counsel.[52]

The denial of Plaintiffs' 2010 Special Master motion was expressly predicated on providing the DOE's Implementation Unit sufficient time for the Court to evaluate whether it would solve the root problems underlying the DOE's inability to meet the Mandatory Benchmarks.[53] Plaintiffs were granted the ability to renew the Special Master motion if the Implementation Unit failed to produce the lasting results necessary to comply with the Third Mandatory Benchmark.[54] Eight years later, the DOE has never met the Third Mandatory Benchmark. Moreover, its implementation rates are currently *worse* than they were when Plaintiffs filed the 2010 Special Master motion.[55]

[52] *See* Shore 2019 Decl. ¶ 10-12.

[53] *See* Order at 1 (Sept. 30, 2011) (ECF No. 186) ("The Court is not prepared to appoint a special master at least until it determines the likely success of the DOE's initiative.").

[54] *See id.* (denying motion for appointment of special master without prejudice).

[55] *See* 2010 Special Master Motion at 8 (ECF No. 146 (unredacted)).

While implementation rates showed some improvement for a time, over the last five periods for which data are available,[56] the DOE's implementation rates plunged back below the First Mandatory Benchmark and have remained there since:

- Between May 2, 2017 and July 30, 2017, the DOE timely implemented just **79.7%** of total Orders and **84.6%** of total Action Items, meeting the First Mandatory Benchmark, but falling just short of the Second Mandatory Benchmark;[57]
- From July 31, 2017 to October 28, 2017, the DOE timely implemented just **72.4%** of total Orders and **76.0%** of total Action Items, failing the First Mandatory Benchmark;[58]
- Between October 29, 2017 and January 26, 2018, DOE timely implemented just **69.6%** of total Orders and **70.3%** of total Action Items, again failing the First Mandatory Benchmark;[59]

[56] Each Navigant report covers the quarter ending approximately one year before the date the report is issued. For example, [redacted]

[57] Wilson Decl. Ex. 10, Navigant, *Independent Auditor's Post Corrective Action Thirty-Second Quarterly Report* at 3 (Oct. 5, 2018). In total, the DOE timely implemented (i) 89.1% of Payment Orders, (ii) 68.2% of Service Orders, (iii) 90.1% of Payment Action Items, and (iv) 80.0% of Service Action Items.

[58] Wilson Decl. Ex. 11, Navigant, *Independent Auditor's Post Corrective Action Thirty-Third Quarterly Report* at 3 (April 19, 2019). In total, the DOE timely implemented (i) 86.9% of Payment Orders, (ii) 55.7% of Service Orders, (iii) 86.5% of Payment Action Items, and (iv) 68.8% of Service Action Items.

[59] Wilson Decl. Ex. 12, Navigant, *Independent Auditor's Post Corrective Action Thirty-Fourth Quarterly Report* at 3, (June 14, 2019). In total, the DOE timely implemented (i) 84.5% of

- From January 27, 2018 to April 26, 2018, [redacted]
- From April 27, 2018 to July 25, 2018, [redacted]

While Navigant has not issued reports on the DOE's performance after July 25, 2018, data from that period will reflect the DOE's continued failure to meet the First Mandatory Benchmark. On the heels of the dramatic drop in implementation rates from May 2017 to July 2018, the DOE also has (i) accumulated a massive and persistent backlog of unimplemented Orders and Actions Items, and (ii) received steadily-increasing quantities of incoming Orders

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Payment Orders, (ii) 49.6% of Service Orders, (iii) 84.6% of Payment Action Items, and (iv) 58.4% of Service Action Items.

[60] [redacted]

[61] *See infra* at 11-12.

[62] [redacted]

and Actions Items to timely implement.[63] Plaintiffs' counsel continued to meet and confer with the DOE during this time to monitor compliance with the Mandatory Benchmarks, inform the DOE of unimplemented Orders, and offer input on the DOE's systems, procedures, and implementation rates. Nevertheless, the backlog of unimplemented Orders has continued to grow.[64] For example, [redacted] Plaintiffs' counsel have been informed that Orders can be unpaid for up to *eleven months*.[66]

The DOE's failures are not confined to Payment Orders: [redacted] Both metrics fall well short of the First Mandatory Benchmark.

The DOE's timely implementation failures have created extreme hardship and duress on students with disabilities, parents, service providers, and schools. These delays have even caused some service providers to stop working with or through the DOE (which creates a disproportionately large impact on families who cannot afford to pay up front for their children's

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[63] *See* Shore 2019 Decl. ¶¶ 10-55; Wilson Decl. Ex. 3 at 13-14 (noting 51% increase in due process complaints seeking reimbursement of tuition and related expenses from the 2014-15 school year to the 2017-18 school year).

[64] *See* Wilson Decl. Ex. 14, Decl. of Elisa Hyman in Supp. of Pls.' Mot. for Appointment of Special Master ¶¶ 20-24 (Aug. 8, 2019).

[65] [redacted]

[66] *See* Shore 2019 Decl. ¶¶ 16, 34, 49 (nine-month payment delays); 23 (eleven-month payment delay); *id.* ¶¶ 36, 38-43, 46-48, 51, 53-54 (multiple payment delays from two to eight months); Wilson Decl. Ex. 15, Decl. of Bonnie Schinagle in Supp. of Pls.' Mot. for Appointment of Special Master (June 26, 2019) ¶ 4 (eight-month payment delay); *id.* ¶¶ 5-13 (multiple five-month payment delays).

[67] [redacted]

services),[68] and at least one school to borrow money to pay for its students' services as a result of the DOE's extended delays in paying service providers.[69]

Moreover, the increased quantity of incoming Orders the DOE experienced in mid-2018 was not phase or a fad — it is the new normal. As the DOE's own data show, the number of students receiving Orders each year is steadily increasing, and this year is no different.[70] Under the Stipulation, the DOE is required to meet the Mandatory Benchmarks regardless of the volume of incoming Orders. Whether the DOE is incapable, unwilling, or both, it is clear that the DOE is simply is not up to the task of fulfilling its obligations under the Stipulation and providing students with disabilities with the services they need, deserve, and to which they legally entitled. Appointment of a Special Master is the only viable option.

II. RELIEF REQUESTED

A. Appointment of a Special Master

It has been nearly *16 years* since this litigation began and almost *12 years* since the DOE agreed to the Stipulation. If the DOE had met the Mandatory Benchmarks it committed to, on the timeline it helped design, it would have exited the Stipulation no later than 2012. It is now 2019.

This Court denied Plaintiffs' 2010 Special Master motion to see if the Implementation Unit was the key to timely implementation as the DOE claimed. While a unit dedicated to implementation of hearing orders is necessary, its presence without an effective system for implementation will not ensure timely implementation of Orders. The Implementation Unit has

[68] *See* Wilson Decl. Ex. 14 ¶¶ 20-24.

[69] *See* Wilson Decl. Ex. 16, Aff. of Ruth Arberman in Supp. of Pls.' Mot. for Appointment of Special Master ¶¶ 4-8 (Aug. 21, 2019).

[70] Wilson Decl. Ex. 3 at 14.

failed to produce lasting results with respect to meeting the Mandatory Benchmarks. Plaintiffs cannot wait any longer for systemic relief. Nor should they. Plaintiffs know — after 16 years of dealing with the DOE, service providers, and schools — that timely implementation is an achievable and realistic goal. Implicitly, so does the DOE, which is why it agreed in good faith to the Stipulation and its Mandatory Benchmarks. Compelling the DOE to take the systemic actions necessary to achieve the Mandatory Benchmarks, however, will take judicial oversight and power: Plaintiffs and the Independent Auditor have already played the roles of advisor and monitor to no avail.

In light of the DOE's persistent failure to timely implement Orders in accordance with the Stipulation, and the scale and complexity of resolving the DOE's internal issues, Plaintiffs revive their request for the one form of relief that can finally assure success: the appointment of an impartial, independent Special Master who will investigate the cause of the DOE's failures to implement Orders in a timely manner, institute a system to ensure they are timely implemented, and oversee and adjust that system to ensure compliance with the Mandatory Benchmarks.

B. Powers Required of the Special Master

The Special Master must be granted powers sufficient to bring about the DOE's compliance with the terms of the Stipulation — that is, to ensure that Orders and Action Items are timely implemented in accordance with Third Mandatory Benchmark.[71] To this end, Plaintiffs request that the Court empower the Special Master to track and monitor the DOE's fulfilment of orders and compel (or at least recommend to the Court so that it may compel) all

[71] The Special Master is not intended to supplant or replace the Independent Auditor. But if it would be more cost-effective for the Special Master to hire a new Independent Auditor or use its own staff to serve as Independent Auditor, Plaintiffs are not opposed. Plaintiffs' ultimate goal is to ensure that Orders are timely implemented, not to impose unnecessary costs on the DOE.

necessary improvements to the DOE's processes, workflow, and resource and staffing allocations, to achieve and sustain the Third Mandatory Benchmark.

Plaintiffs also request that the Court order that the DOE pay for all of the Special Master's costs and fees, notwithstanding any budgetary constraints, alleged comptroller requirements, or any other such barriers to payment. Plaintiffs request that this Court have final interpretive authority regarding the DOE's compliance with any orders setting forth the Special Master's roles and powers. Plaintiffs also request that the Special Master not be relieved of its duties until the DOE has achieved the Third Mandatory Benchmark for three consecutive years.

III. ARGUMENT

A. This Court is Empowered to Appoint a Special Master Under Federal Law and Procedure and the Stipulation

"The power of the federal courts to appoint special masters to monitor compliance with their remedial orders is well established." *U.S. v. Apple Inc.*, 992 F. Supp. 2d 263, 280 (S.D.N.Y. 2014), *aff'd*, 787 F.3d 131 (2d Cir. 2015); *U.S. v. Yonkers Bd. of Educ.*, 29 F.3d 40, 44 (2d. Cir 1994) (same). Moreover, "[a] court has an affirmative duty to protect the integrity of its decree . . . where the performance of one party threatens to frustrate the purpose of the decree." *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985) ("A defendant who has obtained the benefits of a consent decree — not the least of which is the termination of the litigation — cannot then be permitted to ignore such affirmative obligations as were imposed by the decree.").

A Court's power to appoint a Special Master derives from two independent sources: (i) the Court's "inherent equitable power to appoint a person, whatever be his title, to assist it in administering a remedy . . . [or to] supervise the implementation of its decrees"; and (ii) Fed. R. Civ. P. 53, which governs the appointment of Special Masters in federal proceedings. *Apple Inc.*, 992 F. Supp. 2d at 281 ("The role of Rule 53 as a supplement, and not a substitute, to a

court's inherent authority to appoint a monitor has long been recognized[.]"). Under Fed. R. Civ. P. 53, Special Masters may be appointed to address, *inter alia*, any "pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge,"[72] such as "enforcing complex decrees." Fed. R. Civ. P. 53(a)(1)(C); Fed. R. Civ. P. 53 advisory committee's note.

Additionally, under the court-ordered Stipulation, Plaintiffs are entitled to seek "any remedy they deem appropriate" following the DOE's continued failure to meet the Mandatory Benchmarks. *See* Wilson Decl. Ex. 2 ¶ 10(b); *see also* Order at 1 (Sept. 30, 2011) (ECF No. 186) (authorizing "renew[al]" of the Special Master motion if the Implementation Unit did not cause the DOE to meet the Third Mandatory Benchmark).

1. Appointment of a Special Master is Appropriate Because the DOE is Frustrating the Purpose of the Stipulation

As noted above, courts have a duty to appoint a Special Master where a defendant's failure to perform its "affirmative obligations" under a court order "threatens to frustrate the purpose of the decree." *Berger*, 771 F.2d at 1568 (citation omitted) ("Continued non-compliance [with a court order] cannot and will not be tolerated[.]"); *Baez v. New York City Hous. Auth.*, No. 13cv8916, 2015 WL 9809872, at *3-4 (S.D.N.Y. Dec. 15, 2015) (appointing Special Master because NYC Housing Authority failed to implement work orders within stipulated time limits that "were the 'cornerstone' of the parties' settlement").

In *Baez*, a plaintiff class of individuals with disabilities sued the NYC Housing Authority ("NYCHA") under the Americans with Disabilities Act for failing to remove mold infestations in

[72] Courts have appointed Special Masters to oversee compliance with settlement agreements or consent decrees in cases in which a trial was never held. *See Blackman v. District of Columbia*, 454 F. Supp. 2d 1, 7, 13 (D.D.C. 2006).

their homes in a timely manner. *Baez*, 2015 WL 9809872, at *1. NYCHA settled and entered into a stipulation that required it to timely implement mold removal work orders within certain time limits. *Id.* at 2. NYCHA, however, (i) failed to timely implement the work orders, (ii) was "out of compliance with the Consent Decree from the day it was entered by this Court," (iii) "fail[ed] to take effective action to address the underlying causes" of its failures, and (iv) provided "inadequate" "justifications for its failure to comply." *Id.* at *2-3. Moreover, "the attitude of NYCHA officials appear[ed] to be one of indifference" toward permanently fixing the underlying problems. *Id.* at *2.

The parties entered into the stipulation in *Baez* to achieve a single underlying goal: to compel a city agency to implement work orders within certain prescribed time limits. These "time limits were the 'cornerstone' of the parties' settlement," and the failure of that agency, NYCHA, to implement work orders within those time limits thereby "frustrate[d] the purpose of the decree." *See id.* After approximately *one year* of NYCHA failing to timely implement orders, Plaintiffs moved to appoint a Special Master. After noting that NYCHA's failures frustrated the fundamental purpose of that stipulation, and that it had a duty to enforce the decree by appointing a Special Master in such situations, the Court appointed a Special Master to compel NYCHA to comply with its affirmative obligations under the stipulation.

Here, the same factors are at play: the "cornerstone" of the Stipulation is the DOE's affirmative obligation to meet the Mandatory Benchmarks — to timely implement minimum percentages of Orders within certain time limits. The DOE was "out of compliance" with the Mandatory Benchmarks from the moment they were first measured *11 years ago*; failed to take effective action to meet the Mandatory Benchmarks; gave inadequate excuses for its failures; and generally acted with an attitude of indifference toward changing its systems to comply with its

affirmative obligations. It did so not only by failing to meet the Mandatory Benchmarks, but also by not creating a CAP after that failure; not noticing that its implementation rates had plummeted between 2017 and 2018; and not taking action when Plaintiffs' counsel repeatedly brought that fact to the DOE's attention.[73] As in *Baez*, these failures have frustrated the purpose of the Stipulation and warrant the appointment of a Special Master.

2. Appointment of a Special Master Is Appropriate Because the DOE is Resistant, Intransigent, or Unable to Fully Comply With the Stipulation

Appointment of a Special Master is also particularly appropriate where, as here, "a party has proved resistant or intransigent to complying with the remedial purpose" of a stipulation or consent decree. *Apple Inc.*, 992 F. Supp. 2d at 280; *Yonkers Bd. of Educ.*, 29 F.3d at 44 (appointing Special Master because "[t]he remedial phase of this litigation has now dragged on for eight years, producing few tangible results").

Here, the remedial phase of this litigation has dragged on for more than eleven years and produced no lasting results. The DOE has proven to be both "resistant [and] intransigent" in complying with the Mandatory Benchmarks or improving their systems in the wake of failure: it failed the very First Mandatory Benchmark, refused to create a CAP [redacted] continued to fall short of the First Mandatory Benchmark, and refused to take any serious corrective action until Plaintiffs hauled the DOE back into court via the 2010 Special Master motion. Only then did the DOE finally attempt to address its systemic problems by creating the Implementation Unit. The Implementation Unit, however, has not enabled the DOE to meet the Third Mandatory Benchmark, and the DOE has proven unwilling

[73] *See* Shore 2019 Decl. ¶¶ 19, 21, 36, 37, 48 (documenting DOE's failures to respond to notices from Plaintiffs' counsel regarding its plunging implementation rates).

[74] [redacted]

and/or unable to create the systems and processes necessary to allow the Implementation Unit to ensure that the DOE satisfies its legal obligations. Today, the DOE is still failing to meet the First Mandatory Benchmark and is so behind on distributing payments that it is forcing service providers to stop providing services and forcing schools to borrow money to provide bridge loans to students and service providers.[75]

In another example of its resistance and intransigence, the DOE recently resisted a New York State order to develop a plan that would have improved the DOE's Orders implementation rate. In May 2019, the New York State Education Department ("NYSED") found that the DOE had violated numerous provisions of IDEA "for 13 consecutive years" and ordered the DOE to develop a plan to address these ongoing issues.[76] In relevant part, the NYSED found that the DOE had consistently violated the due process rights of parents of students with disabilities by forcing them to obtain an Order enjoining the DOE from changing the student's services pending the outcome of a new due process proceeding.[77] That is a clear violation of the "pendency" (or "stay put") provision of IDEA[78] — which operates as an automatic statutory injunction to ensure children continue to receive the same services without interruption[79] — yet the DOE continues to enforce this policy *even when it does not contest the children are entitled to these ongoing services*. This practice needlessly increases the number of Orders the DOE has to implement, and contributes to the DOE's extensive backlog of unimplemented Orders.

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[75] *See* Wilson Decl. Ex. 16 ¶¶ 4-8.

[76] *See* Shore 2019 Decl. Ex. RR at 2, 22-23.

[77] *See* Shore 2019 Decl. Ex. RR at 19; Wilson Decl. Ex. 3 at 48.

[78] *See, e.g.*, Wilson Decl. Ex. 3 at 48; *Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 452 (2d Cir. 2015).

[79] *See, e.g.*, *New York City Dep't of Educ. v. S.S.*, 09 Civ. 810, 2010 WL 983719, at *6 (S.D.N.Y. Mar. 17, 2010).

The NYSED ordered the DOE to create a plan by ***June 17, 2019*** that would ensure students would continue to receive their pendency services, without new hearings or Orders, in all uncontested pendency matters.[80] Rather than develop the required plan, however, the DOE responded to the NYSED by stating it would create the plan ***no earlier than July 1, 2020*** and only "pending resource availability in the DOE."[81] Once again, the DOE has refused to develop a corrective plan that would improve its ability to implement Orders in a timely manner.

The DOE's conduct has created an overwhelming justification for the appointment of a Special Master. *See Apple Inc.*, 992 F. Supp. 2d at 280; *Yonkers Bd. of Educ.*, 29 F.3d at 44; *U.S. v. Vulcan Society, Inc.*, 07-cv-2067, 2010 U.S. Dist. LEXIS 52092, at *4, *13 (E.D.N.Y. May 26, 2010) (appointing Special Master due to New York City's "chronic — now bordering on recalcitrant —failure to fulfill its court-ordered obligations [to reform the firefighter hiring system] in a timely manner," combined with its general attitude of acting like "a pre-trial defendant who will not move expeditiously on any issue until forced to do so").

Even if the DOE has made ***some*** progress and implemented ***some*** changes over the last eleven years, its pattern of past and current failures shows that it is incapable of achieving ***full and lasting*** compliance with the Stipulation, and that any remedy short of appointing a Special Master would be ineffective and futile. In *Jose P. v. Ambach*, 669 F.2d 865 (2d Cir. 1982), the New York City Board of Education — one of the Defendants in this action — violated IDEA[82] by failing to (i) hire a sufficient number of IHOs and (ii) provide "adequate or speedy" administrative remedies to students with disabilities. *See Jose P.*, 669 F.2d at 868-69. This

[80] *See* Shore 2019 Decl. Ex. RR at 24.

[81] *See* Shore 2019 Declaration Ex. SS at 2 (Row DP11).

[82] IDEA was then known as the Education of All Handicapped Children Act. *See Jose P.*, 669 F.2d at 867.

caused thousands of students with disabilities to be denied their due process right to a timely hearing on their right to educational benefits and accommodations. *Id.* at 868. The district court appointed a Special Master to help formulate a remedial plan. *Id.* at 867.

The Second Circuit affirmed the appointment of a Special Master, explaining that these "complex" problems involving "bureaucratic infrastructure" were "appropriate for resolution by a master" who could take "a structural approach" to fixing those problems. *Id.* at 869. The New York City Board of Education had argued that a Special Master was not yet warranted because "the inadequacy of [its] procedures was not proved" — because it could theoretically solve the problem by immediately hiring additional hearing officers. *Id.* at 868-69. The Second Circuit agreed with the district court's finding that there was "no reason" to believe that the City was suddenly capable of solving this problem — their prior procedures had already "proved inexpeditious" and further efforts by the City to solve the problems would likely have been "futile." *Id.* at 868-70.

This Court is also faced with a "complex" problem tied up in a "bureaucratic infrastructure." These issues are similarly "appropriate for resolution by a master" who can take "a structural approach" to fixing those problems. Likewise, there is "no reason" to believe that the DOE will suddenly devise the solution that has been steadfastly evading it since Plaintiffs filed this lawsuit in 2003. [redacted] Those results speak for themselves. The DOE should not be given further opportunity to prove its inefficacy at the expense of students with disabilities.

3. Students are Being Harmed by the DOE's Failure to Timely Implement Orders

When the DOE fails to implement Orders, students and families suffer. For example, as a result of the DOE failing to implement an Order to provide specialized bussing in a timely

manner, a student did not receive specialized transportation to and from school for at least six weeks.[83] Another student, [redacted] had been illegally excluded from school for approximately *four years* because the DOE failed to provide the student with appropriate health services.[84] In November 2017, an IHO ordered the DOE to provide [redacted] with compensatory therapies and teacher services and required the DOE to identify therapists and providers to provide such services.[85] Despite constant follow-up by Plaintiffs' counsel, the DOE did not identify a physical therapist until late February 2018 or an occupational therapist until May 2018.[86] When the physical therapist ceased providing services after [redacted]'s first session in March 2018,[87] the DOE did not identify a replacement physical therapist until September 2018.[88]

Another student, [redacted], was unable to attend his IEP-mandated classes for months after the DOE failed to identify an appropriate school and forced [redacted]'s mother to locate one.[89] During this time, [redacted]'s mother had to pay for breakfast and lunch that would have otherwise been provided by the school's free breakfast and lunch program for low-income students like J.G.[90] In May 2018, the DOE was ordered to reimburse [redacted]'s mother, *within 20 days*, the cost of these meals, which totaled $630 and which the mother had to delay paying bills in order to provide.[91]

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[83] *See* Shore 2019 Decl. Ex. O.

[84] *See* Wilson Decl. Ex. 17, Aff. of [redacted] in Supp. of Pls.' Mot. for Appointment of Special Master ("Lopez Aff.") ¶ 2 (Aug. 19, 2019).

[85] *See id.* ¶ 3; Lopez Aff. Ex. A at 11.

[86] *See* [redacted] Aff. ¶¶ 10, 26; *id.* ¶¶ 5-39 (Plaintiffs' counsel follow-ups and the DOE's delays).

[87] *See id.* at ¶ 11.

[88] *See id.* at ¶ 17.

[89] *See* Wilson Decl. Ex. 18, Aff. of [redacted] in Supp. of Pls.' Mot. for Appointment of Special Master (Aug. 8, 2019) Ex. A at 10-11.

[90] *Id*. at 18.

[91] *Id.* at 20 (¶ 12); [redacted] Aff. ¶ 15.

Despite constant follow-up from Plaintiffs' counsel, the DOE did not reimburse [redacted]'s mother until the fall of 2018 — putting the family under even more severe financial duress.[92]

The harm to all students who do not received Ordered services in a timely manner is significant and unjustifiable, but the impact on students with limited financial means, such as [redacted] and [redacted] can be particularly extreme. Many families simply cannot afford to pay for their children's needed services and then wait *months to nearly one year* for reimbursement by the DOE, meaning many students must go without their necessary services[93] — even after having to wait an average of 225 days to receive an Order in the first place. This situation is unconscionable and must be rectified once and for all.

4. Appointment of a Special Master Is Appropriate to Administer a Complex Remedial Program Over a City Government Agency

Where, as here, a government agency is unwilling or unable to make the systemic changes necessary to comply with the terms of a stipulation or consent decree, judicial intervention and constant court monitoring are needed. But if court monitoring would be a complex and time-intensive process, and a potential drain on scarce judicial resources, appointment of a Special Master can be "vital" to helping courts fashion practical and effective solutions to such "complex," "difficult," and "multifaceted" compliance problems. *See Hart v. Cmty. Sch. Bd. of Brooklyn, N.Y. Sch. Dist. No. 21*, 383 F. Supp. 699, 767 (E.D.N.Y. 1974), *aff'd sub nom. Hart v. Cmty. Sch. Bd. of Ed., N.Y. Sch. Dist. No. 21*, 512 F.2d 37 (2d Cir. 1975); *see also* Fed. R. Civ. P. 53 advisory committee's note (Special Master appropriate where "a complex decree requires complex policing, particularly when a party has proved resistant or intransigent or special skills are needed.")

[92] *See* Wilson Decl. Ex. 18 ¶¶ 3-15.

[93] *See* Wilson Decl. Ex. 14 ¶¶ 12-13.

Here, ensuring the DOE's compliance with hundreds of Orders encompassing thousands of individual Action Items *while reforming the DOE's internal systems and processes* requires a "skilled master" with special expertise in, *inter alia*, educational administration and management. *See Hart*, 383 F. Supp. at 767. After reviewing the DOE's current implementation practices and procedures, and making recommendations for more effective and efficient implementation, the Special Master can work with all the parties and the Court to craft a long-lasting solution that will allow the DOE to finally meet the Mandatory Benchmarks, ensure students are receiving Ordered services, and eventually exit the Stipulation.

Here, as in *Hart*, any solution to the DOE's persistent failure to implement Orders in a timely fashion will involve the co-participation of, and coordination between, multiple constituencies, including DOE's senior leadership and frontline employees, affected families, service providers, City departments such as the Office of the Comptroller, Plaintiffs' counsel, and the Court. The most efficient way to reconcile those entities' diverse demands and capabilities is to grant a Special Master unitary authority to coordinate those entities' efforts.

CONCLUSION

For the reasons mentioned above, Plaintiffs hereby request the appointment of a Special Master.

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