

# 22-939

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**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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Z.Q., BY HIS PARENT, G.J., G.J., INDIVIDUALLY AND ON BEHALF OF Z.Q., J.H., BY HIS PARENT, Y.H., Y.H., INDIVIDUALLY AND ON BEHALF OF J.H., J.A., BY HIS PARENT, D.S., D.S., INDIVIDUALLY AND ON BEHALF OF J.A., M.S., BY HIS PARENT, R.H., R.H., INDIVIDUALLY AND ON BEHALF OF M.S., D.V., BY HIS GUARDIAN, V.L., V.L., INDIVIDUALLY AND ON BEHALF ON D.V., J.W., BY HIS PARENT, A.W., A.W., INDIVIDUALLY AND ON BEHALF OF J.W., D.M., BY HIS PARENT, E.L., E.L., INDIVIDUALLY AND ON BEHALF OF D.M., C.B., BY HIS PARENT, C.B.2, C.B.2, INDIVIDUALLY AND ON BEHALF OF C.B., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

*Plaintiffs-Appellants,*

v.

NEW YORK CITY DEPARTMENT OF EDUCATION, NEW YORK CITY BOARD OF EDUCATION, RICHARD CARRANZA, IN HIS OFFICIAL CAPACITY AS CHANCELLOR OF THE NEW YORK CITY SCHOOL DISTRICT, NEW YORK STATE EDUCATION DEPARTMENT, NEW YORK STATE BOARD OF REGENTS, BETTY A. ROSA, IN HER OFFICIAL CAPACITY AS INTERIM COMMISSIONER OF EDUCATION AND PRESIDENT OF THE UNIVERSITY OF THE STATE OF NEW YORK,

*Defendants-Appellees.*

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On Appeal from The United States District Court  
for the Southern District of New York, No. 1:20-cv-9866 (Carter, J.)

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**BRIEF OF SPECIAL SUPPORT SERVICES, LLC AS  
AMICUS CURIAE IN SUPPORT OF APPELLANTS AND REVERSAL**

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rules 29 and 26.1 of the Federal Rules of Appellate Procedure, Special Support Services, LLC certifies that it has no parent corporation and no corporation or publicly held entity owns 10% or more of its stock.

**STATEMENT OF COMPLIANCE WITH RULE 29(a)(2)**

Pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure, amicus curiae states that all parties to this appeal have consented to the filing of this brief.

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**OTHER AUTHORITIES**

Amin, Remma, et. al., <i>NYC School Budgets Take A Hit as de Blasio Proposes \$827 Million in Education Cuts</i> , Chalkbeat New York (Apr. 16, 2020), <a href="https://ny.chalkbeat.org/2020/4/16/21225539/nyc-school-budgets-take-a-hit-as-de-blasio-proposes-827-million-in-education-cuts">https://ny.chalkbeat.org/2020/4/16/21225539/ nyc-school-budgets-take-a-hit-as-de-blasio-proposes-827- million-in-education-cuts</a> .....	10
---	----

Amin, Reema, *NYC Schools have spent just half of this year’s COVID relief, report says*, Chalkbeat New York (Apr. 12, 2022) <https://ny.chalkbeat.org/2022/4/12/23022754/covid-federal-relief-de-blasio-stimulus-comptroller-billions-dollars> ..... 11

Brody, Leslie & Katie Honan, *New York City Principals Say They Don’t Have Enough Teachers*, Wall St. J. (Sept. 12, 2020), <https://www.wsj.com/articles/new-york-city-principals-say-they-dont-have-enough-teachers-11599915600> ..... 10

Elsen-Rooney, Michael, *NYC parents push back on shift to special education hearing system*, New York Daily News (May 15, 2022) <https://www.nydailynews.com/new-york/education/ny-parents-push-back-changes-special-education-system-20220515-dgzxgwzabreejhslnnansae3o4-story.html> ..... 26

Giangreco, Michael F., *Remote Use of Paraprofessional Supports for Students with Disabilities During the COVID-19 Pandemic*, University of Vermont, Center on Disability & Community Inclusion (July 13, 2020), <https://www.uvm.edu/sites/default/files/Center-on-Disability-and-Community-Inclusion/ParaprofessionalPlanningCOVID19.pdf> ..... 9

Gonen, Yoav, *Special Education Tuition Hearings Shift to NYC Trials Agency to Address Backlog*, Chalkbeat New York (Dec. 22, 2021), <https://ny.chalkbeat.org/2021/12/22/22851127/nyc-special-education-complaints-impartial-hearings-backlog-overhaul> ..... 25

*N.Y.C. School Reopening Plan: School Scheduling Models*, New York City Department of Education (2020-2021), <https://cdn-blob-prd.azureedge.net/prd-pws/docs/default-source/default-document-library/2020-nycdoe-reopeningplan.pdf>, (last visited June 22, 2022) ..... 20

*Students Receiving Recommended Special Education Programs by Program Type*, New York City OpenData (updated Feb. 11, 2021), [https://data.cityofnewyork.us/api/views/6thv-9wgt/files/58af5272-e32a-4077-9d05-71fab7215290?download=true&filename=Special\\_Education\\_Data\\_Report\\_\\_February\\_2021.xlsx](https://data.cityofnewyork.us/api/views/6thv-9wgt/files/58af5272-e32a-4077-9d05-71fab7215290?download=true&filename=Special_Education_Data_Report__February_2021.xlsx) ..... 8

Shapiro, Eliza, *New York City Public Schools to Close to Slow Spread of Coronavirus*, N.Y. Times (Mar. 15, 2020), <https://www.nytimes.com/2020/03/15/nyregion/nyc-schools-closed.html>.....2

Shapiro, Eliza, *Principals Assail NYC Mayor, Calling for State Takeover of Schools*, N.Y. Times (Sept. 27, 2020), <https://www.nytimes.com/2020/09/27/nyregion/nyc-principals-union-schools-takeover.html> .....21

*Special Education Hearings Divisions*, NYC Office of Administrative Trials and Hearings, <https://www1.nyc.gov/site/oath/about/special-education-hearings-division.page#:~:text=OATH%27s%20Special%20Education%20Hearing%20Office%20rs,in%20the%20decision%20making%20process> (last visited June 22, 2022).....25

*Special Education Teacher Support Services*, United Federation Of Teachers, <https://www.uft.org/teaching/students-disabilities/special-education-teacher-support-services> (last visited June 22, 2022), .....17

Special Support Services, LLC (@go3snyc), Twitter .....27

*Spread Thin: Survey Reveals Students Without Special Education Instruction*, Special Support Services (Dec. 1, 2020), [https://specialsupportservices.files.wordpress.com/2020/11/surveyanalysis\\_final.pdf](https://specialsupportservices.files.wordpress.com/2020/11/surveyanalysis_final.pdf) .....*passim*

*Spread Thin: NYC Special Education Teacher Shortage Survey Results*, Special Support Services (Dec. 1, 2020), <https://specialsupportservices.files.wordpress.com/2020/11/teachershortagesurveyresultsdec2020.pdf> .....16, 17, 25

*Supplement #1—Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State—Additional Questions and Answers*, State Education Department University of New York (Apr. 27, 2020), <https://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-1-covid-qa-memo-4-27-2020.pdf> .....20



*Testimony for the New York City Council Committees on Education and Mental Health, Disabilities and Addiction Re: Reopening NYC Public Schools: Impact on Students with Disabilities, Special Support Services (Oct. 23, 2020), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4647746&GUID=B8379034-5287-4FF6-A46F-DB100141D4A7&Options=&Search=> .....19*

Zimmerman, Alex, *1 in 4 NYC Students with Disabilities Aren't Getting Mandated Services This School Year, New Data Shows*, Chalkbeat New York (Feb. 10, 2021), <https://ny.chalkbeat.org/2021/2/10/22277334/special-education-coronavirus-nyc> .....3, 9, 24

Zimmerman, Alex & Yoav Gonen, *NYC created a massive after-school program to help all students with disabilities catch up after COVID disruptions. Most never showed up*, Chalkbeat New York (Apr. 7, 2022) <https://ny.chalkbeat.org/2022/4/7/23013866/nyc-special-education-recovery-services-after-school>.....12

## INTEREST OF AMICUS CURIAE<sup>1</sup>

Special Support Services, LLC (SSS) is a for-profit organization that supports parents of students with disabilities through the complex special education process in New York City. SSS's founders are advocates for students with disabilities and their families and are themselves parents of students with disabilities in New York. SSS assists parents of children with disabilities in developing their child's Individualized Education Plans (IEP), reviewing available resources at schools, and providing advocacy for students to receive 1:1 training. SSS is acutely familiar with New York City's impartial hearing process, having represented families in navigating those administrative hearings. SSS also regularly provides written and oral testimony at City Council and State Assembly and Senate hearings on education.

To assess the special education crisis in New York City during the COVID-19 pandemic, SSS collaborated with parent volunteers to write, translate, and distribute a 42-question survey, in four languages, across all boroughs. The survey sought to determine potential problems with teacher shortages for students with disabilities. SSS offers the Court the results of that survey to provide broad first-

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<sup>1</sup> Counsel for the parties have not authored this brief. The parties and counsel for the parties have not contributed money that was intended to fund preparing or submitting the brief. No person other than the amicus curiae contributed money that was intended to fund preparing or submitting this brief.

person insight into how systematic shortages of staff who are certified to instruct and support students with disabilities have irreparably harmed students' education during the COVID-19 pandemic and to show why resort to the normal administrative process is futile. Neither SSS nor its founders received any compensation for organizing the survey. All parties have consented to the filing of this brief.

### **SUMMARY OF ARGUMENT**

On March 15, 2020, Mayor Bill de Blasio announced that New York City's public schools would immediately transition to remote learning in response to the COVID-19 pandemic.<sup>2</sup> The next day, Governor Andrew Cuomo ordered every school in the State to close within two days and directed school districts to “develop a plan for alternative instructional options.”<sup>3</sup> NYC Public school students were fully remote in Spring 2020. By September 2020, NYC re-opened schools with classes available either completely virtually (“full remote learning”), or through a blended program (“blended learning”), where students spend part of the week attending virtual classes and the rest of the week attending in-person classes.

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<sup>2</sup> See Shapiro, *New York City Public Schools to Close to Slow Spread of Coronavirus*, N.Y. Times (Mar. 15, 2020).

<sup>3</sup> See N.Y. Exec. Order No. 202.4: *Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency* (Mar. 16, 2020).

Students with disabilities and their parents were affected the most by the abrupt and sustained shift to remote instruction. The shift led to wholly inadequate special education staffing, which has made it nearly impossible for these students to adequately participate in class. In fact, on October 23, 2020, as part of its written testimony to the joint NYC City Council oversight hearing about the impact of remote learning on students with disabilities, the United Federation of Teachers estimated that an additional 2,000 educators would need to be redeployed and 4,500 teachers would need to be hired to address the teacher shortage. And data from the NYC Department of Education proves that the guidance and services that the City had provided were woefully inadequate to meet these students’—and their parents’—critical needs. In particular, that data shows that as of January 2021, one in four students with disabilities were not receiving all their mandated IEP services.<sup>4</sup>

To better advocate for parents of students with disabilities, SSS conducted the survey—which resulted in 1,167 responses from families of students with disabilities—“to investigate ... a teacher shortage that disproportiona[tely] affected

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<sup>4</sup> See Zimmerman, *1 in 4 NYC Students with Disabilities Aren’t Getting Mandated Services This School Year, New Data Shows*, Chalkbeat N.Y. (Feb. 10, 2021).

students receiving special education services.”<sup>5</sup> SSS asked parents a series of 42 multiple-choice and open-ended questions about the adequacy of staffing resources for students with disabilities.<sup>6</sup>

What SSS found was staggering. Social distancing protocols, plus the Department of Education’s short-sighted plan to offer blended and fully remote models, created a significant shortage in teacher staffing, the effects of which were twofold. *First*, the staffing shortages led to unsustainably large class sizes, vitiating the attention and personalized interaction students with disabilities are entitled to. These classes ranged from 38 to 45 students in fully remote classes and up to 80 students for blended remote classes.<sup>7</sup> *Second*, Integrated Co-Teaching (ICT) classrooms—which feature a general education teacher and certified special education teacher who, together, teach to students with IEPs and without IEPs—

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<sup>5</sup> *Spread Thin: Survey Reveals Students Without Special Education Instruction 2*, Special Support Services (Dec. 1, 2020) (hereinafter “SSS Survey Analysis”).

<sup>6</sup> The findings from this survey represent a voluntary sampling between October 7 and October 26, 2020. The survey questions were created to better understand the real-life experiences of New York City Parents of Students with disabilities during the COVID-19 pandemic. In addition to English, the survey was also published in Chinese, Spanish, and Korean. Distribution of the survey was driven organically by parent volunteers who shared the survey throughout their neighborhoods and other interest-based listservs. The survey was also shared by several local news outlets, non-profit organizations, and Department of Education-related groups. SSS Survey Analysis, at 3-5.

<sup>7</sup> *Id.* at 12.

have suffered from the overwhelming absence of certified staff. ICT classrooms provide the least restrictive environment for students with disabilities as they include specially designed instruction, provided by certified special education teachers, that explicitly address an individual student's IEP goals in addition to the general education curriculum. The common thread between this twofold effect was that the students who require the most attention have been getting the least. And while the survey separated results for blended learning from full remote learning, both types of learning lacked the proper number of teachers, paraprofessionals, and therapists.

The negative impacts are likely irreversible. Over a year of inadequately staffed remote learning has caused students with disabilities to fall further behind in their education and, for some, regress in major life skill areas. And the current administrative system will fail to provide a remedy. Each day that these problems remain unaddressed will continue to cause harm. An immediate solution that does not put additional strain on the significant number of already struggling students with disabilities—and their parents—is needed.

Forcing plaintiffs to resort to the State's administrative remedy under 8 N.Y.C.R.R. § 200.5 will be too little and too late for these students. Indeed, it already is. SSS supports plaintiffs' argument that administrative remedies would be futile, as the teacher shortage is a systemic issue that hearing officers have no

power to fully correct. Court intervention is required to vindicate students' rights. This Court should reverse the district court's conclusion that administrative exhaustion was not futile and allow plaintiffs to proceed directly in district court. Only that will provide the class-wide relief these students require.

### ARGUMENT

Before aggrieved individuals may bring actions in federal court alleging violations of the Individuals with Disabilities Education Act (IDEA), they generally must first exhaust their administrative remedies. *See* 20 U.S.C. § 1415(i)(2). But exhaustion is not always required. For one, the exhaustion of administrative remedies is unnecessary when it would be futile. *See* Class Action Compl. ¶¶ 145-148, App. 54-55; Pls.' Opp'n to Mot. to Dismiss, App. 177-178 ("MTD Opp.") (citing *J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 113, 115 (2d Cir. 2004)).

"To show futility, a plaintiff must demonstrate that adequate remedies are not reasonably available or the wrongs alleged could not or would not have been corrected by resort to the administrative hearing process." *Coleman v. Newburgh Enlarged City Sch. Dist.*, 503 F.3d 198, 205 (2d Cir. 2007) (citation and internal quotation marks omitted). But showing futility does not, as the district court found, require showing "administrative delays or backlog." Mem. & Order, SPA-9. Instead, this Court has consistently held in analogous cases that widespread lack

of adequate education programs and facilities that led to violations of IDEA is enough to show futility. *See J.S.*, 386 F.3d at 113; *Jose P. v. Ambach*, 669 F.2d 865, 867 (2d Cir. 1982). Where (as here) “a complaint is aimed at wrongdoing inherent in the program itself and not directed at any individual child, the allegations of systemic violations entitle[] [plaintiffs] to exemption from the exhaustion requirement.” *J.S.*, 386 F.3d at 113 (affirming district court’s denial of motion to dismiss on exhaustion grounds).

This Court should follow *J.S.* and reverse the district court because the administrative officials who would hear the thousands of cases stemming from the City’s COVID-era policies have “no power to correct” the widespread problems SSS’s survey illustrates. *Id.* In finding that the administrative process could provide adequate compensatory services, the district court failed to recognize the extent of the problem; a problem that is not solely “based on students’ IEPs,” but rather on the incurable shortage of qualified staff. Mem. & Order, SPA-12.

**I. THE CHRONIC SHORTAGE OF CERTIFIED STAFF WAS A SYSTEMIC VIOLATION OF FEDERAL AND STATE LAWS WHICH ADMINISTRATIVE REMEDIES WERE FUTILE TO ADDRESS**

The City’s violations of state and federal law require a remedy that cannot be granted through individualized administrative relief. The district court correctly noted that futility of administrative remedies must be found when the “framework and procedures” for placing students in education programs are “at issue.” Mem.



& Order, SPA-9 (citing *J.S.*, 386 F.3d at 114). However, the district court did not accept as true (as it must at the motion to dismiss stage, *see Goldstein v. Pataki*, 516 F.3d 50, 56 (2d Cir. 2008)) that the violations were systemic, and erroneously concluded that plaintiffs failed to identify any specific policy that violates the law and failed to show that it would be improbable to seek the requested relief through the administrative process. Mem. & Order, SPA-9. In fact, plaintiffs have identified specific and widespread systemic policy failures during the period of remote learning. SSS's survey further highlights these systemic failures inherent in the administrative process.

The survey illustrates a common thread. While students with disabilities and their families faced numerous challenges, the systemic and chronic shortage of certified special education teachers and paraprofessionals caused the most damage during the remote learning period. These professionals are needed to implement an effective remote learning program that meets individual students' IEP mandates and provides them a free and appropriate public education (FAPE). The City's own data noted that approximately 81,920 students with IEPs did not receive or had only partially received necessary services in November 2020 and 42,685 students with IEPs had not received or had only partially received services as of

January 2021.<sup>8</sup> SSS submits that the City failed to structure an appropriate framework that would adequately address these systemic problems—problems that, while affecting each student individually, are caused by the “wrongdoing inherent in the [COVID-19 remote and blended learning] program itself.” *J.S.*, 368 F.3d at 113.

**A. The City’s Inadequate Guidance Failed To Provide For Certified Special Education Teachers and Paraprofessionals During the Remote Learning Period**

The systemic shortage of teachers—especially for special education certified teacher positions—and the misuse of paraprofessionals (when provided) cannot be resolved through administrative remedies. These teachers needed to be provided to ensure students with disabilities received a FAPE. They were not.

For context, certified paraprofessionals and special education teachers are trained to ensure that students with disabilities receive a FAPE. Paraprofessionals are trained on how to provide consistency for students with disabilities while preventing regression of previously learned skills.<sup>9</sup> As a result, paraprofessional

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<sup>8</sup> *Students Receiving Recommended Special Education Programs by Program Type*, NYC OpenData (Program Delivery – Citywide tab) (updated Feb. 11, 2021); see also Zimmerman, *1 in 4 NYC Students with Disabilities Aren’t Getting Mandated Services This School Year, New Data Shows*, *supra* note 4.

<sup>9</sup> See Giangreco, *Remote Use of Paraprofessional Supports for Students with Disabilities During the COVID-19 Pandemic*, Univ. of Vt., Ctr. on Disability & Cmty. Inclusion (July 13, 2020).

support is usually only offered to children with significant academic, behavioral, or health support needs and are essential to the success of students with disabilities.<sup>10</sup>

With the abrupt transition to remote learning, it was even more important for students with disabilities to receive mandated instructional time with certified special education teachers and paraprofessionals. Accordingly, school boards needed to dedicate more resources to students with disabilities to implement an effective remote learning program.

But in New York City, none of this happened. Parents of students with disabilities observed that NYC schools have been unable to hire enough special education teachers to ensure that their children receive adequate support in their blended or fully remote classes. In fact, the City exacerbated the shortage of trained special education teachers by implementing a hiring freeze on all teachers in April 2020, right at the outset of remote learning.<sup>11</sup>

The situation did not improve when the new school year began and remained stagnant in the following year. Although the hiring freeze was lifted in September 2020, principals reported that they lacked resources to hire enough staff for New

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<sup>10</sup> SSS Survey Analysis, at 10.

<sup>11</sup> See Amin et al., *NYC School Budgets Take A Hit as de Blasio Proposes \$827 Million in Education Cuts*, Chalkbeat N.Y. (Apr. 16, 2020).

York City’s hybrid instructional models.<sup>12</sup> Despite having the summer to prepare for another semester of remote learning, the NYC DOE and the New York State Department of Education did not address the critical shortage of certified special education teachers despite having the resources to do so. Then, in March 2021, the New York City Department of Education received \$7 billion in federal stimulus money but as of March 2022—a full year later—it had spent only 12% of the \$251 million it had budgeted for extra support in special education.<sup>13</sup>

The survey further reveals the inadequacy of the City’s policies. It found that “[o]nce school started” in the fall of 2020, “parents of students with disabilities noted [their students had] ... [n]o access to a certified special education teacher at all [and/or] no access to 1:1 paraprofessionals.”<sup>14</sup> Even when there was a paraprofessional present, one parent of a fully remote learning student shared that the paraprofessional in the student’s class was “not able to communicate specifically with my child” and called the paraprofessional’s presence “checking a box but without providing any assistance.”<sup>15</sup>

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<sup>12</sup> See Brody & Honan, *New York City Principals Say They Don’t Have Enough Teachers*, Wall St. J. (Sept. 12, 2020).

<sup>13</sup> Amin, *NYC Schools have spent just half of this year’s COVID relief, report says*, Chalkbeat N.Y. (Apr. 12, 2022).

<sup>14</sup> SSS Survey Analysis, at 2.

<sup>15</sup> *Id.* at 10.

Students with disabilities participating in in-class learning faced similar challenges. Nearly 20% of parents surveyed observed inadequate staffing on in-person days and 21% of parents noted that there was no certified special educator or a paraprofessional to work with their children.<sup>16</sup>

Since the survey was conducted, the City failed to cure its systemic issues despite the funds to do so. In 2021, the special education recovery program had set aside about \$200 million of federal stimulus funding to support after-school programs intended to help students with disabilities make up for lost learning time.<sup>17</sup> Yet, staffing shortages and lack of adequate bussing failed to provide sufficient quality and quantity of services and parents overwhelmingly felt that the program did not provide a fair opportunity for their children to catch up.<sup>18</sup>

This waste of federal stimulus funds, along with the previous teacher shortage and paraprofessional misuse, do not speak to the sufficiency of students' IEPs, but rather to the failed policies and systems that the City has (and continues to) put in place. To that end, and contrary to the district court's opinion, plaintiffs specifically allege—and the survey and current landscape show—a pattern and

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<sup>16</sup> *Id.* at 7.

<sup>17</sup> Zimmerman & Gonen, *NYC created a massive after-school program to help all students with disabilities catch up after COVID disruptions. Most never showed up*, Chalkbeat N.Y. (Apr. 7, 2022).

<sup>18</sup> *Id.*

practice of systemic violations of IDEA that is inherent in the program. *See J.G. ex rel. Mrs. G. v. Board of Educ. of Rochester City Sch. Dist.*, 830 F.2d 444, 446-447 (2d Cir. 1987) (finding allegations of systemic wrongdoing inherent in the program sufficient to plead an entitlement to an exemption from exhaustion of administrative remedies). Providing students with the teacher support they required is systemic and cannot be remedied through individualized administrative claims; it requires a judicial remedy. *See Id.*

**B. The Misuse of Paraprofessionals And Shortage of Special Education Teachers Have Negatively Affected the Ability of Students with Disabilities to Learn During the Pandemic**

This misuse of certified paraprofessionals and shortage of special education teachers had a negative impact on every aspect of the learning process for students with disabilities. District courts have previously acknowledged this. They routinely recognize the importance—even in ordinary times—of ensuring that students with disabilities are provided with the appropriate paraprofessional and special education teacher services as their IEPs require. For example, in *S.Y. v. N.Y.C. Department of Education*, the court found that the removal of the “one-to-one paraprofessional recommended” in the student’s IEP “dramatically decreased the individualized attention offered to [the student.]” 210 F. Supp. 3d 556, 572-73 (S.D.N.Y. 2016). In *S.Y.*, the Department of Education’s failure to provide notice of this change denied the child a FAPE because it “[e]ft the Parents completely in

the dark on a matter as fundamental as the reasoning behind” the student’s paraprofessional support. *Id.* at 573; *see also Reyes ex rel. R.P. v. N.Y.C. Dep’t of Educ.*, 760 F.3d 211, 221-222 (2d Cir. 2014) (holding that the student was denied a FAPE where no paraprofessional was provided to the student to aid transition from a 2:1 class-size to 3:1).<sup>19</sup>

A similar pattern, exacerbated by far worse circumstances, is present here. Students’ critical need for their mandated support was significantly amplified by the remote learning environment and additional stressors of the pandemic. But this case is not about ensuring a single student received their mandated support, like in *S.Y.* and *Reyes*. And the schools could not merely find the support to provide, because the City’s policies caused a complete lack of appropriate staffing for blended and fully remote instruction models. Those policies upended the support these students require to be successful and fell far short of what is required by law to provide them with a FAPE. This Court should reverse the district court’s failure to find that it has subject matter jurisdiction over plaintiffs’ claims and allow

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<sup>19</sup> In *Reyes*, this Court tied the need for paraprofessional support directly to class size, stating that “[t]he fact that [the student] did not need a dedicated paraprofessional in a 2:1 environment does not necessarily indicate he would not need one in DOE’s less staff-intensive 3:1 environment.” 760 F.3d at 221. The same reasoning in *Reyes* should be applied to the many students whose class sizes have grown, while their paraprofessional support has shrunk. *See SSS Survey Analysis*, at 12 (noting class sizes ranged from 30-80 students), 7 (highlighting inadequate staffing for classes).

plaintiffs to seek a systemic remedy for the significant number of students with disabilities who have been harmed by the State’s insufficient guidance and the City’s inadequate provision of resources in response to the COVID-19 pandemic.

**1. The Shortage of Certified Teachers Has Led to Inadequate Instruction Time for Students with Disabilities**

The staffing shortage led to inadequate specially-designed instruction time by certified special educators for students with disabilities, either as part of IEP-mandated ICT service, Special Education Teacher Support Services (SETSS), or in a self-contained classroom. Live remote-learning is important for engaging students with disabilities, as it allows teachers to better monitor progress toward meeting the students’ IEP goals. Yet, the survey found a significant number of students with disabilities were provided with an inadequate amount of live remote teaching: 49% of blended learning students and 43% of remote students received less than 1 hour of live instruction per day.<sup>20</sup> Only 27% of parents with blended learning students and 21% of parents with fully remote students felt that their children received “[j]ust the right amount of live and self-directed instruction.”<sup>21</sup> Worse, 39% of parents noted related services for their students (such as speech, physical therapy, counselling, and occupational therapy) were scheduled during the

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<sup>20</sup> SSS Survey Analysis, at 9.

<sup>21</sup> *Id.* at 14.



limited live instruction time for core subjects, often forcing the parent to choose between one IEP-mandated service for specifically-designed instruction and another IEP-mandated service for therapy.<sup>22</sup> Among parents whose children have IEP-assigned paraprofessionals, 55% of survey respondents reported that their children received “either no time at all” with paraprofessionals or “less than 30 minutes” per day.<sup>23</sup>

Parents also observed that paraprofessionals were not properly used during class time. One parent whose student’s IEP called for “dedicated” one-on-one attention from a paraprofessional noted that the paraprofessional was available only “during full class sessions and [was] used as a resource for all students,” rather than for the specific student whose IEP mandated the paraprofessional’s presence.<sup>24</sup> For students who needed ICT service, 22% of parents reported that their child had two teachers, one of whom may be certified in special education, but that the teachers were not teaching together, as mandated by the student’s IEP.<sup>25</sup> Further, even when paraprofessionals were present, the students with disabilities were unable to participate in one-on-one time with the

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<sup>22</sup> *Spread Thin: NYC Special Education Teacher Shortage Survey Results 16, Special Support Services* (Dec. 1, 2020) (hereinafter “SSS Survey Results”).

<sup>23</sup> SSS Survey Analysis, at 10.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 13.

paraprofessionals.<sup>26</sup> Still, 5% of parents noted their child was being taught by a paraprofessional and not by a certified special education teacher.<sup>27</sup> On top of this, 9% of parents reported that even when their child had two teachers, one was not a certified special educator.<sup>28</sup>

The survey also found that 55% of parents stated that their children were not receiving all their mandated SETSS.<sup>29</sup> SETSS provide students with “[s]pecially designed and/or supplemental instruction to support the participation of the student with a disability in the general education classroom” and are “necessary to support [students with disabilities’] progress in schools.”<sup>30</sup> The survey indicated that 15% of parents with children who had mandated SETSS reported that their children’s SETSS providers were not certified special education teachers.<sup>31</sup> A further 18% of parents indicated that their children’s SETSS providers were either not certified special education teachers, or only had special education certification in certain subjects.<sup>32</sup> Furthermore, the survey indicated that of the parents whose children

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<sup>26</sup> *Id.* at 10.

<sup>27</sup> *Id.* at 15.

<sup>28</sup> *Id.* at 13.

<sup>29</sup> *Id.*

<sup>30</sup> *Special Education Teacher Support Services*, United Fed’n of Teachers.

<sup>31</sup> SSS Survey Analysis, at 11.

<sup>32</sup> *Id.*

with disabilities required SETSS, 34% of children in blended education, and over 50% in fully remote education, reported receiving either no SETSS or only partial services (meaning that a special education certified provider was only available in certain subjects).<sup>33</sup> One parent of a student with a disability noted, “[m]y child lost about 30 SETSS sessions in the spring and I was told that the [Committee on Special Education] would not be providing any compensatory services even if the child has been shown to have fallen further behind his peers.”<sup>34</sup> These results indicate that plaintiffs’ allegations are not individualized inquiries, but rather relate to indisputable systemwide failures to provide services and implement students’ IEPs.

**2. The Number of Special Education Certified Teachers is Insufficient to Properly Provide Students with Disabilities the Specially Designed Instruction They Require**

Without enough teachers for remote classrooms, schools had to expand class sizes to the point where students with disabilities were oftentimes ignored. Parents reported classes sizes of up to 45 students in fully-remote elementary school classes, 40 students in fully-remote middle school classes, and 38 students in fully-

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

remote high school classes.<sup>35</sup> The results were even worse for blended remote classes, with some parents reporting class sizes of 60 to 80 students.<sup>36</sup>

Extreme class sizes widened the gap for learning between students with and without disabilities. For example, one 9-year-old autistic girl was given a unicorn head on a stick by her teachers for the Spring remote period and told to use the unicorn stick to signal the teacher's attention during live remote classes.<sup>37</sup>

However, because the remote classes were too large, her teacher did not acknowledge her, even when she waved the unicorn stick. As a result, her mother found her crying in front of the computer with her head down several times, frantically waving the unicorn stick in the air. After a week, the child gave up and refused to participate in remote learning at all. Moreover, when teachers used breakout rooms to minimize the number of students in a group, those breakout rooms often did not include a teacher. One parent observed that "these breakout rooms don't include the teacher and my son is often sitting alone in breakout rooms where all the other kids have neither mic nor camera on."<sup>38</sup>

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<sup>35</sup> *Id.* at 12.

<sup>36</sup> *Id.*

<sup>37</sup> *Testimony for the New York City Council Committees on Education and Mental Health, Disabilities and Addiction Re: Reopening NYC Public Schools: Impact on Students with Disabilities, Special Support Services* (Oct. 23, 2020), at PDF p.37.

<sup>38</sup> SSS Survey Analysis, at 13.

**3. The State’s Guidance Has Created a Lack of Consistency in Remote Learning Creating Significant Disadvantages for Students with Disabilities**

In the proceedings below, the State attempted to pin the blame on “the local school districts” which it said were “tasked with developing plans for ‘alternative instructional options’ during school closures necessitated by the pandemic.” State Defs’ Mot. to Dismiss, App. 93. They contended that they provided sufficient guidance to school districts to “ensure that students with disabilities continue to receive a FAPE.” *Id.* at App. 93-92. But the State left it to individual schools to pursue their own choice of programming schedules and exceptions, which many did, without involving parents or outright disregarding parent concerns.<sup>39</sup>

This approach allowed school districts the “flexibility” to deprioritize the consistency with which they provide services for students with IEPs. The State was responsible for ensuring whether its guidance was actually implemented by the City.<sup>40</sup> But what the State offered was guidance without enforcement leading to inconsistent services provided to students with disabilities. Even after the Council of School Supervisors and Administrators called for the State to take over school

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<sup>39</sup> See generally *N.Y.C. School Reopening Plan: School Scheduling Models* 52, N.Y.C. Dep’t of Educ. (2020-2021).

<sup>40</sup> *Supplement #1—Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State—Additional Questions and Answers* 5, State Educ. Dep’t, Univ. State of N.Y. (Apr. 27, 2020).

reopening on September 25, 2020, the State took no action.<sup>41</sup> These policies caused the systemic problems plaintiffs seek a remedy for.

Consistency of services within the classroom is critical to ensuring that students with disabilities remain engaged, on-task, and achieve their educational goals. The survey shows that the State's policies have allowed local school districts to provide inconsistent services on ad hoc bases. For example, one parent noted their "child's teacher for remote learning has changed 3 times already. Today, he has no remote teacher."<sup>42</sup> Another parent expressed similar concerns that their child "goes to a different teacher's office hours every day," which has been a "disaster," resulting in the student's progress having "gone backwards."<sup>43</sup>

These are not isolated cases. This type of continual change in remote learning offerings affected a significant number of students with disabilities. The inconsistency provided under the State's policies made students with disabilities uncomfortable and unwilling to continue with their education. The State failed to address these systemic issues, and thus bears responsibility for the harms that plaintiffs endured.

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<sup>41</sup> See Shapiro, *Principals Assail NYC Mayor, Calling for State Takeover of Schools*, N.Y. Times (Sept. 27, 2020).

<sup>42</sup> SSS Survey Analysis, at 7.

<sup>43</sup> *Id.* at 16.

## **II. THE SURVEY ESTABLISHED THAT THE ADMINISTRATIVE PROCESS RESULTED IN LITTLE RECOURSE FOR PARENTS OF STUDENTS WITH DISABILITIES**

The survey data also established that the administrative review process could not provide plaintiffs with adequate remedies and shows that the district court's decision was in error. This Court has repeatedly excused the IDEA's exhaustion requirement in cases where the hearing officials involved in the administrative review process would not have the "power to correct" the alleged violation. *J.S.*, 386 F.3d at 113; *see also Heldman v. Sobol*, 962 F.2d 148, 159 (2d Cir.1992) (concluding that it would be "an exercise in futility to require [the plaintiff] to exhaust state administrative remedies" when the agency was "acting in violation of the law or was in unable to remedy the alleged injury"); *Mrs. W. v. Tirozzi*, 832 F.2d 748, 757 (2d Cir.1987) (holding plaintiffs' claims were exempt from exhaustion in part "because a due process hearing officer lacks the authority to effectuate [the] class action and system-wide relief" they sought); *J.G. ex rel. Mrs. G. v. Board of Educ. of Rochester City Sch. Dist.*, 830 F.2d 444, 447 (2d Cir.1987) (holding that exhaustion was not required because the allegations of wrongdoing "went far beyond ... what could have been accomplished through administrative hearings"); *Jose P. v. Ambach*, 669 F.2d 865, 868-870 (2d Cir.1982) (concluding exhaustion was not required because the state's bureaucratic system was not likely to lead to resolution). None of these cases required (as the district court would

have) that the plaintiffs must have first tried and failed to capture the remedy they seek through the administrative process and then—only because of delay and backlog—move to federal court. Like here, the systemic wrongs plaintiffs alleged “could not ... have been corrected by resort to [an] administrative hearing.” *J.G.*, 830 F.2d at 447.

The district court’s analysis of this issue was erroneous. Though the district court quoted that the systemic nature of the violation was the “common element” among cases where administrative remedies would be futile, it failed to recognize that this element was present in this case. *See* Mem. & Order, SPA-9 (quoting *J.S.*, 386 F.3d at 114). Instead, its futility analysis focused solely on whether plaintiffs had experienced “administrative delays or backlog,” and whether they had been able to access legal help. *See* Mem. & Order, SPA-9–SPA-10. The district court asserted that the administrative process provided “the exact relief sought” by plaintiffs because “any assigned hearing officer could make an individualized determination about whether, and to what extent, a child is entitled to compensatory services.” Mem. & Order, SPA-10–SPA-11. But, as plaintiffs have alleged, individual adjudications would not remedy the harms caused by the City’s policies. Indeed, the survey data bolsters plaintiffs’ claims and demonstrates why the administrative remedies touted by the City are incapable of rectifying the systemic problems caused by their failure to plan for or fund an increase in



certified staff to support students with disabilities. Accordingly, SSS submits that plaintiffs have met their burden of showing that the administrative review process will not adequately provide remedies for students with disabilities and their parents for three separate and sufficient reasons.

*First*, the sheer volume of students who have been denied a FAPE would overwhelm the system and lead to inconsistent results. One in every four NYC public school students has disabilities, which equals approximately 48,000 students according to the City who do not receive their IEP mandated services.<sup>44</sup>

The survey data shows that a significant number of parents of these students have expressed concern about the lack of adequate staffing for their students with disabilities with the channels that they were most familiar: teachers and administrators at their own school.<sup>45</sup> Almost 40% of survey respondents (450 parents) stated that they have attempted to voice their concerns about teacher shortages in their children's classrooms.<sup>46</sup>

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<sup>44</sup> See Zimmerman, *1 in 4 NYC Students with Disabilities Aren't Getting Mandated Services This School Year, New Data Shows*, *supra* note 4.

<sup>45</sup> SSS Survey Analysis, at 19.

<sup>46</sup> *Id.*

It would not be feasible to adjudicate all these potential claims individually. These claims would overrun the City's administrative review system, which, as of December 2021, had a backlog of more than 16,000 open cases.<sup>47</sup>

Indeed, the sizeable number of parents who voiced their concerns show that the shortage of specialized teachers was a systemic problem that would likely not be solved by City's administrative remedy. Of those who raised their concerns about teacher shortages, 71% (319 parents) stated that they reached out to teachers, and 47% (212 parents) reached out to the principal or the assistant principal of the school.<sup>48</sup> Even if each claim could be heard individually, as in *J.S.*, "there [would be] a high probability of inconsistent results" if plaintiffs are forced to bring each of their individual claims before hearing officers. 386 F.3d at 114.

*Second*, as part of its efforts to reduce wait times, the City transferred oversight of the City's administrative review system to its Office of Administrative Trials and Hearings (OATH).<sup>49</sup> However, this transition raises even more serious concerns for students and families seeking individualized relief, which SSS's own

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<sup>47</sup> Gonen, *Special Education Tuition Hearings Shift to NYC Trials Agency to Address Backlog*, Chalkbeat N.Y. (Dec. 22, 2021).

<sup>48</sup> SSS Survey Results, at 16.

<sup>49</sup> *Special Education Hearings Divisions*, N.Y.C. Office of Administrative Trials and Hearings.

experiences confirm.<sup>50</sup> By replacing impartial and independent hearing officers with city-hired employees and city-controlled officers, the integrity and impartiality of the entire administrative scheme is now in question. Parents are concerned that city-employed administrative judges adjudicating disputes involving another city agency presents a clear conflict of interest and could deprive individual parents of a fair hearing.<sup>51</sup>

*Third*, the survey shows that school officials were unwilling or unable to act. Parents who voiced concerns about teacher shortages, class sizes, and paraprofessional misuse too often received the same answer from teachers and principals: they were unable to do anything without the City's guidance and permission. One parent asked her principal about more teaching staff and "was told they don't have enough funding for additional teachers. Too many remote students and not enough staff to accommodate. They're working on it."<sup>52</sup> Another parent of a blended elementary school student even noted that she reached out to the district Superintendent, who did not respond and just forwarded her concerns

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<sup>50</sup> During one hearing that was transferred to OATH, SSS was unable to provide a closing memo due to issues with OATH's record keeping during the hearing.

<sup>51</sup> Elsen-Rooney, *NYC parents push back on shift to special education hearing system*, N.Y. Daily News (May 15, 2022).

<sup>52</sup> SSS (@go3snyc), Twitter (Nov. 5, 2020, 2:10 PM).

back to the school.<sup>53</sup> Still another parent reported that the principal suggested, “we should consider getting services outside of the school because they are not given the resources.”<sup>54</sup>

As plaintiffs note, administrative hearing officers “cannot order administrative policy changes to cure systemic issues at the State and City level,” and thus, even if parents went through the administrative process, they would be unable to provide remedies to deal with the systemwide teacher shortage and paraprofessional misuse. MTD Opp., App. 179. Accordingly, the Court should reverse the district court’s finding that find that it did not have subject matter jurisdiction over plaintiffs’ claims and allow plaintiffs to seek a remedy that will adequately address these systemic harms.

### CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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<sup>53</sup> SSS (@go3nyc), Twitter (Nov. 4, 2020, 5:12 PM).

<sup>54</sup> SSS Survey Analysis, at 19.

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## CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P.

32(a)(7)(B), as modified by Local Rule 32.1(a)(4), and Fed. R. App. P. 29(a)(5).

2. Exclusive of the exempted portions of this brief, as provided in Fed. R. App. P.32(f), this brief contains 5908 words.

3. This brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font and complies with the requirements of Fed. R. App. P. 32(a)(5)-(6). As permitted by Fed. R. App. P. 32(g)(1), the undersigned counsel has relied on the word-count feature of the word-processing system with which it was prepared.

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