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 (RJH)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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PRELIMINARY STATEMENT

This is a Motion for Class Certification brought by Plaintiff, HR, in this civil rights action filed by thirteen parents challenging the failure of Defendants, the New York City Board of Education (the "Board"), the New York City Department of Education (the "Department") and Chancellor Joel Klein (collectively, the "Defendants") to timely enforce favorable orders issued in administrative hearings concerning special education services under the Individuals with Disabilities Education Act ("the IDEA"), 20 U.S.C. §§ 1400-1487. Plaintiff HR and the twelve individual Plaintiffs allege that Defendants' failure to implement these orders violates their rights and the rights of their children under 42 U.S.C. § 1983 and the 14th Amendment to the U.S. Constitution.

Statistics obtained from the New York State Education Department indicate that there were approximately 1,070 decisions issued in hearings in New York City in the past year. In this case alone, there are thirteen parents who have obtained favorable orders that have not been timely enforced. Since the First Amended Complaint was filed a few weeks ago, Plaintiffs' counsel has identified two more parents and one student who have recently obtained favorable orders that have not been enforced. Declarants in support of Plaintiffs' Motion for Class Certification identified numerous other examples of children and parents who have not obtained timely enforcement of orders.

In some cases, Defendants' failure to enforce orders results in complete exclusion of children from school; in others, it results in denial of critically needed services. Some parents have obtained orders for the Defendants to pay for private services, evaluations or school tuition, as a remedy to cure Defendants' failure to provide a public education in the first instance, and those funds have not been paid. Many of the parents and children

are poor and lack the means to pursue their claims individually.

HR seeks to represent herself and the class of other parents similarly situated, and moves to certify this class pursuant to Rules 23(a), (b)(1), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure. Class certification should be granted here because Defendants' failure to implement procedures and policies that ensure timely and adequate enforcement of administrative orders is a system-wide problem, likely to affect any parent and child who prevail in a proceeding.

LEGAL FRAMEWORK

The Individuals with Disabilities in Education Act ("IDEA") is a comprehensive scheme passed by the U.S. Congress to rectify grave deficiencies in the educational opportunities afforded to 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." 20 U.S.C. § 1400(d)(1)(A) and (B) (Supp. 1999).[1] The use of Section 1983, 42 U.S.C. § 1983, to enforce the IDEA is firmly established. 20 U.S.C. § 1415(l). See also Mrs. W. v. Tirozzi, 832 F.2d 748, 755 (2d Cir. 1987) ("parents are entitled to bring a § 1983 action based on alleged violations of the [IDEA]").

The IDEA requires the development of elaborate procedural safeguards "to insure

[1] Those services must also be (1) provided at public expense and at no cost to the parent; (2) meet the standards of the State educational agency; (3) include an appropriate preschool, elementary, or secondary school education in the State involved and (4) be provided in conformity with the IEP. See 20 U.S.C. § 1401(a)(18).

the full participation of the parents and proper resolution of substantive disagreements." Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 368 (1985). These procedural protections are not simply empty "procedural" rights, but are the key to guaranteeing a child a substantively appropriate education. Heldman v. Sobol, 962 F.2d 148, 150 (2d Cir. 1992).

In fact, the IDEA requires that school districts, like the Defendants, that receive funding under the IDEA "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). "Foremost among the procedural safeguards provided for in the Act is the guarantee that parents may contest their child's placement or classification in an 'impartial due process [administrative] hearing.'" Heldman, 962 F.2d at 150-51. A parent may initiate a hearing to resolve complaints concerning "any matter relating to the identification, evaluation, or educational placement" of the child or the provision of a free appropriate public education ("FAPE"). 20 U.S.C. §§ 1415(b)(6) and (f).[2] These hearings "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).

New York State operates a two-tiered system. New York State law authorizes an aggrieved parent to file for a hearing with the Board of Education, which is then

[2] "Due process hearing officers and courts may order a school system to take any number of actions in order to correct violations of IDEA . . . including modifying an IEP, implementing an existing IEP it has failed to carry out, providing a particular placement, providing a particular related service." See Ordover, E., Boundy, K, Educational Rights of Children with Disabilities; a Primer for Advocates, Center for Law and Education (1991), at 59. Other remedies available include retroactive reimbursement for private placement or services and compensatory education.

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 the decision 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).

A decision rendered in a hearing is final, unless either party elects to appeal. 20 U.S.C. § 1415(i). Hearing officers do not have the power to enforce their own orders or the power of contempt to hold school districts accountable if the orders are violated. 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).

Parents, like Plaintiffs, who prevail at the local school district hearing level are entitled to seek enforcement of orders in federal court. See Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 2003 WL 23008818, at *4-5 (1st Cir. Dec. 24, 2003) (plaintiffs who were successful before hearing officer were permitted to file an action in federal court when the school system neither appealed from nor complied with the final administrative order); Blackmun v. D.C., No. 97-1629, 28 IDELR 1053 (PLF) (D.D.C. June 3, 1998) (plaintiffs had enforceable right to implementation of hearing officers' determinations and implementation of settlement agreements); R.B. v. Bd. of Educ., 99 F. Supp. 2d 411, 416 (S.D.N.Y. 2000) (court had jurisdiction over claims when plaintiff prevailed at hearing and hearing officer granted relief that defendants failed to enforce).

STATEMENT OF FACTS

The facts are set forth in the First Amended Complaint (hereinafter "Complaint"); the Declaration of Elisa Hyman, Esq., dated February 3, 2004 ("Hyman Decl."), and the exhibits annexed thereto; the Declaration of Matthew Lenaghan, Esq., dated January 27, 2004 ("Lenaghan Decl."); the Declaration of Michael Hampden, Esq., dated January 23, 2004 ("Hampden Decl."); the Declaration of Kim Sweet, Esq. dated January 26, 2004 ("Sweet Decl."); and the Declaration of Irene Hwang, dated January 27, 2004 ("Hwang Decl.").

Defendants and their agents and employees have engaged in systemic violations of Plaintiffs' rights under Section 1983 by failing to ensure that orders issued by impartial hearing officers in IDEA due process hearings are timely enforced and implemented. (Compl. ¶¶ 108-113).

Although New York State Law directs the Board of Education to provide parents with the opportunity for an impartial hearing, the impartial hearings in New York City are under the auspices of the Department of Education. (See Hyman Decl., Exh. N). This office operates centrally and is responsible for assigning hearing officers for hearings that take place throughout New York City. The hearings themselves take place within the Districts or Regions throughout the City.

Once an order is issued, depending on the relief granted, a variety of different individuals may have a role in ensuring that the order is enforced. For instance, if an order directs a child to attend a particular school or class or some other relief at the school level, the school principal and administrative staff must have a role in the implementation of the order. Other orders may require an action from a Region or

District, such as when a hearing officer directs a Region to locate a school or a particular class or to evaluate a child who is out of school. In other cases, parents may win orders in which they are entitled to receive funding for school or other services. Those orders may require regional, district-level and/or central administrative staff to coordinate and involve Defendants' Office of Contract Aid involved. Yet other orders may require Defendants to provide transportation, in which the school, region or district, central office and transportation office might be involved. These are only some of the possible examples of what types of relief might be ordered and who might be responsible for implementing them.

Despite the fact that there are over 1,000 orders that need to be implemented or enforced on an annual basis, Defendants do not appear to have procedures or policies to ensure the timely and full implementation and enforcement of impartial hearing orders. Additionally, Defendants have implemented some policies that actually hamper the enforcement of orders. As a result, parents who prevail at hearings are not able to obtain timely or effective relief through the administrative process.

To date, Defendants have failed to comply with or enforce the favorable orders won by the named Plaintiff, HR. They also have not enforced the orders of the individual Plaintiffs and putative class members discussed below. Named Plaintiff HR is the mother of SR, a 10-year-old student classified as speech-impaired. HR obtained a favorable order dated September 29, 2003, ordering Defendants to pay the cost of SR's tuition at a private school (the Sterling School) and provide round-trip transportation. (Compl. ¶¶

95-100; Hyman Decl., Exh. M).[3] Plaintiff RC is the mother of TC, a 15-year-old student with a disability. RC won a favorable decision dated February 19, 2003 ordering Defendants to reimburse RC the amount of $200 for a school uniform. (Compl. ¶¶ 40-44, Hyman Decl., Exh. C). Plaintiff NA is the mother of SA, a 15-year-old student who is classified as emotionally disturbed. NA obtained a favorable order dated July 11, 2003, ordering Defendants to reimburse NA for the private psycho-educational evaluation of SA. (Compl. ¶¶ 51-55; Hyman Decl., Exh. E). Plaintiff LO is the mother of HG, an 18-year-old student classified as learning disabled. LO won a favorable decision dated April 24, 2003 ordering Defendants to pay for a private psychological evaluation of HG. (Compl. ¶¶ 67-72; Hyman Decl., Exh. H). The order also required Defendants to provide HG with the ordered educational services until mid-July 2003, some five months after HG filed his hearing. (Lenaghan Decl. ¶11; Hyman Decl., Exh. H). Plaintiff AP is the mother of MP, a 14-year-old student classified as speech impaired. AP won a favorable decision dated November 7, 2003, ordering Defendants to fund MP's tuition at a private school and provide round-trip transportation. (Compl. ¶¶ 73-77; Hyman Decl., Exh. I). Plaintiff RLB is the mother of RB, an 11-year-old student classified as learning-disabled. RLB entered into an agreement with Defendants, reflected in a decision dated June 25,

[3] Parents who establish that a district did not offer their child FAPE are able to place the child in private school or purchase private services and obtain payment from a school district. See Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993); Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 (1985). See also 20 U.S.C. 1412(a)(10)(C); 34 C.F.R. 300.403. The IDEA also contains a mechanism for a district to pay for a private evaluation. See 20 U.S.C. 1415(b)(1); 34 C.F.R. 300.502. Parents generally need to have significant financial resources to pay tuition and costs up front to take advantage of this mechanism. Parents without such resources, like Plaintiffs, who are able to convince a private provider or school to accept a child, contingent on obtaining payment through an administrative proceeding, are at the mercy of the system's speed of enforcing favorable orders.

2003, where Defendants agreed to reimburse RLB for expenses incurred by her in obtaining an auditory evaluation, provide an assistive technology evaluation, and provide speech and language therapy incorporating the Fast For Word program, within defined time periods. (Compl. ¶¶ 78-83; Hyman Decl., Exh. J). Defendants have only complied with arranging an assistive technology evaluation for RB, and did so only after Plaintiffs filed this action. Plaintiff RD is the mother of AD, a 13-year-old student classified as speech-impaired. RD won a favorable decision dated March 4, 2003, ordering Defendants to reimburse RD for the cost of services received by AD at the Sylvan Learning Center. (Compl. ¶¶ 84-88; Hyman Decl., Exh. K). JYW is the mother of HL, a 13-year-old student classified as mentally retarded. JYW won a favorable decision dated December 3, 2003, ordering Defendants to immediately provide HL with a bilingual paraprofessional as mandated by HL's IEP, provide HL with 72 hours of compensatory education in speech/language, and translate all communications from the district to JYW into her native language. (Compl. ¶¶ 89-93; Hyman Decl., Exh. L). Defendants have only complied with the provision of a bilingual paraprofessional, and did so only after Plaintiffs filed this action.

Defendants had also failed to comply with the favorable orders won by Plaintiffs LV, VSG, AD, YG, ADJ until Plaintiffs filed this action. (Compl. ¶¶ 30-34; 35-39; 45-50; 56-60; 61-66; Hyman Decl., Exhs. A, B, D, G & F). Further, since this action was filed, AFC identified two additional parents who have not obtained timely enforcement of their orders and are presently awaiting enforcement. (See Lenaghan Decl. ¶ 5, 6).

ARGUMENT

I. CERTIFICATION AS A CLASS ACTION IS APPROPRIATE BECAUSE THE REQUIREMENTS OF RULE 23 ARE MET

Rule 23(c)(1) requires the court to determine whether an action may be maintained as a class action "as soon as practicable after the commencement of an action." Most class determinations are made early in the proceedings. See 2 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 7.12 (3d ed. 1992) ("Newberg"). Certifying the class "as soon as practicable" under Rule 23 is not a "minor formality" but is necessary to identify the plaintiffs, define the boundaries of the legal claims, and make provisions to protect absent class members. Navarro-Ayala v. Hernandez-Colon, 951 F.2d 1325, 1334 (1st Cir. 1991) (district court's failure to determine explicitly and as soon as practicable whether the action could be maintained as a class action was an "egregious omission"); Henry v. Gross, 803 F.2d 757, 769 (2d Cir. 1986) (failure to identify the issues and certify the class early creates confusion).

Rule 23 is traditionally given liberal construction. See Marisol A. v. Giuliani, 126 F.3d 372, 377 (2d Cir. 1997); Sharif v. N.Y. State Educ. Dep't, 127 F.R.D. 84, 87 (S.D.N.Y. 1989) (citations omitted) (court certified class of all female high school seniors in New York State who are or will be applicants for certain scholarships). In making a determination of class status, the court should refrain from deciding any material factual disputes between the parties concerning the merits of the claims and should accept the underlying allegations from the complaint as true. See Eisen v. Carlisle & Jaquelin, 417 U.S. 156, 177-178 (1974) (court should not conduct a "preliminary inquiry into the merits" of the action when making a determination about class certification); Dajour B. ex. rel. L.S. v. City of New York, No. 00 Civ. 2044, 2001 WL 1173504, at *3 (S.D.N.Y.

Oct. 3, 2001) (motion for class certification should not be a "mini-trial on the merits").

Class certification is appropriate here, since the prerequisites of Rule 23(a) are satisfied and the class can be maintained under one of the subsections of Rule 23(b). See Marisol A. v. Giuliani, 126 F.3d at 376; Dajour B., 2001 WL 1173504, at *3. Rule 23(a) permits class certification 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. P. 23(a). Furthermore, the party seeking certification must qualify under one of the criteria set forth in Rule 23(b), where defendants have "acted or refused to act on grounds generally applicable to the class" so that injunctive or declaratory relief is appropriate "with respect to the class as a whole," (FED. R. CIV. P. 23(b)(2)), or where pursuing separate actions "would create a risk of . . . inconsistent or varying adjudications" that "would establish incompatible standards of conduct." FED. R. CIV. P. 23(b)(1)(a).

Plaintiffs seek certification of a class of all current and future individuals who will prevail in impartial hearings. The scope of the proposed class is appropriate. The pattern and practice of failing to enforce these orders is persistent, widespread and longstanding. A system-wide remedy is needed for this system-wide problem. The fact that Defendants have refused to address this problem, despite having long-standing notice of the problem, demonstrates that a piecemeal approach is inadequate. All current and future individuals who prevail in hearings have a common interest in preventing the future delay and failures complained of herein. Classes of similar breadth, alleging systematic violations

of class members' rights, have been certified before. See, e.g., Blackmun v. D.C., No. 97-1629, 28 IDELR 1053 (PLF) (D.D.C. June 3, 1998).

A. The Proposed Class Meets the Numerosity Requirement of Rule 23(a)(1)

The class sought to be maintained by Plaintiffs easily meets the numerosity requirement of Rule 23(a)(1), which requires that the class is "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). Generally, numerosity is presumed at a level of 40 class members. See Dajour B., 2001 WL 1173504, at *5 (citing Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 283 (2d Cir. 2001)). However, courts do not require evidence of the exact class size or the identity of the proposed class members to satisfy the numerosity requirement. See Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993) (plaintiffs claimed "hundreds if not thousands" of class members); Andre H. v. Ambach, 104 F.R.D. 606, 611-612 (S.D.N.Y 1985) (class certified where plaintiffs relied on estimates of percentages of children in custody of Department of Juvenile Justice). Plaintiffs can rely on "reasonable inferences drawn from the available facts" to support a finding of numerosity. McNeil v. NYCHA, 719 F. Supp. 233, 252 (S.D.N.Y. 1989) (estimate that there were 1,059 Section 8 housing tenants were sufficient to establish numerosity).

The numerosity requirement is plainly satisfied here. In this action, thirteen individual parents have obtained favorable orders that were not timely enforced. AFC attorneys and advocates represent and provide advice to hundreds of parents in special education proceedings and regularly observe significant delays in the enforcement of orders. (See Lenaghan Decl. ¶¶ 5-12). Other attorneys and advocates have submitted declarations in support of this motion supporting the system-wide nature of this problem.

(See Hampden Decl. ¶¶ 4-7; Sweet Decl. ¶¶ 5-8). Defendants do not and cannot dispute that every single Plaintiff and putative class member has the rights that they seek to protect and that there are system-wide delays and problems.

Numerosity is further supported by the fact that the proposed class includes future class members who will obtain favorable decisions and settlements that will not be enforced in a timely manner. Accord Boucher v. Syracuse Univ., 164 F.3d 113, 119 n.11 (2d Cir. 1999) (class including future students would satisfy the numerosity requirement because joinder would be impracticable); Jane B. v. N.Y. City Dep't of Soc. Svcs., 117 F.R.D. 64, 70 (S.D.N.Y. 1987) (class of current and future residents of centers for girls with a combined resident population of approximately sixty certified).

In addition, Defendants appear to have an unwritten policy that would affect all parents who prevail in hearings: Defendants often require additional documentation and evidence that was not required by the hearing officer before they will agree to enforce an order. (See Compl. ¶ 65, 71, 121). For example, Plaintiff RC prevailed last year in a hearing in which the hearing officer ordered Defendants to reimburse her $200 that she paid for a uniform when the school inadvertently sent her a letter informing her that her daughter should return to school when she had, in fact, been transferred without her parent's knowledge. (See Lenaghan Decl. ¶ 7). The hearing officer directed payment based upon the evidence presented at the hearing. (See Id.). Yet, Defendants will not comply with this order, as they insist that RC must produce additional evidence of payment. This is only one of many cases in which Plaintiffs' counsel has been unable to obtain enforcement of a decision based on application of this improper and unwritten policy. (See Id.; Compl. ¶65, 71, 121).

Subsequent to the filing of this action, AFC submitted Freedom of Information Law requests to the New York State Education Department ("NYSED") in an effort to ascertain the number of hearings requested, decided and appealed in New York City, as well as data relating to the timeliness of enforcement and compliance with these orders. (See Hwang Decl. ¶¶ 4, 6; Hyman Decl., Exhs. Q, S). NYSED operates a web-based reporting system for tracking impartial hearing decisions and orders.[4] (Hwang Decl. ¶ 3; Hyman Decl., Exh. O). According to the data received from NYSED, 4,104 requests for impartial hearings were made from September 1, 2002 to August 31, 2003. (Hwang Decl. at ¶ 5; Hyman Decl., Exh. ¶ R). NYSED also reported that out of these requests, 1,070 impartial hearing officer decisions were rendered during this time, none of which were reported by Defendants as having been appealed to the State Review Officer. (Id.)

Even though NYSED's new web-based procedures require data on enforcement and compliance with hearing orders to be maintained and entered into the system (Hwang Decl. ¶ 3; Hyman Decl., Exh. P), AFC was informed that no data on enforcement and timeliness of compliance with orders in New York City was available through this system. (Hwang Decl. ¶ 7). Thus, the fact that information regarding numerosity is to be principally found in the hands of Defendants also allows the Court to certify a class without requiring Plaintiffs to establish an exact number of class members. See McNeil,

[4] As of July 1, 2002, NYSED requires school districts to use the web-based Impartial Hearing Reporting System ("IHRS") to report data to NYSED. (See Hyman Decl., Exh, O). The IHRS requires schools to maintain and enter information regarding, among other things, "information regarding the issue(s) of the case, and the corresponding decision on each issue as well as any follow-up action that is ordered for each issue, when the follow-up action is completed, is the issue appealed to the State Review Officer, etc." This data is entered into fields such as District Action Required, District Action Description, Action Date Specified By IHO, Actual Action Completion Date, and Issue Appealed To SRO. (See Hyman Decl., Exh. P).

719 F. Supp. at 252. This is particularly true where, as here, the heart of Plaintiffs' case is that Defendants fail to accurately keep track of and monitor the enforcement of these orders.

B. The Proposed Class Meets the Commonality Requirement of Rule 23(a)(2)

The class also meets the commonality requirements of Rule 23(a)(2), since each Plaintiff alleges the same violations of law and deprivation of rights and relies on the same legal theories. Rule 23(a)(2) requires only that the named plaintiffs share at least one question of fact or law with the rest of the putative class. See Marisol A. v. Giuliani, 126 F.3d at 377 (existence of commonality even at a "high level of abstraction" can and should be found to satisfy this requirement); Daniels v. City of New York, 198 F.R.D. 409, 417-18 (S.D.N.Y. 2001). In fact, the Court may presume commonality where, as in this case, the named Plaintiff seeks to represent a class to remedy an alleged widespread illegal policy and practice of Defendants. See Marisol A. v. Giuliani, 126 F.3d at 377.

At least one court has already certified a class similar to the one that Plaintiff seeks to certify here. See Blackmun v. D.C., No. 97-1629, 28 IDELR 1053, (PLF) (D.D.C. June 3, 1998) (court granted summary judgment on behalf of a class of Plaintiff parents who had not obtained timely enforcement of decisions of impartial hearing officers). Similar to Blackmun, the following questions of fact and law are common to the class and sufficient to satisfy the requisite commonality requirement: (1) whether Defendants failure to implement and enforce orders and settlements favorable to Plaintiffs and putative class members violates their rights under §1983 and the IDEA; and (2) whether Defendants have failed to adopt policies and procedures to ensure that orders of impartial hearing officers are enforced in a timely manner across New York City.

In the present action, the nature of the claims are quite simple and Plaintiff and putative class members seek a common, systemic remedy, which is designed to ensure that the class members never suffer the same type of harm in the future. Thus, in light of the above, this Court should find that Plaintiff has met the requirements of Rule 23(a)(2) as to the proposed class.

C. The Proposed Class Meets the Typicality Requirement of Rule 23(a)(3).

For similar reasons, the claims of the proposed class representatives are typical of the class members they seek to represent and should therefore be found to satisfy Rule 23(a)(3). While distinctly different requirements, typicality and commonality tend to merge in practice due to similar considerations underlying both criteria. See e.g. Dajour B., 2001 WL 1173504, at *6. The typicality requirement is satisfied despite factual variations among the class members' grievances, so long as "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." Robidoux, 987 F.2d at 936. See also McNeil, 719 F. Supp. at 252 (claims don't need to be identical).

Here, the claims of Plaintiff and putative class members are typical in that each parent of a child with a disability has obtained a favorable order through an impartial hearing that has not been timely implemented or enforced. The fact that each Plaintiff's child may have different circumstances or the failure to enforce affects them in varying ways does not affect the fact that the claims are typical of the class under the standards of Rule 23. See Andre H., 104 F.R.D. at 612 (S.D.N.Y. 1985) (diverse factual situations presented by each disabled student did not affect the typicality of the legal claims regarding defendants' faulty development of procedures). The failure to implement

impartial hearing orders arises from the same conduct, to wit Defendants' failure to implement a system for timely enforcement of decisions of impartial hearing officers across New York City.

D. The Proposed Class Meets the Adequacy of Representation Requirement of Rule 23(a)(4)

The proposed class representative, HR, will "fairly and adequately protect the interests of the class," thus meeting with requirement of Rule 23(a)(4). FED. R. CIV. P. 23(a)(4). To ascertain whether adequacy is met, courts look to ensure that (1) there are no conflicts between the named Plaintiff and putative class members; and (2) class counsel is qualified. See Dajour, 2001 WL 1173504, at *8.

There is plainly no conflict here, as the class representative and members of the proposed class have the same interest – and an entitlement – in having their orders enforced in a timely manner and a system of due process that protects their rights to obtain services for their children under the IDEA. See, e.g., Marisol A. v. Giuliani, 126 F.3d at 378 ("broad based relief" seeking to improve "all" services is in the interest of all class members). There is no conflict between a parent who already obtained enforcement of an order and those who still have orders outstanding, particularly since parents who have already had their most recent orders enforced are likely to need to use the due process system in the future. All parents have an interest in ensuring that Defendants establish a system of due process hearings that protect the rights of disabled children and their parents to access timely services. Thus, the interests of all class members are aligned.

Further, the named Plaintiff and putative class members are represented by two experienced attorneys from Advocates for Children of New York, Inc. ("AFC"), who are

unquestionably qualified to litigate this case. For over 32 years, AFC has served families of public school children in New York City, with a mission of providing equal access to a quality education. AFC has decades of experience representing disabled students and students in the school system, with a focus on litigation on behalf of students with disabilities. (See Hyman Decl. at ¶¶ 23-28).

Accordingly, because there is no conflict of interest between the proposed class representative and the putative class members, and because Plaintiffs' counsel is qualified and experienced to litigate this case, the requirements of Rule 23(a)(4) are satisfied.

E. The Suit Qualifies as a Class Action Under Rule 23(b)(2)

Rule 23(b)(2), which provides that class actions are appropriate 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," was designed especially for civil rights cases like this one, where Plaintiffs seek broad declaratory and injunctive relief for a large class of persons. See FED. R. CIV. P. 23(b)(2), Advisory Committee notes to 1966 amendment; Herbert Newberg and Alba Conte, Newberg on Class Actions § 4.11 (3d ed. 1992). Defendants' failure to timely enforce orders and lack of procedures or a system for implementation and enforcement throughout New York City violates the rights of all parents of disabled students and unquestionably affects all parents who have obtained favorable orders in New York City. A class action is appropriate here as the plaintiff class is seeking systemic reform through injunctive relief. See Marisol A. v. Giuliani, 126 F.3d at 378. Were Defendants to adopt adequate policies and procedures to enforce orders and ensure that all parents of disabled students are afforded meaningful due

process, this remedy would inure to the benefit of all parents who seek due process hearings.

F. The Suit Qualifies as a Class Action Under Rule 23(b)(1)(A)

Rule 23(b)(1)(A) provides that class actions are to be maintained if "the prosecution of separate actions by . . . individual members of the class 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 party opposing the class." FED. R. CIV. P. 23(b)(1)(A). See generally Newberg § 4.04. Certification of a class in this action is appropriate because pursuit of these claims for system-wide injunctive relief through multiple individual suits would not only be inefficient but would also create a risk that different courts might order divergent and even conflicting relief. See Abramovitz v. Ahern, 96 F.R.D. 208, 215 (D. Conn. 1982); cf. Robertson v. Nat'l Basketball Ass'n, 556 F.2d 682, 685 (2d Cir. 1977) (Rule 23(b)(1) certification proper where plaintiffs sought rule changes that would impact future class members). Therefore, a class should be certified under Rule 23(b)(1)(A), since this action seeks to remedy the inconsistencies between the policies and practices of different Regions, Districts and Schools and the Defendants' central administration, in light of the wholesale failure of many of the Defendants' high-level administrators to abide by the law.

G. The Suit Qualifies as a Class Action Under Rule 23(b)(3)

Rule 23(b)(3) is satisfied when the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. FED. R. CIV. P. 23(b). The matters

pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action. Id.

As set forth above, Plaintiffs seek primarily structural reforms and improved mechanisms whereby their needs can be addressed. They do not seek to litigate the details of their children's special education programs and placements through this action. It would be virtually impossible for individual Plaintiffs to effectively assert their rights and obtain the remedies they seek without the mechanism of a class action. It is plain that the class mechanism is necessary to effectively ensure a system-wide overhaul in the way Defendants deal with enforcement of impartial hearing orders. Requiring individual families, many of whom are poor and do not have access to legal representation, to file individual lawsuits to seek relief after Defendants have failed to enforce an order on behalf of their child, would be a wholly ineffective means by which to remedy the systemic legal violations complained of herein.

II. PLAINTIFFS WHO HAVE ALREADY OBTAINED ENFORCEMENT OF THEIR ORDERS HAVE STANDING TO CONTINUE THIS ACTION AND THEIR CLAIMS ARE NOT MOOT

A. Plaintiffs Have Standing to Continue this Action

As parents of children with disabilities who remain eligible for education in New York City, all of the Plaintiffs retain a personal stake in the outcome of this action. See

Heldman v. Sobol, 962 F.2d 148, 157 (2d Cir. 1992) (parent challenged New York State procedures for assigning hearing officers in IDEA due process hearings, despite the fact that child had since been withdrawn from school and no hearing was pending).

Plaintiffs here who have had their orders enforced since the filing of this action retain an interest in ensuring that Defendants have an adequate due process system that includes timely enforcement of orders. They face a sufficient "threat of a future denial" of due process rights and educational services and the right to timely enforcement of orders that is sufficiently real such as to ensure that they retain a sufficient personal stake in the outcome of these proceedings. Accord Heldman, 962 F.2d at 157. Moreover, none of the Plaintiffs received injunctive relief, structural reforms or other relief and thus nothing protects them from being subject to future deprivation of services and delays in enforcement of impartial hearing orders.

B. Plaintiffs' Claims are Not Moot Because the Case Falls into One of the Exceptions to the Mootness Doctrine

The claims of Plaintiffs whose orders have been enforced since this action was filed are not moot merely because Defendants have enforced their orders after Plaintiffs filed this action. The mootness doctrine is designed to ensure that a plaintiff's interest in the outcome of an action continues "through the life of the lawsuit." Comer v. Cisneros, 37 F.3d 775, 798 (2d Cir. 1994) (mootness doctrine is "riddled with exceptions"). Even if the claims of some of the Plaintiffs are found to be moot, the claims fall under all of the well-settled exceptions to the mootness doctrine. See Id. at 798.

All of Plaintiffs' children continue to be entitled to educational services, and thus their claims concerning delays and failures in enforcement of hearing orders are "capable of repetition yet evading review." Heldman, 962 F.2d at 157. See also Honig v. Doe,

484 U.S. 305, 318-320 (1988) (plaintiff's claim that his exclusion from school and challenge to the district's policy was not moot; it was capable of repetition, given his continued eligibility for special education services); Morel v. Giuliani, 927 F. Supp. 622, 632 (S.D.N.Y. 1995) (recipients of public benefits are still subject to harm from future attempts by Defendants to change their benefits without a hearing, thus claims not moot because 'capable of repetition, yet evading review').

Plaintiffs' interest in the suit should also be preserved because their claims are transitory and Defendants have the power to "pick off" Plaintiffs' claims through their voluntary actions, every time a parent seeks relief in court. See Robidoux v. Celani, 987 F.2d 931, 938 (2d Cir. 1993) (the fact that plaintiffs received their delayed benefits after the action was filed did not moot their claims); Nasca v. GC Svcs., No. 01 Civ. 10127, 2002 WL 31040647, at *2 (S.D.N.Y. Sept. 12, 2002) (action not moot because "[r]equiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions") (citations omitted); Marisol A. v. Giuliani, No. 95 Civ. 10533, 1998 WL 265123, at *6-7 (S.D.N.Y. May 22, 1998) (population of the City's child welfare system is "fluid"; children who suffer harm constantly change identity, making the provision of foster care services inherently transitory); Crisci v. Shalala, 169 F.R.D. 563, 568 (S.D.N.Y. 1996) (court should consider the potential ability of defendants to "purposefully moot the named plaintiffs' claims after the class action complaint has been filed but before the class has been properly certified."). This doctrine will protect the action from mootness even where the harm is to other class members. See Marisol A. v. Giuliani, 1998 WL

265123, at *7.

Even if this Court finds that any one of the individual Plaintiffs' claims are moot (which they are not), the claims of Plaintiffs that have become moot prior to class certification relate back to the filing of the complaint and the merits of those claims are properly preserved for judicial resolution. See Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975); Comer, 37 F.3d at 798-99; Nasca, 2002 WL 31040647, at *2 (where plaintiffs filed a class action complaint, the action is not moot even if individual claims have been resolved prior to certification motion being filed.).

Similarly, Defendants' voluntary decision to implement certain orders after Plaintiffs filed this action should not lead this Court to find that Plaintiffs' claims are moot. Defendants should not be permitted to avoid this action by deciding to moot Plaintiffs' claims only after Plaintiffs seek relief in federal court. Defendants will always be able to scramble to enforce an order once an action is filed; yet, parents should not have to file federal actions merely to enforce an administrative order obtained in a proceeding that is supposed to be accessible to parents and conducted without the necessity of counsel.

Despite the fact that Plaintiffs' counsel had provided Defendants with plenty of advance notice that this action might be filed, Defendants did not act upon enforcement of these orders until after Plaintiffs filed litigation, even though some of the orders at issue were more than one year old. Defendants' select enforcement of certain orders only after the filing of this action justifies the application relation-back doctrine here. See White v. Matthews, 559 F.2d 852, 857 (2d Cir. 1977) (SSA could not avoid judicial scrutiny of its hearing procedures by granting hearings to plaintiffs before class

certification); Mathis v. Bess, 138 F.R.D. 390, 393-93 (S.D.N.Y. 1991) (representative of incarcerated indigent class members deemed proper even after a decision was issued on his appeal because defendants had power to expedite individual appeals); Goetz v. Crosson, 728 F. Supp. 995, 1000-1001 (S.D.N.Y. 1990) (because defendant's granting of named plaintiff's request after litigation filed "could be construed as an attempt to squelch a spark before it turns into a conflagration," relation back doctrine applied as necessary to ensure justiciable class action claim heard); Bacon v. Toia, 437 F. Supp. 1371, 1384 (S.D.N.Y. 1977) (relation back doctrine applies where defendant could agree to pay benefits sought by plaintiff every time action was instituted) (citations omitted).

Furthermore, although Defendants have provided some limited relief to individual Plaintiffs, none of the Plaintiffs have been offered a guarantee that they will not be subject to the same type of harm in the future. Defendants have neither admitted to the allegations in the Complaint nor conducted the type of structural overhaul or made the systemic changes needed to ensure that Plaintiffs will not be subject to future deprivations and exclusions.

III. PLAINTIFFS ARE NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES

Plaintiffs are not required to exhaust administrative remedies before obtaining relief through this Court. Where, as here, resort to the administrative process would be futile or inadequate, exhaustion is not required. See Honig v. Doe, 484 U.S. 305, 327 (1988). Having won a favorable impartial hearing order, Plaintiffs have no further administrative remedy, and thus exhaustion under IDEA is futile; this court has already held that parents who prevail in impartial hearings and do not have their orders enforced

have direct access to federal court. See Polera v. Bd. of Educ., 288 F.3d 478, 489 (2d Cir. 2002); Antkowiak v. Ambach, 838 F.2d 635, 641 (2d Cir. 1988) (citing Robinson v. Pinderhughes, 810 F.2d 1270, 1272 (4th Cir.1987)) (parties seeking to enforce favorable decisions under the IDEA don't have the right or responsibility to appeal that decision since they were not aggrieved by it); R.B. v. Bd. of Educ., 99 F. Supp. 2d 411, 416 (S.D.N.Y. 2000) (where hearing officer granted a certain relief to plaintiff parent, plaintiff parent could seek relief in court). Plaintiffs are also excused from exhaustion because they are requesting system-wide relief that cannot be provided through the administrative process. See Mrs. W. v. Tirozzi, 832 F.2d 748, 757 (2d Cir. 1987).

CONCLUSION

For the reasons set forth above, since the proposed class meets the Rule 23(a) requirements of numerosity, commonality, typicality and adequacy of representation, and qualifies for certification under Rules 23(b)(1)(A) and 23(b)(2) and (b)(3), Plaintiffs respectfully request that the Court grant the proposed class representative's Motion for Class Certification.

Dated: February 4, 2004

Respectfully submitted,

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