UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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N.T., et al.,

Plaintiffs,

- against -

New York City Board of Education, et al.,

Defendants.

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CV-02-5118 (CPS)

[CORRECTED]
MEMORANDUM
AND ORDER

SIFTON, Senior Judge.

The nine named plaintiffs are disabled children who bring this action against defendants, the New York City Board of Education, the New York City Department of Education, and Joel Klein, the Chancellor of the New York City School District, alleging violations of 42 U.S.C. § 1983, the Fourteenth Amendment to the United States Constitution, the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* ("IDEA"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, et seq. Plaintiffs seek declaratory and injunctive relief based on their allegedly illegal exclusion from public schools. Plaintiffs claim that defendants instituted a policy, practice, and custom pursuant to which plaintiffs and other disabled students are, or were, illegally excluded from school.

Plaintiffs now move pursuant to Federal Rule of Civil Procedure 23 to certify a class of "disabled New York City

children age three through twenty-one who have been, will be, or are at risk of being excluded from school and deprived of educational services through suspensions, expulsions, transfers, discharges, removals and denials of access conducted in violation of law." Plaintiff also move pursuant to Rule 23(c)(4) to certify two subclasses consisting of: 1) "disabled class members who, after being excluded, have been or will be transferred to an alternative educational program that does not provide minimally adequate regular or special education services"; and 2) "disabled class members, not identified as disabled, who have been or will be excluded in the future or at risk of such exclusion."

For the reasons set forth below, the motion to certify is granted, but with respect to a class defined less broadly than plaintiffs' proposal. The motion to certify subclasses is denied without prejudice.

Background

The following facts are drawn from plaintiffs' Third Amended Complaint.

Plaintiffs are nine New York City children ranging in age from three to twenty-one who have been or will be at risk of being suspended, expelled, transferred, or otherwise excluded from New York City public schools. The children suffer from various learning disabilities and emotional disorders.

Plaintiffs allege that defendants are engaged in a systemic practice of excluding children from school without

providing procedures mandated by federal law. Specifically, plaintiffs allege that students frequently fail to receive notice or an adequate hearing prior to exclusion, and students are excluded for reasons not authorized by law. Once excluded, many of these students are placed in alternative educational environments that do not meet the requirements of the IDEA.

Plaintiffs also allege that defendants have failed to adopt appropriate procedures to prevent violations of the IDEA and other laws. Defendants are said to have failed to institute a system to track students in need of special education. Defendants have not provided appropriate training or supervision to school teachers and administrators or instituted a system to hold them accountable for violations of the IDEA,.

Plaintiffs allege that there are approximately 165,000 students with identified disabilities receiving special education in the New York school system. Approximately 10,000 students with disabilities drop out or are discharged from the New York school system each year.

The Named Plaintiffs

Plaintiff NT

At the time of filing this action, plaintiff NT was an 18-year-old woman. She has been diagnosed with bipolar disorder and has experienced behavioral and academic difficulties for years. In October of 2001, after being discharged from Lower Manhattan Outreach school, and having missed at least four months

of school, NT was enrolled at Borough Academy. She did not receive any special education services while at Borough Academy.

In January 2002, NT was hospitalized due to her bipolar disorder. Upon her discharge, her grandmother attempted to reenroll her at Borough Academy. NT's grandmother was informed that NT would not be permitted to re-enroll and that she would be forced to wait until the following fall to reregister. The school did not inform NT or her guardian of her rights regarding appropriate educational placements, and NT's mother was encouraged to sign NT out of the school. No services were offered to NT, and she missed the entire Spring semester.

In September of 2002, NT and her mother were told by Borough Academy that due to her behavior, she would not be allowed to return to the school because Borough Academy did not have the resources to address her needs. At no time during or prior to the 2001-2002 school year did any of the defendants, or their employees or agents, refer NT for an evaluation under the IDEA or Section 504 of the Rehabilitation Act or provide her with other services or protections prescribed by law.

Plaintiff EB

In the Spring of 2001, EB was classified as emotionally disturbed. In September 2002, he was suspended from school. EB's mother was never provided notice of, nor was she informed of her rights regarding, EB's suspension. EB did not receive instructional services while he was suspended. When EB returned

to school, he was placed in a self-contained class without appropriate instruction or services.

Plaintiff HG

Plaintiff HG is classified as learning disabled. In the spring of 2002, HG was told that he would have to transfer from John Jay High School to another school. HG's parents were never informed of his rights regarding the transfer. In the fall of 2002, HG's mother attempted to enroll HG in the Accorn School. Upon his arrival at Accorn, HG was told that he would not be permitted to enroll. As a result, HG was out of school for over eight months.

In March 2003, HG's attorneys filed an Impartial Hearing on behalf of HG and his mother. Defendants claim that the IHO issued a decision in HG's favor. Defendants contend that the Officer's decision was initially complied with in substance, but that the portion of the decision regarding home instruction presented special difficulties. On or about July 18, 2003, home instruction was arranged to provide HG with three hours per day of instruction during the 2003 summer session. Plaintiffs claim that at the time that this action was filed, HG was not receiving any of the services that had been ordered, and that the when he did receive instruction, it came five months after his hearing was held.

Plaintiff KSG

Plaintiff KSG is learning disabled and has Attention Deficit Hyperactivity Disorder (ADHD) and a Traumatic Brain Injury (TBI). In the year preceding the filing of the Complaint, KSG was repeatedly suspended, transferred, and warehoused in inappropriate suspension centers without services. KSG's parents were not notified by the Department of KSG's rights regarding transfers and suspensions. KSG has missed more than 50 days of appropriate instruction. At the time the Complaint was filed, KSG continued to be in an alternative center that was not providing appropriate educational services.

Plaintiff AJ

Plaintiff AJ is autistic. From September to November 2002, AJ sat in a room at P178 with only a paraprofessional because the school and superintendent of District 23 refused to implement his IEP. AJ was excluded from all of his classes, and his guardians were never informed of his rights regarding the exclusion.

In September 2002, AJ's attorneys filed an Impartial Hearing on behalf of AJ and his guardian. Although the IHO ordered that AJ be restored to his class with his IEP services, neither the District nor the school complied with that order. In October 2002, the IHO issued a second order directing AJ to be placed in his class, and defendants eventually reinstated AJ, although not before he had missed more than two months of instruction.

Plaintiff SM

Plaintiff SM has ADHD. Although he took medication for his learning disability, he was decertified from special education in 1999 and was offered no services after that time. SM has been subject to numerous suspensions and behavioral referrals throughout his school career, and his father was never provided with adequate notice of his rights.

Plaintiff IP

Plaintiff IP received special education teacher support services (SETTS) for his learning disabilities. In March of 2003, after being accused of a suspendable offense, IP was referred to two alternative placements, neither of which provided any instruction. As of April 2003, IP had not received a decision or disposition regarding his suspension. At some point, either IP or his mother was verbally informed that IP had been transferred to another school.

Plaintiff JW

Plaintiff JW has ADHD and has a Section 504 plan to receive medication in school. In February 2002, JW was removed from his regular class due to behavioral problems and was placed in a dean's intervention room at his school for approximately one month. JW received no direct instruction the dean's intervention room and was segregated from his peers. During this time, JW's

parents never received notice of the suspension or removal, or of a hearing, conference, or manifestation determination review.

After JW's attorneys contacted his principal, JW was taken out of suspension, but was not permitted to return to his regular class; instead, he was sent to a class of lower functioning students.

In March 2002, JW's attorneys filed a request for an Impartial Hearing. JW missed a month of school before the hearing was held. On May 3, 2002, a decision was issued in favor of the parent, and the district was ordered to transfer JW to another school with an appropriate class. However, despite the order, defendants did not transfer JW until September 2002, and JW suffered from three months of inappropriate instruction as a result.

Plaintiff DR

Plaintiff DR is disabled. DR spent much of the 2002-2003 school year out of his class, in the in-house suspension room and time-out rooms. DR's mother never received any notice or information about DR's rights regarding these exclusions.

In March 2003, DR's school called a hospital, and DR was admitted for psychiatric observation. In April 2003, he was discharged from the hospital and eventually enrolled in a day treatment program. DR was excluded from school from early April 2003 until the Complaint was filed.

Discussion

Class certification is appropriate if the prerequisites of Federal Rule of Civil Procedure 23(a) are satisfied and the class can be maintained under one of the subsections of Rule 23(b). *Eisen v. Carlisle & Jaqueline*, 417 U.S. 156, 163 (1974). The party seeking to certify the class bears the burden of proving that the requirements of Rule 23 have been met. *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 539 n.30 (S.D.N.Y. 2003). A district court has broad discretion in certifying a class. *In re Holocaust Victim Assets Litigation*, 225 F.3d 191, 201 (2d Cir. 2000).[1] For purposes of class certification, the merits of the complaint are not at issue and the allegations are taken as true. *Shelter Realty Corp. v. Allied Maintenance Corp.*, 574 F.2d 656, 661 n.15 (2d Cir. 1978); *DeAllaume v. Perales*, 110 F.R.D. 299, 305 (S.D.N.Y. 1986).

Federal Rule of Civil Procedure 23 allows certification of a class only if:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. PRO. 23(a).

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[1] The Court of Appeals may, however, be less deferential when the district court has denied certification. *Parker v. Time Warner Entertainment Co., L.P.*, 331 F.3d 13, 18 (2d Cir. 2003).

In addition, the class must fall into one of the three categories identified in Rule 23(b): 1) individual actions pose a danger of varying adjudications; 2) plaintiffs seek injunctive or declaratory relief against a party who has acted on grounds generally applicable to the class; or 3) common questions of law or fact predominate over individual issues.

The Class Definition

Plaintiffs move to certify a class of "disabled New York City children age three through twenty-one who have been, will be, or are at risk of being excluded from school and deprived of educational services through suspensions, expulsions, transfers, discharges, removals and denials of access conducted in violation of law." As discussed further infra, this definition encompasses individuals who do not share plaintiffs' proposed elements of commonality and typicality. Plaintiffs' definition would encompass students excluded for any reason, pursuant to any policy, that violates any law. The proposed class would therefore include members who shared no point of commonality other than an exclusion from school that in some manner violated some law.

Courts have broad discretion over class definition. *Boucher v. Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999). In accordance with plaintiffs' proposed common questions of law, the class to be certified shall consist of "disabled New York City children age three through twenty-one who have been, will be, or

are at risk of being excluded from school without adequate notice and deprived of a free and appropriate education through suspensions, expulsions, transfers, discharges, removals and denials of access."

Rule 23(a)(1) - Numerosity

No fixed rule exists to answer the question of what constitutes a class so numerous as to make joinder impracticable. Courts have identified several relevant factors in making this determination, including the size of the class itself, their geographic location, and requests for prospective injunctive relief that would involve future class members. *Robidoux v. Celani*, 987 F.2d 931, 935-36 (2d Cir. 1993). Courts may make common sense assumptions to support findings of numerosity, and numerosity is presumed at forty. *Id.* at 936; *Weisman v. ABD Financial Services, Inc.*, 203 F.R.D. 81, 84 (E.D.N.Y. 2001).

Plaintiffs have satisfied the numerosity requirement. The named nine named plaintiffs all allege to have been excluded from school pursuant to the same illegal policies of the defendant. The complaint identifies another seventeen students that plaintiffs allege have been excluded pursuant to the same policies. Plaintiffs seek future injunctive relief involving future class members. Plaintiffs contend that the school board excludes thousands of special education students per year.

Defendants do not seriously dispute that the proposed class meets the numerosity requirement. Instead, defendants

challenge the plaintiffs' use of statistics, arguing that the class does not consist of all 14,135 students who "exited" the special education system between 1996-1997, as many of them graduated, were transferred, or moved out of New York City. Other than the twenty-six students identified, the complaint does not allege that any of the 14,135 students who exited the New York City special education system in particular were excluded illegally. It is nevertheless clear that a sufficient number of disabled students have or will be excluded from school pursuant to the defendants' allegedly illegal policies to make joinder impracticable.

Rule 23(a)(2) - Commonality

Federal Rule of Civil Procedure 23 requires that "questions of fact or law common to the class" be present in order to maintain a class action. Commonality may be met where the individual circumstances of class members differ but they stem from a unitary course of conduct. *Vengurlekar v. Silverline Technologies, Ltd.*, 220 F.R.D. 222, 227 (S.D.N.Y. 2003). A single common question may be sufficient. *German v. Federal Home Mortgage Corp.*, 885 F. Supp. 537, 553 (S.D.N.Y. 1995). Class actions alleging a violation of the due process right to be heard are commonly certified. *See* 7A WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 1763 at 225-26, n.22 (1986) (listing cases).

The plaintiffs allege that the defendants have adopted a policy or practice of not providing the appropriate procedures

that are prerequisite to excluding disabled students from school. Plaintiffs also allege that each plaintiff has been denied a "free and appropriate education" during their exclusion in violation of the IDEA. Because plaintiffs seek systemic change to the New York School System, the complaint makes no effort to match particular legal claims with each of the named plaintiffs. Instead, the complaint briefly describes each plaintiff's disability, in what regard he was excluded from school, and the procedures the defendant provided.

Defendants argue that the plaintiffs lack a common factual question. They contend that the only link between the plaintiffs is that they have been excluded from school and are disabled in some way. Defendants further argue that the merits of each plaintiff's claim will depend on unique factual findings. Defendants also argue that the plaintiffs' request for a compensatory fund to pay for educational services for class members who have suffered substantial exclusion will require the Court to make individualized determinations regarding each class member's denial of educational services.

Plaintiffs' briefs alternately concede that the factual circumstances surrounding each of their exclusions are unique, and then argue that they share the common characteristic of being excluded from school. Although the complaint alleges that each plaintiff has been excluded from school, the factual determination of whether that is so will depend on evidence unique to that individual and be determined on a case-by-case

basis. Plaintiffs point to no piece of evidence that is relevant to the factual question of whether each plaintiff has been excluded. The determination of whether any individual plaintiff has been excluded is therefore not "common." *See* 7A WRIGHT ET AL., § 1763 at 203 n.10 (listing cases where no common question of fact is found where the determination of that fact for each plaintiff depends on facts unique to each plaintiff).

Plaintiffs also seek to establish that all plaintiffs share common legal issues. The issues of law that plaintiffs claim that the members of the proposed class have in is pursuant to the same policy: 1) They failed to receive sufficient notice prior to their exclusion; and 2) While excluded, they did not receive a free and appropriate education as required by the IDEA.

Defendant directs the Court's attention to an unpublished District of Minnesota opinion, *Reinholdson, et al. v. State of Minnesota, et al.*, No. 02-795, 2002 U.S. Dist. Lexis 17169 (D. Minn. Sept. 9, 2002). The *Reinholdson* court denied certification of a class of plaintiffs challenging the reasonableness of each plaintiff's IDEA-mandated "individualized education plan" ("IEP"). The defendant would have met its obligations under each IEP if it was "reasonably calculated to enable the child to receive educational benefits." *Id.* at *23 (quoting *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982)). The court denied certification because each plaintiff's plan was, in fact, individualized and would turn on unique evidence. *Id.*

Defendant also turns this Court's attention to a Tenth Circuit decision, *J.B., ex rel Hart v. Valdez, et al.*, 186 F.3d 1280 (10th Cir. 1990). In that case, plaintiff sought structural reform of New Mexico's system for evaluating and treating developmentally disabled children in its custody. *Id.* at 1283. The court denied certification because plaintiffs could not satisfy the commonality element. The factual manner in which the plaintiffs entered into state custody and their treatment once in custody differed. *Id.* at 1288-89. Because there was no single claim for relief that all plaintiffs shared, the court held that no common legal question existed. *Id.* at 1289. The court declined to read the plaintiffs' general allegations of "systematic failures" as establishing a common legal question.

The conservative approach to certification applied in *J.B.* and *Reinholdson* are in tension with the "liberal rather than restrictive construction" the Second Circuit has given Rule 23. *See Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997). As the dissent in *J.B.* noted, the majority failed to distinguish the Second Circuit's decision in *Marisol A. v. Giuliani*, 126 F.3d 372 (2d Cir. 1997), and the Third Circuit's decision in *Baby Neal v. Casey*, 43 F.3d 48 (3d Cir. 1994). *See J.B., ex rel Hart*, 186 F.3d at 1300 (Briscoe, J., dissenting) (finding "troubling the majority's unexplained rejection of two cases from our sister circuits"). Under very similar facts to *J.B.*, the Second Circuit affirmed certification and the Third Circuit reversed a lower court's decision not to certify.

In *Marisol A.*, the district court found a common legal question in the plaintiffs' allegation that the child welfare system had "failed to provide legally mandated services" to the plaintiffs. *Marisol A.*, 126 F.3d at 377. Their challenges were to different aspects of the child welfare system, including allegations of inadequate training of foster parents, the failure to properly investigate reports of abuse, delay in removing children from abusive homes, and the inability to secure placement for adoption. *Id.* at 376. These allegations implicated different statutory and constitutional provisions. *Id.* at 376-77. No plaintiff was affected by every violation. *Id.* at 377. The district court found it sufficient that all plaintiffs were at risk of suffering a deprivation of "services to which they claim they are entitled." *Marisol A.*, 929 F. Supp. at 691.

The Court of Appeals affirmed, although it noted that the lower court's characterization of the claims at such a high level of abstraction "stretches the notions of commonality and typicality." *Marisol A.*, 126 F.3d at 377. Nevertheless, the district court's finding that plaintiffs' injuries stemmed from a unitary course of conduct by a single system was sufficient to uphold certification. *Id.*

The issue of whether the defendants' policies by which disabled students are excluded comply with the IDEA falls well within the outer bounds suggested by *Marisol A.* Here, plaintiffs have alleged that defendants have a practice or policy of

providing insufficient procedures and notice prior to excluding students from school and not providing a free and appropriate education during those exclusions. Whether these policies and practices are in compliance with the law is a common question. *See Upper Valley Ass'n for Handicapped Citizens v. Mills*, 168 F.R.D. 167 (D.Vt. 1996) ("Defendants efforts to develop and implement procedures under the IDEA are common to all participants within the class . . . ."). That question is substantially more concrete than the common issue of whether the defendants "failed to provide legally mandated services" that the *Marisol A.* court upheld.

Neither the unique factual circumstances surrounding each plaintiff's exclusion or each plaintiff's request for compensatory relief alter this conclusion. Unique factual questions such as requests for damages that must be determined on an individualized basis do not destroy commonality so long as a common question of law exists. *See Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001) (certifying class seeking damages for disparate treatment under Title VII).

Rule 23(a)(3) - Typicality

Rule 23(a) requires that the claims of the representative class members be typical of the claims of the class. When the same unlawful conduct is directed at all members of the class, typicality is usually satisfied despite minor variations in the fact pattern underlying individual claims.

Robidoux v. Celani, 987 F.2d 931, 936-37 (2d Cir. 1993). Allegations that a defendant violated plaintiffs' rights in the "same general fashion" may satisfy the typicality requirement. *Id.* at 937 (citing *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986)). Similarly, when the plaintiffs' rights are violated by the same practice, typicality is satisfied. *Baby Neal ex rel Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994). The Court of Appeals has observed that the typicality and commonality requirements tend to merge into one another and involve similar considerations. *Marisol A.*, 126 F.3d at 376.

Defendants provide the same arguments against the plaintiffs' typicality as they did against commonality. Plaintiffs' exclusions stemmed from different conduct and were implemented in different manners.

To the extent that plaintiffs allege that they were all deprived of sufficient procedures and notice prior to their exclusion and denied a free and appropriate education while excluded, the named plaintiffs' claims are typical of the class. Each claim stems from the defendants' alleged policy and practice of providing deficient procedure and notice and not providing a free and appropriate education during the period of exclusion. Defendants' indication that plaintiffs' exclusion stemmed from unique circumstances does not suggest that named plaintiffs' claims that they were all provided insufficient procedure or notice and denied a free and appropriate education pursuant to the same policy are unique. *See Upper Valley Ass'n for*

Handicapped Citizens, 168 F.R.D. at 170 ("Plaintiffs complain that Defendants failed to investigate and resolve their allegations under the IDEA in a timely fashion. Factually, those allegations are typical of the allegations made by the class . . . .").

Rule 23(a)(4) - Adequacy of Representation

Rule 23(a)(4) provides that a class action can only be maintained where the representatives "will fairly and adequately protect the interests of the class." Defendants do not contest that the named plaintiffs and their counsel will adequately represent the interests of the class.

Maintaining the Class Under Rule 23(b)

In addition to satisfying the requirements of Rule 23(a), the class must satisfy one of three provisions of Rule 23(b). Plaintiffs argue that their class satisfies any one of the three provisions of Rule 23(b). The Court finds that plaintiffs' class will be maintained pursuant to Rule 23(b)(2), and could also be maintained pursuant to Rule 23(b)(3).

Rule 23(b)(1)(A)

Rule 23(b)(1)(A) allows for maintenance of the class action when prosecution of separate actions would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish

incompatible standards of conduct for" the defendants. For Rule 23(b)(1)(A) to be applicable, there must be an actual risk that individual members of the class would bring separate actions if the class action were not permitted. *Eisen v. Carlisle & Jacqueline*, 391 F.2d 555, 564 (2d Cir. 1968); 7A WRIGHT ET AL., § 1773 at 427.

Plaintiffs contend that certification under Rule 23(b)(1)(A) is appropriate because the class seeks an injunction mandating a consistent, legally adequate procedure for determining when excluding children with disabilities from school is appropriate.

Plaintiffs, however, concede that there is little risk that individual members of the class will bring suit thereby producing varying adjudications. Plaintiffs state that absent the class action mechanism it would be "virtually impossible" for individual plaintiffs to assert their rights. (Plaintiffs' Brief at 41). When the party seeking certification concedes that individual suits are highly unlikely, the risk of varying adjudications is eliminated, and the class cannot be maintained under Rule 23(b)(1)(a). *Eisen*, 391 F.2d at 564 ("Plaintiff has effectively rebutted his own argument because he admits that individual actions could not be brought as the small claimants who constitute the entire class could not, on an individual basis, afford the expense of lengthy anti-trust litigation."). The class action is therefore not maintainable pursuant to Rule 23(b)(1)(A).

Rule 23(b)(3)

A class is maintainable pursuant to Rule 23(b)(3) when the common questions of law or fact predominate over questions affecting only individual class members. Rule 23(b)(3) is a "broad catch-all provision allowing the district court to certify a class in its discretion when to do so would conserve the resources of the judiciary and the parties." *J.B. ex rel Hart*, 186 F.3d at 1298 (Briscoe, J., dissenting).

Rule 23(b)(3) sets out two prerequisites for the maintenance of a class action. First, the questions of law or fact must predominate. Second, the class action must be superior to other methods of resolving the controversy. In determining whether the class action is a superior method of resolution, the Rule instructs the Court to take into account four factors: 1) the interest of class members in pursuing separate actions; 2) the extent and nature of any litigation already commenced; 3) the desirability of concentrating the claims in this forum; 4) the difficulties likely to be encountered in the management of the class action. FED. R. CIV. PRO. 23(b)(3).

Plaintiffs argue that because they seek structural relief and not individual damages, the common issue of the legality of the procedure for excluding disabled students from school predominates over any particular plaintiff's claim. Defendants again argue that certification fails because common issues of fact or law are absent. Defendants also contend that plaintiffs' request for the creation of a compensatory fund to

pay for educational services for class members who have suffered substantial exclusion will require the Court to make individualized determinations regarding each class member's denial of educational services

The common question of law predominates over the unique factual aspects of plaintiffs' claims. The central issues of the complaint is the appropriateness of the defendants' procedures for excluding disabled students and whether a free and appropriate education is provided during that exclusion. The logistics of individualized compensation, if liability is established, do not alter this conclusion. Although it may be true that determining the compensation due each plaintiff may be time consuming in total should this class be certified, that same time would be expended should each plaintiff bring a separate suit. *See* 7A WRIGHT ET AL., § 1778 at 527-28.

The class action is also superior method of resolution to individual suits. There is no indication that class members are interested in pursuing separate actions. Resolving the common issue of law of the legality of defendants' policies with regard to exclusion of disabled students in a single action in this forum preserves the resources of the judiciary and the parties. Finally, the class appears sufficiently numerous and seem to possess relatively small claims unlikely to be individually adjudicated, thereby making the class action a superior means of resolution. *See Dornberger v. Metropolitan Life Ins. Co.*, 182 F.R.D. 72, 83 (S.D.N.Y. 1998).

Accordingly, the class is maintainable pursuant to Rule 23(b)(3).

Rule 23(b)(2)

Rule 23(b)(2) provides that a class action is maintainable when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

In opposing the plaintiffs' argument that the class is maintainable pursuant to Rule 23(b)(2), defendants rely on their previous arguments that the factual circumstances surrounding each plaintiff's exclusion is unique, including plaintiffs' request for a compensatory fund. The complaint alleges, however, that the defendants have adopted a policy or practice of providing legally inadequate notice or procedure prior to excluding disabled students from school. The Court of Appeals found similar allegations sufficient to satisfy Rule 23(b)(2) in *Marisol A.* *See Marisol A.*, 126 F.3d at 378 (affirming certification pursuant to 23(b)(2) where complaint alleged "central and systemic" failures); 7A WRIGHT ET AL., § 1775 at 449 (class maintainable where action toward class may be viewed as part of a pattern of activity).

The plaintiffs' request for individually determined compensation does not preclude maintenance of the class under

Rule 23(b)(2). When compensatory damages are sought in conjunction with injunctive relief, a class can be maintained under Rule 23(b)(2) when two conditions are satisfied: 1) class treatment is efficient and manageable; and 2) the value to the plaintiffs' of the injunctive relief predominates over the value of the monetary relief. *Robinson*, 267 F.3d at 164. With regard to the predominance of injunctive and declaratory relief, *Robinson* instructs the Court to consider two factors: 1) whether reasonable people would bring the suit to obtain the injunctive and declaratory relief sought even in the absence of individual compensation; and 2) the injunctive or declaratory relief would be reasonably necessary and appropriate were the plaintiffs to succeed on the merits. *Id.* at 164.

I conclude that the value to the plaintiffs of injunctive and declaratory relief predominates over any monetary relief sought. Plaintiffs are alleged to have been denied and are at risk of being denied essential educational opportunities. The Court is therefore satisfied that "even in the absence of a possible monetary recovery, reasonable plaintiffs would bring suit to obtain the injunctive or declaratory relief sought." *Robinson*, 267 F.3d at 164.

I am also satisfied that should plaintiffs prevail, injunctive or declaratory relief would be reasonably necessary. Private plaintiffs are authorized to enforce the IDEA by seeking injunctive and declaratory relief. *See D.D. ex rel V.D. v. New York City Bd. of Educ.*, 03-CV-2489, 2004 WL 633222 (E.D.N.Y.

March 30, 2004) (certifying class seeking injunctive and compensatory relief under the IDEA pursuant to Rule 23(b)(2)). The class is accordingly maintainable pursuant to Rule 23(b)(2).

Where a class is maintainable under either Rule 23(b)(3) or Rule 23(b)(2), the preferable course is to certify pursuant to Rule 23(b)(2). *Duprey v. Connecticut Dept. of Motor Vehicles*, 191 F.R.D. 329, 339-40 (D.Conn. 2000); 7A WRIGHT ET AL., § 1775 at 491-92. Accordingly, the Court certifies the class pursuant to Rule 23(b)(2).

Sub-Classes

Plaintiffs also seek to certify two subclasses. First, the proposed "Alternative Instruction" subclass would consist of plaintiffs who were identified as disabled by the defendants and referred to alternative programs, but those alternative programs did not comply with the mandates of the IDEA or New York law. Second, plaintiffs propose the "Child Find" subclass, which would consist of students who, though they are disabled, have not been classified as such by defendants. This subclass would share the common legal question of whether the defendants had established adequate policies and procedures for identifying disabled students and referring them for evaluation, rather than excluding them for behavioral problems. Defendants do not challenge plaintiffs' subclasses. Nor do defendants argue that additional subclasses are needed.

Federal Rule of Civil Procedure 23(c)(4) allows the Court to divide a class into various subclasses. Such subdivision enables courts to adjudicate class actions that would otherwise be dismissed as unmanageable. 7B WRIGHT ET AL., § 1790 at 269. This subdivision may occur as needed, and may be imposed on the Court's initiative. *Id.* at 269-70. Each subclass must independently meet the requirements of Rule 23(a) and one of the categories specified in subsection (b). *In re MTBE Products Liability*, 209 F.R.D. 323, 351 (S.D.N.Y. 2002).

The district court in *Marisol A.* certified two similar classes. One consisted of children who were in custody of New York's Administration for Children's Services. The other consisted of children not in custody, but who were at a risk of abuse and whose status should be known by Children's Services. *Marisol A.*, 126 F.3d at 378. Although the Court of Appeals affirmed class certification, it remanded for further division into subclasses. *Id.* It instructed the district court to "engage in rigorous analysis of plaintiffs' legal claims and factual circumstances to ensure that appropriate subclasses are identified" and that each subclass was tied to an appropriate representative. *Id.* In particular, the district court was to identify for each subclass: 1) a discrete legal claim at issue; 2) the named plaintiffs who are aggrieved under each individual claim; and 3) the subclasses that each named plaintiff represents. *Id.*

The Court of Appeals stated that this procedure would serve several functions. By identifying the specific issues to be tried, discovery could be focused. *Id.* at 379. Claims for which no named plaintiff is an adequate representative can be weeded out. *Id.* The trial can be conducted in a more orderly manner by tying the order of proof to claims raised. *Id.* Finally, subclass identification provides defendants with notice of the specific charges they face. *Id.*

In light of *Marisol A.*, subclasses are warranted. Nevertheless, neither party has briefed the issue. Plaintiffs have not argued that the subclasses identified satisfy Rule 23 requirements. Nor have they adequately identified for each subclass the three factors the *Marisol A.* court found relevant. Nor have defendants addressed whether plaintiffs' proposed subclasses are appropriate or whether more subclasses are warranted. The motion for certification of subclasses is therefore denied without prejudice.

Conclusion

For the reasons stated, the plaintiffs' motion to certify a class of "disabled New York City children age three through twenty-one who have been, will be, or are at risk of being excluded from school without adequate notice and deprived of a free and appropriate education through suspensions, expulsions, transfers, discharges, removals and denials of

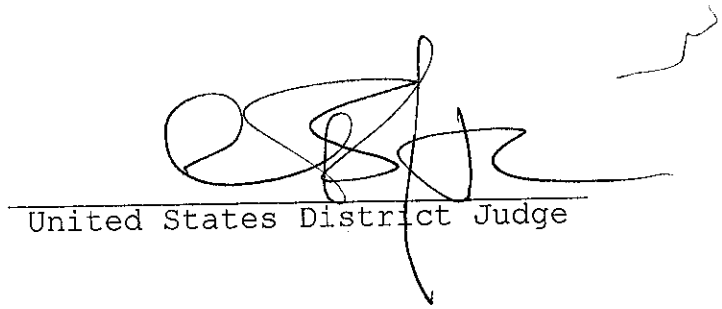
access" is granted. The motion to certify subclasses is denied without prejudice.

The Clerk is directed to furnish a filed copy of the within to all parties and to the magistrate judge.

SO ORDERED.

Dated : Brooklyn, New York

August 17, 2004



United States District Judge