



THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
BRAD LANDER

February 8, 2023

Superintendent Adrienne A. Harris
New York State Department of Financial Services
1 State Street
New York, NY 10004-1511

Re: Governance and Management Deficiencies at the New York City Board of Education Retirement System

Dear Superintendent Harris,

I am writing you today to request that the New York State Department of Financial Services commence a review of the New York City Board of Education Retirement System (BERS), in light of serious and troubling governance and management deficiencies, including ethical breaches and a severe lack of board oversight over key financial and investment functions.

As Comptroller of the City of New York, I serve as a Trustee, Investment Adviser and Custodian to all five of New York City's pension funds, including BERS. BERS was created to manage the pension fund assets and ensure retirement security for the non-pedagogical workers of New York City's schools and their families (e.g. school crossing guards, cafeteria workers, etc). The protection of the members deferred wages is a sacred trust, especially given that they are some of the lowest-paid public servants in New York City. While BERS is the smallest of the five NYC pension funds, it is responsible for more than \$8 billion of assets under management, representing the retirement security of 57,000 public sector workers and retirees.

As a Trustee, Investment Advisor, and Custodian to BERS, I believe it is my fiduciary duty to raise these concerns to your attention:

- 1. The BERS Board has failed to hold senior management accountable for a serious breach of public trust identified by the Special Commissioner for Investigation for the NYC School District.** In 2019, prior to my joining the BERS Board, the previous iteration of the BERS Board raised ethical and possible legal concerns about senior management to the Special Commissioner for Investigation for the NYC School District (SCI). The SCI conducted an investigation which found that Executive Director Sanford Rich and Deputy Executive Director Daniel Miller had acted inappropriately, for the purpose of receiving substantial personal pay increases. The SCI advised the BERS Board both to consider discipline for Rich and Miller, up to and including termination, and to establish new policies to prevent future abuses. The SCI delivered the report to the BERS Board on August 9, 2022.

Unfortunately, the BERS Board has failed to take any action. There has neither been any discipline whatsoever for Rich and Miller, who continue to earn salaries far above what they earned prior to the events identified by SCI, making them amongst the highest-paid employees of a New York City agency; nor have any steps been taken to develop policies to prevent future abuses with regard to executive compensation. At the most fundamental level, the responsibility of the board is to ensure that management is acting with integrity. The board's failure to hold them accountable for their breaches of public trust has placed me in a difficult position as the City's chief fiscal officer.

2. The BERS Board is failing to provide adequate oversight of the BERS budget. Since 2016, the budget for BERS has grown exponentially and now far exceeds the other funds when viewed proportionately. BERS has approximately 57,000 members and beneficiaries, the second smallest membership universe of the five systems, and has an investment portfolio of \$8 billion, the smallest by far of the City's five pension funds. Yet its budget is the third largest of the five systems. The approved 2023 BERS budget is \$34,657,458. For comparison, the Police Pension Fund has a membership of 96,000 and a \$48 billion portfolio, yet its budget is \$25,188,345 - 9 million LESS than that of BERS. The BERS Board has not exercised meaningful oversight of the budget, allowing the same staff who breached the public trust in relationship to their own salaries untrammelled control over a rapidly expanding budget.

3. The BERS Board has failed to hold management accountable for the lack of basic procurement and other internal management policies. BERS does not currently have basic procurement guardrails in place. Per a recent Audit Committee report on October 6th, 2022, few if any of the recommendations that they had previously raised in 2019 and 2020 to create standardized procurement processes have been completed. It is the Board's responsibility to ensure that concerns raised in an audit are responded to in an appropriate time period. However, staff have failed to address the procurement vulnerabilities identified in the audit, and the Board has failed to hold them accountable. These are not abstract concerns, but reflect a lack of oversight of the administrative management of the fund as it relates to policies and procedures, conflicts of interest policies, travel and more. The recent approval of a \$110,000 emergency contract for technology infrastructure, without going through any competitive solicitation process is one example.

4. The BERS Board has allowed staff to provide it with recklessly scant information about investment decisions. The Comptroller's Bureau of Asset Management (BAM) is delegated by the BERS Board to serve as investment advisor to BERS. In that capacity, the Bureau manages the investment portfolio, recommends investments after thorough due diligence processes, negotiates all investment contracts, guides the Board through the asset allocation process and more. There is a staff of over 100 investment professionals in the Comptroller's office making this work happen, who work on behalf of BERS and the other four City pension funds. Each month, BAM sends the BERS staff detailed memos and presentations that lay

out the investment rationale to send to the trustees, in order to ensure that trustees have the information necessary to make multi-million-dollar investment decisions. The trustees of the other four City pension funds are provided with the full investment recommendations and review them prior to voting on investments. I assumed the same was true for BERS.

In July, I was stunned to learn for the first time that these memos are not even sent by staff to the BERS trustees. Nor do trustees join the monthly joint BERS/NYCERS investment committee meetings to hear the presentations from potential investment managers. Instead, trustees are making large-scale investment decisions based solely on a one-page summary by BERS staff, that the BAM staff who performed the due diligence and prepared the report do not even see or verify before it gets presented to the trustees.

Trustees have a fiduciary obligation to understand, and weigh carefully, the decisions they are making on behalf of tens of thousands of beneficiaries. The BERS staff is not providing them with the information they need to make such consequential decisions. It appears to me that the BERS trustees may not currently be fulfilling the standard of prudence for fiduciaries required by law.

5. The BERS Board is allowing staff to take additional control of the investment process, with little oversight or safeguards. In the past, the BERS Board and staff have expressed interest in considering investments that may be appropriately sized for BERS, but would be too small for the City's larger pension funds. I made clear from the beginning of my tenure as comptroller in January that I would be willing to look for ways for such investments to be prudently considered.

In May of this year, the BERS staff reached out about a public infrastructure investment and a venture capital investment that they were interested in pursuing based on the recommendation of BERS' internal investment staff and consultant. BERS staff requested the compliance and legal services of the Comptroller's office in executing those investments. After a series of discussions, it was agreed that the staff at BAM would perform due diligence on the venture capital investment (Base X) and bring a recommendation to the BERS board. In addition, we agreed that we would work together over the longer term to figure out how to consider and provide due diligence for smaller, more targeted investments for the smaller retirement systems.

As part of this agreement, the BERS staff committed to not investigate any new investments outside of the official BAM process during the due diligence period for the Base X deal. It is our understanding that this arrangement, while negotiated via my staff and BERS administrative staff, was only disclosed to the executive committee of BERS at the insistence of my staff and was never discussed by the full Board. Additionally, there have been many occasions when the staff have asserted that BERS is uninterested in certain investment recommendations that are being recommended to the four other systems, without any discussion with trustees whatsoever.

It appears to us that the BERS staff is taking increasing control of the investment process, without adequate procedures or safeguards in place, and that the BERS Board is allowing this to continue.

6. The BERS Board has failed to request information about other potential investigations and vulnerabilities, has instead sought to prevent them from even being discussed, and then sought to remove trustees who raised concern. After the Special Commissioner for Investigation report was given to trustees, we received reports from individuals with potentially important information that other investigations of BERS are underway. Given our fiduciary duty to identify risks and vulnerabilities, my representative asked the BERS General Counsel Alex Kazasis, in executive session, whether there were any other outstanding investigations in progress concerning Rich, Miller, or any other senior leadership at BERS that trustees should be aware of.

The other BERS trustees would not even let Mr. Kazasis, its own general counsel, answer the question. Soon after, upon returning to public session, the board deliberated on a resolution that would have restructured the board in order to explicitly remove the Comptroller as a trustee. At a time when we, as a Board, have an obligation to hold leadership accountable, and to identify other potential risks, the Board instead chose to pursue efforts to remove the City's chief fiscal watchdog and sole elected official from the board charged with its oversight.

These failures by the BERS Board add up to a broad dereliction of its duties, and they have led to my loss of confidence in the ability of the board of trustees of BERS to provide fiduciary oversight to the system.

It is with a heavy heart that I raise these concerns. While I have begun a formal audit of the BERS through my capacity as the Comptroller of the City of New York, I feel obligated to raise these issues to the Department of Financial Services for a broader review.

I believe this oversight is required by our fiduciary duty to the cafeteria workers, school crossing guards, and other members of BERS, as well as by my duties under the City Charter to the City of New York.

Thank you for your consideration of this request.

Sincerely,



Brad S. Lander
New York City Comptroller