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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LV, RC, AD, NA, ADJ, YG, LO, AP, RLB, RD, and JYW, individually; and VSG, HR, CW, SS, MG, MS, ST, RZ, MC and JP, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

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' RENEWED MOTION FOR CLASS CERTIFICATION

PRELIMINARY STATEMENT

This lawsuit seeks to remedy a systemic deprivation of the civil rights of children with disabilities and their parents. Having obtained favorable orders from Impartial Hearing Officers in matters involving the child's free appropriate public education, the children and their parents are deprived of the benefits of that order by the refusals and failures of Defendants to comply in a timely manner. As a result, children most in need of educational assistance – assistance to which they are already adjudicated to be entitled under the law – often go for long periods without that assistance, to their severe educational detriment.

This motion seeks the certification of a class of all persons (i) who have obtained, or will in the future obtain, for the benefit of a child with a disability, a favorable order by an IHO against, or stipulation of settlement placed on the record at an impartial due process hearing with, the New York City Department of Education, or who are children with disabilities who are the beneficiaries of such an order or stipulation of settlement, and (ii) who fail to obtain, or who are at risk of failing to obtain, full and timely implementation of such order or settlement.

Class certification is appropriate here because the prerequisites of Rule 23(a) are satisfied and the class can be maintained under one of the subsections of Rule 23(b). The class, likely consisting of hundreds, if not thousand of persons, is so numerous that joinder of all members is impracticable. Common questions of fact include whether Defendants have failed to timely enforce orders or to adopt policies and procedures to ensure that orders are timely enforced, and the common question of law is whether this circumstance constitutes a systematic denial of Plaintiffs' rights. Finally, the claims or defenses of the representative parties are typical of the claims or defenses of the class, and the representative parties, and their counsel, will fairly and adequately protect the interests of the class.

LEGAL FRAMEWORK

The Individuals with Disabilities Education Act

Congress passed the Individuals with Disabilities in Education Act ("IDEA") to rectify deficiencies in the educational opportunities afforded to students with disabilities. The IDEA's purpose is to "assure that all children with disabilities have . . . 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). Those services must be provided in conformity with the student's individualized educational plan ("IEP"). *See* 20 U.S.C. § 1401(a)(18).

To further the goal of providing a free appropriate public education ("FAPE") for all children, the IDEA creates procedural safeguards "to insure the full participation of the parents and proper resolution of substantive disagreements" concerning the delivery of special education services. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 368 (1985). These safeguards are not simply "procedural" rights. They are the key to guaranteeing a child a substantively appropriate education. *See Heldman v. Sobol*, 962 F.2d 148, 150 (2d Cir. 1992).

School districts that receive IDEA funds are required to "establish and maintain procedures . . . to ensure that children with disabilities and their parents are guaranteed procedural safeguards" with respect to the FAPE provisions of the IDEA. 20 U.S.C. § 1415(a). The rights that form the basis of the Plaintiffs' claims here are "foremost among the procedural safeguards provided for in the Act." *Heldman*, 962 F.2d at 150-51.

A parent may initiate an impartial hearing to resolve complaints concerning "any matter relating to the identification, evaluation, or educational placement" of the child. *See* 20

U.S.C. §§ 1415(b)(6) and (f). The State Educational Agency ("SEA") or State law determines whether the hearings will be conducted by the SEA or local school district. 20 U.S.C. § 1415(f). The SEA in New York is the New York State Education Department ("NYSED"), which has a two-tiered hearing system. An aggrieved parent may request a hearing of the Board of Education, which is then responsible for assigning an impartial hearing officer (an "IHO"), 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 decision rendered in an impartial hearing is final, absent timely appeal. 20 U.S.C. § 1415(i). IHOs have the power to 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, [or] providing a particular related service." *See* Ordover & K. Boundy, *Educational Rights of Children with Disabilities; a Primer for Advocates*, Center for Law and Education (1991), at 59. Other available remedies include retroactive reimbursement for private placement or services, advance payment for placement or services, and compensatory education.

Parents who prevail at an impartial hearing are entitled to enforce IHO orders in federal court pursuant to 42 U.S.C. § 1983.[1] Parents have enforceable rights in the procedural

[1] *See* 20 U.S.C. § 1415(l); *Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir. 1987) (granting parents standing to bring a § 1983 action based on IDEA violations); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 115-16 (1st Cir. 2003) (enforcing plaintiffs' order when the school system neither appealed from nor complied with the order); *D.D. v. N.Y. City Bd. Of Educ.*, No. CV-03-2489, 2004 U.S. Dist. LEXIS 5189, *64 (E.D.N.Y. Mar. 30, 2004) (allowing parents to enforce an IDEA claim under § 1983); *Blackman v. Dist. of Columbia*, No. 97-1629, 28 Ed. Law. Rep. 1053 (D.C. Cir. June 3, 1998) stating plaintiffs had enforceable right to implementation of hearing officers' determinations and settlement agreements); *R.B. v. Bd. of Educ.*, 99 F. Supp. 2d 411, 416 (S.D.N.Y. 2000) (asserting jurisdiction over claims when plaintiff prevailed at hearing and hearing officer granted relief that defendants failed to enforce). *See also Jeremy H. v. Mount Leb. Sch. Dist*., 95 F.3d 272 (3d Cir. 1996); *Robinson v. Pinderhughes*, 810 F.2d 1270, 1273-75

protections of the IDEA and need not show particularized injury or prejudice as a result of such violation.[2] Therefore, Defendants' failure to adopt procedures to assure the timely enforcement of IHO orders, without more, constitutes a cognizable injury to Plaintiffs.

The law guarantees FAPE to rich and poor alike. *See Blackman v. Dist. of Columbia*, 39 Ed. Law Rep. 241 (D.D.C. Aug. 30, 2004). (rejecting argument that wealthy parents were not entitled to an injunction directing reimbursement for tuition and services). However, enforcement of IHO orders assuring FAPE is especially critical for children from families of lesser means, who must rely on such orders to attend school or obtain services.[3]

Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination in federally funded programs, such as schools. *See* 29 U.S.C. § 794(a); 34 C.F.R. § 104.4(a). Section 504 requires FAPE and procedural due process to be provided to "qualified individuals with

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(4th Cir. 1987); *A.T. and I.T. o/b/o Z.T. v. New York State Educ. Dep't*, No. 98-CV-4166, 1998 WL 765371, *6-7 (E.D.N.Y. Aug. 4, 1998) (all holding that parents can enforce orders of special education hearing officers in federal court).

[2] *See Heldman*, 962 F.2d at 157 (allowing challenge to procedures for assigning hearing officers); *Blackman v. Dist. of Columbia*, 39 Ed. Law Rep. 241 (D.D.C. Aug. 10, 2004) (stating "when a plaintiff's rights to the due process hearing are circumscribed in significant ways, a plaintiff need not show prejudice in order to demonstrate injury"); *Blackman v. Dist. of Columbia*, 28 Ed. Law. Rep. 1053 (D.D.C. June 3, 1998) (stating IDEA creates an enforceable right to timely implementation of the determinations of hearing officers and of settlements).

[3] *See Murphy v. Arlington Ctr. Sch. Dist.*, 86 F. Supp. 2d 354, 366 (S.D.N.Y. 2000), *aff'd* 297 F.3d 195 (2d Cir. 2002) (stating "[t]he purpose of the Act . . . is not advanced by requiring parents, who have succeeded in obtaining a ruling that a proposed IEP is inadequate, to front the funds for continued private education . . . . [t]he prospect of reimbursement at the end of the litigation turnpike is of little consolation to a parent who cannot pay the toll at the outset" (quoting *Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78 (3d Cir. 1996)); *Connors v. Mills*, 34 F. Supp. 2d 795, 804 (N.D.N.Y. 1998) (stating, "[i]t simply cannot be the case that an act designed to grant "all" disabled children access to needed services would undermine that very goal by making such access dependent upon a family's financial situation").

disabilities," a category of students broader than just those who qualify for services under the IDEA. 34 C.F.R. §§ 104.31-104.37. Section 504 also requires "a system of procedural safeguards that includes . . . an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure." 34 C.F.R. § 104.36. Defendants use the IDEA hearing procedures for hearings under Section 504.

FACTS

Plaintiffs – all parents of children with disabilities – have exercised the right to a due process hearing only to have that right rendered meaningless by Defendants' failure and refusal to comply with the resulting orders. All Plaintiffs have obtained favorable IHO orders or settlements on the record, and all have experienced significant delays in enforcement. None of the Plaintiffs' orders was enforced until after the Plaintiff filed, or sought to intervene in, this action. In addition, since this case was first filed, Plaintiffs' attorneys have brought to the attention of Defendants multiple additional orders (i.e. orders relating to students other than Plaintiffs' children) that have not been timely enforced. Further, many orders remain un-enforced despite the existence of this lawsuit. *See* Declaration of Randee J. Waldman dated October 20, 2004 (hereinafter "Waldman Decl.") ¶¶ 5-11.

Class Representatives

Plaintiffs VSG, HR, CW, SS, MG, MS, ST, RZ, MC and JP seek to represent themselves and a class of similarly situated individuals. The claims of VSG were raised in the original Complaint filed on December 12, 2003. The First Amended Complaint was filed on January 14, 2004, as a putative class action with Plaintiff HR as a representative plaintiff. On March 26, 2004, plaintiffs CW, SS, MG, MS, ST, RZ, MC and JP moved to intervene and amend the First Amended Complaint. The Second Amended Complaint was filed on April 16, 2004,

and contains allegations concerning VSG, HR, CW, SS, MG, MS, ST, RZ, MC and JP. None of the class representatives' orders was enforced until after they appeared in this lawsuit. Each of their orders is annexed as an exhibit to the Declaration of Elisa Hyman, dated October 20, 2004 (hereinafter "Hyman Decl."). The facts related to the proposed class representatives' claims are set forth below.

VSG

VSG is the mother of KSG, a student with attention deficit disorder and traumatic brain injury. By decision dated July 10, 2003, an IHO found that Defendants failed to offer KSG FAPE and ordered Defendants to pay KSG's tuition for a private school summer school program at the Stevenson School for summer 2003, which VSG was not able to afford.[4] Despite the fact that the $2,800 cost of tuition was reflected in the order, VSG did not receive payment until on or about January 8, 2004. This was approximately six months after the decision was issued, but just weeks after VSG filed the initial Complaint in this action. *See* Declaration of Matthew Lenaghan dated October 20, 2004, (hereinafter "Lenaghan Decl.") ¶ 7; First Amended Complaint, ¶¶ 35-39 (hereinafter "First Compl."); Second Amended Complaint, ¶¶ 103-07 (hereinafter "Second Compl."). *See* Hyman Decl., Exh. Q, for a copy of VSG's order.

MS

[4] Parents who establish that a district did not offer their child FAPE may 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 school district to pay for a private evaluation. *See* 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502. Generally, to take advantage of this mechanism, parents need significant financial resources to pay tuition and costs up front. Parents without such resources, like Plaintiffs, are at the mercy of the system's speed of enforcing orders.

MS is the parent of JF, a student with a disability. MS filed for a hearing on October 29, 2003, and, by decision dated December 16, 2003, an IHO ordered Defendants to provide: (i) a Nickerson letter [a voucher entitling a parent to place a child in a non-public school at public expense] dated November 19, 2003, with an expiration date six months from that date; (ii) authorization for JF to attend a private school; (iii) Related Service Authorizations ("RSAs") for private speech and counseling services dated November 19, 2003; and (iv) reimbursement to MS for all costs related to JF's tutoring services at the Sylvan Learning Center. The final RSA was not issued until February 17, 2004, two months after the order and three months after the date by which the order had specified that it be issued. Prior to that, MS took out a private loan to fund her son's tutoring at Sylvan, and on March 13, 2004, MS finally received a check in the amount of the principal loan balance. However, she had accrued interest on the loan. On April 26, 2004, after she moved to intervene in this action and filed the Second Amended Complaint, Defendants paid MS $1,582, reflecting the interest owed to her. *See* Lenaghan Decl. ¶¶ 8-10; Second Compl. ¶¶ 134-38. *See* Hyman Decl., Exh. J, for a copy of MS's order.

ST

ST is the parent of PTD, a child with a disability. ST filed for a hearing on March 11, 2002, and, by decision dated May 17, 2002, an IHO ordered Defendants to pay prospective tuition for PTD to attend the Smith School; $26,000 for the 2002-2003 academic year and $4,500 for the 2002 summer program. The order specified when payments had to be made: for the summer program, not later than 45 days after PTD began the program; for the fall semester, by January 2003; and for the spring semester, by June 2003. It was not until May 6, 2004, after ST moved to intervene and filed the Second Amended Complaint, that Defendants finally fully

implemented the order, issuing a check for the full amount due. *See* Lenaghan Decl. ¶ 11; Second Compl. ¶ 139. *See* Hyman Decl., Exh. K, for a copy of ST's order.

RZ

RZ is the parent of FZ, a student with a disability. RZ filed for an impartial hearing on September 18, 2003, and, by decision dated January 8, 2004, an IHO issued an order reflecting a settlement agreement between the parties on the record. In it, Defendants agreed to pay FZ's tuition at the Clarke NYC Auditory/Oral Center for the 2003-2004 school year and related transportation. It was not until mid-April 2004, after RZ moved to intervene in this action, that Defendants finally issued checks in the amount owed. *See* Lenaghan Decl. ¶ 12; Second Compl. ¶¶ 140-42. *See* Hyman Decl., Exh. L, for a copy of RZ's order.

MC

MC is the parent of JC, a student with a disability. MC filed for an impartial hearing on September 30, 2003, and, by decision dated December 5, 2003, an IHO ordered Defendants to pay JC's tuition for the 2003-2004 school year at Xaverian High School Reach Program. It was not until August 2004, well after MC sought to intervene in this action and filed the Second Amended Complaint, that tuition payment was finally made. *See* Lenaghan Decl. ¶ 13; Second Compl. ¶¶ 150-52. *See* Hyman Decl., Exh. M, for a copy of MC's order.

JP

JP is the parent of DM, a student with a disability. JP filed for an impartial hearing on October 2, 2003, and, by decision dated November 21, 2003, an IHO ordered Defendants to: (i) immediately pay for the cost of a private placement at the Sterling School; (ii) pay for a speech therapist; (iii) provide round-trip transportation to and from school; and (iv) reimburse JP for transportation costs she had already incurred and would incur until Defendants

provided such transportation. It was not until April 30, 2004, after DM intervened in this action and filed the Second Amended Complaint, that Defendants finally paid the school tuition. *See* Lenaghan Decl. ¶ 14; Second Compl. ¶¶ 143-49. *See* Hyman Decl., Exh. N, for a copy of JP's order.

SS

SS is the parent of AR, a child with a disability. His IEP classifies him as autistic and mandates placement in a special class, full time, as well as speech and language therapy, counseling, and occupational therapy. In a Statement of Agreement and Order dated July 18, 2002, an IHO found that AR had not received speech or occupational therapy for three years and ordered Defendants to provide compensatory speech and occupational therapy for the 2002-2003 year and RSAs for these services. In a subsequent Statement of Agreement and Order, dated May 14, 2003, an IHO ordered Defendants to provide compensatory occupational therapy, and once again, an RSA. Defendants failed to provide AR with any IEP-mandated speech or occupational therapy for the 2003-2004 school year. SS moved to intervene and filed a TRO seeking enforcement of both of these orders on March 26, 2004. Despite the fact that child's IEP continues to mandate these services for the current school year, since September 2004, AR has not received any of them. *See* Lenaghan Decl. ¶¶ 15-16; Second Compl. ¶¶ 127-29. *See* Hyman Decl., Exh. O, for a copy of SS's orders.

MG

MG is the parent of AG, a student with a disability. MG filed for an impartial hearing on October 2, 2003, and, by decision dated December 11, 2003, an IHO ordered Defendants to pay the $31,500 tuition for AG at the Cooke Center for Learning and Development for the 2003-2004 school year. The order directed payment to be made to the

school by January 15, 2004. Defendants paid nothing by January 15, 2004. MG received a check for half of the tuition in early March 2004. It was not until mid-April, after MG had moved to intervene in this action, that Defendants sent the balance of the tuition to the school. *See* Lenaghan Decl. ¶ 17; Second Compl. ¶¶ 130-33. *See* Hyman Decl., Exh. I, for a copy of MG's order.

HR

HR is the mother of SR, a student classified as a child with a disability. On September 5, 2003, HR requested an expedited impartial hearing seeking prospective payment of tuition in a private school and transportation for SR. HR obtained a favorable order, dated September 29, 2003, requiring Defendants to pay the cost of SR's tuition at the Sterling School and to provide round-trip transportation. Defendants did not comply with the order promptly. Consequently, SR remained in her public school program without any special education services. Transportation was finally provided, beginning on October 27, 2003, but tuition was not paid. It was not until February 18, 2004, after HR filed the First Amended Complaint, that HR received payment. *See* Lenaghan Decl. ¶ 18; First Compl. ¶¶ 95-100; Second Compl. ¶¶ 108-15. *See* Hyman Decl., Exh. H, for a copy of HR's order.

CW

CW is the parent of LW, a child whose IEP indicates multiple disabilities (including mental retardation, speech delay, other health impairment, pervasive developmental delay, Hirschsprung's disease, and tracheotomy central hypoventilation syndrome). CW filed for a hearing under the IDEA and Section 504 of the Rehabilitation Act, alleging a denial of FAPE for the 2003-2004 school year. Specifically, LW had not received bussing for the first two months of the school year, had not received occupational therapy or adaptive physical education,

and had been repeatedly stuck in the school elevator when it broke. During the weeks that the elevator was not working, LW's ventilator was locked in the closet, instead of being in his classroom. Also, LW's classroom was moved to a much smaller room of inadequate size.

On March 5, 2004, the IHO issued a Statement of Agreement and Interim Order requiring Defendants to: provide an occupational therapist at LW's school, who would start providing services by February 9, 2004; provide 40 sessions of compensatory occupational therapy; pay for private educational, occupational, physical, speech, and assistive technology evaluations; continue to provide specialized transportation for LW (he was to be accompanied by a nurse on an air-conditioned minibus); and ensure that LW's ventilator be with him at all times. Defendants were further ordered to pay for a private psychological evaluation, to keep the school elevator in good repair, to provide adaptive physical education by a qualified provider by February 9, 2004, to change LW's program to a twelve-month program, and to move LW to a classroom that met the minimum space requirements to provide him with an appropriate education.

Defendants did not comply with the order. On March 26, 2004, CW moved to intervene in this action, and shortly thereafter filed a motion for a temporary restraining order to have the IHO's order enforced. LW was subsequently hospitalized. LW finally received a private school placement for the current, 2004-2005, school year. The order regarding his former placement was never implemented. LW is currently in a private school funded by the Defendants. *See* Lenaghan Decl. ¶¶ 19-23; Second Compl. ¶¶ 116-26. *See* Hyman Decl., Exh. F, for a copy of CW's order.

Putative Class Members

In addition to the Plaintiffs who seek to represent others similarly situated, Plaintiffs LV, RC, AD, NA, ADJ, YG, LO, AP, RLB, RD, and JYW joined this action in their individual capacities, seeking enforcement of their orders as well as systemic changes[5]. The first seven of these eleven Plaintiffs appeared in the initial Complaint (filed December 12, 2003); the latter five first appeared in the First Amended Complaint (filed January 14, 2004). None of them obtained enforcement of an order until after appearing in this action. *See* Lenaghan Decl. ¶¶ 24-34, which provides a brief summary of these Plaintiffs' cases. A number of these individual Plaintiffs experienced delays approaching and, at times exceeding, a full year. In some cases, children were deprived of services during the time orders were not being enforced. *See, e.g.*, Lenaghan Decl. ¶ 29.

In addition to assisting the twenty-one parents who have appeared in this action in either an individual or representative capacity, since the Second Amended Complaint was filed last April, AFC has been asked to assist many other parents seeking to enforce IHO orders. As of the date of this memorandum, AFC is handling at least 18 cases where the primary issue is that an order remains unimplemented. Fourteen of these cases involve orders for payment and at least four involve orders that the Defendants provide services to the student. *See* Waldman Decl. ¶¶ 5, 11. Upon these facts, as well as others set forth below, Plaintiffs seek certification of a class under Rule 23. *See* Fed. R. Civ. P. 23.

ARGUMENT

Plaintiffs seek certification of a class of all persons who have obtained or will obtain favorable determinations from an IHO after seeking an impartial hearing. All who prevail

[5] Defendants sought to dismiss the claims of LV, ADJ, MG, RZ, VSG, AD, NA, YG, LO, RD, HR, AP, RLB, ST, MC and JP, a group including both putative class members and representative plaintiffs. Plaintiffs opposed that motion, which is still pending.

in such hearings have a common interest in preventing delay in enforcement of orders. Classes of similar breadth, alleging systemic violations of class members' rights, have been certified before. *See, e.g., Blackman v. Dist. of Columbia*, No. 97-1629, 28 Ed. Law Rep. 1053 (D.D.C. June 3, 1998). The pattern and practice of failing to enforce these orders is persistent, widespread and long-standing, and Plaintiffs are seeking a system-wide remedy. 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.

I. THIS ACTION SATISFIES THE PREREQUISITES TO A CLASS ACTION

Class certification is warranted 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 and 23(a). Class certification is appropriate here because the prerequisites of Rule 23(a) are satisfied and the class can be maintained under one of the subsections of Rule 23(b). Rule 23 is traditionally given liberal construction. *See Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997).

Plaintiffs "are not obliged to make an extensive evidentiary showing" in support of their motion, but "only to set forth sufficient factual information to enable the Court reasonably to permit the action to continue as a class action under Rule 23." *Boyland v. Wing*, No. 92-CV-1002, 2001 U.S. Dist. LEXIS 7496, at *14 (E.D.N.Y. Apr. 6, 2001) (citation omitted); *Sharif v. New York State Educ. Dep't*, 127 F.R.D. 84, 87 (S.D.N.Y. 1989) (citations omitted) (certifying a class of all female high school seniors in New York State who are or will be applicants for certain scholarships). A determination of class status is based solely on

whether the requirements of Rule 23 are met, without regard to the strength of the merits of the case, and the Court should accept the underlying allegations from the complaints as true. *See Eisen v. Carlisle & Jaquelin*, 417 U.S. 156, 177-78 (1974) (stating that a court should not conduct a "preliminary inquiry into the merits" when making a class certification determination); *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 570-71 (2d Cir. 1982); *Dajour B. ex rel. L.S. v. City of New York*, No. 00-CV-2044, 2001 WL 1173504, at *3 (S.D.N.Y. Oct. 3, 2001) (stating class certification motion should not be a "mini-trial on the merits").

Moreover, Defendants have admitted that they have no way of tracking whether individual orders are enforced and that they do not "maintain centrally-stored or readily producible files concerning implementation of hearing decisions. *See* letter from Emily Sweet dated April 8, 2004, to this Court. As this Court is aware through the discovery process to date, Defendants have not been able to ascertain for themselves whether orders have been enforced.

A. The Proposed Class Easily Meets The Numerosity Requirement Of Rule 23(a)(1)

Rule 23(a)(1), requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1); *Dajour B.*, *2001* WL 1173504, at *5 (presuming numerosity is generally at a level of 40 class members). That requirement is easily met in this case.

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, 611-12 (S.D.N.Y. 1985) (certifying class where plaintiffs relied on estimates of percentages of children in custody of Department of Juvenile Justice). Instead, 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) (deeming estimate of 1,059 Section 8 housing tenants sufficient to establish numerosity); *Passeggio v. Cosmetique Inc.*, No. CV-98-1774, 1999 U.S. Dist. LEXIS 7607, at *14-15 (E.D.N.Y. 1999) (explaining that courts may make "common sense assumptions" to support a finding of numerosity (citing 2 Newberg on Class Actions § 7.22.A (3d ed. 1992)).

This Court may include future class members for the purposes of evaluating numerosity.[6] Moreover, the fact that information regarding numerosity is principally in the hands of Defendants allows the Court to relax this requirement. *See German v. Federal Home Loan Mortg. Corp.*, 885 F. Supp. 537, 552-53 (S.D.N.Y. 1995) and *McNeil v. NYCHA*, 719 F. Supp. 233, 252 (S.D.N.Y. 1989) (lack of knowledge as to the exact number of persons affected is not a bar to certification where the information is within the defendant's control); *see also Nicholson v. Williams*, 205 F.R.D. 92, 100 (E.D.N.Y. 2001) (relaxing the numerosity requirement where much of the information regarding numerosity is in the hands of the defendants).

Plaintiffs satisfy the numerosity requirement of Rule 23. Through the discovery process, Defendants have provided Plaintiffs with approximately 2,700 written decisions issued between July 2002, and mid-September 2004. *See* Waldman Decl. ¶ 4. Moreover, Freedom of Information Law (FOIL) requests to the New York State Education Department reveal that 4,104 requests for impartial hearings were made from September 1, 2002, to August 31, 2003, and that

[6] *See 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); *Robidoux v. Celani*, 987 F.2d at 936 (requests for injunctive relief involving future class members weighs in favor of numerosity); *Jane B. v. New York City Dep't of Soc. Servs.*, 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). *See also*, *Everett v. Marcase*, 426 F. Supp. 397 (E.D. Pa. 1977) (class included students who have been or will be involuntarily transferred between schools for disciplinary reasons).

1,071 IHO decisions were rendered during that time. *See* Declaration of Irene Hwang ¶ 5, attached as Exhibit D to the Hyman Decl.

In addition, this motion is supported by at least fifty examples of parents who have obtained favorable orders or settlements on the record that were not timely enforced. Plaintiffs have alleged facts concerning ten class representatives and eleven additional individual parents who claim they have obtained orders that were not timely enforced. *See* Second Compl. ¶¶ 7-27, 38-152; Lenaghan Decl. ¶¶ 7-34. Moreover, since mid-June 2004, Plaintiffs' counsel has pursued enforcement of twenty-nine additional orders obtained by parents who are putative class members. *See* Waldman Decl. ¶¶ 5, 11. Some of these orders were described in a letter dated June 14, 2004, to Defendants' counsel, on which the Court was copied. As of the date of this motion, fourteen orders directing payment, and four directing services, are still outstanding, despite extensive efforts of counsel to facilitate their enforcement. *See* Waldman Decl. ¶¶ 5, 11.

Plaintiffs have also alleged sufficient facts to establish that their claims reveal a system-wide problem affecting parents across the City who try to use the impartial hearing process to obtain FAPE for their children. *See* Second Compl. ¶¶ 163-71, 182-85. These allegations are supported by the individual stories, as well as by practitioners in the field and AFC's direct service attorneys and staff. *See* Declaration of Michael Hampden ¶¶ 4-7, and Declaration of Kim Sweet ¶¶ 5-8, copies of which are attached to the Hyman Decl. as Exhibits A and B respectively. *See also* Declaration of Alice Rosenthal ¶¶ 4-14, attached to the Hyman Decl. as Exhibit C; Lenaghan Decl. ¶¶ 7-34.

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

The commonality requirement is met if plaintiffs' grievances share a common question of law or of fact." *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997). In

Marisol, the Second Circuit helped to define what circumstances satisfy the commonality requirement. The trial court in *Marisol* certified a class of children whose cases were mishandled by child welfare officials and who were deprived of their rights under the state child welfare regulatory scheme. *Marisol A. by Forbes v. Giuliani*, 929 F. Supp. 662, 690 (S.D.N.Y. 1996). The court identified the common legal question as whether each child was entitled to the services that they were being denied, and the common factual question as whether the defendants had systematically failed to provide the legally mandated services. As the court explained:

> [T]he myriad constitutional, regulatory, and statutory provisions invoked by plaintiffs are properly understood as creating a single scheme for the delivery of child welfare services and as setting standards of conduct for those charged with providing such services – standards that the defendants are alleged to have violated in a manner common to the plaintiff class by failing to operate and maintain a functioning child welfare system.

Marisol, 126 F.3d at 377. The Second Circuit approved the district court's foundation as satisfying the requirement of involving common questions of law and fact. *Id.*

Plaintiffs in the case at hand allege common questions of law and fact much more concrete than those approved in *Marisol*. *A fortiori*, this Court should certify this class. The common questions of fact are (1) whether Defendants have failed to timely enforce hearing orders obtained by Plaintiffs, and (2) whether Defendants have failed to adopt policies and procedures to ensure that orders of IHOs are enforced in a timely manner. The common question of law is whether Defendants have systematically denied Plaintiffs their rights to an adequate due process system under § 1983 by failing to have in place procedures and policies to implement and enforce IHOs' orders. These common questions are more than sufficient under *Marisol* to meet the requirements of Rule 23(a)(2).

All named Plaintiffs suffer from the same failure of the Defendants to implement and enforce IHOs' orders in a complete and timely manner. That their orders direct Defendants to provide different types of relief or that their children are of varying ages and have a range of disabilities will not defeat commonality. *Daniels v. City of New York*, 198 F.R.D. 409, 417 (S.D.N.Y. 2001) (holding that "the commonality requirement . . . does not mandate that all class members share identical claims . . . factual differences among the claims of the class members will not defeat certification").

Courts have consistently certified classes seeking to vindicate the rights of students with disabilities. In *Engwiller v. Pine Plains Central School District*, 199 F.R.D. 127 (S.D.N.Y. 2001), for example, the court certified a class consisting of "all students with disabling conditions who are now parties to, or who may in the future be parties to, an impartial hearing in a special education case in [specific New York State Counties]." These plaintiffs complained of the failure of the IHOs to issue timely decisions. In *N.T. v. New York City Board of Education*, 8/25/2004 N.Y.L.J. 23, (col. 1), the Court certified a class of "disabled NYC children age three through twenty-one who have been, will be or are at risk of being excluded from school without notices and denied a free and appropriate education due to a suspension, expulsions, transfers, discharges, removals and denials of access." There, the Court held that where plaintiffs alleged that the NYC DOE has a practice or policy of providing insufficient procedures and notice prior to excluding students from school and not providing FAPE during the exclusions, whether those policies and practices are in compliance with the law is a common question. *See also D.D. v. N.Y. City Bd. of Educ.*, No. CV-03-2489, 2004 U.S. Dist. LEXIS 5189 (E.D.N.Y. Mar. 30, 2004) (stating "despite individual variations in the services sought by the named representatives and the putative class members, all their claims singularly focus on the defendants' alleged failure to

provide services listed on their IEPs in a timely manner in violation of the IDEA, the ADA, Section 504 and 42 U.S.C. §§ 1983").[7]

At least one court has even certified a class similar to the one Plaintiffs seek to certify here. *See Blackman*, 28 Ed. Law Rep. at 1053 (granting summary judgment to a sub-class of children with disabilities whose hearing orders and settlements had not been timely enforced).

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

The claims of the proposed class representatives are typical of the class members they seek to represent and therefore satisfy Rule 23(a)(3). Although distinctly different

[7] *See also Andre H. v. Ambach*, 104 F.R.D. 606 (S.D.N.Y. 1985) (certifying class of all current and future residents of Spofford Juvenile Center in need of special education services); *Louis M. v. Ambach*, 113 F.R.D. 133 (N.D.N.Y. 1986) (rejecting defendants' argument that children's individual needs precluded finding of commonality); *Ray M. v. Bd. of Educ.*, 884 F. Supp. 696, 699 (E.D.N.Y. 1995) (finding common question of law when suit was brought "to challenge the practices and policies of the defendants, and to determine whether or not defendants' actions are in violation of state and federal law"); *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (certifying consisting of all school age "exceptional" children eligible for education under the D.C. code who had been, or might be, excluded from such education or otherwise deprived of access to publicly supported education); *Upper Valley Ass'n for Handicapped Citizens v. Mills*, 168 F.R.D. 167 (D. Vt. 1996) (certifying class of disabled students who had filed or would file complaints under the IDEA); *Chapman v. CA Dep't of Educ.*, 229 F. Supp. 2d 981 (N.D.C.A. 2002) (certifying class of disabled students challenging California standard test requirement despite the fact that they each presented with different disabilities and accommodation needs); *Battle v. Commonwealth.*, 629 F.2d 269 (3d Cir. 1980) (certifying class consisting of students with varying handicaps in need of differing special education services); *Corey H. v. Bd. of Educ.*, 995 F. Supp. 900 (N.D. Ill. 1998) (certifying class of disabled students who alleged systemic failures on the part of defendants to educate children with disabilities in the least restrictive environment); *Tonya K. v. Chicago Bd. of Educ.*, 551 F. Supp. 1107, 1111 (N.D. Ill. 1982) (certifying a class of handicapped children who had been, were being, or would be excluded from schools because of their handicaps); *Evans v. Evans*, 818 F. Supp. 1215 (N.D. Ind. 1993) (certifying where disabled students brought action challenging legality of Indiana's procedures regarding implementation of individualized education plans); *Duane B. v. Chester Upland Sch. Dist.*, 1990 WL 55082 (E.D. Pa. 1990) (certifying of class comprised of all students determined by the school district to have emotional or behavioral handicaps as well as those who would be so identified in the future); *Petties v. District of Columbia*, 881 F. Supp. 63 (D.D.C. 1995) (certifying class of all students receiving, or eligible to receive, special education services from private providers).

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." *Id.*; *Robidoux*, 987 F.2d at 936 (citations omitted).

Here, the named Plaintiffs' claims are typical of those of the class as a whole because their claims arise from the same course of events and rely on the same legal arguments. All members of the class were injured by the delays and obstacles they experienced through the impartial hearing process; all received favorable decisions that Defendants thereafter failed to timely implement or enforce. The named Plaintiffs will make the same legal argument any member of the class would make – that Defendants' failure to have policies and procedures in place resulted in a denial of their rights. The fact that each Plaintiff's child suffers differently from this same administrative failure does not change the fact that the claims are typical of the class under the standards of Rule 23. In *Ray M. v. New York Board of Education*, 884 F. Supp. 696, 706 (E.D.N.Y. 1995), for example, the court concluded, finding that "plaintiffs are entitled to a free preschool special education under IDEA and NYEL. Plaintiffs claim that they have been deprived of this statutory right. While the specific disabilities of the named Plaintiffs are different – each disabled child is unquestionably unique – it is the finding of this court that the named plaintiffs are sufficiently typical of the expanded class." *See also 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). As in *Ray M.* and *Andre H.*, the claims of the named Plaintiffs here are typical of the class in that they

suffer from the same deprivation of a statutory right, namely, Defendants' failure to implement a system for timely enforcement of decisions of IHOs across New York City.

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

The proposed class representatives will "fairly and adequately protect the interests of the class," thus meeting the requirement of Rule 23(a)(4). Fed. R. Civ. P. 23(a)(4).[8] Adequacy requires the Court to ensure that (1) there are no conflicts between the named Plaintiffs and putative class members, and (2) class counsel is qualified. *See Dajour B.*, 2001 WL 1173504, at *8.

There is no conflict here, as the class representatives and members of the proposed class have the same interest in having their orders enforced in a timely manner and in a system of due process that protects their rights to obtain services for their children under the IDEA. *See, e.g., Marisol A.*, 126 F.3d at 378 (stating "broad based relief" seeking to improve "all" services is in the interest of all class members). Nor is there any 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 the due process system to access additional services in the future for their children. All

[8] Rule 23 was amended effective December 1, 2003 to add subsection (g). This subsection codifies the standards used to determine the adequacy of class counsel. It is not meant to replace the determination of adequacy under Rule 23(a)(4), but rather, is meant to set guidelines for the court when deciding on the appointment of class counsel at the class certification stage. "Rule 23(a)(4) will continue to call for scrutiny of the proposed class representative, while [subdivision (g)] will guide the court in assessing proposed class counsel as part of the certification decision." The new amendment became effective on December 1, 2003, and is meant to "govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending." Orders of the Supreme Court of the United States Adopting and Amending the Rules, Order of March 27, 2003 (2003). For many of the same reasons identified in this section, Plaintiffs also request that AFC and Milbank Tweed be appointed class counsel. *See* Part III, below.

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.[9] Thus, the interests of all class members are aligned.

Further, the named Plaintiffs and putative class members are represented by experienced attorneys from Advocates for Children of New York, Inc. ("AFC") and Milbank, Tweed, Hadley and McCloy LLP ("Milbank"). For more than thirty-two 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. Hyman Decl. ¶¶ 20-24. Also, AFC has already put in a substantial amount of work on this case, and has shown its ability to represent the class in this litigation. *Id.* at ¶ 25. Milbank is an international law firm with deep experience in class action litigation. Nagel Decl. ¶¶ 3-7. The firm has handled numerous class actions, including several major ones in the last few years. *Id.* ¶ 7.

[9] To the extent certain class members would be subject to the City's pending Motion to Dismiss Plaintiffs' Second Amended Complaint, that motion should be denied for the reasons stated in Plaintiffs' Memorandum in Opposition to that motion. With respect to individuals subject to City's motion, we note that those plaintiffs are adequate class representatives even though their individual orders have been enforced. *See Heldman*, 962 F.2d at 154-55 (granting parent standing to challenge 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). Claims of the Plaintiffs relate back to the Complaint filed or the motion in which they sought to intervene, whichever is earlier and their claims would fall under one of the exceptions to the mootness doctrine in that they are, (1) capable of repetition yet evading review and (2) transitory and susceptible of being picked off by defendants. *See Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975) (holding termination of a class representative's claim does not moot the claims of the unnamed members of the class); *Comer v. Cisneros*, 37 F.3d 775, 798 (2d Cir. 1994); *Marisol A. v. Giuliani*, No. 95 Civ. 10533, 1998 WL 265123, at 7, n.7 (S.D.N.Y. May 22, 1998) (citing *Sosna v. Iowa*, 419 U.S. 393, 400 (1975) (claims not moot even where there is no prospect that a challenged practice may again injure the named plaintiff as such practices may cause future injury to unnamed members of the class); *Robidoux v. Celani*, 987 F.2d 931, 938 (2d Cir. 1993) (plaintiffs' receipt of their delayed benefits after the action was filed did not moot claims).

Milbank has sufficient resources and a dedicated team of experienced lawyers prepared to assist AFC in litigating this action. *Id*.

The requirements of Rule 23(a)(4) are met because there is no conflict of interest between the class representatives and the putative class members, and because the class is represented by well-qualified and experienced counsel.

II. PLAINTIFFS' ACTION IS MAINTAINABLE AS ONE OF THE TYPES OF CLASS ACTION IDENTIFIED BY RULE 23

A. The Suit Qualifies As A Class Action Under Rule 23(b)(2)

Rule 23(b)(2) 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." The Rule was designed especially for civil rights cases like this one, where Plaintiffs seek systematic 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). *See also Marisol A.*, 126 F.3d at 378 (finding class action appropriate where plaintiff class is seeking systemic reform through injunctive relief).

Defendants' failure to adopt a system for timely enforcement of hearing orders violates the rights of all class members and affects all class members. 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.

B. The Suit Qualifies As A Class Action Under Rule 23(b)(1)(A)

Rule 23(b)(1)(A) provides that class actions may 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); s*ee generally* Newberg § 4.04. Certification of a class in this action is appropriate because pursuit of these claims for system-wide injunctive relief through thousands of multiple individual suits would be inefficient and would 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) (finding Rule 23(b)(1) certification proper where plaintiffs sought rule changes that would impact future class members). Moreover, this suit also seeks to remedy the inconsistencies between the policies and practices of different Regions, Districts and Schools, and the Defendants' central administration.

III. THE COURT SHOULD APPOINT ADVOCATES FOR CHILDREN AND MILBANK AS CLASS COUNSEL

Under new Rule 23(g), the Court must appoint class counsel when it certifies a class. Fed. R. Civ. P. 23(g)(1)(A). Both Advocates for Children and Milbank have submitted declarations attesting to the fact that they are well qualified to handle this class action, and will fairly and adequately represent the interests of the class. *See* Hyman Decl. ¶¶ 20-25; Nagel Decl. ¶ 8. The Court should approve Plaintiffs' request to appoint AFC and Milbank Tweed as class counsel.

CONCLUSION

The proposed class meets the Rule 23(a) requirements of numerosity, commonality, typicality and adequacy of representation by both class representatives and counsel. It therefore qualifies for certification under Rules 23(b)(1)(A) and 23(b)(2).

The Court should certify a class of all persons (i) who have obtained, or will in the future obtain, for the benefit of a child with a disability, a favorable order by an IHO against, or stipulation of settlement placed on the record at an impartial due process hearing with, the New York City Department of Education, or who are children with disabilities who are the beneficiaries of such an order or stipulation of settlement, and (ii) who fail to obtain, or who are at risk of failing to obtain, full and timely implementation of such order or settlement. This Court should further grant the proposed class representative's Renewed Motion for Class Certification and appoint the undersigned as class counsel.

Dated: October 22, 2004

Respectfully submitted,

By: _____

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