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Re: Special Education Due Process Resolution and Settlement Processes

Dear Chancellor Porter, Commissioner Rosa, and Chancellor Young:

We are a group of legal services organizations and attorneys who advocate for the families of New York City children who have disabilities requiring special education services. We previously wrote to you on October 15, 2019 and write now to reiterate significant concerns about the New York City Department of Education's ("DOE") continuing failure to meet its obligations under the Individuals with Disabilities Education Act ("IDEA"), its implementing regulations, and New York State Education Department ("NYSED") regulations to resolve special education due process proceedings in a timely manner. In this letter, we offer some practical solutions for addressing the significant delays at the Impartial Hearing Office for your consideration.

In our October 15, 2019 letter we detailed the legal obligations of the DOE. For the sake of brevity, and in order to focus on solutions, we will not belabor those points and have attached the October 15, 2019 letter for your convenience. We will note, however, that the delays we highlighted in our 2019 letter—and which are documented by the February 22, 2019 External Review of the New York City Impartial Hearing Office conducted by Deusdedi Merced—persist. These issues pre-date the COVID-19 pandemic.

While there are innumerable areas for improvement in the New York City impartial hearing process, in this letter we focus on two aspects of the process that we believe, if addressed, could resolve a

significant number of cases without the need for an impartial hearing: the (I) resolution process and (II) settlement process.

I. Resolution Process

The IDEA and New York State regulations require local school districts to convene a resolution session within 15 days of receiving notice of the parents' due process complaint and to involve a representative of the school district with "decision-making authority" in the meeting. *See* 20 U.S.C. § 1415(f)(1)(B)(i); N.Y. Comp. Codes R. & Regs. tit. 8 § 200.5(j)(2). For the reasons outlined below, the DOE is failing to meet these obligations, and missing a crucial opportunity to resolve due process complaints quickly and efficiently, and without the need for impartial hearing.

a. Failure to Schedule

It has been our experience that, in many cases, the DOE has not convened a resolution session at all, in violation of the IDEA and New York State law. In a survey of special education legal advocates, over 80% of respondents reported that in the last two years they had at least one case in which they wanted a resolution session but the DOE did not convene one. Over 70% of respondents said that had happened in more than one case. This widespread failure to provide a resolution session deprives both families *and* the DOE of an opportunity to meaningfully engage about the facts that form the basis of the complaint and to speedily resolve issues in special education disputes.

We have noted through our practice that there is wide disparity across New York City in timely scheduling and holding resolution sessions, with some DOE offices more consistent about scheduling than others. The DOE must take measures to ensure that all offices contact parent representatives and/or parents to convene a resolution session within 15 days of the filing of a due process complaint.

Frequently, when resolution sessions *are* held, it is because a parent's attorney affirmatively reaches out to the DOE, often multiple times. It is the responsibility of the DOE, not the parent, to schedule the resolution session in all cases.

b. Lack of a DOE Representative with "Decision-making Authority"

In our experience, many resolution sessions result in either a partial resolution agreement or no resolution agreement at all due to the absence of a DOE representative who has appropriate decision-making authority. Routinely, the DOE representative lacks authority to resolve simple, much less crucial, aspects of families' due process complaints. In our survey of special education legal advocates, over **90% of respondents** stated that they had participated in at least one resolution session in which the DOE explicitly or implicitly lacked authority to offer reasonable relief. A combined 84% of respondents said that, in general, the DOE representative has decision-making authority either less than half of the time *or never*. It is important to note that in this area, too, there is disparity across DOE offices as to what DOE representatives have the authority to offer at a resolution session.

DOE representatives at resolution sessions regularly report that they lack authority to approve the following, among other things:

- "Enhanced"-rate or market-rate independent educational evaluations. Our understanding is the DOE has not raised its "standard" rates for independent testing such as neuropsychological evaluations, speech-language evaluations, and others to keep pace with the organically increasing market-based rates for these evaluations.
- "Enhanced"-rate or market-rate compensatory services, such as tutoring, occupational therapy, speech-language therapy, etc.
- Compensatory services based on what the student needs to place them in the position they would have been in but for the denial of free appropriate public education ("FAPE") (rather than based on an oversimplified and abstracted internal formula employed by the DOE)
- New York State-approved non-public school (NPS) placements
- Private school tuition
- Reimbursement for expenses incurred by parents, including meals and transportation

To resolve this problem, the DOE must ensure representatives at the resolution meetings have the authority to approve reasonable and regularly-sought forms of relief at resolution, such as the above. The DOE's systemic failure to reasonably fund evaluations and services not only unnecessarily prolongs legal cases, but it prevents students from receiving critical and high-quality services and evaluations in a timely way—*or at all*. In situations where a family decides to accept a "standard" rate through resolution, for example, because the need is urgent and they do not want to risk a substantial delay while waiting for a hearing, they are limited in their choice of provider to only those very few, if any, who are now willing to accept the DOE's antiquated rates. And, sadly, in our experience, many of the "standard" rate services or evaluations are often of lower quality, biased, do not make concrete recommendations, or simply suffer from more extreme delays, as market-rate services and evaluations are prioritized by providers.

Granting DOE representatives the authority to approve reasonable forms of relief at resolution will provide an "off-ramp" for an extraordinarily large number of cases, ensuring that the only cases and claims that continue on to an impartial hearing are those which truly require the intervention of a hearing officer. In our experience, the forms of relief often denied at resolution are later won during simple impartial hearings in which the DOE does not defend its provision of a FAPE to the student in question. In these situations, the failure to resolve issues at resolution results in damaging delays in the delivery of services for children, as well as steep costs to both parent advocates, the DOE, and Impartial Hearing Office staff in valuable time, resources, and fees.

In addition to a clear grant of authority to DOE representatives, one simple, across-the-board action the DOE should take to reduce further harm to children and resolve more cases at resolution is to formally increase "standard" rates for evaluations and services to more accurately reflect current market rates. In doing so, it should also build in an annual cost-of-living adjustment to prevent future rate lags.

II. **Settlement Process**

The resolution session is just one path for cases to resolve without the need for impartial hearing. The DOE can also resolve a larger number of cases through settlement, though it often does not. We suspect this may be owing in part to inadequate staffing.

A system for the swift settlement of appropriate cases would ameliorate delays at the Impartial Hearing Office. By settling cases expeditiously and removing them from the impartial hearing queue, the DOE could reduce the number of ultimately unnecessary hearings and ensure that advocates, the DOE, and Impartial Hearing Office staff are able to focus on those cases that truly require a hearing on the merits. Sadly, in our survey of special education legal advocates, over 85% reported that they had filed a due process complaint in the last two years that was appropriate for settlement but was not referred.

While reasonable parties can disagree about whether settlement is appropriate in any given case, the DOE has already identified a set of cases in which settlement is appropriate—private school placement cases falling under a special "fast-track" policy established under Chancellor Fariña—that it simply fails to actually implement. In addition to following through on its fast-track policy, the DOE should also *minimally* establish a priority settlement policy for another set of cases—cases with common fact-patterns and clear-cut failures that can be easily identified and resolved.

a. Private School Placements Falling Under the "Fast-Track" Settlement Policy

i. Single-Year Fast-Track Settlement Agreements

Although the fast-track settlement policy is well defined and limited in scope, it is in reality so protracted that some advocates have decided that it can be more expeditious to request a hearing and obtain an order than wait to finalize one-year stipulations of settlement. The fast-track settlement policy established under Chancellor Fariña involves only cases seeking tuition payment or reimbursement and is applicable where (a) there was a settlement or unappealed decision awarding the same unilateral placement in the prior year and the DOE program or placement recommendation remains the same as in the prior year, (b) there was a settlement the prior year for the same program, placement, or circumstances, or (c) the child is entering a terminal grade in a school that the DOE previously funded. Although when the procedure was established the goal was set to settle eligible cases within 90 days, the process unfortunately nearly always takes much longer—routinely months beyond the school year at issue. Failure to follow through on the fast-track policy results in an extra category of unnecessary impartial hearings, not to mention numerous collateral consequences, including the endangerment of low-income student's places in their schools due to the egregious delays in tuition payments.

ii. Multi-year Settlement Agreements

The DOE has not made genuine efforts to negotiate multi-year settlement agreements with families, a mechanism employed by jurisdictions outside New York City for the efficient settlement of certain

tuition cases. Rather than offer meaningful, binding multi-year agreements, the DOE *sometimes* offers parents what is called a "renewable" agreement. The terms of the DOE's standard renewable agreement are, by and large, one-sided and do not promote the efficiencies achieved by true multi-year agreements. Advocates who have tried to engage the DOE on the renewable agreements have been repeatedly told there is no room for modification.

The DOE's renewable agreement only settles the case in the first year; afterwards, the agreement *may be renewed by the DOE* if the IEP is not significantly changed from the previous year, if the parent is fully cooperative in the IEP process, if the parent enrolls the student in the same school, and if the Office of the New York City Comptroller ("Comptroller") approves the settlement. Nothing, essentially, guarantees that the DOE will settle the case in the second and third years. Critically, the maximum amount paid in years two and three of the renewable agreement are tied to shifts in the Consumer Price Index, rather than realistic tuition increases tied to actual increases and costs in New York City. The renewable agreement also makes no allowance for increases in tuition due to the addition of services (such as a 1:1 paraprofessional) or programming extensions (such as summer school). The low-income families we serve would be unable to cover the difference between what the renewable agreement covers in years two and three and the actual increases in tuition in years two and three.

The renewable agreement also does little to hasten the settlement process in the second and third years. Parents must still file Ten Day Notices or Due Process Complaints. The DOE must still review the claim and determine whether there is a "legal basis" for settlement. The DOE must still seek approval of the Comptroller which, as we note below, can be time consuming.

The DOE must revisit its standard renewable agreement and work meaningfully and reasonably with parent advocates to create a template multi-year settlement agreement that will work in the best interest of both parties. Doing so in appropriate cases will not only promote efficiency and ease the caseload of the DOE, but will, among other things, provide families and students much needed educational stability and security.

b. <u>"Common" Failure Cases</u>

i. *Referral*

After an impartial hearing request is submitted, and even after the resolution session process has failed, there are some cases that are eventually referred for settlement by DOE attorneys or Impartial Hearing Representatives. However, it often takes months for the assigned DOE representative to focus on and investigate a case in order to determine whether referral for settlement is appropriate. Many times, the DOE representative never investigates the case and, often after many, many months, an impartial hearing is held as a default, at great expense to all parties.

In our survey of special education legal advocates, a staggering **95% of respondents** stated that they participated in an impartial hearing within the last two years in which the DOE either explicitly conceded that it did not provide a FAPE or else did not present a case to prove that it provided a

FAPE. **Nearly half of respondents said that the DOE conceded FAPE or did not put on a case *in all of their impartial hearings within the last two years***.

With some guiding principles, these cases could be identified and referred for settlement early and without need for involving a hearing officer, decreasing the burden and cost of litigation for all. We recommend that the DOE develop a protocol for identifying common failures and/or circumstances in which there is a high probability that the DOE denied the student a FAPE, and designate staff members with the sole responsibility of flagging and investigating cases for settlement referral according to that protocol.

In our opinion, some common and easily identifiable failures that would warrant settlement include, but are not limited to:

- the student did not have an IEP in effect in accordance with the IDEA;
- the DOE did not timely (or ever) offer a placement for the student;
- the DOE placed the student in a program different from the program mandated on the IEP;
- the DOE did not timely (or ever) evaluate the student;
- the DOE did not provide services mandated on the student's IEP; and
- any other situations in which the allegations of a denial of FAPE are simple to verify.

Once the DOE determines that the denial of FAPE will not be contested, the DOE and the family should be able to negotiate a settlement.

ii. *Settlement Negotiations*

Unfortunately, when cases are referred for settlement, the process of finalizing an agreement often takes many months, sometimes for no discernible reason. In cases involving agreements implicating over $25,000.00, advocates have often been told by DOE staff that the delay is due to delays in securing approval from the Comptroller. However, in our experience, the delay results in large part from the time it takes for DOE legal staff to prepare and submit memoranda to the Comptroller to justify the settlement. The requirements of collaboration with the Comptroller must be streamlined and simplified in order to decrease the burden on DOE legal staff. Again, we suspect the delay in submitting legal memoranda is due in part to lack of staff and not related to whether a case is appropriate for settlement. Accordingly, we recommend that the DOE augment its staff in the Office of Legal Services to efficiently process cases identified as appropriate for settlement in accordance with the above recommendations.

Additionally, a separate factor that contributes to delays and lack of efficiency in the settlement process is the DOE's unnecessary compartmentalization of various aspects of the impartial hearing process. The DOE is typically represented by one individual in the impartial hearing process and a completely different individual in the settlement process, with apparently limited to no communication between the two. In other legal contexts, the pressure of impending litigation often promotes urgency and efficient progress towards settlement. This urgency is nearly always absent when dealing with the DOE, however, because the individual representing the DOE in the settlement

negotiation does not bear the burden or responsibility of representing the DOE in the impartial hearing and does not face any direct pressure from the Impartial Hearing Officer. On the flip side, the person representing the DOE in the hearing is often unable to introduce relevant updates from the settlement process into the impartial hearing process. Requiring the settlement representative to appear during status conferences, or ensuring that only one individual handles hearing and is authorized to enter into settlements in lieu of hearing, would incentivize a more efficient settlement process overall.

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As you can imagine, the consequences of unnecessary delays weigh particularly heavily on students whose families' lack the economic resources to pay for private services or a unilateral school placement while they wait for their cases to be heard. Many low- and middle-income students must do without needed programs and services for many months, and often *years*, for a resolution, during which time, of course, more damage has been done, on top of what they have already suffered. By facilitating and streamlining the resolution and settlement processes, the DOE could serve children more efficiently, decrease the burden on the Impartial Hearing Office, and make the hearing process more readily available to only those cases which genuinely require the intervention of an Impartial Hearing Officer.

We look forward to working with your offices to improve these processes and ensure that children receive a FAPE, no matter their financial means. We look forward to a reply and to scheduling a meeting with you at your earliest availability to discuss solutions. Please direct your reply to Todd Silverblatt, Supervising Attorney in the Warren Sinsheimer Children's Rights Project of Mobilization for Justice, at tsilverblatt@mfjlegal.org.

Sincerely,

Advocates for Children of New York
Brooklyn Defender Services
Cooke School and Institute
Isaacs Bernstein, P.C.
The Legal Aid Society
Legal Services NYC
Mobilization for Justice
New York Lawyers for the Public Interest
Ratcliff Law, PLLC

cc: Members, New York State Board of Regents

Encl.

October 15, 2019

Elizabeth Berlin
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Dear Interim Commissioner Berlin and Chancellor Carranza:

We are a group of legal services organizations and attorneys who advocate for the families of New York City children who have disabilities requiring special education. We write to raise significant concerns that the New York City Department of Education ("NYCDOE") is habitually failing to meet its obligations under the Individuals with Disabilities Education Act ("IDEA"), its implementing regulations, and New York State Department of Education ("NYSED") regulations to provide impartial due process hearings, conducted by Impartial Hearing Officers ("IHOs"), in a timely manner.

The purpose of this letter is to reiterate NYCDOE's and NYSED's legal obligations to provide due process hearings in a timely manner; present real world examples of the educational impacts these delays are causing; offer practical solutions to begin to curb this problem; and **request an immediate meeting with State and City decision makers to discuss our concerns**.

Through our advocacy for children and parents, we have all personally witnessed these illegal delays and the impacts they have on some of the most vulnerable children in New York City. This letter should not come as a surprise. For years, NYSED has "documented that parents/guardians of students with disabilities are not being provided timely access to an impartial hearing upon the filing of a due process complaint notice with NYCDOE,"[1] and that

[1] New York City Department of Education Compliance Assurance Plan, May 2019 (New York State Education Department, Office of Special Education) ("CAP"), Attached as Exhibit A, at 2.

"NYCDOE fails to provide parents access to adequate due process after a complaint has been filed."[2]

NYSED has concluded that "NYCDOE has multiple outstanding findings of noncompliance involving the requirements to ensure proper procedural safeguards to students and parents, and the provision of programs and services to preschool and school-age students with disabilities," and that despite NYSED's efforts to work with NYCDOE to resolve these issues, those efforts have "not resulted in the systemic change necessary to sustain compliance and/or scale-up effective approaches to ensuring compliant policies, procedures, and/or practices in the identified areas."[3]

NYCDOE Fails to Meet Its Obligations to Provide Timely Due Process Hearings

The right to challenge adverse special education determinations through the complaint and hearing process is among the most critical protections the IDEA provides to parents. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 205 (1982) ("[T]he importance Congress attached to [IDEA's] procedural safeguards cannot be gainsaid."). Integral to these procedures are strict timelines imposed by federal and state law. Both federal and state regulations explicitly require that an IHO issue a final decision on any due process complaint no later than 45 days after the expiration of the 30-day resolution period. 34 C.F.R. § 300.515(a); 8 N.Y.C.R.R. § 200.5(j)(5). New York state law further protects parents' right to timely determinations on their due process complaints by, for example, requiring that the hearing process begin within the first fourteen days of the federally-mandated resolution period, prohibiting appointment of IHOs unable to meet that deadline, and severely curtailing the circumstances in which the mandated timeframes may be exceeded. *See, e.g.*, 8 N.Y.C.R.R. § 200.5(j)(3)(iii)(*b*) (fourteen-day requirement); *id.* § 200.5(j)(3)(i)(*b*) (IHOs); *id.* §§ 200.5(j)(5)(i)–(iv) (limits on granting extensions of time).

As courts routinely recognize, the time constraints on due process hearings are fundamental to the IDEA's statutory scheme. "[The] failure to provide a timely due process hearing to plaintiffs is not an unimportant or technical violation of the procedural safeguards provided for in the IDEA. Rather, it is the denial of a fundamental component of the due process protections afforded by the statute." *Blackman v. Dist. of Columbia*, 277 F. Supp. 2d 71, 78 (D.D.C. 2003). The reason is clear: delay causes immediate and real harm to the students IDEA is designed to protect. "[T]he brevity of the 45–day requirement indicates Congress's intent that children not be left indefinitely in an administrative limbo while adults maneuver over the aspect of their lives that would, in large measure, dictate their ability to function in a complex world." *Engwiller v. Pine Plains Cent. School Dist*., 110 F. Supp. 2d 236, 240 (S.D.N.Y. 2000). As a practical matter, the failure to timely adjudicate due process complaints often has the effect of denying children their statutorily mandated free appropriate public education ("FAPE"), and a sufficiently egregious delay "can itself constitute the denial of a free appropriate education." *Blackman*, 277 F. Supp. 2d at 79; *see also Schmelzer ex rel. Schmelzer v. New York*, 363 F. Supp.

[2] *Id.*, at 18.

[3] *Id.*, at 1.

2d 453, 459 (E.D.N.Y. 2003) ("Inordinate delays in the decision making process deprive those students of the rights provided to them under the IDEA and cause those students to suffer irreparable harm.").

The responsibility for ensuring compliance with these critical deadlines rests with NYCDOE and, ultimately, with NYSED. 20 U.S.C. § 1412 (a)(11)(A); 34 C.F.R. § 300.149(a) *and* 300.515(a)–(b); and 8 N.Y.C.R.R. § 200.5(j)(3). Egregious delay gives rise to liability by those actors, from which affected students may seek legal redress in court, including on a class basis. *See, e.g.*, *Blackman*, 277 F. Supp. 2d at 79, 85–89 (granting preliminary injunction in lengthy class litigation to redress systemic delays in District of Columbia due process hearings); *L.V. v. N.Y.C. Dep't of Educ.*, No. 03 Civ. 9917, 2005 WL 2298173, at *8 (S.D.N.Y. Sept. 20, 2005) (granting certification to class of students harmed or at risk of being harmed by systemic delays in implementing IHO decisions); *Schmelzer*, 363 F. Supp. 2d at 459–62 (certifying and granting summary judgment to class harmed by State Review Officers' violations of federal timeliness requirements).

NYCDOE has woefully failed to meet its obligations to timely provide due process hearings. As described in the CAP, "NYCDOE has been identified as not meeting the requirements of IDEA for ***13 consecutive years*** due to performance and/or compliance outcomes for the subgroup of students with disabilities"[4] (emphasis added). As NYSED put it, NYCDOE is "a district that needs intervention in implementing these requirements."[5]

The CAP is replete with descriptions of NYCDOE's failure to meet required deadlines, including specifically that "NYCDOE fails to afford students with disabilities and their parents with required procedural safeguards."[6] An independent report commissioned by NYSED found that the "average number of days a case is open in New York State far exceeds the abbreviated timeline established in the IDEA and what is reasonable under an extended timeline."[7] For example, in the 2017-2018 school year, the average number of days a case was open ("case length") in New York City was 202 days.[8] In the 2018-2019 school year, it was 225 days.[9] By comparison, the average case length in the rest of New York State was 120 and 140 days in 2017-2018 and 2018-2019, respectively.[10] As described in the External Review, this "failure to

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[4] *Id.*, at 2.

[5] *Id.*

[6] *Id.*, at 18.

[7] External Review of the New York City Impartial Hearing Office, February 22, 2019 (Deusdedi Merced, Special Education Solutions, LLC) ("External Review"), attached as Appendix B, at 18.

[8] *Id.*, at 19.

[9] *Id.* (as of January 2019).

[10] *Id.* (as of January 2019).

promptly resolve due process complaints keeps children in 'administrative limbo' and, for some, delays access to free appropriate public education to which they are entitled."[11]

The independent report found that in the 2016-2017 school year, of the due process complaints that resulted in written decisions, only 14% were decided within the mandatory 45-day timeline.[12] The majority—71%—were decided within extended timelines, and 15% were untimely.[13] The report assumed the extended timelines were based on valid requests, but stated that there have been allegations of IHOs unilaterally extending the timelines absent valid requests,[14] something we have experienced firsthand. Indeed, according to the External Review, the number of extensions granted in New York State is "exceptionally high," and New York City accounted for over 95% of all extensions granted in the 2015-2019 school years.[15] For example, in the 2017-2018 school year, of 36,369 extensions granted state-wide, 35,157 (or 97%) were in New York City.[16]

IHOs in New York City also have a "startling" number of recusals, with 5,634 in the 2017-2018 school year (compared with 30 in the rest of the state), and 6,968 recusals as of January 2019 in the 2018-2019 school year (compared with 11 in the rest of the state).[17] Significantly, the vast majority of these recusals relate to scheduling and availability, not substantive matters.[18] The "disproportionate number of recusals are an impediment to the timely completion of due process hearings."[19] Overall, the External Review concluded that "these systemic deficiencies are symptomatic of an unhealthy hearing system that requires immediate intervention."[20]

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[11] *Id.*, at 18–19.

[12] *Id.*, at 15.

[13] *Id.*

[14] *Id.*, at 15 n.41. See, 34 CFR § 300.515(c); and 8 NYCRR 200.5(j)(5)(i) ("The impartial hearing officer shall not solicit extension requests or grant extensions on his or her own behalf or unilaterally issue extensions for any reason.").

[15] *Id.*, at 16–17.

[16] *Id.*, at 17.

[17] *Id.*, at 17–18.

[18] *Id.*, at 17 n.48 (explaining that the term "recusal" is a "misnomer" in this context, because IHOs are assigned "on an automatic rotational appointment basis" and "[a]n IHO who is appointed but simply unavailable, or . . . chooses not to accept the appointment, is deemed to have recused him/herself").

[19] *Id.*, at 17.

[20] *Id.*, at 20.

These Delays Cause Serious Harm to New York City Children

These egregious and systemic delays are continuing to cause material, demonstrable harm to the children we represent. Every day of delay is another day that these children miss out on critical services they need to develop and learn. And these delays disproportionately affect low income children whose families do not have the means to pay for the services they require on their own while waiting for their claims to be processed. Below are several examples of children experiencing real injury from NYCDOE's delays. As these families' experiences make clear, many compounding dysfunctions contribute to the delays, including multiple recusals by successive IHOs, overburdened and overscheduled IHOs, unexplained gaps between hearing dates, delayed transcripts, improperly entered compliance deadline extensions, poor communication from NYCDOE and the Impartial Hearing Office, and an inefficient process and protocol for reaching settlement in uncontested cases. These dysfunctions led to between six and twelve months of delay in the below examples, including one student whose hearing still has not yet been completed and another who is still waiting on a decision after a hearing.

Zachary Wang[21] is a 10-year-old boy with emotional disturbance whose school failed to implement his IEP. Zachary's aunt requested a due process hearing in February 2019. An IHO was assigned immediately, but replaced without explanation three weeks later by a new one, who in March scheduled a hearing in late June. The night before the June hearing, the IHO recused himself, citing an inability "to conduct the hearing in a timely manner." Several IHOs subsequently were assigned and recused themselves without explanation. Counsel later learned that many of these IHOs had, on their own and without a request from either party, extended the compliance deadline without notice to either party. The seventh assigned IHO scheduled a telephonic hearing in August, but then, without notice, failed to appear for it because, as he later acknowledged, he had seven other matters that morning. Only after counsel wrote NYSED was an IHO assigned who could timely hear the matter. At the pre-hearing conference in August, NYCDOE offered a settlement for the first time, after other NYCDOE representatives had refused Zachary's settlement requests for months on the ground that they lacked authority to agree to a settlement.

Matthew Adebayo is a non-verbal 8-year-old with autism and developmental delay, who engages in constant aggressive behaviors. For two years, NYCDOE paid an independent agency to provide Matthew 20 hours per week of home-based behavior management services, leading to significant progress. In March 2019, NYCDOE issued an IEP discontinuing the services. Matthew's parent filed a due process complaint in April 2019, but the earliest hearing date permitted by the assigned IHO's packed schedule was September—and even then, for only two hours a day, so the hearing would take three nonconsecutive days spanning three weeks. Matthew's services ended in June 2019, but the hearing was completed only on September 19. No decision has yet been issued. Because his family has been unable to pay for services in the meantime, Matthew has regressed nearly to his levels of aggressive behavior from two years ago.

[21] The names and certain identifying features have been changed to protect the privacy of the students.

Paul Stoddard is a 12-year-old with autism, attention-deficit/hyperactivity disorder, and intellectual development and adjustment disorders. Following severe academic and behavioral problems, Paul's parents requested a due process hearing on June 29, 2016. A hearing was calendared for September, but in late August NYCDOE told Paul's parents the case would settle, and thus requested an adjournment to October 31. NYCDOE did not follow up, however. In November 2016, the IHO recused himself and a new one was appointed. Then, the parents heard *nothing* until February 2017. After counsel's inquiry, the Impartial Hearing Office stated that two adjournments had been granted to prepare witnesses—but no party had requested or even knew about those. That IHO recused himself, on Paul's parents' request, and a third IHO scheduled a hearing for May 1. In April, NYCDOE first told counsel the case had been settled, but a week later, NYCDOE informed parents that the case was in fact rejected for settlement. The hearing began on May 1, but was continued until June 21 because of the IHO's schedule. Ultimately—more than a year from the filing date, during which time Paul struggled behaviorally and academically—the IHO ruled for Paul's parents.

Dario Kahler is a third grader with a speech and language disability. His mother's requests to restore speech and language therapy, which NYCDOE had discontinued, and for a paraprofessional, were denied. Dario's mother filed an impartial hearing request in February 2018 and subsequently amended it, but the Impartial Hearing Office apparently never received the amended request. Counsel resubmitted it in July 2018. Although NYCDOE conceded it had denied Dario a free appropriate public education, and granted the services and a paraprofessional in December 2018, it refused compensatory services. The IHO did not hold a hearing until the end of January 2019, and the Impartial Hearing Office did not provide the transcripts until *June* 2019—almost *six months* after the hearing and eighteen months after the original request. To date, the IHO has not issued a decision. Dario has thus started school without the services he needs to compensate for NYCDOE's admitted denial of a free appropriate public education.

Maria Mulloy is a 12-year-old with emotional disturbance whose self-contained class and related services were inadequate to meet her needs. On August 31, 2018, Maria's mother filed a due process complaint. On September 10, 2018, an IHO was assigned, but the IHO did not hold the hearing until seven months later, on April 10, 2019. NYCDOE did not appear or contest the allegations. The Impartial Hearing Office did not provide the transcript until almost three months later, and did not issue a final decision granting her services until August 30, 2019—*a full year* after her mother filed the hearing request.

Recommended Priorities

In light of the deficiencies in the current process, NYSED and NYCDOE must take immediate steps to address the following priorities, each of which is critical to protecting our clients' federal and state rights to timely obtain hearings and resolutions of their cases.

Timely Obtaining a Hearing

1. **Appoint Additional IHOs.** NYSED should appoint substantially more IHOs to meet the need for adjudicating complaints, including by increasing its recruiting outreach

efforts. The current number of IHOs—71 in fiscal year 2018[22]—is vastly insufficient to meet the number of hearings requested in New York City: over 7,100 during the 2017-2018 school year.[23]

2. **Improve IHO Compensation.** NYCDOE should (a) revise the IHO compensation scheme to fairly compensate officers; (b) timely compensate IHOs; and (c) develop compensation approaches that will incentivize IHO conduct that promotes timely and compliant resolution of complaints. Currently, "[i]nadequate compensation has resulted in IHOs engaging in widespread practices that are inconsistent with appropriate, standard legal practice and best practices."[24]

3. **Improve Case Management for IHOs.** NYSED/NYCDOE should limit the number of cases that can be assigned at one time to an IHO, limit the number of cases IHOs can calendar on one day, and create transparency in case selection so as to limit unnecessary and multiple recusals. Currently, for example, NYCDOE "automatically appoint[s] an IHO to a due process complaint without first confirming his/her availability," which "is inconsistent with the regulatory requirement" and "is the primary reason for the high number of recusals in New York City."[25]

4. **Additional Hearing Offices.** NYCDOE should establish a hearing office in each borough, similar to the structure of the NYCDOE suspension hearing offices. Having multiple locations would help with the overcrowding in the current hearing office and streamline the hearing process. "[Eleven] hearing rooms is simply not enough, when on average in the past two school years, there have been over 100 matters on the calendar per day."[26]

5. **Improve the Hearing Spaces.** NYCDOE should provide additional space to conduct hearings, as well as separate waiting rooms for NYCDOE and parents/representatives so that the parties can have confidential conversations. "The absence of a designated area for parent attorneys/advocates to have confidential discussions with their clients hinders the right of parents to be" advised by counsel.[27]

6. **Hire Additional Hearing Office Staff.** Given the delays experienced in the Impartial Hearing Office, NYSED/NYCDOE should hire more personnel for the office.

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[22] External Review, at 34.

[23] CAP, at 19.

[24] External Review, at 31.

[25] *Id.*, at 43.

[26] *Id.*, at 37.

[27] *Id.*, at 39.

Timely Obtaining Resolution

7. **Improve the Settlement Process.** NYSED/NYCDOE should implement a streamlined settlement protocol that clearly delineates which entities/actors are responsible for milestones in the process and authorizes the individual representing NYCDOE in the impartial hearing to settle cases. This process should include a commitment from NYCDOE to empower its representatives to engage in true settlement discussions and settle cases, particularly where NYCDOE does not intend to put on a case.[28]

8. **Implement Pendency Automatically.** NYSED/NYCDOE should end the practice of requiring hearings and pendency orders where pendency is uncontested.[29] Alternatively, NYSED and NYCDOE should investigate the development of an alternative track to handle pendency hearings with separate dedicated staff.

9. **Make Mediation and Alternative Dispute Resolution More Readily Available.** NYSED/NYCDOE should make mediation more readily available and accessible as a means to resolve cases without going to hearing, including by training Impartial Hearing Office staff and NYCDOE employees on the availability of alternative dispute resolution. Currently, NYCDOE "is not resolving or attempting to resolve enough matters through mediation."[30]

10. **Permit IHOs to Enter So-Ordered Judgments.** IHOs should have the authority to enter a so-ordered judgment against NYCDOE if an NYCDOE representative represents that NYCDOE does not intend to defend its failure to provide a free appropriate public education or does not object to the parent's request for remedies. This judgment should then be directed to the Implementation Unit in order to streamline services and remedies for the student.

It is incumbent on both NYCDOE and NYSED to take immediate action on these priorities. The current pattern of extensive delays violates the procedural protections that federal and state law afford to our clients in precisely the manner these safeguards were designed to prevent. The legal responsibility for redressing these violations lies with both agencies.

We hope to work collaboratively with your offices to resolve our concerns and improve NYCDOE's hearing process for all New York City children. Please note, however, that these egregious delays have impaired our clients' rights under federal and state law, and we will consider all action necessary to seek redress on their behalf. We look forward to a reply by November 15, 2019, and to scheduling a meeting (or meetings) with you within thirty days of

[28] CAP, at 19 ("NYCDOE does not defend numerous cases at hearing, but rather admits that it did not provide [free appropriate public education] and does not offer to settle these cases.").

[29] *Id.* ("NYSED has documented that NYCDOE requires a hearing or IHO determination for pendency, even when a student's pendency is not in dispute.").

[30] *Id.*, at 21.

this letter. Such a meeting should include, at a minimum, individuals from your agencies with knowledge of the problems described in this letter and the authority to commit to any agreed-upon solutions. Please address any reply to either Nelson Mar at nmar@lsnyc.org or Danielle Tarantolo at dtarantolo@nylag.org.

Sincerely,

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