

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,

vs.

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

Defendants.

Civ. No.: 03-9917

**SECOND AMENDED
COMPLAINT**

PRELIMINARY STATEMENT

1. This class action is brought by individual Plaintiffs LV, RC, AD, NA, ADJ, YG, LO, AP, RLB, RD, and JYW (“Individual Plaintiffs”) and Plaintiffs VSG, HR, CW, SS, MG, MS, ST, RZ, MC and JP, on behalf of themselves and all others similarly situated (“Class Representatives”), seeking to enforce Defendants’ compliance with decisions, determinations, orders and statements of agreement and orders of Impartial Hearing Officers (“Impartial Hearing Orders”) entered pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §1415, et. seq. Defendants’ failure to comply with these Impartial Hearing Orders is in violation of Plaintiffs’ rights under the due process clause of the 14th Amendment of the U.S. Constitution; the IDEA; 42 U.S.C. § 1983; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (“Section 504”);

and New York State Education Law §§ 4401 *et. seq.*, and the regulations promulgated thereunder.

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

3. Plaintiffs and putative class members seek to enforce Impartial Hearing Orders issued on their behalf and to obtain an order directing the Defendants to develop an impartial due process compliance system to ensure that disabled children and their parents are not denied their right to a hearing system and a free appropriate public education.

JURISDICTION

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

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

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

PARTIES

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

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

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

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

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

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

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

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

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

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

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

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

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

20. Plaintiff CW is the mother of LW, a child with a disability who resides in New York City.

21. Plaintiff SS is the mother of AR, a child with a disability who resides in New York City.

22. Plaintiff MG is the mother of AG, a child with a disability who resides in New York City.

23. Plaintiff MS is the mother of JF, a child with a disability who resides in New York City.

24. Plaintiff ST is the mother of PTD, a child with a disability who resides in New York City.

25. Plaintiff RZ is the mother of FZ, a child with a disability who resides in New York City.

26. Plaintiff JP is the mother of DM, a child with a disability who resides in New York City.

27. Plaintiff MC is the mother of JC, a child with a disability who resides in New York City.

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

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

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

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

LEGAL FRAMEWORK

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

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

34. One of the most important procedural safeguard provided to parents under the IDEA is the opportunity for an impartial due process hearing to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child. 20 U.S.C. §§ 1415(b)(6), 1415(f). The hearing shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency. 20 U.S.C. § 1415(f).

35. New York State law authorizes an aggrieved parent to file for a hearing with the Board of Education, which is then responsible for assigning a hearing officer, scheduling a hearing and providing a location for the hearing. See N.Y. EDUC LAW § 4404(1) (McKinney 1999); N.Y. COMP. CODES R. & REGS. TIT. 8 §200.5 (2000). A

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

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

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

FACTUAL ALLEGATIONS OF THE INDIVIDUAL PLAINTIFFS

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

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

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

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

42. Defendant did not provided RV with the \$2,800 for RV's attendance at the Stevenson School summer program, as required by the Impartial Hearing Order, until after Plaintiffs filed this action.

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

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

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

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

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

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

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

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

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

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

53. Defendants did not pay the ordered tuition in the amount of \$6,000 for the period of time that TD attended the Stevenson School, as required by the Impartial Hearing Order, until after Plaintiffs filed the First Amended Complaint in this action, and almost 14 months after the initial hearing on this matter.

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

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

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

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

58. Defendants did not provided payment for the private psycho -educational evaluation in the amount of \$400, as required by the Impartial Hearing Order, until af ter the filing of the Motion for Class Certification in this action.

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

60. ADJ requested a hearing seeking, inter alia, payment from the Board for JDJ's round trip transportation to a private school and reimbursement for transportation expenses paid to date. A hearing was held on April 26, 20 02.

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

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

63. Defendants did not reimburse ADJ for transportation costs incurred in the amount of \$1,590, as required by the Impartial Hearing Order, until after Plaintiffs filed the First Amended Complaint in this action.

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

65. YG initiated a hearing requesting, inter alia, reimbursement to Columbia Presbyterian for psychiatric, neuropsychological and neurological examinations.

Hearings were conducted on November 5, 2003, November 26, 2003, January 22, 2003, February 28, 2003 and March 14, 2003.

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

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

68. Defendants have had proof of the total cost of these evaluations at the amount of \$2,000 since February 19, 2003.

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

70. Defendants did not render the ordered payment as required by the Impartial Hearing Officer until January 2004, after Plaintiffs filed this action, and approximately one year after Defendants were made aware and provided proof of the exact costs of services to be reimbursed.

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

72. LO initiated a hearing requesting, inter alia, an independent psychological evaluation at Defendants' expense. A hearing was conducted on April 16, 2003.

73. By decision dated April 24, 2003, the Impartial Hearing Officer ordered, inter alia, that HG receive the psychological evaluation at the Defendants' expense.

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

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

76. Defendants did not render the ordered payment for the psychological evaluation of HG, the cost of which amounted to \$400, as required by the Impartial Hearing Order, until February 2004, and after the filing of the Motion for Class Certification in this action.

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

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

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

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

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

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

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

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

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

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

87. During the month following the order, Plaintiff's attorney made several attempts to secure the assistive technology evaluation. On July 23, 2003, Defendants informed Plaintiffs' counsel that they were unable to provide the assistive technology evaluations because they lacked sufficient personnel. Defendants remained unable to provided the assistive technology evaluation until February 6, 2004, seven months past the date contemplated in the order.

88. Plaintiff's counsel actively pursued execution of the order granting reimbursement of the Central Auditory Processing Deficit evaluation, placing numerous unreturned phone calls to Defendants.

89. In February of 2004, eight months after the issuance of the order, Defendants contacted RLB informing her that despite the order granting the reimbursement, she would need to submit an original receipt, a notarized affidavit and W -9 form. On March 17, 2004, RLB submitted a W-9 form.

90. As of the date of this Second Amended Complaint, approximately 9 months after the June 25, 2003 Impartial Hearing Order was issued, Defendants have still not reimbursed RLB for expenses incurred in obtaining the Central Auditory Processing

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

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

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

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

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

95. Defendants finally reimbursed RD for the cost of services received at the Sylvan Learning Center in the amount of \$6,068, as required by the Impartial Hearing Order, on February 17, 2004, almost one year after they were ordered to do so, and after the filing of the Motion for Class Certification in this action.

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

97. JYW initiated a hearing requesting immediate implementation of HL's Individualized Education Plan ("IEP"), namely bilingual instruction for the current school year, compensatory education for failure to deliver IEP services for the prior two years, and all communication to the parent from the school translated into the parent's native language, Mandarin. A hearing was held on September 29, 2003.

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

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

100. As of the date of this Second Amended Complaint, Defendants have not provided HL with any of the 72 hours of compensatory education in speech and language therapy and have not translated communications from the district to JYW into her native language, as required by the Impartial Hearing Order.

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

102. All Plaintiffs and their children suffered harm as a result of Defendants' conduct.

FACTUAL ALLEGATIONS OF PLAINTIFFS
VSG, HR, CW, SS, MG, MS, ST, RZ, JP AND MC

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

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

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

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

107. On or about January 8, 2004, approximately 6 months after the decision was issued, and weeks after the initial Complaint in this action was filed, VSG received payment in the amount of \$3,000 for KSG's attendance at the Stevenson School summer program, as required by the Impartial Hearing Order.

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

109. HR initiated a hearing and requested prospective funding for tuition and transportation for the 2003-2004 school year for SR at the Sterling School, a non-public program that has not been approved by the New York State Education Department to

provide education to students with disabilities. A hearing was held on September 23, 2003.

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

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

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

113. On December 31, 2003, Plaintiffs' counsel received by fax a memorandum from Stacey Brock to John Cahalin of the Department's Bureau of Contract Aid. The memorandum states that "the Department is obligated to prospectively fund" tuition costs for SR's attendance at The Sterling School and "Transportation to and from the school by either bus or car service from October 9, 2003, through June 30 , 2004."

114. Although no further documentation was required by the Hearing Officer's Order, on January 15, 2004, Plaintiffs' paralegal submitted to the Bureau of Contract Aid all of the following documents requested by Defendants for payment: an affidavit from the school, the contract between the school and the parent, the attendance up to that date, a copy of the OLS memorandum, and the parent's W-9 form.

115. On February 18, 2004, approximately five months after Defendants had been ordered to pay, Plaintiffs' counsel received notification from the parent that she had received a check for the sum of \$19,387.50, the pro-rated cost of tuition at The Sterling School, as required by the Impartial Hearing Order. This payment was received after Plaintiff HR filed her Motion for Class Certification in this action.

116. CW is the parent of LW, an 8-year-old child with a disability. LW was born on October 10, 1995. LW is currently classified a multiply disabled and his Individualized Education Program (IEP) indicates he is Mentally Retarded, Speech Delayed, Other Health Impaired and has Pervasive Developmental Delay, Hirschsprung's diseases, and Tracheotomy Central Hypoventilation Syndrome.

117. LW's last agreed-upon IEP, dated April 29, 2003, recommends a 12:1:1 class with related services, adaptive physical education, occupational therapy (OT), speech therapy, and Physical Therapy (PT). He also receives a nurse on the bus and at school and use of a ventilator. He is in need of a barrier-free school, because of his physical condition and the need for the ventilator to accompany him at all times. LW's IEP dated April 29, 2003 IEP also mandated special transportation, in a mini-bus with a lift, seat for a nurse and air conditioning.

118. After attempts by Plaintiffs' counsel to negotiate with Defendants' counsel to resolve the problems with LW's program without litigation, CW filed a hearing, through counsel, under the IDEA and Section 504 of the Rehabilitation Act contesting the denial of a free appropriate public education for the 2003-2004 school year.

119. In particular, LW had not received bussing for the first two months of the school year, had not received occupational therapy or adaptive physical education at all

for this year, and had been repeatedly stuck in the elevator at school when it broke. In addition, during the weeks the elevator was not working, LW's ventilator was locked in the closet, instead of being in his classroom. Moreover, LW's classroom was moved to a much smaller and inadequate room, which used to be the resource room, and general education students were placed in his old classroom.

120. A hearing was held on February 2, 2004, during which time there was an agreement on the record concerning a number of matters, including but not limited to the fact that LW should be immediately receiving his IEP - mandated services of occupational therapy and adaptive physical education. Plaintiffs' counsel advised Defendants' counsel of this hearing.

121. The hearing officer ordered a number of different items as relief on the record. The order included the following relief: Defendants must provide an occupational therapist at LW's school to start providing services by February 9, 2004. Defendants must provide 40 sessions of compensatory occupational therapy; Defendants must pay for private educational, occupational, physical, speech and assistive technology evaluations; for the upcoming school year, Defendants must continue the specialized transportation for LW and put that transportation on his IEP. This includes an air - conditioned minibus with a seat for a nurse and a nurse; Defendants must not lock up LW's ventilator and should ensure that it is with him all times.

122. The hearing officer also issued three orders at the conclusion of the hearing on issues that were not stipulated to by Defendants. Defendants were ordered to pay for a private psychological evaluation to be conducted, keep the elevator in the

school in good repair and in service, and provide adaptive physical education by a qualified provider by February 9, 2004.

123. Plaintiffs' counsel advised Defendants' counsel of this hearing and the order, but attempts to resolve the matter between the parties were unsuccessful.

124. On March 5, 2004, the hearing officer issued a Statement of Agreement and Interim Order, which memorialized the agreement between the parties and issued another order concerning the relief set forth above. On March 5, 2004, the hearing officer also issued an order on behalf of CW concerning two additional issues raised at the hearing. First, she ordered that the CSE to change LW's program to a twelve month program. Second, the hearing officer ordered that "[i]mmmediately, but in no event later than five days after the date on which the order is issued, [LW] shall be moved to a classroom that meets the minimum space requirements to provide him with an appropriate education, which is at least 770 square feet, the minimum size required by New York State Education Department policy for a 12:1:1 class. The classroom shall have all of the features that the regulations education classroom contains, including: a library, a carpeted reading area, a computer, and a bathroom in close proximity to [LW], with a full changing table or area; and . . . [i]n all other respects, the classroom and class population to which LW is moved must meet his individual educational requirements."

125. After this order was issued, Plaintiffs' counsel informed Defendants' counsel that they must implement the order.

126. On February 19, 2004, Plaintiffs' counsel indicated to Defendants' counsel that they would be required to seek relief in court if LW was not provided his services and the order was not enforced. As of this date, LW's order has not been

followed and he is still not receiving occupation therapy or assistive physical education. His classroom is still in the resource room. In addition, LW's IEP - mandated nursing service has stopped.

127. SS is the parent of AR, a ten-year-old child with a disability, who is classified as autistic and recommended for placement in a special class full time. He is also recommended for speech and language therapy, counseling and occupational therapy. SS requested a hearing because AR had not been receiving the speech and occupational therapy mandated by his IEP. SS received a Statement of Agreement and Order dated July 18, 2002 stating that AR had not received any speech or occupational therapy past 3 years, and ordering Defendants to provide compensatory speech and occupational therapy for 2002-2003 year and Related Service Authorizations for these services.

128. SS then requested and attended another hearing in March 2003 because, although AR began to receive some speech therapy, AR was not receiving occupational therapy. Another Statement of Agreement & Order, dated May 14, 2003, was issued ordering Defendants to again provide compensatory occupational therapy, and once again, a Related Service Authorization.

129. Defendants have failed to provide AR with any IEP - mandated occupational or speech therapy for the 2003 -2004 school year as ordered. Thus, both the July 2002 and May 2003 orders have not been enforced.

130. MG is the parent of AG, a student with a disability. MG filed for an impartial hearing on October 2, 2003. The hearing was held on November 12, 2003. On

December 11, 2003, a decision was issued on her behalf, ordering Defendants to pay tuition for AG for the 2003 -2004 school year in the amount of \$31,500.

131. Defendants were ordered to make payments directly to the Cooke Center for Learning and Development (the "Cooke Center") by no later than January 15, 2004. Defendants failed to render any of the tuition payment by January 15, 2004.

132. To obtain admission to the Cooke Center, MG signed an Enrollment Contract that included a provision acknowledging that the Cooke Center reserves the right to cancel the contract "at any time before or during the Academic Year if a lack of enrollment or financial support for placement of [AG] becomes apparent."

133. MG received a check for only half of the tuition payment in the amount of \$15,750 in early March 2004. On March 4, 2004, Plaintiffs' counsel notified Defendants' counsel that the order had not been fully implemented. As of the date hereof, Defendants have still failed to fully comply with this order and make the remaining payment. Thus, MG is still at risk of the Cooke Center terminating her admission.

134. MS is the parent of JF, a student with a disability. MS filed for an impartial hearing on October 29, 2003. The hearing was held on November 10 and 19, 2003. On December 16, 2003, a decision was issued on her behalf, ordering Defendants to reimbursement to MS for all costs related to enrollment and tuition for tutoring services at Sylvan Learning Center ("Sylvan") already received, issue a Nickerson letter dated November 19, 2003, with an expiration date six months from the date, authorizing MS to place JF in an approved private school; Related Service Authorizations for private speech and counseling services dated November 19, 2003..

135. MS had taken out a private loan in the amount of \$9,166 on May 17, 2002 to fund her son's tutoring at Sylvan, which will not start services and simply wait for an order to be paid. MS took out a second loan in the amount of \$8,650 on April 9, 2003 to continue funding tutoring. At the hearing held on November 19, 2003, the Defendants were ordered to reimburse MS all costs relating to enrollment and tuition at Sylvan upon proof of payment.

136. On February 2, 2004, Plaintiffs' paralegal sent proof of attendance and payment in the form of a Sylvan attendance statement, a Sylvan payment history, a Sylvan refund account statement and detailed payment history statement from Sallie Mae Financial Corporation to Defendants. On February 18, 2004, after discussion with Defendants' Bureau of Contract Aid that they needed further proof of payment, Plaintiffs' paralegal sent copies of the Sallie Mae Loan Application filed by the parent to Defendants.

137. On March 13, 2004, MS received a check in the amount of the principal loan balance of \$14,733.34. She used this to pay off the loan, but still has an out of pocket loss of \$2,468, which is the amount of the principal that she paid out -of-pocket that is not accounted for in the \$14,733.34 and the interest that has accrued on the loan.

138. Further, the decision ordered the Defendants to issue an RSA on November 19, 2003 to provide speech and language therapy for JF. The RSA was not given final authorization until February 17, 2004. Upon information and belief, because of Defendants' failure to comply with the order and issue the RSA in the time ordered by the hearing officer, the speech therapist told MS that she would cease providing JF with

any ordered services immediately unless she received final authorization to provide these services in the form of an RSA.

139. ST is the parent of PTD, a child with a disability. ST filed a hearing on March 11, 2002 to obtain prospective funding for tuition in a private school. The hearing was scheduled for April 17, 2002. On May 17, 2002, the hearing officer issued an order granting ST prospective tuition funding for the Smith School in the amount of \$26,000 and \$4500 for the 2002 summer program. The hearing officer ordered that “in no event shall payment by the Board of Education to the Smith School for PTD be made more than 45 days after the student commences the summer 2002 program and later than January 2003, for the fall, 2002, semester and June, 2003, for the spring 2003, semester.” As of this date, no payment has been made. Upon information and belief, the Smith School has threatened to bring suit against ST for payment.

140. RZ is the parent of FZ, a student with a disability. RZ filed for an impartial hearing on September 18, 2003. A hearing was held on October 24, 2003. On January 8, 2004, an amended order was issued reflecting a settlement agreement entered into by RZ and Defendants on the record, whereby Defendants agreed to pay FZ’s tuition at the Clarke NYC Auditory/Oral Center (“Clarke Center”) for the 2003-2004 school year and related transportation.

141. The cost of tuition at the Clarke Center is \$21,500 for a 12 -month program. This amount was introduced as evidence at the hearing through oral testimony by the Director of the Clarke Center, and is reflected in the transcript of the hearing.

142. Defendants have not paid FZ’s tuition at the Clarke Center as required by the Impartial Hearing Officer. On March 8, 2004, Plaintiffs’ counsel notified

Defendants' counsel that the order had not been fully implemented. To date, Defendants have failed to comply with the order.

143. JP is the parent of DM, a student with a disability. JP filed for an impartial hearing on October 2, 2003. A hearing was held on October 23, 2003. On November 21, 2003, a decision was issued on her behalf, ordering Defendants to immediately pay the cost of private placement at the Sterling School, in the amount of \$23,500 with an RSA or \$26,500 if the school provides speech therapy, provide round-trip transportation to and from school for DM, and to immediately reimburse JP for transportation costs she has incurred and will incur until Defendants provide transportation for DM. At the hearing JP testified that she spends \$50-\$70 per day on transporting DM to school.

144. The cost of tuition at the Sterling School in the amount of \$23,500 and transportation reimbursement costs in the amount of \$50-75 day are reflected in the order issued in this case.

145. On December 15, 2004, Plaintiffs' paralegal sent proof of payment for the transportation services as well as supplemental documentation requested by Defendants for prospective tuition payment to the school, including receipts and invoices of transportation payment, attendance records, the school contract and affidavit of tuition, and a W9 form signed by the parent. The Enrollment Contract signed by the parent and the Sterling School states the "Non-payment of tuition can result in dismissal."

146. On February 20, 2004, Plaintiffs' paralegal sent Defendants additional documentation for reimbursement for transportation expenses incurred by JP as of that date.

147. On March 13, 2004, after the filing of the Motion for Class Certification in this action, JP received a check in the amount of \$975 for partial reimbursement of transportation expenses. Upon information and belief, this payment did not cover the additional \$750, or any of the costs JP has incurred since February 20, 2004, and continues to incur, as required by the Impartial Hearing Order.

148. Defendants did not provided transportation for DM until March 23, 2004 and JP continued to pay \$75 per week for a private car service to send DM to school until that time. Defendants have also neither provided JP, the Sterling School or Plaintiffs' counsel with the tuition payment of \$23,500 or the additional transportation expenses incurred by JP.

149. On March 3, 2004, Plaintiffs' counsel notified Defendants' counsel that the order relating to DM had not been fully implemented. On March 12, 2004, Defendants' counsel notified Plaintiffs' counsel that Defendants would not pay the ordered tuition because the proof of attendance submitted by Plaintiffs' counsel on December 15, 2004 was not on the official letterhead of the school, and Defendants are thus refusing to comply with the order, despite the fact that no such requirement was imposed by the Impartial Hearing Officer.

150. MC is the parent of JC, a student with a disability. MC filed for an impartial hearing on September 30, 2003 and an amended request on October 14, 2003. A hearing was held on November 4, 2003, at which testimony was presented. Another hearing was held on November 18, 2003, because it was discovered that the tape of the electronically-recorded testimony that was offered on November 4, 2003, had been lost, causing further delay. As a result, witness testimony was presented a second time on

November 18, 2003. On December 5, 2003, a decision was issued on MC's behalf, ordering Defendants to pay tuition for JC for the Xaverian High School Reach Program, a state-approved private school, for the 2003-2004 school year directly to Xaverian High School (the "Xaverian School").

151. The cost of tuition at the Xaverian School in the amount of \$23,000 is reflected in the order issued in this case.

152. Defendants have failed to make the ordered tuition payment to the Xaverian School. On March 4, 2004, Plaintiffs' counsel notified Defendants' counsel that the order had not been fully implemented. Furthermore, to date, almost four months after the date of the order, Defendants have failed to fully comply with this order and make the tuition payment.

CLASS ACTION ALLEGATIONS

153. The claims for relief of Plaintiffs VSG, HR, CW, SS, MG, MS, ST, RZ, MC and JP ("Class Representatives") are brought on their own behalf and on behalf of all those similarly situated pursuant to Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure. Defendants have acted or refused to act on grounds generally applicable to the Class Representatives and class members, making appropriate relief as to the class as a whole.

154. The class is comprised of all persons who, now and in the future, obtain a favorable order or stipulation of settlement through an impartial due process hearing relating to a child's identification, evaluation, educational placement or the provision of a free appropriate public education pursuant to Section 615(b)(6) of the IDEA and implementing regulations, and who fail to obtain full and timely implementation of the

Impartial Hearing Order or settlement in accordance with Section 615 of the IDEA, 20 U.S.C. § 1415, et seq.

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

156. Upon information and belief in the 2002 -2003 school year, there were approximately 1050 Impartial Hearing Orders issued.

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

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

159. The claims of Class Representatives are similar to those of the class they seek to represent. For example, Class Representatives, like the other members of the class, maintain that Defendants have violated the law by failing to enforce Impartial

Hearing Orders or settlements made on the record. Accordingly, the claims of the Class Representatives are typical of those of the class.

160. All Individual Plaintiffs and Class Representatives have suffered harm because of Defendants' failure to timely enforce orders.

161. All Individual Plaintiffs and Class Representatives are parents of children who are eligible for special education services and are likely utilize the special education impartial hearing process in the future.

162. Class Representatives will adequately represent and protect the interests of the class. Counsel for the Class Representatives are experienced in federal class action litigation and will vigorously pursue this action in the interest of the class.

FURTHER FACTUAL ALLEGATIONS

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

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

165. Defendants clearly lack an effective policy and procedures to effectuate the timely and efficient enforcement of Impartial Hearing Orders, resulting in the Defendants' widespread failure to comply with the Impartial Hearing Orders and a clear deprivation of the rights of the Individual Plaintiffs and Class Representatives.

166. Defendants have not developed or maintained a system to ensure that all Impartial Hearing Orders are enforced in a timely and comprehensive manner and to

ensure that Defendants and their agents and employees are held accountable for complying with these orders and other federal, state and local laws that protect the rights of parents and students with disabilities.

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

168. Defendants do not have centralized or regional staff members with sufficient authority and resources to make sure orders are followed.

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

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

171. Defendants have repeatedly been made aware of Impartial Hearing Orders that have been issued but not enforced, in violation of the rights of the Individual Plaintiffs and Class Representatives.

172. On October 10, 2003, Plaintiffs' counsel informed Defendants' General Counsel and Office of Legal Services that Plaintiffs' counsel were preparing to file an action based on Defendants' systematic failure to implement Impartial Hearing Orders,

and provided to them a list of certain Plaintiffs and the names of their children, including Plaintiffs LV, VSG, RC, AD, NA, ADJ, YG and LO. Plaintiffs' counsel requested immediate resolution and enforcement of the Impartial Hearing Orders.

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

174. As of the date of the filing of the initial Complaint on December 12, 2003, nearly two months after Defendants were provided with this information, the Impartial Hearing Orders of Plaintiffs LV, VSG and YG continued to remain unenforced in clear violation of law. The order of Plaintiffs AD and ADJ were not enforced until after Plaintiffs filed the First Amended Complaint in this action on January 13, 2004. The orders of Plaintiffs NA, YG and LO were not enforced until after the filing of the Motion for Class Certification in this action on February 4, 2004. The order of Plaintiff RC has still not been enforced as of this date.

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

176. As of the date of this Second Amended Complaint, nearly five months after Defendants were provided with this information, this Impartial Hearing Order has not been fully unenforced in clear violation of law.

177. On February 19, 2004, Plaintiffs' counsel notified Defendants' counsel that CW was not receiving services as per the order of the hearing officer and then again, after March 5, 2004, Plaintiffs' notified Defendants of the written order . To date, CW's order has not been enforced.

178. On March 3, 2004, Plaintiffs' counsel informed Defendants' counsel that the orders of Plaintiffs MS, JP and ST had not been enforced and provided to Defendants' counsel with the name, date of birth and case number of the children of Plaintiffs MS, JP and ST.

179. On March 4, 2004, Plaintiffs' counsel informed Defendants' counsel that the orders of Plaintiffs MC and MG had not been enforced and provided to Defendants' counsel with the name, date of birth and case number of the children of Plaintiffs MC and MG.

180. On March 8, 2004, Plaintiffs' counsel informed Defendants' counsel that the order of Plaintiff RZ not been enforced and provided to Defendants' counsel with the name, date of birth and case number of Plaintiff RZ' s child.

181. On March 25, 2004, Plaintiffs' counsel informed Defendants' counsel that the orders obtained by SS had not been enforced and provided to Defendants' counsel with the name, date of birth and case number of Plaintiff SS's child, AR.

182. In many of the cases at issue herein, Impartial Hearing Officers heard testimony about the non-public schools and provision of other services in question and found the testimony sufficient to order Defendants to provide payment for the services sought by Plaintiffs. In spite of the direct order to Defendants to provide payment, Defendants subsequently request various documents that are not ordered by the Hearing

Officer before processing payment, thus adding further undue delay to the enforcement of the Impartial Hearing Orders.

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

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

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

CAUSES OF ACTION

186. Defendants have violated the rights of the Individual Plaintiffs, Class Representatives and class members under the due process clause of the 14th Amendment to the Constitution of the United States.

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

188. Defendants' failure to provide the Individual Plaintiffs, Class Representatives and class members with the relief ordered by the Impartial Hearing Officers deprived them of their rights under Section 504.

189. Defendants' failure to provide the Individual Plaintiffs, Class Representatives and class members with the relief ordered by the Impartial Hearing Officers deprived them of their rights under Section 504 and thus deprives them of rights secured by federal law in violation of 42 U.S.C. § 1983.

190. Defendants have violated the rights of the Individual Plaintiffs, Class Representatives and class members under New York State Education Law §§4401, 4404 and 4410 and Section 200.5 of the Regulations of the New York State Commissioner of Education, 8 N.Y.C.R.R. § 200.5.

191. Having won favorable Impartial Hearing Orders, the Individual Plaintiffs, Class Representatives and class members have no further administrative remedy, and thus exhaustion is futile and not required.

RELIEF

WHEREFORE, Plaintiffs request that this Court:

- a. Certify a class;
- b. Issue a preliminary injunction:
 - i. Ordering Defendants to immediately comply with and implement the provisions of the Impartial Hearing Orders of the Plaintiffs and putative class members;
 - ii. Ordering Defendants to identify all class members and immediately comply with and implement the provisions of the Impartial Hearing Orders of class members;
- c. Enter a judgment:

- i. Requiring Defendants to timely implement all Impartial Hearing Orders issued on behalf of Plaintiffs and Putative Class members;
- ii. Requiring Defendants to design, submit to Plaintiffs' counsel and the Court for approval, and implement an effective plan to ensure that all Impartial Hearing Orders are enforced in a timely and comprehensive manner. This plan should include: (a) the policies and procedures Defendants will implement to ensure Defendants come into full compliance with the Court's Order and effectuate timely implementation of orders; (b) the persons directly accountable, respectively, ensuring the successful implementation of each provision of the plan; (c) the additional resources that will be allocated and disbursed to bring Defendants into full compliance with the Court's Order; and (d) milestones and target dates used to hold Defendants accountable to this Court; (e) notices to parents who obtain orders sufficient to inform them of their rights to timely enforcement; (f) procedures for addressing emergency situations.
- iii. Ordering Defendants to submit monthly compliance reports to the Court, with copies to Plaintiffs' counsel;
- iv. Ordering compensatory education and other equitable relief for Plaintiffs and Putative Class members; and
- v. Retaining jurisdiction of this action for all purposes, including entry of such additional orders as may be necessary or proper;

- c. Appoint a special master or independent monitor to oversee and monitor Defendants' implementation of the requirements of the Court's Order;
- d. Issue a declaratory judgment that Defendants have violated Plaintiffs' rights as set forth;
- e. Award to Plaintiffs their costs and attorneys fees; and
- f. Grant such other and further relief as may be appropriate.

Dated: April 15, 2004
New York, New York

Respectfully submitted,

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