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,

v.

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

Defendant.

ECF CASE

No. 03 Civ. 9917 (LAP)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR DECLARATORY RELIEF

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PRELIMINARY STATEMENT

Under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (the "IDEA"), the New York City Department of Education ("DOE") is required to provide a free appropriate public education ("FAPE") to all New York City students with disabilities. *See* 20 U.S.C. § 1412(a)(1)(A). When a student with disabilities cannot obtain a FAPE in a New York City public school, the student's family may, pursuant to the IDEA, seek a hearing before an Impartial Hearing Officer ("IHO") to request an alternative placement, including at a private school. At the conclusion of a hearing, the IHO issues an "Order"—a legally binding directive that the student is entitled to a certain educational placement for the year at issue. An IHO can order a school district (here, DOE) to pay tuition at a private school upon finding that (i) the district's public schools do not provide the student with an appropriate education (denying the student a FAPE) and (ii) that the education the private school provides is appropriate for the student. When an IHO issues an Order that the DOE pay for a child to attend a private school (a "Tuition Order"), DOE is legally obligated to pay the cost of that student's tuition. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 367 (1985); *see also Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 12-15 (1993). An IHO can order DOE to pay the tuition directly to the private school or to reimburse the student's parents. As with all Orders, the deadline for DOE to pay a Tuition Order is governed by the Parties' 2007 Stipulation, which requires DOE to pay Tuition Orders within 35 days of issuance, unless the Order specifies a different time.[1] *See* Wilson Decl. Ex. 1 ¶ 1.ii.

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[1] In 2007, following years of litigation concerning DOE's failure to timely implement Orders, the Parties entered into a Stipulation that required DOE to timely implement Orders at three progressively escalating "Benchmark" rates. The events leading up to the Stipulation are described in detail in the memorandum of law in support of Plaintiffs' Special Master Motion. *See* ECF No. 206 at 3-10.

Where DOE does not timely pay a Tuition Order, one of two scenarios typically results. Either the student's family pays the cost of tuition up front or the student's school enrolls the student in reliance on DOE eventually complying with the Tuition Order. In either case, the family, the school, or both are effectively forced to extend an interest-free loan to DOE. Until DOE ultimately implements the Tuition Order, the family, school, or both bear a burden that can greatly exceed the limited financial resources of the Class's numerous low-income families.[2] When parents are forced to pay up front, they often have no choice but to finance the student's tuition using personal credit cards or loans, and the added monthly payments can make it difficult for families to pay their basic living expenses.[3] Parents are thus faced with an impossible choice: remove their children from their appropriate school, or keep them in and risk extreme financial hardship.

The chronically low rate at which DOE implements Orders on time is a decades-long problem, well known to this Court, that has already forced Plaintiffs to seek the Court's intervention in a separate motion (the "Special Master Motion"). *See* ECF Nos. 205, 206. More recently, DOE has imposed additional hardships on the Class by freezing the implementation of Tuition Orders for more than eight months since New York City public and private schools were ordered to transition to remote learning in response to the COVID-19 pandemic in March 2020.

Between March and June 2020, DOE simply withheld ordered payments without offering any justification and without responding to repeated inquiries from Plaintiffs' counsel. Then, in June 2020, DOE claimed it was denying payment of all Tuition Orders until it could unilaterally "approve" each private school's remote learning program—even for schools whose remote

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[2] *See, e.g.*, Wilson Decl. Exs. 3 ¶¶ 4-5; 4 ¶ 15; 5 ¶¶ 5-7; 6 ¶¶ 10-11; 7 ¶ 11, 13; 9 ¶ 7; 10 ¶ 6. "Class" refers to all students with disabilities subject to the Stipulation.

[3] *See, e.g.*, Wilson Decl. Ex. 5 ¶¶ 4-6, 10. Parents are not reimbursed for accrued interest.

learning programs had been specifically approved in a Tuition Order. DOE is applying this policy (the "Policy") to Tuition Orders issued both before and after March 2020—including to Tuition Orders on which DOE's payments were already months overdue before the pandemic began. DOE has never explained its criteria for assessing private schools' or students' remote learning programs, or when (if ever) it would complete such assessments. Dozens of schools have not been "approved" and thus remain in administrative limbo.

As of September 22, 2020, DOE had declined to comply with ***any*** Tuition Orders at a minimum of 27 private schools. *See* Defs.' Ltr. Opposing Pre-Motion Conference (Sept. 17, 2020) (ECF No. 226) (the "Opp. Ltr.") at 2. (DOE had not "approved" 27 schools' remote learning programs and is refusing to pay an indeterminate number of Tuition Orders at an undisclosed number of schools it had "generally . . . approve[d]"). DOE has carried the Policy into the 2020-21 school year.[4] In response to DOE's failure to pay tuition, and the uncertainty that DOE will "approve" their remote learning arrangements, some private schools are not permitting students to attend, or are threatening to disenroll students mid-year without a parent or other party advancing tuition on behalf of DOE. DOE argues that its Policy is justified because DOE has an obligation to "protect the public fisc." Opp. Ltr. at 2. DOE claims this purported obligation derives from a prohibition in the New York Constitution against local government units making "gifts" without consideration.

The legal question before the Court is therefore a simple one: whether DOE can lawfully refuse to implement Tuition Orders without violating the IDEA, New York law, and the Parties' Stipulation. It cannot. As explained below, each of these authorities—including the New York

[4] The 2020-21 school year began on July 1, 2020, with most schools continuing remote learning to prevent exposure to COVID-19.

Constitution—unambiguously requires DOE to promptly implement every unappealed Tuition Order. The IDEA, which was enacted to protect students with disabilities from being denied educational services, expressly requires DOE to pay all unappealed Tuition Orders. DOE has not appealed these Tuition Orders and must pay them under federal law. DOE's new Policy is also inconsistent with New York Education Law, which implements the IDEA. Moreover, the section of the New York Constitution upon which DOE relies does not apply to legal orders and explicitly ***exempts*** special education payments. And even if the New York Constitution did purport to allow DOE to withhold such payments, it would be superseded by the IDEA under longstanding doctrines of federal-state preemption. Finally, the Policy is barred by the plain terms of the parties' Stipulation, which requires DOE to timely implement all Tuition Orders.

Accordingly, Plaintiffs seek (i) a declaratory judgment that DOE's Policy violates the IDEA, New York law, and the Parties' Stipulation; and (ii) one or more orders requiring DOE to immediately identify and fulfill all outstanding Tuition Orders. The requested declaration and orders will clarify DOE's obligations to pay Tuition Orders under the applicable laws and will assure that no family or school will be forced to make the impossible choice between financial security and a child's education in the midst of a nationwide pandemic. Plaintiffs respectfully submit that the Court should grant the requested relief.

I. RELEVANT FACTS

The facts of this motion are not in dispute. Under the IDEA and New York law, if the family of a student with disabilities disagrees with DOE about whether the student's educational placement is appropriate, the family has a right to an impartial hearing before an IHO to seek a different placement. *See* 20 U.S.C. § 1415(f)(1)(A), 1415(k)(3); N.Y. Educ. Law § 4404. If the IHO finds after such hearing that DOE denied a FAPE, the IHO issues an Order pursuant to

which DOE must (i) provide educational or other services to the student, (ii) pay for the student to receive such services from a private provider, or (iii) pay for an appropriate private school. *See* 20 U.S.C. § 1415(k)(3); Wilson Decl. Ex. 1 ¶ 1(t). If DOE disagrees with an Order, it must perfect any appeal within 40 days of its issuance. 8 N.Y.C.R.R. §279.4(a). Orders that DOE does not timely appeal have the same status as a final court judgment: DOE must comply with these "Final Orders" by providing services or issuing payment within a specified timeframe. The IDEA and New York law do not accord DOE any discretion to revisit, or refuse to comply with, Final Orders except through the statutory appeal procedures.

Where DOE is unable to meet a student's educational needs in a DOE-run public school for a particular school year, an IHO may order that the student may attend a private school for that school year at DOE's expense. A school district must pay for the cost of a student's tuition at a private school if the three prongs of the *Burlington/Carter* test are satisfied: (i) the DOE denied the student a FAPE; (ii) the private placement is appropriate; and (iii) the equities favor an order of tuition. *See Burlington v. Dep't of Educ.*, 471 U.S. 359, 367 (1985); *see also Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 12-15. With regard to the second prong of this test, the Second Circuit has made clear that the private placement need only "enable the child to receive educational benefits." *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 364 (2d Cir. 2006) (citation omitted). A parent need not show that the unilateral private placement would "meet the IDEA definition of a free appropriate public education . . . [or] state education standards or requirements." *Id.*

In such cases, DOE's obligation to pay the student's tuition is memorialized in a Tuition Order. *See* Wilson Decl. Ex. 1 ¶¶ 1.p, 1.t. As with all Orders, once a Tuition Order becomes final, DOE lacks any discretion to delay or decline to implement it. Where DOE does not pay a

Tuition Order (or does not do so timely), one of two outcomes typically results: either the student's family must "front" the tuition cost, paying the school themselves; or the school admits the student without payment and without receiving funds necessary to cover its costs attendant to providing the student's education. In either scenario, the family, school, or both bear the cost of the ordered tuition until DOE ultimately complies with the Order. *See* Wilson Decl. Ex. 8 ¶ 7. Where a school has many students covered by Tuition Orders—like many special education schools attended by members of the Class—the school can be forced to carry millions of dollars of receivables while awaiting payment from DOE. *See* Wilson Decl. Ex. 9 ¶¶ 7-8.

On March 15 and 16, 2020 the New York City and New York State governments issued executive orders closing schools in response to the COVID-19 pandemic.[5] Pursuant to those orders, New York City public and private schools suspended in-person instruction in favor of remote learning. As it became clear that the pandemic would not abate in the near term, schools extended remote learning through the spring semester

On March 20, 2020, Plaintiffs' counsel sought confirmation that DOE would continue to implement Orders. Shore Decl. Ex. A. In response to a second inquiry, Defendants' counsel emailed on April 7, 2020 that DOE was "working on guidance about tuition and will be distributing that shortly." DOE never sent Plaintiffs' counsel such guidance. Shore Decl. Ex. B.

After March 2020, and throughout the spring, DOE refused to implement any Tuition Orders, including both (i) Orders whose implementation deadlines fell prior to the start of remote

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[5] *See New York City to Close All School Buildings and Transition to Remote Learning*, NYC.gov (Mar. 15, 2020), https://www1.nyc.gov/office-of-the-mayor/news/151-20/new-york-city-close-all-school-buildings-transition-remote-learning; *Governor Cuomo Signs Executive Order Closing Schools Statewide for Two Weeks*, New York State Governor's Press Office (Mar. 16, 2020), https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-closing-schools-statewide-two-weeks.

learning and (ii) Orders that were issued after New York City schools adopted remote learning. In the weeks following the parties' March and April 2020 email exchanges, private schools began to warn parents that they would be unable to re-enroll students for the 2020-21 school year because of outstanding tuition that DOE had been ordered to pay for the 2019-20 school year. Shore Decl. Ex. C. Plaintiffs' counsel continued to contact Defendants' counsel to secure compliance with these Tuition Orders, and explained that students could be prohibited from enrolling for the 2020-21 school year if DOE did not first pay the ordered 2019-20 tuition. DOE still refused to implement any Tuition Orders. Shore Decl. ¶ 7, Ex. D.

In June 2020, three months after schools went remote, DOE for the first time informed Plaintiffs' counsel that it was not paying Tuition Orders because DOE had to "approve" private schools' remote learning plans, even though tuition payment for those schools had already been ordered. Shore Decl. ¶ 8, Ex. E. On June 18, 2020, DOE stated to Plaintiffs' counsel that the Policy is premised on a purported obligation under the New York Constitution to "protect the public fisc." *See* Shore Decl. Ex. E; Opp. Ltr at 2.

Many schools that provide special education to members of the Class depend on timely payment of Tuition Orders to operate. *See* Wilson Decl. Ex. 8 ¶¶ 6, 9-10; Wilson Decl. Ex. 10 ¶¶ 8-9. As DOE continued to refuse to pay tuition, some schools eventually did not permit students to enroll for the 2020-21 school year as because of DOE's failure to implement the Tuition Orders for the 2019-20 school year, resulting in students missing instruction. Shore Decl. ¶¶ 10-12 and Exs. F, G, H, and I.

By September, DOE still had not paid all the tuition ordered pursuant to Tuition Orders since March 2020. Many Tuition Orders for the 2019-20 school year remain unpaid in their entirety. In other cases, DOE has paid tuition up to, but not including, March 2020. *See* Nelson

Decl. at ¶ 9-10. After months of communications with DOE proved fruitless, Plaintiffs' counsel requested leave of this Court on September 17, 2020 to file the instant motion. *See* ECF No. 225. In response, DOE for the first time offered a legal basis for its purported obligation to "protect the public fisc"—namely, the gift prohibition in Article VIII of the New York State Constitution, which, *inter alia*, prohibits a "school district" from "giv[ing] or loan[ing] any money or property [or its credit] to or in aid of any individual, or private corporation or association, or private undertaking . . . ." *See* N.Y. Const. art. VIII § 1 ("Article VIII"). To date, DOE has not altered the Policy and has refused to comply with Tuition Orders unless and until it reviews and approves the schools' remote learning program on its own undefined schedule, delaying parents' and schools' receipt of ordered payments by months.

II. RELIEF REQUESTED

DOE's Policy not to pay Tuition Orders since March 2020 is illegal and denies Class members the FAPE they are guaranteed under the IDEA, New York law, and the Stipulation. Some Class members have been excluded from their ordered schools due to DOE's nonpayment of tuition; others are at imminent risk of being ejected mid-school year. The Policy has pushed private special education schools throughout the City to the brink of closure and left parents with an impossible choice of either removing their children from school completely, or paying tuition out of their own pocket—without any assurance that they will ever be reimbursed. Due to the substantial and ongoing harm that would result to Class members were DOE's Policy permitted to continue, Plaintiffs respectfully request that the Court issue the following relief:

1) A declaratory judgment that DOE's Policy violates the IDEA, New York law, and the Stipulation;
2) An order that DOE must, within 15 days, identify and pay all outstanding Tuition Orders more than 35 days past the date of issuance; and

3) An order that, going forward, DOE must implement all Orders as written within the timeframes set forth in the Stipulation, regardless of whether the school is providing education in person or remotely.

III. ARGUMENT

A. This Court May Issue a Declaratory Judgment Concerning the Parties' Legal Rights and Obligations

"In a case of actual controversy within its jurisdiction [a federal court] may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." *118 E. 60th Owners, Inc. v. Bonner Properties, Inc.*, 677 F.2d 200, 205 (2d Cir. 1982) (quoting 28 U.S.C. § 2201). DOE's refusal to implement Tuition Orders despite being required to do so by the Stipulation, the IDEA, and New York State law has created an actual controversy over DOE's legal obligations and Class members' legal rights.

In such cases, a court may issue a declaratory judgment if it will be "useful . . . in clarifying or settling the legal issues involved" and will "finalize the controversy and offer relief from uncertainty." *See Kleeberg v. Eber*, 2020 WL 4586904, at *16 (S.D.N.Y. Aug. 10, 2020) (citations and internal punctuation omitted). The requested relief would do so here. This dispute is purely legal in nature, and a final declaration of the parties' respective rights and obligations would settle the underlying legal issues and provide both parties with certainty going forward.

A district court is empowered to adjudicate disputes concerning the parties' compliance with a settlement that expressly provides for continuing oversight by the court. *McLean v. Vill. of Sleepy Hollow*, 166 F. Supp. 2d 898, 901 (S.D.N.Y. 2001) ("A federal court has jurisdiction to enforce a settlement agreement if the . . . settlement terms were incorporated into a stipulation that was so-ordered by this Court.") (citations omitted). Here, the Stipulation provides that "[t]he administration and consummation of the Settlement as embodied in this Stipulation shall

be under the authority of the Court," and that the "Parties submit to the jurisdiction of the Court for purposes of implementing and enforcing this Stipulation and the orders contemplated herein." *See* Wilson Decl. Ex. 1 ¶ 47. This Court thus may resolve this dispute and is the proper forum in which to adjudicate it. And a court ***must*** intervene where, like DOE, a party breaches its obligations under a settlement agreement, thereby depriving the opposing party of settlement benefits to which it is entitled. *See Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985) ("A court has an affirmative duty to protect the integrity of its decree . . . where the performance of one party threatens to frustrate the purpose of the decree."). DOE has done exactly that: by refusing to implement Tuition Orders since March 2020 and unilaterally imposing conditions on its compliance with Orders, DOE has breached its obligation to implement all Final Orders in a timely manner, frustrating the relief bargained for by the Class.[6]

B. The IDEA Requires DOE to Implement All Final Orders

As DOE admits, all Orders are "final if not appealed [by DOE]" and "must be implemented." Defs.' Opp. to Special Master Mot. (ECF No. 216) at 3; Nathan Decl. (ECF No. 215) ¶ 15 ("When an [Order] is issued . . . each obligation . . . must be implemented"). DOE's "Impartial Hearing Order Implementation Unit is responsible for ensuring the timely implementation of all impartial hearing orders."[7]

The IDEA is unambiguous that an IHO's Order is final and legally binding unless successfully appealed. *See* 20 U.S.C. § 1415(i)(1) ("[a] decision made in a hearing . . . shall be final, except that any party involved in such hearing may appeal"); *Nieves-Marquez v. Puerto*

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[6] DOE claims that this dispute is best pursued through a plethora of individual actions. Opp. Ltr. at 2. That approach is needlessly inefficient and, given the vast number of Orders the DOE has not paid since March, would overwhelm this Court.

[7] DOE, *Impartial Hearing Order Implementation Unit*, https://infohub.nyced.org/working-with-the-doe/special-education-providers/impartial-hearing-order-implementation-unit.

Rico 353 F.3d 108, 116 (1st Cir. 2003) (the IDEA reflects "Congress's instruction that the administrative order be final unless appealed in a civil action"); *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 275 (3d Cir. 2014) (unappealed Orders are "final and binding under the IDEA").

The only lawful action DOE may take with respect to Final Orders is to implement them. *Robinson v. Pinderhughes*, 810 F.2d 1270, 1274 (4th Cir. 1987) ("The [IDEA] can only be fairly construed to contemplate that once a final favorable administrative decision has been gained by a plaintiff, the State will carry out that decision although it may have opposed the position of the plaintiff in the administrative proceedings."). The IDEA neither contemplates nor condones DOE independently evaluating whether it must pay tuition for students ordered to attend private schools: under the IDEA, an IHO must have already evaluated the private school program and determined that it is appropriate for that student ***before*** an Order can be issued. *See Florence County School District Four v. Carter*, 510 U.S. 7 (1993). Indeed, multiple Final Orders that DOE refuses to implement were issued after the school transitioned to remote learning and after the IHO ***specifically evaluated the school's remote learning program and found it appropriate for the student***. *See* Wilson Decl. Ex. 7 ¶ 23. DOE's Policy therefore appears to be pretextual and intended to protect DOE's budget at the expense of parents and schools.

DOE's refusal to implement Tuition Orders frustrates the purpose of the IDEA, undermines the due process protections the IDEA grants to students with disabilities, usurps the role of the IHO, and destroys the impartiality of the administrative process. *See SJB ex rel. Berkhout v. N.Y.C. Dep't of Educ.*, No. 03 Civ. 6653 (NRB), 2004 WL 1586500, *4-5 (S.D.N.Y. July 14, 2004) ("[A] hearing's efficacy depends on the binding IHO decision being adhered to by the parties . . . [and] IDEA's purpose of ensuring services to disabled students depends on the prompt and effective implementation of IHO orders . . . ."); *Nieves-Marquez*, 353 F.3d at 116

(allowing a school system to "neither appeal[] from nor compl[y] with a valid administrative order and its continuing obligations. . . . would open a gaping hole it IDEA's coverage," "render virtually meaningless the guarantee of a [FAPE]," "undercut the integrity of the administrative process," and negatively "impact the 'stay put' provisions of the IDEA, which specify . . . [that] the educational placement of a child must be maintained"); *Miener By & Through Miener v. State of Mo.*, 800 F.2d 749, 753 (8th Cir. 1986) ("We are confident that Congress did not intend the child's entitlement to a *free* education to turn upon her parent's ability to 'front' its costs.") (emphasis original).

C. The IDEA Preempts Any State Law That DOE Could Claim Prevents the Implementation of Final Orders

In addition to requiring DOE to implement all Final Orders, the IDEA preempts all conflicting state laws. DOE claims that it is required to withhold payment of Tuition Orders under the gift prohibition in Article VIII, Section 1 of the New York Constitution. *See* Opp. Ltr. at 2. As discussed *infra* § III.D, the New York Constitution neither empowers nor requires DOE to withhold tuition payments mandated by Final Orders. However, even if it purported to do so, the gift prohibition would be preempted by the IDEA, which requires DOE to implement all Final Orders.

"Under the doctrine of federal preemption, which is rooted in the Supremacy Clause of the Constitution of the United States, state laws are invalid if they interfere with, or are contrary to, federal law." *R.B. v. Mastery Charter Sch.*, 532 F. App'x 136, 141-42 (3d Cir. 2013) (internal quotation marks omitted) (citing *Hillsborough Cnty. v. Automated Med. Labs.*, 471 U.S. 707, 712 (1985). "[F]ederal law [also] preempts conflicting state constitutions under the Supremacy Clause, which provides, as follows: 'the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary

notwithstanding.'" *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 605 (S.D.N.Y. 2020) (quoting U.S. Const., Art. VI, cl. 2.; citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 716 (1984)).

Additionally, "[n]umerous courts have found that the IDEA preempts state law when the state standard conflicts with the federal." *Sarah M. v. Weast*, 111 F. Supp. 2d 695, 703 (D. Md. 2000) (collecting cases); *see, e.g.*, *Antkowiak v. Ambach*, 838 F.2d 635, 641 (2nd Cir. 1988) (state statute permitting state review of unappealed Orders violated IDEA's finality provision); *Mrs. C. v. Wheaton*, 916 F.2d 69, 73 (2d Cir. 1990) (state standard waiving IDEA procedural safeguards was preempted); *E.Z.–L. ex rel. R.L. v. NYC Dep't of Educ.,* 763 F. Supp. 2d 584, 599 (S.D.N.Y. 2011) (the IDEA's stay-put provision preempts state unjust enrichment law).

"Conflict preemption is found [i] where compliance with both federal and state regulations is a physical impossibility, or [ii] where state law erects an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Mastery Charter Sch.*, 532 at 142 (internal quotation marks and citations omitted). DOE's rationale for the Policy violates both prongs. *First*, it is impossible for DOE to simultaneously: (i) implement all Final Orders without delay, as required by the IDEA; and (ii) suspend the implementation of Tuition Orders, as DOE claims the New York Constitution requires. *See Bray v. Hobart City Sch. Corp.*, 818 F. Supp. 1226, 1236 (N.D. Ind. 1993) (preempting state law that impeded the IDEA's requirement that Final Orders "should be implemented without delay"). It is also impossible to comply with the IDEA's "stay-put" provisions while concurrently refusing to pay students' tuition and causing students to be excluded from their pendency school for non-payment. *See* Wilson Decl. Ex. 8 ¶ 23 (describing non-implementation of Tuition Order at pendency school); *L.A. v. New York City Dept. of Educ.*, 2020 WL 5202108 *2 (S.D.N.Y. Sept. 1, 2020) (the IDEA's stay put provision operates as "an automatic injunction . . . to maintain the

child's educational status quo while the parties' IEP dispute is being resolved"); *Ventura de Paulino v. N.Y. City Dept. of Educ.*, 959 F.3d 529, 531 (2d Cir. 2020) (under the IDEA, students are statutorily "entitled to remain in [their] placement at public expense during the pendency of an IEP dispute"); *Zvi D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982) (the stay put provision is "an absolute rule in favor of the status quo"). Indeed, as this Court recently held, "[c]ase law in the Second Circuit makes clear that the ***DOE is required to continue funding the student's last placement during the pendency of an IEP dispute, even when that last placement was a private school***." *L.A.*, 2020 WL 5202108 * 4 (citing *Soria v. N.Y. City Dept. of Educ.*, 397 F. Supp. 3d 397, 400 (S.D.N.Y. Aug. 7, 2019)).

DOE's Policy is furthermore preempted because it eviscerates one of the IDEA's key procedural safeguards for students and parents: that Final Orders can only be challenged via established appeal procedures adjudicated by an impartial party. *See Bray*, 818 F. Supp. at 1236 (preempting state review procedure that did "not conform to the minimal procedural safeguards required in [the IDEA] Section 1415(d)"). In *Bray*, for example, the Court found that a state's law purporting to grant the state the power to conduct a *post hoc* review of Final Orders was preempted because the review procedure was "not part of the [IDEA's official] appeal process, but rather [was] a *sua sponte* review conducted by the State." *Id.* The *Bray* Court also found that the IDEA preempts policies giving the State discretion over whether to implement a Final Order because the IDEA requires ***impartial*** due process hearings and "the State has an interest in the outcome of the review." *Id.* Indeed, DOE is the party ***against*** whom Final Orders are issued, making it impossible for DOE to impartially assess its payment obligations under the IDEA.[8]

[8] *See, e.g.*, 8 NYCRR §§ 200.1(x) and 200.21(b) (IHOs "shall not be an officer, employee or agent of the school district . . . , shall not have a . . . professional interest which would conflict

Second, Congress intended Final Orders to be unreviewable by states and entities like DOE. *See, e.g.*, *Porter v. Bd. of Trustees of Manhattan Beach Unified Sch. Dist.*, 307 F.3d 1064, 1071 (9th Cir. 2002) ("Once a due process hearing issues an order that is not appealed by either party, the IDEA requires that the order be treated as 'final.' No other administrative procedures are required [for implementation]. This clear congressional demarcation of an end point to the due process procedures weighs heavily in our conclusion that ***Congress did not intend to allow states to add additional [administrative] requirements not identified in the statute***." (emphasis added) (internal citation omitted)). As the Second Circuit has explained, "[w]hile state procedures which more stringently ***protect*** the rights of the handicapped and their parents are consistent with the [IDEA][9] and thus enforceable, those that merely add additional steps not contemplated in the scheme of the [IDEA] are not enforceable." *Antkowiak*, 838 F.2d at 641 (internal citations omitted) (emphasis added) (New York State Education Department cannot conduct *sua sponte* reviews of unappealed Orders without violating the IDEA). Indeed, as the Second Circuit has made clear, "[t]he [IDEA] considers final any unappealed decision of a hearing officer and ***no further review appears to be contemplated under the [IDEA]***. Thus, to the extent that [New York's] *sua sponte* review 'would . . . subject children and their parents to an additional step not required by the [IDEA],' it would seem inconsistent with the finality provision of section 1415 [of IDEA] and therefore without 'official status or standing under the [IDEA].'" *Id.* (emphasis added) (citations omitted).

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with his or her objectivity in the hearing, and shall not have participated in any manner in the formulation of the [IEP] recommendation sought to be reviewed.").

[9] The case refers to the Education of the Handicapped Act ("EHA"), which was the short title of IDEA prior to the statute's amendment in 1991. *See* Pub. L. 102–119, § 1 (Oct. 7, 1991).

DOE's Policy adds additional steps and requirements not contained in the IDEA or the Final Orders. *See* Opp. Ltr. at 2, Ex. A. DOE admits that prior to complying with Tuition Orders, it is: (i) reviewing "the nature of the programs being provided to students at private special education schools" that were originally "considered by impartial hearing officers at the time of the hearings" to ultimately (ii) approve whether students are receiving "appropriate services." *See* Opp. Ltr. at 2. The IDEA is unambiguous that such determinations are made solely by IHOs, and provides no mechanism for re-review and approval by interested parties such as DOE. *See* 20 U.S.C. §§ 1401(9), 1414(d), 1415(f); *Carlisle Area Sch. v. Scott P. By & Through Bess P.*, 62 F.3d 520, 527 (3d Cir. 1995), *amended* (Oct. 24, 1995) ("Federal regulation § 300.510, promulgated under § 1415(c), provides that an 'impartial' officer is to conduct the review and that such officer should make an 'independent decision.'") (quoting 34 C.F.R. § 300.510 (1993)). Moreover, DOE also refuses to disclose the standards by which it approves remote learning programs or the timeline for that process.

D. New York Law Does Not Require or Permit DOE to Refuse to Implement Final Orders

As discussed above, special education in New York, like in all states, is subject to a strict federal-state framework in which state laws implement the federal framework creating a due process system consistent with federal law. *See, e.g.*, *Antkowiak*, 838 F.2d at 641; *Scott P.*, 62 F.3d at 527 (pursuant to the IDEA, "[s]tates may choose either a one- or a two-tier administrative system"; under the two-tier system, "the initial hearing occurs at the local educational agency level followed by an 'independent' [appellate] review of that hearing at the state educational agency level"). New York enacted a two-tier administrative system consistent with the IDEA, including the IDEA's finality provision regarding unappealed Orders. *See, e.g.*, N.Y. Educ. Law

§ 4404(1)(c) ("The decision of the impartial hearing officer shall be binding upon both parties unless appealed to the state review officer.").

New York law is clear that first-tier "local educational agency" determinations are made exclusively by IHOs, and that second-tier "state educational agency" determinations are made solely by State Review Officers ("SROs"). N.Y. Educ. Law § 4404. DOE is neither an IHO nor an SRO, nor could it render an impartial decision in any event. *See supra* § III.C. Under New York law and the IDEA, DOE can implement only Final Orders issued by approved entities.

DOE attempts an end-run on the express limitations of New York's administrative system (and the IDEA) by claiming that it can unilaterally refuse to implement Class members' Tuition Orders based on Article VIII, Section 1 of the New York Constitution—which DOE claims prohibits it from "making a gift of public funds" to private schools. *See* Opp. Ltr. at 2. DOE's reliance on Article VIII's gift prohibition is misplaced: the New York Constitution expressly ***exempts*** special education services from the constitutional prohibition on gifts, providing that "nothing in this constitution contained shall prevent" state bodies from "***providing health and welfare services for all children.***" N.Y. Const. Art. VIII § 1. Special education services are "welfare services" under New York law. *See Scales v. Bd. of Ed. of Union Free Sch. Dist. No. 12, Town of Hempstead*, 245 N.Y.S.2d 449, 452-55 (N.Y. Sup. Ct. 1963) (special education laws provide "welfare services for . . . children" within the meaning of the gift prohibition sections of the New York Constitution). Moreover, Article VII provides that "nothing in this constitution" shall prevent the New York legislature from providing for "***the education and support of . . . the physically handicapped . . . [or] the mentally retarded*** . . . ; or for health and ***welfare services for all children, either directly or through subdivisions of the state, including school districts***." N.Y. Const. art. VII § 8 (emphasis added). Simply put, DOE cannot use Article VIII's gift

prohibition to defy the state legislature or to justify its ongoing refusal to implement Class members' Tuition Orders.

Even if the gift prohibition did apply, Article VIII merely prohibits ***gifts*** of public funds—and "gifts" do not include payments that DOE is legally obliged to make. *See Piro v. Bowen*, 76 A.D.2d 392, 398 (2d Dep't 1980) ("the [New York] Constitution requires that there be a legal obligation on the part of the State or municipality before public funds can be paid to individuals, [and] such a legal obligation may be either statutory or contractual") (citation omitted). As discussed *supra*, DOE is legally obligated to: (i) implement all Final Orders pursuant to the IDEA and New York law, and (ii) implement all Final Orders within 35 days of issue under the Stipulation unless and until DOE exits the Stipulation. *See Scales*, 245 N.Y.S.2d at 452-55 (rejecting argument that New York Constitution's gift prohibition defeats statutory requirements to provide special education services). DOE itself admits as much. *See* Opp. Ltr. at 2 (DOE is subject to Tuition Orders "obtained by parents of students with disabilities which ***direct DOE to pay*** for certain programs and services provided by private schools so the students may receive an appropriate education at public expense.") (emphasis added). Tuition Orders legally bind DOE.

In any event, DOE's mere suspicion that it is "possible" that some schools may not be providing any remote services at all, *see* Opp. Ltr. at 2, does not justify its City-wide preemptive refusal to pay Tuition Orders. Indeed, by its own admission, DOE erroneously refused to implement Tuition Orders for all students at 64 private schools whose remote learning programs DOE found sufficient. *Id.* Moreover, schools have been providing evidence since March 2020 that they are providing remote services. *See* Wilson Decl. Ex. 3 ¶ 9. The gift prohibition can only be invoked when there is "***no*** legal liability"—a far cry from DOE's unsupported suspicions

that it might not have legal liability in the face of Final Orders and contrary evidence from schools. *See City of Rochester v. Chiarella*, 98 A.D.2d 8, 11 (4th Dep't 1983), *aff'd*, 63 N.Y.2d 857 (1984) (emphasis added).

E. The Stipulation Requires DOE to Implement All Final Orders

In 2007, the Class and DOE entered into the Stipulation to settle claims brought by the Class for DOE's systemic failure to "comply with," "enforce[,]" and "implement" Final Orders. *See* Wilson Decl. Ex. 1 ¶¶ Recitals A, B. The Stipulation's injunctive and prospective provisions are its backbone and impose a still-operative injunction against DOE that (i) prohibits DOE from failing to comply with Final Orders and (ii) requires DOE to timely implement all Final Orders. *See* Wilson Decl. Ex. 1 ¶¶ 4-11. DOE's Policy completely suspends the implementation of Class members' Tuition Orders, many of which have been unimplemented for ***at least eight months.*** Thus, DOE's Policy plainly violates the Stipulation.

Other provisions of the Stipulation also reflect DOE's obligation to implement all Final Orders. For example, the Stipulation states that if DOE believes that implementation of an Order would require DOE "to take action that would either violate applicable law or [are] factually impossible," Wilson Decl. Ex. 1 ¶¶ 1.ll.i, iii-iv, DOE must appeal or "provide the parent with an appropriate written alternative to the requirements of the Order or Action Item ***and implement that alternative within 35 calendar days***" of the date of the Order. *Id.* ¶ 1.ll.i (emphasis added). DOE has not satisfied either requirement. Instead, DOE has caused Class members to be excluded from school and parents to bear an enormous financial burden.

The Implementation Unit's website confirms that the only types of documentation required to implement Orders are ***either*** (i) a "[s]igned tuition contract," or (ii) an affidavit including the name of the student, the applicable school year, tuition amount, enrollment period,

payments made to date, and amount due and owing.[10] This makes clear that DOE is using the COVID-19 crisis as a pretext to avoid paying Tuition Orders. By unilaterally and indiscriminately suspending payment of Tuition Orders for eight months or more, DOE's Policy violates the Stipulation and harms students, their families, and schools.

CONCLUSION

For the foregoing reasons, Plaintiffs hereby respectfully request the relief described in Section II above and such other relief as the Court deems just and proper. Plaintiffs request oral argument in this matter.

[10] *See* https://infohub.nyced.org/working-with-the-doe/special-education-providers/impartial-hearing-order-implementation-unit.

Dated: October 28, 2020

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