

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

LV, VSG, RC, AD, NA, ADJ, YG, LO, AP, RLB,  
RD, and JYW, individually; HR, on behalf of herself  
and all others similarly situated,

Plaintiffs,

vs.

NEW YORK CITY DEPARTMENT OF  
EDUCATION; NEW YORK CITY BOARD OF  
EDUCATION; JOEL KLEIN, in his individual and  
official capacity as Chancellor of the New York City  
School District,

Defendants.

Civ. No.: 03-9917

**FIRST AMENDED  
COMPLAINT**

**PRELIMINARY STATEMENT**

1. This action is brought pursuant to 42 U.S.C. § 1983 by individual Plaintiffs and the named Plaintiff, on behalf of herself and all others similarly situated, seeking to enforce Defendants' compliance with settlements and agreements and final decisions, determinations and orders of Impartial Hearing Officers ("Impartial Hearing Orders") entered pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1415, et. seq. Defendants' failure to comply with these Impartial Hearing Orders is in violation of Plaintiffs' rights under the due process clause of the 14<sup>th</sup> Amendment of the U.S. Constitution; the IDEA; 42 U.S.C. § 1983; and Section 200.5 of the Regulations of the New York State Commissioner of Education, 8 N.Y.C.R.R. § 200.5.

2. Plaintiffs also seek a declaratory judgment that Defendants' failure to comply with the Impartial Hearing Orders is in violation of the due process clause of the 14<sup>th</sup>

Amendment to the U.S. Constitution; the IDEA; 42 U.S.C. § 1983; and Section 200.5 of the Regulations of the New York State Commissioner of Education, 8 N.Y.C.R.R. § 200.5.

3. The acts and omissions complained of herein are indicative of the system-wide failure of Defendants to establish a policy and procedure for the timely and effective enforcement of Impartial Hearing Orders.

### **JURISDICTION**

4. This Court has jurisdiction under 28 U.S.C. § 1331, in that claims are asserted under the laws of the United States; under 28 U.S.C. § 1343(a), in that claims are asserted under laws providing for the protection of civil rights; and under 42 U.S.C. § 1983. This Court has jurisdiction over Plaintiffs' pendent state law claims pursuant to 28 U.S.C. § 1367. Plaintiffs also seek declaratory relief pursuant to 28 U.S.C. § 2201 and 2202.

5. Venue is proper under 28 U.S.C. § 1391(b).

6. If successful, Plaintiffs are entitled to costs and attorneys fees under 42 U.S.C. § 1988 and 20 U.S.C. §1415.

### **PARTIES**

7. Plaintiff LV is the mother of RV, a child with a disability who resides in New York City.

8. Plaintiff VSG is the mother of KSG, a child with a disability who resides in New York City.

9. Plaintiff RC is the mother of TC, a child with a disability who resides in New York City.

10. Plaintiff AD is the mother of TD, a child with a disability who resides in New York City.

11. Plaintiff NA is the mother of SA, a child with a disability who resides in New York City.

12. Plaintiff ADJ is the mother of JDJ, a child with a disability who resides in New York City.

13. Plaintiff YG is the mother of SG, a child with a disability who resides in New York City.

14. Plaintiff LO is the mother of HG, a child with a disability who resides in New York City.

15. Plaintiff AP is the mother of MP, a child with a disability who resides in New York City.

16. Plaintiff RLB is the mother of RB, a child with a disability who resides in New York City.

17. Plaintiff RD is the mother of AD, a child with a disability who resides in New York City.

18. Plaintiff JYW is the mother of HL, a child with a disability who resides in New York City.

19. Plaintiff HR is the mother of SR, a child with a disability who resides in New York City.

20. Initials are used throughout this Amended Complaint to preserve the confidentiality of the infant plaintiff in conformity with the privacy provisions of the IDEA, 20 U.S.C. §1417(c), and the Family Educational and Privacy Rights Act (FERPA), 20 U.S.C. §1232g.

21. Defendant THE NEW YORK CITY DEPARTMENT OF EDUCATION (“Department”) is the newly formed official body charged with the responsibility for developing policies with respect to the administration and operation of the public schools in the City of New York, including programs and services for students with disabilities. N.Y. Educ. Law §§ 2590, 2590-g (McKinney 1980). It is a recipient of federal financial assistance.

22. Defendant THE NEW YORK CITY BOARD OF EDUCATION (“the Board of Education” or “the Board”) was or continues to be the official body charged with the responsibility for developing policies with respect to the administration and operation of the public schools in the City of New York, including programs and services for students with disabilities. N.Y. Educ. Law §§ 2590, 2590-g (McKinney 1980). It is a recipient of federal financial assistance.

23. Defendant JOEL KLEIN is the Chancellor of the New York City School District (“the Chancellor”) and as such is entrusted with the specific powers and duties set forth in N.Y. Educ. Law § 2590-h (McKinney 1930), including the power and duty to control and operate all academic and vocational senior high schools in the city school district.

## LEGAL FRAMEWORK

24. The IDEA, 20 U.S.C. 1401 *et. seq.*, is a comprehensive scheme passed by Congress to rectify grave deficiencies in the educational opportunities afforded students with disabilities, and to "assure that all children with disabilities have available to them a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, [and] to assure that the rights of children with disabilities and their parents or guardians are protected." § 1400(d)(1)(A) and (B).

25. Upon information and belief, Defendants are recipients of funding under the IDEA, 20 U.S.C. § 1400-1487, and, as such have the responsibility to "establish and maintain procedures . . . to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate education." 20 U.S.C. § 1415(a).

26. One of the procedural safeguards provided to parents under the IDEA is the opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child. 20 U.S.C. § 1415(b)(6). Whenever a complaint has been received under subsection 20 U.S.C. § 1415(b)(6) or (k), the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency. 20 U.S.C. § 1415(f).

27. New York State law authorizes an aggrieved parent to file for a hearing with the Board of Education, which is then responsible for assigning a hearing officer, scheduling a hearing and providing a location for the hearing. See N.Y. EDUC LAW §

4404(1) (McKinney 1999); N.Y. COMP. CODES R. & REGS. TIT. 8 §200.5 (2000). A parent must wait up to 45 days to receive a decision. N.Y. COMP. CODES R. & REGS. TIT. 8 § 200.5 (2002). After a decision is issued, an aggrieved parent or district has 30 days in which to appeal to the State Review Officer. See N.Y. EDUC. LAW § 4404 (2) (McKinney 1999); N.Y. COMP. CODES R. & REG TIT 8 § 200.5(j) (2002).

28. A decision rendered in a hearing is final, unless either party elects to appeal. 20 U.S.C. § 1415(i).

29. The IDEA permits disabled children to vindicate their educational rights through other statutes, including 42 U.S.C. § 1983. See 20 U.S.C. §1415(l)

### **FACTUAL ALLEGATIONS OF THE INDIVIDUAL PLAINTIFFS**

30. Plaintiff LV is the mother of RV, a 16-year-old student classified as emotionally disturbed. RV was born on February 16, 1987.

31. LV initiated an impartial due process hearing to request prospective funding for summer school tuition for RV at the Robert Louis Stevenson High School (“Stevenson School”), a non-public program that has not been approved by the New York State Education Department to provide education to students with disabilities. A hearing was held on July 24, 2003.

32. By decision dated August 11, 2003, the Impartial Hearing Officer ordered that LV receive \$2,800 for summer school tuition from the Department that she would in turn endorse to the Stevenson School.

33. Defendants did not appeal the Impartial Hearing Officer's decision within 30 days, and the decision became final as of September 11, 2003.

34. As of the filing of the initial Complaint, Defendants had not provided RV with the \$2,800 for RV's attendance at the Stevenson School summer program as required by the Impartial Hearing Order.

35. Plaintiff VSG is the mother of KSG, a 15-year-old student with Traumatic Brain Injury and Attention Deficit Disorder. KSG was born on May 4, 1988.

36. On April 30, 2003, VSG requested an impartial hearing alleging that the placement offered to KSG by Defendants was inappropriate. At the June 16, 2003 hearing, VSG requested that Defendants fund KSG's attendance at the 2003 summer program at the Stevenson School. A hearing was held on June 16, 2003.

37. By decision dated July 10, 2003, the Impartial Hearing Officer ordered, *inter alia*, that the Department fund KSG's attendance at the Stevenson School summer program.

38. Defendants did not appeal the Hearing Officer's decision within 30 days, and the decision became final as of August 10, 2003.

39. As of the filing of the initial Complaint, Defendants had not provided VSG funding in the amount of \$3,400 for KSG's attendance at the Stevenson School summer program as required by the Impartial Hearing Order. On or about January 8, 2004, approximately 6 months after the decision was issued, and weeks after the initial Complaint in this action was filed, VSG received payment in the amount of \$3,400.

40. Plaintiff RC is the mother of TC, a 15-year-old student who had exhibited behavioral and academic problems in school and was suspected of having a disability. TC was born on August 1, 1988.

41. RC initiated a hearing and hearings were held on January 16, 17, and 27, 2003.

42. By decision dated February 19, 2003 and corrected February 25, 2003, the Impartial Hearing Officer ordered, *inter alia*, Defendants to reimburse RC the amount of \$200 for a uniform that she purchased for TC to attend The Young Women's Leadership School.

43. Defendants did not appeal the Impartial Hearing Officer's decision within 30 days, and the decision became final as of March 28, 2003.

44. As of the filing of this Amended Complaint, Defendants have still not provided RC with the \$200 as required by the Impartial Hearing Order.

45. Plaintiff AD is the mother of TD, a 17-year-old student who is classified as emotionally disturbed. TD was born on April 17, 1986.

46. AD initiated hearings, which were held on October 11, 2002 and November 25, 2002, to request, *inter alia*, payment for tuition for the period of time that TD attended the Stevenson School.

47. By decision dated March 3, 2003, the Impartial Hearing Officer ordered the Department to pay tuition for the period of time that TD spent in the Stevenson School during the 2002-2003 school year.

48. TD attended the Stevenson School from mid-December 2002 to mid-February 2003. The amount of tuition for this period amounts to \$6,000.

49. Defendants did not appeal the Impartial Hearing Officer's decision within 30 days, and the decision became final as of April 3, 2003.

50. As of the filing of this Amended Complaint, Defendants have not paid tuition in the amount of \$6,000 for the period of time that TD attended the Stevenson School as required by the Impartial Hearing Order.

51. Plaintiff NA is the mother of SA, a 15-year-old student who is classified as emotionally disturbed. SA was born on September 2, 1988.

52. NA initiated a hearing to request, *inter alia*, reimbursement for a private psycho-educational evaluation performed by Dr. June Rousso on February 28, 2003. The hearing was held on May 30, 2003.

53. By decision dated July 11, 2003, the Impartial Hearing Officer ordered, *inter alia*, that NA receive reimbursement for the private psycho-educational evaluation.

54. Defendants did not appeal the Impartial Hearing Officer's decision within 30 days, and the decision became final as of August 10, 2003.

55. As of the filing of this Amended Complaint, Defendants have not provided payment for the private psycho-educational evaluation in the amount of \$400 as required by the Impartial Hearing Order.

56. Plaintiff ADJ is the mother of JDJ, a 12-year-old student who was classified as speech-impaired in his IEP dated March 15, 2001, the most current at the time of AD's request for a hearing. JD was born on September 2, 1991.

57. ADJ requested a hearing seeking, *inter alia*, payment from the Board for JDJ's round trip transportation to a private school and reimbursement for transportation expenses paid to date. A hearing was held on April 26, 2002.

58. By decision dated May 24, 2002, the Impartial Hearing Officer ordered, *inter alia*, the Board to reimburse ADJ for transportation costs they had incurred during the 2001-2002 school year.

59. Defendants did not appeal the Impartial Hearing Officer's decision within 30 days, and the decision became final as of June 24, 2002.

60. As of the filing of the initial Complaint, Defendants had not reimbursed ADJ for transportation costs incurred in the amount of \$1,590 as required by the Impartial Hearing Order.

61. Plaintiff YG is the mother of SG, a 17-year-old student classified as learning disabled and emotionally disturbed. SG was born on August 12, 1986.

62. YG initiated a hearing requesting, *inter alia*, reimbursement to Columbia Presbyterian for psychiatric, neuropsychological and neurological examinations. Hearings were conducted on November 5, 2003, November 26, 2003, January 22, 2003, February 28, 2003 and March 14, 2003.

63. By decision dated March 14, 2003, the Impartial Hearing Officer ordered, *inter alia*, the Department to reimburse Columbia Presbyterian for psychiatric, neuropsychological and neurological examinations for a total cost not to exceed \$3,600.

64. Defendants did not appeal the Impartial Hearing Officer's decision within 30 days, and the decision became final as of April 14, 2003.

65. After the filing of the initial Complaint, Defendants' counsel requested that Plaintiffs' counsel provide documentation that was neither ordered by the Impartial Hearing Officer, nor agreed to on the record, as a prerequisite for Defendants' obligation to comply with the Impartial Hearing Order and render payment. Nonetheless, in an

effort to expedite Defendants' compliance with the order, Plaintiffs' counsel sent Defendants' counsel the requested documents on December 30, 2003, the same day as Defendants' request.

66. However, as of the filing of this Amended Complaint, Defendants have still not paid Columbia Presbyterian for the psychiatric, neuropsychological and neurological examinations, the cost of which amounted to \$2,000, as required by the Impartial Hearing Order.

67. Plaintiff LO is the mother of HG, an 18-year-old student classified as learning disabled. HG was born on July 7, 1985.

68. LO initiated a hearing requesting, *inter alia*, an independent psychological evaluation at the Department's expense. A hearing was conducted on April 16, 2003.

69. By decision dated April 24, 2003, the Impartial Hearing Officer ordered, *inter alia*, that HG receive the psychological evaluation at the Department's expense.

70. Defendants did not appeal the Impartial Hearing Officer's decision within 30 days, and the decision became final as of May 23, 2003.

71. After the filing of the initial Complaint, Defendants' counsel requested that Plaintiffs' counsel provide documentation that was neither ordered by the Impartial Hearing Officer, nor agreed to on the record, as a prerequisite for Defendants' obligation to comply with the Impartial Hearing Order and render payment. Nonetheless, in an effort to expedite Defendants' compliance with the order, Plaintiffs' counsel sent Defendants' counsel the requested document on December 30, 2003, the same day as Defendants' request.

72. However, as of the filing of this Amended Complaint, Defendants have still not rendered payment for the psychological evaluation of HG, the cost of which amounted to \$400, as required by the Impartial Hearing Order.

73. Plaintiff AP is the mother of MP, a 14-year-old student classified as speech impaired. MP was born on November 29, 1989.

74. On September 15, 2003, AP requested an impartial hearing alleging that the Defendants had failed to provide MP with an appropriate placement, or in fact, any placement at all in spite of AP's specific requests that they do so. AP requested prospective funding for tuition for the 2003-2004 school year for MP at the Cooke Center for Learning and Development at St. Raymond's High School ("the Cooke Center"), a non-public program that has not been approved by the New York State Education Department to provide education to students with disabilities. A hearing was held on October 10, 2003.

75. By decision dated November 7, 2003, the Impartial Hearing Officer ordered that the Department fund MP's tuition for the 2003-2004 school year at the Cooke Center and provide transportation for MP to and from the school.

76. Defendants did not appeal the Hearing Officer's decision within 30 days, and the decision became final as of December 7, 2003.

77. As of the filing of this Amended Complaint, Defendants have still not provided AP tuition in the amount of \$31,500 for MP's attendance at the Cooke Center as ordered by the Impartial Hearing Order.

78. Plaintiff RLB is the mother of RB, an 11-year-old student classified as learning-disabled. RB was born on May 17, 1992.

79. RLB initiated a hearing requesting, *inter alia*, an assistive technology evaluation, reimbursement for the cost of a Central Auditory Processing Deficit evaluation paid for by RLB, and implementation of speech and language therapy incorporating the Fast For Word program. A hearing was held on June 16, 2003.

80. As reflected in the decision dated June 25, 2003, the parties agreed at the hearing that, *inter alia*, the Department would reimburse RLB for expenses incurred by her in obtaining the Central Auditory Processing Deficit evaluation – proof of which was submitted at the hearing and reflected in the decision -- no later than 15 days after the date of the decision; provide an assistive technology evaluation no later than 30 days after the date of the decision; and provide speech and language therapy incorporating the Fast For Word program beginning 30 days after the date of the decision.

81. Defendants did not appeal the Impartial Hearing Officer's decision within 30 days, and the decision became final as of June 17, 2003.

82. Defendants failed to reimburse RLB for expenses incurred in obtaining the Central Auditory Processing Deficit evaluation within 15 days after the date of the decision. Defendants failed to provide an assistive technology evaluation within 30 days of date of the decision. Defendants failed to provide speech and language therapy incorporating the Fast For Word program beginning 30 days after the date of the decision.

83. Furthermore, as of the date of the filing of this Amended Complaint, over 6 months after the June 25, 2003 Impartial Hearing Order was issued, Defendants have still not reimbursed RLB for expenses incurred in obtaining the Central Auditory Processing Deficit evaluation, have still not provided an assistive technology evaluation, and have

still failed to provide speech and language therapy incorporating the Fast For Word program, as required by the Impartial Hearing Order.

84. Plaintiff RD is the mother of AD, a 13-year-old student classified as speech-impaired. AD was born on May 12, 1990.

85. RD initiated a hearing requesting reimbursement for placement of AD at Sylvan Learning Center and prospective payment for the Sylvan Center until AD reaches grade level reading skills. Hearings were conducted on January 13, 2003 and February 4, 2003.

86. By decision dated March 4, 2003, the Impartial Hearing Officer directed the Department to reimburse RD for the cost of services received at the Sylvan Learning Center from March 2002 and continuing through May 2003, in the amount of two hours per week at \$59.00 per hour upon proper proof of payment submitted to the Department by the parent. On March 31, 2003, RD, through her attorney, submitted proof of payment to the Department in the amount of \$6,068.

87. Defendants did not appeal the Impartial Hearing Officer's decision within 30 days, and the decision became final as of April 4, 2003.

88. As of the filing of this Amended Complaint, Defendants have not reimbursed RD for the cost of services received at the Sylvan Learning Center in the amount of \$6,068 as required by the Impartial Hearing Order.

89. Plaintiff JYW is the mother of HL, a 13-year-old student classified as mentally-retarded. HL was born on July 8, 1990.

90. JYW initiated a hearing requesting immediate implementation of HL's Individualized Education Plan ("IEP"), namely bilingual instruction for the current

school year, compensatory education for failure to deliver IEP services for the prior two years, and all communication to the parent from the school translated into the parent's native language, Mandarin. A hearing was held on September 29, 2003.

91. By decision dated December 3, 2003, the Impartial Hearing Officer ordered that HL's IEP be implemented immediately, and if the Department could not comply, then the parent shall be entitled to find an alternate placement or services at Department expense; that HL be provided 72 hours of compensatory education in speech/language; and that all communications from the district to JYW be translated into her native language.

92. Defendants did not appeal the Impartial Hearing Officer's decision within 30 days, and the decision became final as of January 3, 2004.

93. As of the filing of this Amended Complaint, Defendants have failed to comply with the order to implement HL's IEP. Furthermore, despite the fact that JYW has procured the services of a bilingual service provider, namely a bilingual paraprofessional, Defendants have failed to allow these services to be provided to HL. In addition, as of the filing of this Amended Complaint, Defendants have not provided HL with any of the 72 hours of compensatory education in speech/language and have not translated communications from the district to JYW into her native language, as required by the Impartial Hearing Order.

94. All the actions and failures to act of Defendants alleged above were made under color of state law.

## **PLAINTIFF HR'S FACTUAL AND CLASS ACTION ALLEGATIONS**

### **FACTUAL ALLEGATIONS OF PLAINTIFF HR**

95. Plaintiff HR is the mother of SR, a 10-year-old student classified as speech-impaired. SR was born on September 7, 1993.

96. HR initiated a hearing to request prospective funding for tuition for the 2003-2004 school year for SR at the Sterling School, a non-public program that has not been approved by the New York State Education Department to provide education to students with disabilities. A hearing was held on September 23, 2003.

97. By decision dated September 29, 2003, the Impartial Hearing Officer ordered that the Department pay the cost of SR's tuition at the Sterling School for the 2003-2004 school year. It was further ordered that the Department provide transportation for SR to and from the school for the 2003-2004 school year and that the transportation was to be provided by car service if the DOE could not provide bus service.

98. Defendants did not appeal the Impartial Hearing Officer's decision within 30 days, and the decision became final as of October 29, 2003.

99. Defendants failed to provide SR with transportation for many weeks following the rendering of the Impartial Hearing Order, delaying SR's attendance at the Sterling School significantly.

100. As of the filing of this Amended Complaint, Defendants have not provided HR or Advocates for Children ("AFC"), the attorneys for HR, with the \$23,500 for SR's attendance at the Sterling School as required by the Impartial Hearing Order.

## **CLASS ACTION ALLEGATIONS**

101. Plaintiff HR's claims for relief are brought on her own behalf and on behalf of all those similarly situated pursuant to Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure. Defendants have acted or refused to act on grounds generally applicable to the named Plaintiff and class members, making appropriate relief as to the class as a whole.

102. The class represented by HR is comprised of all persons who, now and in the future, obtain a favorable order or stipulation of settlement through an impartial due process hearing relating to a child's identification, evaluation, educational placement or the provision of a free appropriate public education pursuant to Section 615(b)(6) of the IDEA and implementing regulations, and who fail to obtain full and timely implementation of the Impartial Hearing Order or settlement in accordance with Section 615 of the IDEA, 20 U.S.C. § 1415, et seq.

103. The class is so numerous that joinder of all members is impracticable. Upon information and belief, there are more than 5,300 hearings held in New York City and due to Defendants' failure to adopt a process for effective and timely implementation of orders there are significant delays or complete failure to implement almost every order.

104. Furthermore, joinder is impracticable because large numbers of class members are without adequate economic resources to retain counsel. Requiring hundreds of class members to litigate their rights before this Court would impose a significant economic burden on the educational and judicial systems, as well as a substantial injustice upon children and parents too poor to obtain competent representation.

105. There are questions of law and fact in common between HR and the members of the class she seeks to represent, including whether Defendants failed to timely and comprehensively implement Impartial Hearing Orders and whether Defendants' failure to provide the relief set forth in an Impartial Hearing Order constitutes a violation of Plaintiffs' civil rights and/or procedural safeguards, as set forth in the IDEA.

106. The claims of HR are similar to those of the class she seeks to represent. For example, HR, like the other members of the class, maintains that Defendants have violated the law by failing to enforce Impartial Hearing Orders or settlements made on the record. Accordingly, the claims of HR are typical of those of the class.

107. HR will adequately represent and protect the interests of the class. Counsel for the named Plaintiffs are experienced in federal class action litigation and will vigorously pursue this action in the interest of the class.

### **FURTHER FACTUAL ALLEGATIONS**

108. Defendants' failure to comply with Impartial Hearing Orders is a systemic problem that demonstrates a clear indifference to the rights of Plaintiffs.

109. Upon information and belief, throughout New York City, Impartial Hearing Orders and settlements are not being enforced and implementation is not occurring in a timely, effective and comprehensive manner.

110. Defendants clearly lack an effective policy and procedures to effectuate the timely and efficient enforcement of Impartial Hearing Orders, resulting in the Defendants' widespread failure to comply with the Impartial Hearing Orders and a clear

deprivation of the rights of the individual Plaintiffs, the named Plaintiff and class members.

111. Defendants have not developed or maintained a system to ensure that all Impartial Hearing Orders are enforced in a timely and comprehensive manner and to ensure that Defendants and their agents and employees are held accountable for complying with these orders and other federal, state and local laws that protect the rights of parents and students with disabilities.

112. Defendants do not have a system for tracking and monitoring impartial hearing orders for the purposes of ensuring timely enforcement.

113. Defendants failed to train, supervise and monitor persons responsible for ensuring enforcement and implementation of Impartial Hearing Orders in a timely and comprehensive manner, even though Defendants had knowledge of circumstances reflecting the facts set forth above, and that training, supervision and monitoring would increase the likelihood of timely and full implementation of Impartial Hearing Orders.

114. Furthermore, Defendants' systematic failure to promptly comply with Impartial Hearing Orders in cases involving tuition for students whose families are unable to front the cost of tuition themselves discourages private schools with appropriate programs from admitting students who are otherwise entitled to prospective funding for private school placement by law.

115. Defendants have repeatedly been made aware of Impartial Hearing Orders that have been issued but not enforced, in violation of the rights of the individual Plaintiffs, the named Plaintiff and class members.

116. On October 10, 2003, Plaintiffs' counsel informed Defendants' General Counsel and Office of Legal Services that Plaintiffs' counsel were preparing to file an action based on Defendants' systematic failure to implement Impartial Hearing Orders, and provided to them a list of certain Plaintiffs and the names of their children, including Plaintiffs LV, VSG, RC, AD, NA, ADJ, YG and LO. Plaintiffs' counsel requested immediate resolution and enforcement of the Impartial Hearing Orders.

117. On or about October 14, 2003, Plaintiffs' counsel again provided to the Department's General Counsel and Office of Legal Services the same list of names, including dates of birth and case numbers of the Plaintiffs' children.

118. As of the date of the filing of the initial Complaint on December 12, 2003, nearly two months after Defendants were provided with this information, the Impartial Hearing Orders continued to remain unenforced in clear violation of law.

119. On October 29, 2003, Plaintiffs' counsel provided to the Department's Office of Legal Services the name, date of birth and case number of Plaintiff RLB's son, RB. On the same day, Plaintiffs' counsel faxed to the Department's Office of Legal Services a copy of the hearing order issued in RB's case. Plaintiffs' counsel requested immediate resolution and enforcement of this Impartial Hearing Order.

120. As of the date of this Amended Complaint, nearly three months after Defendants were provided with this information, this Impartial Hearing Order remains unenforced in clear violation of law.

121. In the cases at issue herein, Impartial Hearing Officers heard testimony about the non-public schools and provision of other services in question and found the testimony sufficient to order the Department to provide payment for the services sought

by Plaintiffs. In spite of the direct order to Defendants to provide payment, Defendants subsequently request various documents that are not ordered by the Hearing Officer before processing payment, thus adding further undue delay to the enforcement of the Impartial Hearing Orders.

122. Defendants' actions constitute a policy, custom and practice of illegally failing to enforce Impartial Hearing Orders in a timely, effective and comprehensive manner.

123. Defendants have denied students with disabilities and their parents the right to substantive and procedural protections of federal and state law.

124. Defendants' failure to enforce orders results in children not receiving their special education and related services and can even result in a child being excluded from school.

### **CAUSES OF ACTION**

125. Defendants have violated the rights of the individual Plaintiffs, the named Plaintiff and class members under the due process clause of the 14<sup>th</sup> Amendment to the Constitution of the United States.

126. Defendants' failure to provide the individual Plaintiffs, the named Plaintiff and class members with the relief ordered by the Impartial Hearing Officers deprived them of their right to a free appropriate public education under IDEA, 20 U.S.C. § 1400(c) and due process under IDEA, 20 U.S.C. § 1415, and the regulations promulgated thereunder, and thus deprives them of rights secured by federal law in violation of 42 U.S.C. § 1983.

127. Defendants have violated the rights of the individual Plaintiffs, the named Plaintiff and class members under Section 200.5 of the Regulations of the New York State Commissioner of Education, 8 N.Y.C.R.R. § 200.5.

128. Having won favorable Impartial Hearing Orders, the individual Plaintiffs, the named Plaintiff and class members have no further administrative remedy, and thus exhaustion is futile and not required.

### **RELIEF**

WHEREFORE, Plaintiffs request that this Court:

- a. Certify a class;
- b. Enter a judgment:
  - i. Ordering Defendants to immediately comply with and implement the provisions of the Impartial Hearing Orders of the individual Plaintiffs and the named Plaintiff;
  - ii. Ordering Defendants to identify all class members and immediately comply with and implement the provisions of the Impartial Hearing Orders of class members;
  - iii. Requiring Defendants to design, submit to Plaintiffs' counsel and the Court for approval, and implement an effective plan to ensure that all Impartial Hearing Orders are enforced in a timely and comprehensive manner. This plan should include: (a) the procedures Defendants will implement to ensure Defendants come into full compliance with the Court's Order; (b) the persons

directly accountable, respectively, ensuring the successful implementation of each provision of the plan; (c) the additional resources that will be allocated and disbursed to bring Defendants into full compliance with the Court's Order; and (d) milestones and target dates used to hold Defendants accountable to this Court.

- iv. Ordering Defendants to submit monthly compliance reports to the Court, with copies to Plaintiffs' counsel;
- v. Retain jurisdiction of this action for all purposes, including entry of such additional orders as may be necessary or proper;
- c. Appoint a special master or independent monitor to oversee and monitor Defendants' implementation of the requirements of the Court's Order;
- d. Issue a declaratory judgment that Defendants have violated Plaintiffs' rights as set forth;
- e. Award to Plaintiffs their costs and attorneys fees; and
- f. Grant such other and further relief as may be appropriate.

Dated: January 13, 2004  
New York, New York

Respectfully submitted,

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