

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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In the Matter of the Application of K.W., an infant by his  
Mother and Natural Guardian CHANTEL  
PHINAZAEE,

Petitioner,

**PETITION**

For an Order of Disclosure for Purposes  
of Investigating and Bringing an Action and preserving  
evidence Pursuant to CPLR § 3102 (c)

Index No.:

-against-

THE CITY OF NEW YORK and THE DEPARTMENT OF  
EDUCATION OF THE CITY OF NEW YORK,

Respondents.

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HARPER A. SMITH ESQ., an attorney duly licensed to practice law before the  
Courts of the State of New York, hereby affirms under the penalty of perjury pursuant to  
CPLR 2106:

1. I am associated with RUBENSTEIN & RYNECKI, ESQS., attorneys for  
the Petitioner herein. As such, I am fully familiar with the facts of this matter, the source  
of my knowledge being the file maintained by my office.

2. This affirmation is submitted in support of the within application for an  
Order directing the Respondents, pursuant to CPLR 3102(c), to make available for  
inspection any and all video footage depicting the assault of infant Petitioner K.W. by  
Respondents' employee Osman Couey on December 23, 2015; compelling Respondents to  
preserve all evidence within their possession and/or control relating to the aforesaid  
incident, including any other recordings, photographs and investigative reports; and for  
such other and further relief as this Court deems just and proper.

3. On December 23, 2015, at approximately 11:30 a.m., Petitioner K.W., a second grade student at P.S. 194 M – Countee Cullen, located at 244 West 144<sup>th</sup> Street, County, City and State of New York, was violently assaulted by a teacher, Osman Couey, at the subject school. Mr. Couey threw the infant Petitioner across a hallway into a wall and then slammed a door on him, causing the Petitioner to sustain severe personal injuries.

4. Upon information and belief, Respondents are in possession of at least one video depicting the aforesaid assault. A news article published in the New York Post, indicating the existence of such a video, is annexed as “**Exhibit 1**”.

5. The aforesaid video footage is essential to allow Petitioner to properly frame his Summons and Complaint, so that he can precisely describe the nature of the assault and the circumstances surrounding it.

6. CPLR §3102(c) provides that: “Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order.” CPLR §3102(c). A petition for pre-action discovery should be granted when the Petitioner demonstrates a meritorious cause of action and that the information sought is material and necessary to the claim. Holzman v. Manhattan and Bronx Surface Transit Operating Authority, 271 A.D.2d 346 (1<sup>st</sup> Dept. 2000); Cohen v. Google, Inc., 887 N.Y.S.2d 424. In determining whether the Petitioner has set forth a meritorious claim, the Court must consider the evidence “in a light most favorable to the petitioner”. Toal v. Staten Island Univ. Hosp., 300 A.D.2d 592 (2d Dept. 2002).

7. Here, Petitioner amply demonstrates that he has a meritorious cause of action by annexing his verified Notice of Claim, which was duly served upon Respondents on February 22, 2016, as “**Exhibit 2**”. The verified Notice of Claim is a sworn and notarized

statement by Petitioner's mother and natural guardian, CHANTEL PHINAZEE, setting forth the essential facts of the claim, including the date and location of the assault, the name of the individual who committed the assault (Osman Couey), the specific actions of Mr. Couey in throwing K.W. across the third-floor hallway and into a wall and slamming a door on him, the names of the school's Principal and Assistant Principal who failed to adequately supervise Mr. Couey, the theories of liability against the Respondents, and the injuries to K.W.

8. Moreover, there can be no dispute that the video footage of the subject assault is "material and necessary" to the Petitioner's claim. The video footage is crucial, irreplaceable evidence of the circumstances surrounding and leading up to the assault, and it will assist Petitioner in identifying any school staff members who may have been present during the assault and failed to intervene (and who therefore should be named as individual defendants in Petitioner's forthcoming lawsuit), and in identifying witnesses to the assault.

9. In the absence of a Court order, it is possible that the video recordings, photographs, investigative reports, and other evidence regarding this assault could be destroyed. Accordingly, the Court should grant Petitioner's within request for pre-action disclosure.

10. Petitioner has made no previous application for the relief sought herein.

WHEREFORE, it is respectfully requested that this Court issue an Order directing Respondents, pursuant to CPLR 3102(c), to make available for inspection any and all video footage depicting the assault of Petitioner KAEVON WILSON by Respondents' employee Osman Couey on December 23, 2015; compelling Respondents to preserve all evidence within their possession and/or control relating to the aforesaid incident, including any other recordings, photographs and investigative reports; and for such other and further relief as this Court deems just and proper.

Dated: Brooklyn, New York  
February 24, 2016

  
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HARPER A. SMITH, ESQ.