# 22-939

IN THE

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

Z.Q., by his parent, G.J., G.J., individually and on behalf of Z.Q., J.H., by his parent, Y.H., Y.H., individually and on behalf of J.H., J.A., by his parent, D.S., D.S., individually and on behalf of J.A., M.S., by his parent, R.H., R.H., individually and on behalf of M.S., D.V., by his guardian, V.L., V.L., individually and on behalf of D.V., J.W., by his parent, A.W., A.W., individually and on behalf of J.W., D.M., by his parent, E.L., E.L., individually and on behalf of D.M., C.B., by his parent, C.B.2, C.B.2, individually and on behalf of C.B., on behalf of themselves and all others similarly situated,

*Plaintiffs-Appellants,*

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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*(For Continuation of Appearances See Inside Cover)*

—against—

NEW YORK CITY DEPARTMENT OF EDUCATION, NEW YORK CITY BOARD OF EDUCATION, RICHARD CARRANZA, in his official capacity as Chancellor of the New York City School District, NEW YORK STATE EDUCATION DEPARTMENT, NEW YORK STATE BOARD OF REGENTS, BETTY A. ROSA, in her official capacity as Interim Commissioner of Education and President of the University of the State of New York,

*Defendants-Appellees*

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure, *amici curiae* The Legal Aid Society, Children's Law Center, Brooklyn Defender Services, Lawyers for Children, Inc., Mobilization for Justice, Inc., and New York Lawyers for the Public Interest state that they have no parent corporation and that no publicly held company owns 10% or more of their stock.

## STATEMENTS OF INTEREST[1]

The Legal Aid Society, Children's Law Center, Brooklyn Defender Services, Lawyers for Children, Inc., Mobilization for Justice, Inc., and New York Lawyers for the Public Interest, respectfully submit this *amici curiae* brief in support of Plaintiffs-Appellants ("Appellants") pursuant to Federal Rules of Appellate Procedure 29(a). Appellants and Appellees have consented to the filing of this brief.[2]

## INTEREST OF THE AMICI CURIAE

*Amici curiae* are New York-based organizations that represent and advocate for the rights of children and families, including on matters pertaining to education, special education, and school discipline.

The Legal Aid Society ("Legal Aid") is the nation's oldest and largest private not-for-profit organization, providing free legal services to low-income individuals and families for over 140 years. Our education units represent over 500 indigent children each year on education matters in administrative, trial and appellate courts, provide brief consultations in over 1,000 cases each year, conduct training sessions, and pursue impact litigation and other law reform initiatives.

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[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting this brief; and no person other than *amici curiae*, its members, or its counsel, contributed money intended to fund preparing or submitting this brief. *See* FED. R. APP. P. 29(a)(4)(E).
[2] *See* FED. R. APP. P. 29(b)(2).

The Children's Law Center of New York ("CLC"), founded in 1997, is a nonprofit law firm that represents children in custody, visitation, guardianship, paternity, and family offense proceedings. CLC's Securing Seamless Education Services Project has helped hundreds of clients and their families, most of whom have limited financial resources, to obtain special education evaluations and services mandated by their Individualized Education Programs ("IEP").

Brooklyn Defender Services ("BDS") is one of the largest public defense offices in New York State, handling between 20,000 and 40,000 cases of low-income residents of Brooklyn and elsewhere each year in criminal, family, civil, and immigration proceedings, and providing interdisciplinary legal and social services. BDS's Education Practice delivers special education legal representation and informal advocacy to our school-age clients and to parents of school-age children.

Since 1984, the attorneys and social workers at Lawyers for Children, Inc. ("LFC"), have provided critically needed legal representation and social work services to over 30,000 children in New York City family court proceedings. LFC's Education Advocacy Project provides legal advocacy, representation, and outreach for the general and special education needs of our clients.

Mobilization for Justice, Inc. ("MFJ") is a private, not-for-profit organization that provides free legal services to New York City residents. MFJ's Warren Sinsheimer Children's Rights Project provides representation and advice to

approximately 500 families of students with disabilities each year in special education and school discipline matters, conducts community outreach and trainings, pursues impact litigation in concert with other education advocates.

Founded in 1976, New York Lawyers for the Public Interest ("NYLPI") is a community-driven civil rights organization that advocates for New Yorkers with disabilities through its Disability Justice Program. Through individual and systemic cases and campaigns, NYLPI represents low-income parents and their children with disabilities to ensure the children receive a free, appropriate public education, as guaranteed by the Individuals with Disabilities Education Act ("IDEA").

*Amici* are intimately familiar with the barriers that low-income families face in accessing appropriate special educational services. Accordingly, *amici* are uniquely positioned to provide essential information to the Court about the nature and scope of the NYC Department of Education ("DOE")'s failings. Based upon our extensive experience representing children and families, it is clear that the DOE's Impartial Hearing Office ("IHO") is unable to provide timely relief to the tens of thousands of students with disabilities in need of compensatory educational services due to the COVID-19 pandemic. As a result, exhaustion of this process is futile and the District Court's order dismissing the Complaint should be reversed.

## ARGUMENT

The District Court's order ("Order") granting the Defendants-Appellees' ("Appellees") motion to dismiss the Complaint due to a lack of subject matter jurisdiction arising from Appellants' failure to exhaust administrative remedies is contrary to established case law concerning the futility doctrine. In the Second Circuit, there are three exceptions to the exhaustion requirement. Exhaustion is not necessary if (1) IDEA's due process procedures would be futile; (2) an agency has adopted a policy or practice of general applicability that is contrary to the law; or (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies.[3] As this matter falls firmly into each of the exceptions to the exhaustion doctrine, the Order should be reversed.

### I. DOE's failure to provide mandated special education services caused extraordinary harm to a vast number of students with disabilities.

Annually over 200,000 DOE students qualify as students with disabilities under IDEA and receive services through an IEP.[4] DOE's failure to provide mandated IEP services to many of these students during the pandemic is well documented. According to the New York State Comptroller,

[3] *Murphy v. Arlington*, 297 F.3d 195, 199 (2d Cir. 2002) (citing *Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir.1987)).

[4] In the 2020-2021 school year, 1,058,888 students enrolled in NYC public schools, of whom 20.6% (or 218,130) were identified as students with disabilities. *See DOE Data at a Glance*, accessed on 6/16/22 at https://www.schools.nyc.gov/about-us/reports/doe-data-at-a-glance

> [d]uring the COVID-19 crisis, many factors associated with remote learning led to a reduction in special education programs, supports and related services that students with disabilities need to meet their educational goals. DOE, which educates almost half the State's students with disabilities, reported in November 2020 that **as many as "46% of City students with disabilities… received only part of the interventions specified in their IEPs or none at all**."[5] (emphasis added).

In addition, another 28% of students were not receiving their mandated related services, such as speech and language therapy, occupational therapy, physical therapy and counseling.[6] Applying these percentages to DOE's total of 200,000 students with IEPs reveals that more than 92,000 students with disabilities did not fully receive their recommended programs and more than 56,000 students did not receive the related services mandated by their IEPs.

The damage to each individual class member is great. Time and again, we see that students with disabilities who do not receive their special education programs and services fall farther behind their peers, and sometimes even experience regression in the skills they have already achieved. Each of these students – an estimated 148,000 – is entitled to compensatory services. In order to obtain redress under the current administrative hearing system, each one would have to file an

[5] Thomas P. DiNapoli, Office of the New York State Comptroller, *Disruption to Special Education Services: Closing the Gap on Learning Loss from COVID-19* (September 2021) at 1, 9, accessed on 6/15/22 at http://www.osc.state.ny.us/files/reports/pdf/special-education-report.pdf.
[6] *Id.* at 9.

individual complaint with the IHO. As set forth below, however, this process would be futile and must be excused.

## II. Exhaustion of administrative remedies should be excused as futile because the Impartial Hearing Office lacks capacity to render timely and adequate relief.

Federal law and regulations purposely establish a short timeline for resolving complaints under IDEA. Education agencies must schedule a resolution meeting within 15 days of the filing of a petition for relief. If the matter is not resolved to the satisfaction of the parent within 30 days, the matter must proceed to hearing. The public agency must then ensure that a hearing is held, a final decision is reached, and a copy of the decision is mailed to each of the parties no later than 45 days after the expiration of the 30-day period.[7]

These timeline requirements are central to the administrative remedies set forth in IDEA. As one court noted, "the 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."[8] Nevertheless, DOE routinely disregards these legally mandated time frames.

[7] 34 C.F.R. § 300.515(a).
[8] *Engwiller v. Pine Plains Cent. Sch. Dist.*, 110 F. Supp.2d 236, 240 (S.D.N.Y . 2001).

Families seeking impartial hearings in NYC have had to grapple with egregious delays for years. Even prior to the pandemic, the IHO faced a tremendously high volume of requests for impartial hearings via special education due process complaints, dwarfing that of entire states. In the 2017-18 school year (pre-pandemic), DOE received 7,635 due process complaints, more than all of California, Florida, Illinois, New Jersey, Pennsylvania and Texas combined.[9] The numbers of cases filed, and the delays in their resolution were so staggering that in January 2019, the New York Stated Education Department ("NYSED") ordered an independent review of DOE's due process system. The resulting report revealed an ever-increasing number of complaints and delays. Between 2014 and 2018, the average case length climbed from 149 days between filing and decision to 225 days, both numbers far exceeding the 75-day timeline mandated by the IDEA.[10]

DOE's systemic failure to comply with the IDEA's timelines has only increased in the intervening three years. In the 2018-19 school year (before the pandemic) the number of due process complaints filed in NYC rose to 10,189.[11] The

[9] Deusdedi Merced, Report on External Review of The New York City Impartial Hearing Office, Spec. Educ. Solutions, LLC (filed on Feb. 22, 2019), p. 11, available at https://www.politico.com/states/f/?id=00000170-9867-d855-a3f7-d8ff5cdb0000

[10] *Id.* at 19.

[11] Deusdedi Merced, Update on the NYC Impartial Hearing System, Spec. Educ. Solutions, LLC (January 12, 2022), p. 4, accessed on 6/15/22 at https://www.regents.nysed.gov/common/regents/files/P-12%20-%20Update%20on%20the%20NYC%20Impartial%20Hearing%20System.pdf

average number of days to reach a final decision soared to 259 days during the 2019-2020 school year.[12] This means that on *average,* a parent who filed a due process complaint on the first day of the school year would not have received a decision on their case until late May, and their child would have lost nearly an entire school year without redress.

The harm to students created by these delays was so widespread and egregious that in 2020, *J.S.M. v. New York City Department of Education* was filed.[13] Plaintiffs in that suit, children entitled to receive special education services, seek to compel DOE to abide by the timelines set out in the IDEA.

On December 27, 2021, then Mayor Bill De Blasio announced that impartial hearings under the IDEA would be moved to the NYC Office of Administrative Trials and Hearings (OATH). Impartial hearing officers would be hired as City employees, rather than as independent contractors. This led to another pending lawsuit against DOE[14] which alleges (inter alia) that the transfer of jurisdiction to a City agency is contrary to law because it renders the impartial hearing system "partial" by shifting custody, control, and oversight of the hearing officers to the

[12] *Id*. at 7.
[13] *J.S.M. v. New York City Department of Education* (1:20-cv-00705) District Court, E.D. New York (February 7, 2020).
[14] *E.F. et. al. v. De Blasio et. al.* (Civ. No. 21-cv-11150) District Court, S.D.N.Y. (January 12, 2022).

City and the Mayor (who also controls the school district in NYC), effectively eliminating the IDEA's most important procedural safeguards.

Meanwhile, little has changed for children with disabilities. As of February 18, 2022, there was a waitlist of approximately 4,049 due process complaints in NYC that did not yet even have an impartial hearing officer appointed.[15] For most IDEA complaints filed by Legal Aid during 2021, the length of time between the filing of a due process complaint and the assignment of a hearing officer ranged from three to nine months. However, the assignment of a hearing officer does not ensure a speedy or timely resolution. Some hearing officers, once assigned, fail to schedule hearing dates for months. Similarly, some hearing officers take months to issue a written decision after closing the hearing record.

In one case, Legal Aid filed a complaint for compensatory services on November 25, 2020. A hearing officer was not appointed until November 1, 2021, nearly a year later. The initial hearing was not scheduled until February 2022. The case is still awaiting final resolution. In the intervening year and a half, the student has languished without the services to which he is entitled.

[15] Memorandum of James N. Baldwin (Senior Deputy Commissioner for Education Policy at NYSED) to the P-12 Education Committee of the State Education Department (3/10/22) accessed on 6/15/22 at www.regents.nysed.gov/common/regents/files/322p12d4.pdf

Another client is a 4-year-old boy with Cerebral Palsy who is non-verbal, non-ambulatory, and requires intensive treatment to develop physical and communication skills. Legal Aid filed a due process complaint on his behalf in June 2020 requesting compensatory services. A hearing officer was not appointed until December 2020, and a hearing was finally held at the end of March 2021. A decision was not rendered until two months later, in May 2021 – almost a year after filing. In the meantime the student regressed, and lost skills he had previously mastered. Unfortunately, these procedural delays are typical of our clients' experiences.

While there is no bright-line rule for when a delay renders a claim futile, "courts have found exhaustion after a delay in cases ranging from [one] month to two years."[16] Additionally, the Second Circuit has held that "if state administrative bodies *persistently fail* to render expeditious decisions as to a child's educational placement, district courts have the power under [IDEA 20 U.S.C.] § 1415(e)(2) to assume jurisdiction over the review process on the grounds that exhaustion would be futile or inadequate ...."[17] Similarly, in *Jose P. v. Ambach*, the Second Circuit

[16] *J.Z. v. New York City Dep't of Educ.*, 281 F. Supp. 3d 352, 363 (S.D.N.Y. 2017) (citing *M.G. v. New York City Dep't of Educ.*, 15 F. Supp. 3d 296, 303 & n. 44 (S.D.N.Y. 2014)).

[17] *Frutiger v. Hamilton Cent. Sch. Dist.*, 928 F.2d 68, 74 (2d Cir. 1991) (emphasis added); *see also Mackey ex rel. Thomas M. v. Board of Educ. for Arlington Cent. Sch. Dist.*, 386 F.3d 158, 162 n. 3 (2d Cir. 2004) (noting district court's finding, unchallenged on appeal, that exhaustion was excused based on SRO delay of almost a year).

held that it would be futile for plaintiffs to seek administrative remedies when NYC's education commissioner acknowledged that "he would be unable to *expeditiously* process the appeals of all the members of the plaintiff class were they to pursue administrative proceedings."[18] It is beyond doubt that the IHO has persistently failed to issue timely decisions and would be unable to expeditiously process tens of thousands of additional claims related to service deprivations during the COVID-19 pandemic. The requirement to exhaust administrative remedies must therefore be waived.

## III. DOE's persistent failure to implement impartial hearing orders makes exhaustion of administrative remedies futile.

It would be unreasonable to require children and families to exhaust the impartial hearing process because DOE routinely fails to implement impartial hearing orders. DOE's hearing order implementation process is as dysfunctional as the other parts of the impartial hearing process. In fact, a special master was recently appointed in a 17-year-old class action lawsuit, *L.V v. New York City Department of Education*, to address implementation delays.[19] The special master's report, issued March 1, 2022, identified complex problems with DOE's implementation unit, including severe process inefficiencies, antiquated data systems, staffing shortages,

[18] *Jose P. v. Ambach*, 669 F.2d 865, 869 (2d Cir. 1982) (emphasis added).
[19] *L.V. v. New York City Department of Education* No. 03-CV-9917 (LAP), 2021 WL 663718, at *1 (S.D.N.Y. Feb. 18, 2021).

and inadequate training.[20] These extensive problems mean there will be no "quick fix" for the implementation delays that plague DOE's impartial hearing system.

*Amici's* experience with this aspect of the IHO —untimely implementation of orders for relief—is powerful and instructive. When an impartial hearing officer orders DOE to provide compensatory services to a student, the providers are paid in one of two ways: 1) the parent can pay the provider directly, then submit bills to DOE and wait for reimbursement; or 2) the provider can bill DOE directly and await payment. It can take six months to one year for a parent to be reimbursed, or for a service provider to be paid for services rendered pursuant to an impartial hearing order. Most compensatory service providers will only work with families who can afford to pay for services upfront. A small number of compensatory service providers are willing to bill DOE directly, but in recent months, as the wait time for reimbursement has ballooned, that number has diminished even further.

Compensatory service implementation delays severely harm students. In one recent case, DOE was ordered to pay for a 10-year-old student to receive compensatory services with a private reading specialist. The student began receiving the assistance he needed, but the services were interrupted when DOE stopped paying the private provider. The family did not have the financial resources

[20] Special Master Findings Report: Prepared for Loretta A. Preska, Senior United States District Judge, *LV v. New York City Dept. of Educ.*, 1:01-cv-09917-LAP-KNF, Document 286 (March 1, 2022).

to pay the provider themselves and had to reach out to their Legal Aid attorney to request help in enforcing the order. The student lost weeks of tutoring while Legal Aid pursued enforcement.

If forced to exhaust administrative remedies through the existing impartial hearing process, very few, if any, low and middle income students would receive compensatory services for COVID-19 losses. Unlike families with means, these families cannot afford to pay for the educational services their children need, wait for an impartial hearing order, and wait again to be reimbursed pursuant to that order. They must rely on the limited set of service providers who are willing to accept direct payment from DOE, and there simply are not enough of those service providers to meet demand. An order that cannot be implemented is an empty remedy. Since the current administrative hearing system is incapable of implementing impartial hearing orders in a timely manner, it would be futile for Appellants to exhaust their administrative remedies.

## IV. Appellants seek systemic relief that cannot be obtained through the administrative hearing process.

Exhaustion of administrative remedies is not required in "cases involving systemic violations that [cannot] be remedied by local or state administrative agencies because the *framework and procedures* for assessing and placing students in appropriate educational programs [is] at issue, or because the nature and *volume*

of complaints were incapable of correction by the administrative hearing process."[21] Appellants here have brought systemic claims challenging the framework and procedures DOE currently uses to adjudicate claims for compensatory services related to the COVID-19 pandemic. Individual hearing officers would be unable to grant the relief requested by Appellants, namely, an order that DOE develop, implement, and fund an expedited process for efficiently and fairly providing the compensatory services that students require due to COVID-19-related service deprivations. Individual hearing officers are not authorized to issue an order of this type. They are also unable to issue adequate relief on a student-by-student basis because they do not have the capacity to adjudicate such a large number of cases, nor can they enforce implementation once a decision is rendered. Therefore, an exception to the exhaustion requirement should apply.

NYSED's review makes it clear that even before the pandemic, the IHO's "rapid, continuing decline" prevented it from providing timely review and resolution of 7,000 pre-pandemic due process complaints per year.[22] In the 2020-2021 school year, the number of filings in NYC rose to 14,141.[23] Yet Appellees argue that this same dysfunctional office will somehow be able to provide meaningful, timely due

[21] *Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 249 (2d Cir. 2008) (citing *J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 114 (2d Cir.2004)) (emphasis added).
[22] Merced, *supra* note 6, at 44.
[23] Baldwin, *supra* note 17, at 2.

process to the more than 200,000 NYC students who currently have IEPs and who may not have received their full complement of services through the COVID-19 pandemic. This argument is untenable. In order for NYC students with disabilities to receive the COVID-19 compensatory services to which they are entitled, it is necessary to create a streamlined process for efficiently and fairly providing compensatory services.

## CONCLUSION

The New York City Impartial Hearing Office is incapable of processing requests and providing timely relief for the vast number of students who have been deprived of IDEA mandated services during the COVID-19 pandemic. As a result, *Amici* respectfully submit that the requirement that Appellants exhaust administrative remedies should be excused as futile and the Order dismissing the Complaint should be reversed.

Dated: New York, New York
June 24, 2022

Respectfully submitted,

By: /S/

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Local Rules 29.1(c) and 32.1(a)(4)(A) of the Local Rules and Internal Operating Procedures of the Court of Appeals for the Second Circuit, and Rule 32(g) of the Federal Rules of Appellate Procedure and because it contains 3,407 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally-spaced typeface using Microsoft Word in Times New Roman 14-point font.

/S/
Lisa Freeman

**CERTIFICATE OF SERVICE**

I certify that, on June 24, 2022, the foregoing document was served on all parties or their counsel of record through the CM/ECF.

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