UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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J.T., Individually and On Behalf Of D.T.;
K.M., Individually and On Behalf Of M.M. and S.M.;
J.J., Individually and On Behalf Of Z.J.;
C.N., Individually and On Behalf Of V.N.; and,
All Others Similarly Situated,

Plaintiffs, **20-CV-5878 (CM)**

- against -

BILL de BLASIO, in his official capacity as the Mayor of New York City; **RICHARD CARRANZA**, in his official capacity as the Chancellor of New York City Department of Education; the **NEW YORK CITY DEPARTMENT OF EDUCATION**; the **SCHOOL DISTRICTS IN THE UNITED STATES**; and, **STATE DEPARTMENTS OF EDUCATION IN THE UNITED STATES,**

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

This memorandum of law is submitted in support of Plaintiffs' Application for an Order to Show Cause for a Temporary Restraining Order and Preliminary Injunction, pursuant to Rule 65 of the Federal Rules of Civil Procedure: 1) ordering the Defendants to either reopen their schools and implement the Students' IEPs ("Individualized Education Program") *or* have Defendants fund a Pendency Voucher to allow the Plaintiff-Parents an opportunity to self-cure; 2) ordering the Defendants to fund an independent evaluation of the Plaintiff-Students to determine a) compensatory services for the Students, and b) determine any changes that needs to be made to the Plaintiff-Students' IEPs; 3) ordering Defendants to reimburse Plaintiff-Parents for out-of-pocket expenses or loss of income and/or employment; and 4) ordering punitive damages based upon the Defendants' willful and deliberate neglect and abandonment of the educational and medical needs of the Plaintiff-Students as evidenced by Defendants' unjustified termination or modification of the implementation of the Students' IEPs.

STATEMENT OF FACTS

PLAINTIFFS[1] (*See* Appendix A of Complaint ECF Dkt. Entry # 1) are parents and/or natural guardians ("Plaintiffs-Parents") of students who are classified under federal law as being disabled and having an educational disability, and the students themselves ("Plaintiff-Students"), bring this action on their own behalf and on the behalf of all others similarly situated against DEFENDANTS BILL de BLASIO, in his official capacity as the Mayor of New York City, RICHARD CARRANZA, in his official capacity as the Chancellor of New York City Department of Education, the NEW YORK CITY DEPARTMENT OF EDUCATION, the SCHOOL DISTRICTS IN THE UNITED STATES (*See* Appendix B of Complaint ECF Dkt. Entry # 1), and STATE DEPARTMENTS OF EDUCATION IN THE UNITED STATES (*See* Appendix C of Complaint ECF Dkt. Entry # 1) (collectively "Defendants"). (*See* Par. 2-5, Complaint ECF # 1)

[1] Pursuant to the federal Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. §1232g (and 34 C.F.R. Part 99), Counsel is using the initials of the parent/guardian and student to protect the student's privacy.

SCHOOL DISTRICTS' RESPONSE TO COVID-19

As the novel coronavirus ("Covid 19") began spreading across the United States during the month of March 2020, state Governors around the nation unilaterally closed school buildings and required all students and school staff to remain home in order to prevent the hospital systems from becoming overloaded due to the coronavirus crisis. (*See* Par. 6, Complaint ECF Dkt. Entry #1) During the month of March 2020, Defendant School Districts across the United States unilaterally closed school buildings and required all students and staff to remain home and changed in-person instruction to "remote learning," if any. (*See* Par. 7, Complaint ECF Dkt. Entry # 1)

Defendant State Education Departments ("SEDs") throughout the United States began issuing guidance to school districts within their states, otherwise known as "local educational agencies" ("LEAs"), about how to provide proper educational services to students during the coronavirus shutdown. (*See* Par. 12, Complaint ECF Dkt. Entry # 1)

School districts across the country requested the Secretary of Education to grant waivers from IDEA requirements and from providing FAPE ("free appropriate public education") during the coronavirus crisis.[2] While the United States Department of Education ("USDOE") and state education departments provided great flexibility in the provision of educational services during the coronavirus crisis, there has been no change in federal or state law.

On March 12, 2020, USDOE offered guidance to Defendants reinforcing the Plaintiffs' rights during the coronavirus crisis. "If a [local educational agency, typically a school district (LEA)] continues to provide educational opportunities to the general student population during a school closure [i.e. by providing online learning], the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of [free appropriate public education (FAPE)]. (34 CFR §§ 104.4, 104.33 (Section 504) and 28 CFR § 35.130 (Title II of the ADA)). [State Educational Agencies (SEAs)], LEAs, and schools must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's [individualized education program (IEP)] developed under [the Individuals with Disabilities Education Act (IDEA)], or a plan developed

[2] https://edsource.org/2020/disability-rights-groups-school-administrators-spar-over-possible-changes-to-special-education-laws/628376

under Section 504. (34 CFR §§ 300.101 and 300.201 (IDEA), and 34 CFR § 104.33 (Section 504)).”[3]

On March 21, 2020, USDOE reinforced its previous guidance. “At the outset, OCR [Office for Civil Rights] and OSERS [Office of Special Education and Rehabilitative Services] must address a serious misunderstanding that has recently circulated within the educational community. As school districts nationwide take necessary steps to protect the health and safety of their students, many are moving to virtual or online education (distance instruction). Some educators, however, have been reluctant to provide any distance instruction because they believe that federal disability law presents insurmountable barriers to remote education. This is simply not true. We remind schools they should not opt to close or decline to provide distance instruction, at the expense of students, to address matters pertaining to services for students with disabilities. Rather, school systems must make local decisions that take into consideration the health, safety, and well-being of all their students and staff. To be clear: ensuring compliance with the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act (Section 504), and Title II of the Americans with Disabilities Act should not prevent any school from offering educational programs through distance instruction.” [4]

On April 27, 2020, the USDOE presented a Report to Congress from United States Education Secretary Betsy DeVos (“Secretary DeVos”) which specifically did not recommend giving school districts the option to bypass major parts of federal special education law.[5] “While the Department has provided extensive flexibility to help schools transition, there is no reason for Congress to waive any provision designed to keep students learning,” Education Secretary Betsy DeVos said in a statement.[6]

As recently as July 8, 2020, Secretary DeVos reaffirmed the position of the USDOE during a briefing of the White House Coronavirus Task Force: “[t]here were a number of schools and districts across the country that did an awesome job of transitioning this Spring. And there were a

[3] March 12, 2020, Fact Sheet by USDOE: https://www.isbe.net/Documents/qa-covid-19-03-12-2020.pdf

[4] March 21, 2020, Supplemental Fact Sheet by USDOE: https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf

[5] https://www2.ed.gov/documents/coronavirus/cares-waiver-report.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

[6] https://www.ed.gov/news/press-releases/secretary-devos-reiterates-learning-must-continue-all-students-declines-seek-congressional-waivers-fape-lre-requirements-idea

lot in which I and state school leaders were disappointed in that they didn't figure out how to continue to serve their students. Too many of them just gave up. The Center for Reinventing Public Education [CRPE] said that only 10 percent across the board provided any kind of real curriculum and instruction program."[7]

On July 23, 2020, Dr. Robert R. Redfield, Director of the Centers for Disease Control and Prevention ("CDC"), stated that "**It is critically important for our public health to open schools this fall."** Towards this goal, the CDC released new science-based resources and tools for school administrators, teachers, parents, guardians, and caregivers. The CDC's guidance document stated that as of July 21, 2020, 6.6% of reported COVID-19 cases and less than 0.1% of COVID-19-related deaths are among children and adolescents less than 18 years of age in the United States. "The best available evidence indicates that COVID-19 poses relatively low risks to school-aged children. "School closures have disrupted normal ways of life for children and parents, and they have had negative health consequences on our youth. CDC is prepared to work with K-12 schools to safely reopen while protecting the most vulnerable." Dr. Redfield added that the "CDC resources released today will help parents, teachers and administrators make practical, safety-focused decisions as this school year begins. [8]

State Governors around the country rescinded their executive orders to allow school buildings to be reopened starting in July 2020 for extended school year ("ESY") special education students, as defined by 34 C.F.R. § 300.106. (*See* Par. 16, Complaint ECF Dkt. Entry # 1).

School districts throughout the United States were aware they were not in compliance of the IDEA, Section 504 or the ADA, as law firms who represent these school districts were advising them in real time. For this reason, Defendants sought a waiver from the Secretary of Education, which was denied. In addition, Defendants were also aware of the harm their actions were causing to Plaintiffs. Thus, Defendants knowingly, willfully and deliberately violated the rights of the Students and Plaintiff-Parents by acting in bad faith. (*See* Par. 17-25, Complaint ECF Dkt. Entry #1).

There have been school districts across the United States that have reopened for special education students as of July 2020. Meanwhile, some schools never closed and continued to

[7] https://www.whitehouse.gov/briefingsstatements/press-briefing-vice-president-pence-members-coronavirus-task-force-july-8-2020/.

[8] https://www.cdc.gov/media/releases/2020/p0723-new-resources-tools-schools.html

provide services throughout the coronavirus crisis. Furthermore, day care centers remained open across the United States without any noted outbreaks to the children or workers. (*See* Par. 26-27, Complaint ECF Dkt. Entry # 1).

However, even with the public health research and guidance as well as the success of schools around the world, most United States school districts remained closed to in-person services during the Summer 2020 with such closures remaining in place as they approach Fall 2020. In fact, most of the 50 largest school districts in the United States have not fully reopened for special education students, nor have plans to fully reopen for special education students in Fall 2020. (*See* Par. 28-47, Complaint ECF Dkt. Entry # 1).

Extensive research from around the world has established the importance of reopening schools for special education students and has shown that schools can be reopened safely. Many leading public health officials, scientists, physicians and experts have publicly stated the need to reopen schools. (*See* Par. 49-79, Complaint ECF Dkt. Entry # 1).

Since schools have been shuttered, there has been a noted increase in other public health concerns such as increases in child abuse and neglect, malnutrition, mental health, as well as increases in alcohol and drug use, associated with children remaining out of school. (*See* Par. 80, Complaint ECF Dkt. Entry #1).

Even prior to the Covid-19 pandemic, more than half of Defendant-State Education Departments[9] and many Defendant-School Districts were already in violation of IDEA. As an example, Defendant-NYCDOE has repeatedly been in violation of federal law with "systemic failures" as documented in its annual state review.[10]

PLAINTIFF-SPECIFIC FACTS

The specific facts for PLAINTIFF #1 (J.T.) are detailed in Declaration of Peter Albert (See Albert Declaration, Par. 2, dated August 20, 2020)("Albert Declaration"); the specific facts for PLAINTIFF #2 (K.M.) are detailed in the Albert Declaration, Pars. 3 and 4; the specific facts for PLAINTIFF #3 (J.J.) are detailed in Albert Declaration, Par. 5; and, the specific facts for PLAINTIFF #4 (C.N.) are detailed in Albert Declaration, Par. 6.

[9] https://www.usatoday.com/story/opinion/voices/2020/08/08/disability-rights-states-fail-obligation-special-needs-students/3318292001/

[10] https://ny.chalkbeat.org/2019/7/9/21108488/nyc-vows-to-address-special-education-failures-detailed-in-state-review-but-will-their-reforms-go-fa

The additional facts for PLAINTIFFS #5-104 are detailed in Complaint, Appendix A (see ECF Dkt. Entry #1).

IDEA STAY-PUT / PENDENCY PROVISION

The IDEA contains a so-called "stay put" or "pendency" provision that provides as follows: "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and parent otherwise agree, the child shall remain in the then-current educational placement of the child . . . until all such proceedings have been completed." 20 U.S.C. § 1415(j); *see also* 34 C.F.R. § 300.518(a) and in New York State, N.Y. Educ. L. § 4404(a).

This pendency provision evinces Congressional intent that all disabled children, "regardless of whether their case is meritorious or not, are to remain in their current educational placement until the dispute with regard to their placement is ultimately resolved." *Mackey v. Board of Educ.,* 386 F.3d 158, 160 (2d Cir. 2004).

"The purpose of this provision is 'to maintain the educational status quo while the parties' dispute is being resolved.'" *Avaras v. Clarkstown Central School District, et al.,* 18-CV-6964 (NSR), Docket Entry No. 30 (S.D.N.Y. August 27, 2018); *Doe v. East Lyme Board of Ed.,* 790 F.3d 440, 452 (2d Cir. 2015)(quoting *T.M. v. Cornwall Central School District*, 752 F.3d 145, 152 (2d Cir. 2014)).

This "stay put" provision codifies a student's right to a stable learning environment during what may become a lengthy administrative and/or judicial proceeding. *Avaras, supra*; *Murphy v. Arlington*, 297 F.3d 195, 199 (2d Cir. 2002). And, as alleged above, this "stay put" operates in a due process challenge "regardless of whether the [underlying] case is meritorious or not." *Avaras, supra; Doe, supra*, 790 F.3d at 453; *E.Z.-L. v. N.Y.C. Dep't of Educ.*, 763 F. Supp.2d 584, 598-99 (S.D.N.Y. 2011).

The IDEA's "stay put" provision is essentially an automatic preliminary injunction requiring the school district to maintain the student's educational placement. *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.,* 297 F.3d 195 (2d Cir. 2002). In this regard, the IDEA:

> substitutes an absolute rule in favor of the status quo for the court's discretionary consideration of the factors of irreparable harm, and either a likelihood of success on the merits or a fair ground for litigation and a balance of hardships.

See, Board of Educ. v. J.P., 2018 U.S. Dist. LEXIS 105102at *7 (E.D.N.Y. June 21, 2018) (citing *Zvi D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982)); *see also* 34 C.F.R. § 300.518(a) and N.Y. Educ. L. § 4404(a).

The Defendants unilaterally closed its schools and required students and staff to remain home, thereby altering the status quo of the educational programs of the Plaintiff-Students. The Defendants essentially failed to provide Plaintiff-Students with the special education and related services set forth in their IEPs. Due to the actions of Defendants, they have denied Plaintiffs pendency rights under IDEA.[11]

The Defendants unilaterally, substantially, and materially altered the Students' "status quo" educational program as it relates to the Plaintiff-Students' pendency rights. The IDEA includes a number of procedural safeguards "that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." *Honig v. Doe*, 484 U.S. 305, 311-12, 108 S. Ct. 592 (1988).[12] For example, in New York City, therapists were instructed to alter the students' educational program *WITHOUT* parental participation.[13]

The USDOE issued updated guidance for special education students in June 2020, reaffirming previous guidance about including parents in the decision-making process: "Timely communication between ***parents and public agency*** staff can often help resolve disagreements that may arise regarding the educational services provided to a child with a disability during the pandemic," according to the Q&A (emphasis added). "However, when those informal efforts prove unsuccessful, IDEA's three dispute resolution mechanisms — mediation, state complaint and due process complaint procedures — are available."[14] The Defendants blatantly disregarded these

[11] The maximum amount of time a school district can displace a student and change the educational program without triggering a violation of 20 U.S.C. § 1415(j) is 10 school days based on *Honig v. Doe*, 484 U.S. 305, 325, 325-26 n.8, 98 L. Ed. 2d 686, 108 S. Ct. 592 (1987). However, this unilateral action of a suspension by the school district may create a "change in placement," and by the terms of the IDEA, a change in placement can only occur with the consent of the parents, or after written notice, and the opportunity for a hearing.

[12] *Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78, 82, 83 (3d Cir. 1996). Accordingly, the stay-put provision "protect[s] handicapped children and their parents during the review process," by "block[ing] school districts from effecting unilateral change in a child's educational program."

[13] https://www.uft.org/news/news-stories/teletherapy-guidance-speech-otpts

[14] https://www.disabilityscoop.com/2020/06/23/ed-department-new-guidance-special-education-pandemic/28517/

procedural safeguards and simply failed to comply with these long-established federal laws and regulations with respect to the Plaintiff-Parents.

First, the Defendants unilaterally, substantially and materially altered the location of where the Plaintiff-Students were to receive services, from a school classroom to the most restrictive environment along the continuum of service: at the Plaintiff-Students' home. A unilateral change from a classroom to total isolation at home, would further violate the Supreme Court's express preference for educating students in the least restrictive environment and with their typically developing peers. *Honig*, 484 U.S. at 313.

Concerned Parents v. NYC Board of Educ., 629 F.2d 751, 753 (2d Cir. 1980), clearly demonstrates a change from a school-based program to home instruction is a material and substantive change to the educational program, "45 C.F.R. § 121a.551 Continuum of alternative placements: (a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services, and (b) The continuum required under paragraph (a) of this section must: (1) Include the alternative placements listed in the definition of special education under § 121a.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions). . . ."

Second, the Defendants unilaterally, substantially, and materially altered the delivery of these services by precluding the Plaintiff-Students from receiving any in-person services by special education teachers or related service providers, including any supplemental support as documented in the Plaintiff-Students' IEPs.

This unilateral, substantial, and material change in the delivery of academic and related services constitutes an improper change of educational program as discussed in *T.Y. v. N.Y.C. Dept. of Educ.*, 584 F.3d 412, 419 (2d. Cir. 2009): "The United States Department of Education ("USDOE") expressly considered this question in its commentary to the 1997 amendments to the IDEA. In that commentary, the USDOE noted, that some commenters requested that the term "location" be defined as the placement on the continuum and not the exact building where the IEP service is to be provided . . . . Other commenters similarly stated that a note be added clarifying that "location" means the general setting in which the services will be provided, and not a particular school or facility. Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed. Reg. 12406, 12594 (Mar.

12, 1999). In resolving this issue, the USDOE concluded that "[t]he location of services in the context of an IEP generally refers to the *type of environment that is the appropriate place* for provision of the service. For example, is the related service to be provided in the child's regular classroom or resource room?" *Id.* This conclusion comports with the Senate's commentary, which states that "[t]he location where special education and related services will be provided to a child influences decisions about the nature and amount of these services and when they should be provided to a child." S. Rep. No. 105-17, at 21 (1977). "For example, the appropriate place for the related service may be the regular classroom, so that the child does not have to choose between a needed service and the regular educational program." *Id*. "For this reason," the commentary continues, "in the bill the committee has added 'location' to the provision in the IEP that includes 'the projected date for the beginning of services and modifications, and the anticipated frequency, location, and duration of those services.'" *Id.* (emphasis omitted). We interpret these statements to indicate that the term "location" does not mean the specific school location, but the general environment of the overall program."

Third, no Plaintiff-Students' IEP provides for the remote provision of special education or related services. Rather, the Plaintiff-Students' IEPs require these services to be provided as a direct service to the Plaintiff-Students. In most instances, Defendants also unilaterally, substantially, and materially altered the frequency and duration of Plaintiff-Students' related services, if they provided them at all.

GOVERNORS' EXECUTIVE ORDERS IN RELATION TO PENDENCY

There is no "pandemic exception" to the IDEA[15] and if a student's educational program becomes unavailable, then the school district must find a comparable alternative placement. *See Knight v. District of Columbia*, 278 U.S. App. D.C. 237, 877 F.2d 1025, 1028 (D.C. Cir. 1989) ("This court has held that if a student's 'then current educational [*301] placement' becomes unavailable, [the school board] must provide him with a 'similar' placement pending administrative and judicial approval of its eventual plans."). When a student's educational program becomes unavailable, the stay-put provision requires that a similar program be found for the student. *See*

[15] https://www.disabilityscoop.com/2020/05/29/school-groups-want-flexibility-on-special-ed-spending-due-to-COVID-19/28387/

McKenzie v. Smith, 771 F.2d 1527-33 (D.C. Cir. 1985); *F.S. v. District of Columbia*, 2007 U.S. Dist. LEXIS 27520, 2007 WL 1114136 (D.D.C. 2007).

As a result of the violations committed by the Defendants, during the adjudication of the due process complaints, Plaintiffs seek either an immediate reopening of the schools to implement a substantially similar educational program as outlined in Plaintiff-Students' IEPs or alternatively have a "Pendency Voucher" issued to Plaintiff-Parents to provide an opportunity to self-cure the violations of the Defendants. This outcome is consistent with the legal advice school district law firm, Sweet, Stevens, Katz & Williams LLP, advised to their clients on their website:

> "A hearing officer, moreover, could not order an LEA to maintain a pre-closure brick-and-mortar program in violation of the governor's school closure and social distancing orders. The hearing officer could, presumably, order a different array of virtual services than those the LEA has proposed, although he or she would not likely issue any such order much before the current school year closes."[16]

While Plaintiffs disagree in the above legal analysis that a governor's school closure order supersedes the federal laws (IDEA, Section 504, ADA) protecting the rights of Plaintiff-Students, this is no longer a legal issue since state governors have rescinded those orders relating to special education students as of July 2020. (*See* Appendix D of Complaint ECF Dkt. Entry #1).

It is understandable that governments across the country are grappling with how to deal with the emergency caused by COVID-19. However, as Justice William Douglas wrote when President Truman seized the steel mills in the midst of a labor strike during the Korean War: "There can be no doubt that the emergency which caused the President to seize these steel plants was one that bore heavily on the country. But the emergency did not create power; it merely marked an occasion when power should be exercised." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 629 (1952) (Douglas, J., concurring). "We therefore cannot decide this case by determining which branch of government can deal most expeditiously with the present crisis. The answer must depend on the allocation of powers under the Constitution." *Id.* at 630. If Congress intended to curtail Plaintiffs rights, they had the opportunity to do so. In fact, Congress specifically offered the opportunity for the Secretary of Education to report back on any modifications to Plaintiffs rights under IDEA, ADA or Section 504; but Secretary DeVos declined to do so.

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[16] http://www.sweetstevens.com/newsroom/coronavirus-and-schools-parent-rejection-of-continuity-of-education-noreps

While State Governors have the discretion to warrant its state governments to engage in extreme measures in order to protect public health, gubernatorial power is not limitless. *See Phillips v. City of New York*, 775 F.3d 538, 542-43 (2d Cir. 2015); *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358 (1905). This power stems from the fact that "in every well-ordered society charged with the duty of conserving the safety of its members, the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." *Id*. at 29. In *Jacobson*, the Supreme Court held that while government may take significant measures for public health, government does not have carte blanche in that there must be a real or substantial nexus between the problem and the proposed solution. The Second Circuit held in *Phillips* that mandatory vaccination as a condition to attend school does not violate the Free Exercise clause, nor does it violate any other Constitutional provisions, since there is no substantive due process right to public education. However, in the instant case there are significant violations of the federal due process rights of the Plaintiffs.

Still, as the Supreme Court recognized in *Jacobson*, *supra*, the courts retain a role to examine the use of governmental power even during a public health emergency, for "an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons." Id. at 28; *see also Lindsay F. Wiley and Stephen I. Vladeck, Coronavirus, Civil Liberties, and the Courts: The Case Against 'Suspending' Judicial Review*, 133 HARV. L. REV. F. (forthcoming 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3585629 [https://perma.cc/7ZGX-9VKM] .

"In other words, just as "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens," *Hamdi v. Rumsfeld*, 542 U.S. 507, 536, 124 S. Ct. 2633 (2004), the COVID-19 crisis does not mean that government officials have limitless discretion to intrude on the rights of the people. Nevertheless, courts owe great deference to the protective measures ordered by government officials in response to the COVID-19 crisis, not simply because the virus has [*32] lethal consequences but also because the virus acts in unknown ways that engender uncertainty about what scope of protective measures are warranted." *See, S. Bay United*

Pentecostal Church v. Newsom, S. Ct., 2020 U.S. LEXIS 3041, 2020 WL 2813056 (2020) (Roberts, C.J., concurring) (discussing the need for deferential judicial review of COVID-19 protection measures).

In a recent case, the Court granted the Plaintiffs a Preliminary Injunction when it held the Governor of Connecticut was unable to show the continued "substantial fit between the goal of protecting people from COVID-19 and a suspension of all fingerprinting collection requirements." *See, Conn. Citizens Def. League, Inc. v. Lamont*, 2020 U.S. Dist. LEXIS 99872, at *33-34.

> The U.S. Constitution permits the States to set out a procedural road to lawful handgun ownership, rather than simply allowing anyone to acquire and carry a gun. *See Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 98 (2d Cir. 2012). That road may be long. *See Silvester v. Harris*, 843 F.3d 816, 828 (9th Cir. 2016) (upholding waiting period). It may be narrow. *See Jimenez*, 895 F.3d 237 (upholding ban on firearm possession by persons dishonorably discharged from the military for felony-equivalent conduct). It may even have tolls. *See Kwong v. Bloomberg*, 723 F.3d 160, 167-69 (2d Cir. 2013) (upholding handgun licensing fee). But it may not be built only to be indefinitely closed down when there are evident alternatives to achieve the government's countervailing compelling interest.

The court continued: "But with the passage of time it is clear that a categorical ban on the collection of fingerprints no longer bears a substantial relation to protecting public health [*4] consistent with respecting plaintiffs' constitutional rights. Accordingly, I will enter a preliminary injunction to require the Governor and the Commissioner to take the necessary steps to allow for the resumption of fingerprint collection activities not later than one week from now on June 15, 2020."

In another recent case dealing with the emergency powers of executives during the coronavirus crisis, Judge Gary Sharpe opined, "As the Chief Justice recognized in *Newsom*, it is not the judiciary's role to second guess the likes of Governor Cuomo or Mayor de Blasio when it comes to decisions they make in such troubling times, that is, until those decisions result in the curtailment of fundamental rights without compelling justification." *See Soos v. Cuomo*, 2020 U.S. Dist. LEXIS 111808, 2020 WL 3488742 (June 26, 2020), citing *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613

INDEPENDENT EVALUATIONS

As a result of the violations committed by the Defendants, Plaintiff-Parents seek independent evaluations for the purpose of determining the extent to which the Plaintiff-Students exhibit regression and/or loss of competencies and abilities due to the loss of, or substantial change to, the Plaintiff-Students' educational program. As described by the Illinois State Board of Education, "Addressing the impact of remote learning. Under *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S. 137 S. Ct. 988 (2017)]* and Department of Education guidance, IEP teams ***should convene if a student is not making expected progress and changes to the IEP may be warranted.*** Upon return to in-person instruction, teams should convene if the student is not on track to meet IEP goals. Revisions related to goals, services, placement, or methodology may be considered to ensure the student is receiving FAPE." [17] (emphasis added).

RECONVENE TO DEVELOP UPDATED IEPS

As a result of the violations committed by the Defendants, Plaintiff-Parents seek to have their respective LEAs' Committee on Special Education promptly convene after the completion of the requested independent evaluations for the purpose of ascertaining the Plaintiff-Students' current needs and abilities to develop modified IEPs reflecting the loss or substantial and material alterations of Plaintiff-Students' special education and/or related services.

COMPENSATORY EDUCATIONAL AWARD

As a result of the gross violations committed by the Defendants, Plaintiff-Parents seek compensatory damages from their respective LEAs. Compensatory education is an award of educational services designed to remedy a deprivation in the child's education. *Doe v. E. Lyme Bd. Of Educ.*, 790 F.3d 440, 445 (2d Cir. 2015). An award of compensatory education serves to correct a violation of the IDEA that resulted in the child's regression. Regression refers to the failure to maintain an acquired skill in an identified goal area of concern as a result of an interruption of special education instruction or support services.

[17] https://www.jdsupra.com/legalnews/cheat-sheet-for-isbe-s-faq-for-special-47954/#:~:text=Under%20Endrew%20F.,the%20IEP%20may%20be%20warranted.&text=Revisions%20related%20to%20goals%2C%20services,the%20student%20is%20receiving%20FAPE.

Due to the deliberate indifference, intentional, and willful actions of the Defendants, Plaintiff-Parents were required to fill in and compensate for the failure of their school district (LEA) and either lost income, incurred out-of-pocket expenses, and/or experienced loss of employment. As a result of the deliberate indifference, intentional, and willful violations committed by the Defendants, Plaintiff-Parents shall seek both compensatory damages as well as punitive damages.

Defendants discriminated against Plaintiff-Students, who are qualified individuals under the ADA, by prohibiting the provision of in-person academic and related services the opportunity to participate or benefit from such services. "Remote learning" is not "equal" to the "aid, benefit or service" nor is it as effective as in-person services that were provided to other special education students.[18]

Pursuant to the IDEA, Plaintiff-Parents sent statutory Ten Day notices to their respective LEAs advising that the LEA improperly modified Plaintiff-Students' IEPs, denied their pendency rights under Section 1415(j) of the IDEA, and requesting relief for such violations.

Also pursuant to the IDEA, Plaintiff-Parents filed due process complaints with their LEAs alleging violations of the IDEA and Section 504 by unilaterally modifying the Plaintiff-Students' IEPs and failing to maintain their pendency programs and placements.

Plaintiff-Parents shall also seek other relief as equitable 20 U.S.C. § 1415(i)(2)(C)(iii), §1439(a)(1).

POINT I

PLAINTIFFS HAVE STANDING AND THE COURT HAS SUBJECT MATTER JURISDICTION AND PERSONAL JURISDICTION OVER THE INSTANT MATTER

The instant case arises under a federal statute, the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq. ("IDEA") and the regulations of the United States Department of Education, which were promulgated pursuant to authority granted by the statute (34 C.F.R. Part 300), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, et seq. ("Section 504"); and the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. ("ADA").

This Court has subject matter jurisdiction of this matter under 28 U.S.C. §1331, in that claims arise under federal law (IDEA, Section 504, and ADA), 28 U.S.C. §1343(a), in that the

[18] Title II of the American with Disabilities Act ("ADA"), 42 U.S.C. § 12182.

claims herein arise under laws providing for the protection of civil rights, and under 42 U.S.C. § 1983.

This Court has diversity subject-matter jurisdiction over this class action pursuant to the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 ("CAFA"), which, *inter alia*, amends 28 U.S.C. § 1332, at new subsection (d), conferring federal jurisdiction over class actions where, as here: (a) there are more that 100 or more Members in the proposed Class and subclass; (b) at least some Members of the proposed Class have a different citizenship from Defendants; and (c) the claims of the proposed Members of the Class exceed the sum or value of five million dollars ($5,000,000) in the aggregate. *See* 29 U.S.C. § 1332(d)(2).

This Court has personal jurisdiction over the Plaintiffs because they submit to the jurisdiction of this Court.

This Court has personal jurisdiction over all Defendants in this matter either by virtue of the presence of some of the Defendants in this district or long-arm jurisdiction over all others. Specifically, several Defendants have a presence in the district based on their residency or principal place of business being within the state. *See, e.g., A.I. Intl Corporate Holdings, Inc. v. SurgiCare, Inc*., 2003 U.S. Dist. LEXIS 20561, at *8 (S.D.N.Y. Nov. 17, 2003). Additionally, this Court has long-arm jurisdiction over other Defendants, particularly out-of-state school districts ("Defendant-School Districts"), and out-of-state education departments ("Defendant-State Education Departments") based on several grounds. *See* N.Y. CPLR §302(a).

The Defendants all receive federal funding pursuant to the Individuals with Disabilities Education Act ("IDEA"). This federal funding includes Medicare and Medicaid reimbursement, which is administered through local agencies such as The Center of Medicare and Medicaid Services ("CMS") here in New York.[19] The federal funds each Defendant receives is a conferred benefit which is concomitant with an obligation to defend suits in a federal district court forum.

Furthermore, upon information and belief, the Defendant-School Districts directly transact business in New York through their pension fund and bond investments with New York-based financial institutions. *See* N.Y. CPLR §302(a)(1).

Also, upon information and belief, having received federal funds by electronic means and having failed to provide special education students in various school districts across the country

[19] https://www.cms.gov/Medicare-Medicaid-Coordination/Medicare-and-Medicaid-Coordination/Medicare-Medicaid-Coordination-Office/FinancialAlignmentInitiative/New-York

with the services required by their Individualized Education Programs ("IEPs"), the Defendant-School Districts are subject to the personal jurisdiction of this Court based on their violations of the civil section of the Racketeer Influenced and Corrupt Organization Act ("RICO"). *See* 18 § U.S.C. 1964(a). Specifically, through their actions which caused, inter alia, False Certification Fraud, Implied Certification Fraud and Worthless Service Fraud, Defendant-School Districts violated 18 U.S.C. § 1341 (mail fraud) and § 1343 (wire fraud). Defendant-State Education Departments had a fiduciary and oversight responsibility of Defendant-School Districts and were complacent in these activities. Defendant-State Education Department were either fully aware of the activities of the Defendant-School Districts within their respective states or they should have been aware. "However, it is generally accepted that "ends of justice" jurisdiction is authorized where the RICO claim could not otherwise be tried in a single action because no district court could exercise personal jurisdiction over all of the defendants." *See Elsevier Inc. v. W.H.P.R., Inc.*, 692 F. Supp. 2d 297.

The Defendants engaged in these "prohibited activities" consisting of predicate acts which constitute a "pattern of racketeering activities" 18 U.S.C. §§ 1961-1968. The Defendant-School Districts are also subject to 31 U.S.C. § 3729(a) for those who receive federal funds fraudulently to civil liability.[20] The United States Justice Department rely on this provision to curb the abuse of federal funds in programs ranging from Medicaid to disaster assistance.[21]

FALSE CERTIFICATION FRAUD: The Defendant-School Districts submitted a "false claim" when its representatives submitted fraudulent representations that A) the IEPs they created were knowingly not in compliance with IDEA and they could not implement these IEPs, thereby denying the students a FAPE, and B) when their service providers knowingly misrepresented they

[20] *See* 31 U.S.C. § 3729(a) (2012). Originally enacted during the Civil War, the Act served as the first widespread check on military contractors who defrauded the Union army. See Christopher L. Martin, Jr., Comment, *Reining in Lincoln's Law: A Call to Limit the Implied Certification Theory of Liability Under the False Claims Act*, 101 Calif. L. Rev. 227, 236 (2013). As the federal bureaucracy grew in the twentieth century, the scope and impact of the FCA grew as well. *See id.* at 229.

[21] *See* Press Release, U.S. Dep't of Justice, Justice Department Recovers Over $4.7 Billion from False Claims Act Cases in Fiscal Year 2016 (Dec. 14, 2016), https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016 [https://perma.cc/PEJ3-NW4B] ("The False Claims Act is the government's primary civil remedy to redress false claims for government funds and property under government programs and contracts relating to such varied areas as health care, defense and national security, food safety and inspection, federally insured loans and mortgages, highway funds, small business contracts, agricultural subsidies, disaster assistance, and import tariffs.").

were providing related services in accordance with IDEA and Medicaid regulations. These claims were legally false, since the provider knew it was in violation of federal regulations at the time of submission.[22] The federal and state government only disbursed the money because the Defendants certified that they would comply with the relevant federal regulations. In other words, the Defendants lied when it took federal funds while simultaneously—and knowingly—breaking federal regulations. Specifically, in *Hopper*, the Court stated, "It requires a false claim. Thus, some request for payment containing falsities made with scienter (i.e., with knowledge of the falsity and with intent to deceive) must exist."

IMPLIED CERTIFICATION FRAUD: In some instances, the Defendant-School Districts representative may not have actually signed a form certifying compliance would still constitute fraud.[23] By the provider submitting the claim, it is implied the provider affirmed that it was in compliance with the regulations, since violating those regulations would have made it ineligible to receive the funding. Put another way, the fact the provider submitted any claim at all when it knew or should have known it was ineligible to receive funds because of a violation is

[22] Keith D. Barber et al., *Prolific Plaintiffs or Rabid Relators: Recent Developments in False Claims Act Litigation*, 1 Ind. Health L. Rev. 131, 137 (2004). Occasionally, courts will apply a limited version of this theory, "finding it applicable only 'when certification is a prerequisite to obtaining a government benefit.' " Id. (quoting United States ex rel. Hopper v. Anton, 91 F.3d 1261, 1266 (9th Cir. 1996)). For example, in *United States ex rel. Hopper v. Anton*, the Ninth Circuit concluded that under the FCA "the false certification of compliance . . . creates liability when certification is a prerequisite to obtaining a government benefit." 91 F.3d 1261, 1266 (9th Cir. 1996); see also United States ex rel. Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 902 (5th Cir. 1997) ("[W]here the government has conditioned payment of a claim upon a claimant's certification of compliance with, for example, a statute or regulation, a claimant submits a false or fraudulent claim when he or she falsely certifies compliance with that statute or regulation.")

[23] See Barber et al., *supra* note 57, at 137; see, e.g., Universal Health Servs., Inc. v. United States, 136 S. Ct. 1989, 1995 (2016) ("We first hold that, at least in certain circumstances, the implied false certification theory can be a basis for liability."); United States ex rel. Augustine v. Century Health Servs., Inc., 289 F.3d 409, 416 (6th Cir. 2002) (stating that FCA claims brought under an implied certification theory can proceed as long as "the contractor knew, or recklessly disregarded a risk, that its implied certification of compliance was false" (quoting Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 519, 533 (10th Cir. 2000))); Mikes v. Straus, 274 F.3d 687, 700 (2d Cir. 2001) ("[W]e think a medical provider should be found to have implicitly certified compliance with a particular rule as a condition of reimbursement in limited circumstances."); Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 519, 531 (10th Cir. 2000) ("[T]he language and structure of the FCA itself supports the conclusion that, under 31 U.S.C. § 3729(a)(1), a false implied certification may constitute a 'false or fraudulent claim.' "); AbTech Constr., Inc. v. United States, 31 Fed. Cl. 429, 434 (1994) (finding the defendant liable under an implied certification theory).

what makes the claim legally "false." In this context, the relevant regulations include keeping accurate attendance and providing special education services to all students.[24]

WORTHLESS SERVICES FRAUD: Under the Worthless Services Fraud understanding of false claiming, the Defendants are liable since the limited services they may have provided was so subpar as to be completely worthless.[25] By claiming reimbursement for providing valueless care, the provider effectively has forced the government to pay for nothing—making it so the provider submits a legally false claim when it asks the government to reimburse it for services that have no value.[26] These deceptive practices are a prima facie case of fraudulent behavior. If a provider's services are so bad that they in effect have no value, the provider might as well be selling snake oil. The Defendants knew the services they were claiming to provide were sub-par, if not worthless.[27]

Further, and to the extent, if any, that this case involves questions of special education rights under a particular state constitution, law or regulation, this Court has supplemental

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[24] *See*, e.g., Clare McCann, IDEA Funding, EdCentral: Edcyclopedia,http://www.edcentral.org/edcyclopedia/individuals-with-disabilities-education-act-funding-distribution/ [https://perma.cc/YJ2U-AL4U] (discussing the requirement to provide services to students with special needs); see also Office of Elementary & Secondary Educ., U.S. Dep't of Educ., Non-Regulatory Guidance: Local Educational Agency Identification and Selection of School Attendance Areas and School and Allocation of Title I Funds to Those Areas and Schools (2003), https://www2.ed.gov/programs/titleiparta/wdag.doc [https://perma.cc/N4KV-N3W6] (discussing the requirements for schools to receive Title I funds).

[25] Isaac D. Buck, *Caring Too Much: Misapplying the False Claims Act to Target Overtreatment*, 74 Ohio St. L.J. 463, 487–88 (2013); see, e.g., United States ex rel. Lee v. SmithKline Beecham, Inc., 245 F.3d 1048, 1053 (9th Cir. 2001) ("In an appropriate case, knowingly billing for worthless services or recklessly doing so with deliberate ignorance may be actionable under § 3729, regardless of any false certification conduct."); Mikes v. Straus, 274 F.3d 687, 703 (2d Cir. 2001) ("We agree that a worthless services claim is a distinct claim under the Act. It is effectively derivative of an allegation that a claim is factually false because it seeks reimbursement for a service not provided.").

[26] Buck, *supra* note 73, at 487–88. This theory emerged after the U.S. Attorney's Office for the Eastern District of Pennsylvania successfully prosecuted a long-term care facility after one of its patients was sent to the emergency room and found to be suffering from "26 ulcers, a gangrenous leg and a series of other serious complications." Id. (quoting Devin S. Schindler, *Pay for Performance, Quality of Care and the Revitalization of the False Claims Act*, 19 Health Matrix 387, 396–97 (2009)).

[27] *Cf.* Ctr. for Research on Educ. Outcomes, Stanford Univ., Online Charter School Study 23 (2015), https://credo.stanford.edu/pdfs/Online%20Charter%20Study%20Final.pdf [https://perma.cc/74M4-N5SA] (finding that students in online charter schools lagged behind their peers in traditional schools in terms of academic achievement). In one Stanford University study, researchers found that students in online charter schools made academic gains in math that translated to the gains that the researchers would have expected to see if they had spent 180 fewer days—or an entire academic year—learning than their peers in a brick-and-mortar classroom. Id. Likewise, online charter school students' reading gains put them 72 school days behind their peers in traditional schools. Id.

jurisdiction pursuant to 28 U.S.C. § 1367. For example, New York State's Constitution Article XI, Section 1, states, "A system of free common schools, wherein all the children of this state may be educated."[28] For a complete list of each state's laws or regulations regarding the right to education, see Appendix F of Complaint ECF Dkt. Entry # 1.

Further, "the irreducible constitutional minimum of standing contains three elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1547 (2016).

INJURY IN FACT

"To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical."' *Spokeo,* 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). Further, "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact," where the violation "entail[s] a degree of risk sufficient" to indicate a resulting concrete harm. *Spokeo,* 136 S. Ct. at 1550; *see also Heldman v. Sobol,* 962 F.2d 148, 154 (2d Cir. 1992) ("Congress may create a statutory right the alleged violation of which constitutes injury in fact.").

In this regard, it is well-established that "[t]he denial of ... a procedural right created by the IDEA ... constitutes an injury sufficient to satisfy the standing requirement." *S.W. v. New York City Dep't of Educ.*, 646 F. Supp. 2d 346, 358 (S.D.N.Y. 2009); *see also Cruz v. New York City Dep't of Educ*., 18-CV-12140 (PGG), Docket Entry No. 14 (S.D.N.Y., January 9, 2019). The "stay put" provision of IDEA creates a procedural right. *See A.S. ex rel. P.B.S. v. Bd. of Educ. for Town of W. Hartford*, 47 F. App'x 615, 616 n.2 (2d Cir. 2002) Thus, the violation of the "stay put" provision of IDEA creates an injury in fact that confers standing.

In addition, Defendant-School Districts have failed to provide the services Plaintiff-Students are entitled to as outlined in their IEPs. The Defendants' violations of procedural safeguards are injuries to Plaintiff-Parents and Plaintiff-Students.

[28] https://www.dos.ny.gov/info/constitution.htm

CAUSATION

The traceability requirement for Article III standing requires the plaintiff "'demonstrate a causal nexus between the defendant's conduct and the injury.'" *Rothstein v. UBS AG*, 708 F.3d 82, 91 (2d Cir. 2013) (quoting *Heldman*, 962 F.2d at 156). A causal nexus is "most easily shown" by a direct relationship between the plaintiff and defendant, but indirectness is not fatal; indeed, the standard is less than the concept of proximate causation. *Id.* at 91. "The fact that there is an intervening cause of the plaintiff's injury may foreclose a finding of proximate cause but is not necessarily a basis for finding that the injury is not 'fairly traceable' to the acts of the defendant." *Id.* at 92.

Defendant SCHOOL DISTRICTS IN THE UNITED STATES (*See* Appendix B of Complaint ECF Dkt. Entry #1) are the official bodies charged with the responsibility of developing and enforcing policies with respect to the administration and operation of the public schools in their respective geographic areas, including programs and services for students with disabilities, as defined as the "local educational agency" ("LEA") in 20 U.S.C. §1401(19) and 34 C.F.R. § 300.28.

Upon information and belief, all States and Territories of the United States receive 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). Defendant STATE DEPARTMENTS OF EDUCATION IN THE UNITED STATES (*See* Appendix C of Complaint ECF Dkt. Entry #1) are the State Educational Agencies ("SEA") which exercise general supervision over all programs in the State that provide educational services to disabled students, and must ensure that all such meet State education standards. *Michael C. ex rel. Stephen C. v. Radnor Tp. School Dist.*, 202 F.3d 642, 648 (3d Cir. 2000).

RIPENESS AND EXHAUSTION OF ADMINISTRATIVE REMEDIES

"The doctrine of ripeness embodied in Article III of the United States Constitution ensures that a dispute has 'matured to a point that warrants decision.'" *Mehta v. Surles*, 720 F. Supp. 324, 334 (S.D.N.Y. 1989) (internal quotation removed), aff'd in part, vacated in part, 905 F.2d 595 (2d Cir. 1990). "[I]ts basic rationale is to prevent the courts, through premature adjudication, from

entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 580 (1985) (citing *Abbot Laboratories v. Gardner*, 387 U.S. 136, 148 (1967)).

The IDEA contains an exhaustion requirement. *See Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 483 (2d Cir. 2002) (quoting 20 U.S.C. §1415(1) ("Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution ... or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.")).

New York State and five other states[29] have a two-tier system of administrative review for claims brought under IDEA: the first level involves a hearing before and decision by an impartial hearing officer ("IHO"); the second level is an appeal to a state review officer ("SRO"), based on the record developed before the hearing officer. Thereafter, it is generally true that an "appeal may be taken to either the state or federal courts only after the SRO has rendered a decision." *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 197 (2d Cir. 2002).

However, the IDEA also carves out three exceptions to this exhaustion requirement when: "(l) it would be futile to resort to the IDEA's due process procedures; (2) an agency has adopted a policy or pursued a 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." *Id.* at 199.

In *Murphy, supra,* the Second Circuit unequivocally held that "an action alleging violation of the stay-put provision falls within one, if not more, of the enumerated exceptions to this jurisdictional prerequisite." *Id.* The underlying rationale is that "the administrative process is inadequate to remedy the violations of [the "stay-put" provision] because, given the time sensitive nature of the IDEA's stay-put provision, an immediate appeal is necessary to give realistic protection to the claimed right." *Id.* (citations omitted); *see also, Cruz, supra,* Docket Entry No. 14; *Doe, supra,* 90 F.3d at 445; *M.G., supra,* 982 F. Supp.2d at 247. Accordingly, exhaustion of administrative remedies herein is not required.

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[29] https://www.wrightslaw.com/blog/due-process-decisions-difference-between-sro-and-iho/#:~:text=States%2C%20including%20Kansas%2C%20New%20York,depending%20on%20that%20state's%20regulations.

POINT II

PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF

"A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the defendant by a clear showing, carries the burden of persuasion." *Sussman v. Crawford*, 488 F.3d 136, 139 (2d Cir. 2007) (emphasis in original) (internal quotation removed). Pursuant to Fed. R. Civ. P. 65, a court may issue a preliminary injunction when the moving party demonstrates that (1) she is likely to succeed on the merits, (2) she is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of the equities tips in her favor, and (4) an injunction is in the public interest. *See Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008).

As this Court found in *Cronin v. Bd. of Educ. of East Ramapo Cent. Sch. Dist.,* 689 F. Supp. 197, 202 (S.D.N.Y. 1988) (citing *Cochran v. District of Columbia*, 660 F. Supp. 314, 319 (D.D.C. 1987)), the traditional preliminary injunction test does not apply to cases involving pendency issues. This "stay-put" functions as an automatic preliminary injunction, without regard to factors such as irreparable harm or likelihood of success on the merits. *Drinker ex rel. Drinker v. Colonial Sch. Dist.*, 79 F.3d 859 (3d Cir. 1996); *Casey K. ex rel. Norman K. v. Saint Anne Cmty High Sch. Dist.*, 400 F.3d 508, 511 (7th Cir. 2005) (comparing a stay put injunction to an automatic stay in a bankruptcy case); *Wagner v. Bd. of Educ. of Montgomery County*, 335 F.3d 297, 301 (4th Cir. 2003) (noting that an "injunction is automatic").

As noted, in pendency-related cases, irreparable harm is presumed. *See Honig v. Doe*, 484 U.S. 305, 328 n.10 (1988) ("While the Government complains that the District Court indulged an improper presumption of irreparable harm to respondent, we do not believe that school officials can escape the presumptive effect of the stay-put provision simply by violating it and forcing parents to petition for relief."); *see also Donohue v. Mangano*, 886 F. Supp. 2d 126, 150 (E.D.N.Y. 2012).

Although the IDEA has an "exhaustion" requirement, the Plaintiffs herein are not required to exhaust administrative remedies by alleging a violation of 20 U.S.C. §1415(j). An action alleging the violation of the stay-put provision falls within one or more of the exceptions to the exhaustion prerequisite. *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 199 (2d Cir. 2002); *Doe*, 790 F.3d at 445; *Digre v. Roseville Schs. Indep. Dist.*, 841 F.2d 245, 250 (8th Cir. 1988) (holding federal courts have authority to enter injunctions [**25] regarding placement

during pendency of state administrative proceedings); s*ee also N.D. v. Hawaii Dept. of Educ*, 600 F.3d 1104, 1111 (9th Cir. 2010) (concluded that "exhausting the administrative process would be inadequate because the stay-put provision (and therefore the preliminary injunction) is designed precisely to prevent harm while the proceeding is ongoing.").[30]

Moreover, the "stay put" provision operates in a due process challenge "regardless of whether [the underlying] case is meritorious or not." *Avaras, supra*, at *5; *Doe, supra,* at 453; *E.Z.-L. v. New York City Dep't of Educ.*, 763 F. Supp.2d 584, 598-99 (S.D.N.Y. 2011).

LIKLIHOOD OF SUCCESS

Alternatively, while Plaintiffs need not demonstrate likelihood of success to be entitled to the immediate injunctive relief sought herein, even assuming, *arguendo*, Plaintiffs are required to demonstrate the likelihood of success, the evidence and accompany case law supports a finding that Plaintiffs have an entitlement of pendency and the Defendants have violated these rights through IDEA, ADA and 504.

IRREPARABLE HARM

Alternatively, while Plaintiffs need not demonstrate irreparable harm to be entitled to the immediate injunctive relief sought herein, even assuming, *arguendo*, Plaintiffs are required to demonstrate the risk of irreparable harm, the evidence supports a finding that Plaintiff-Students have already sustained irreparable harm, are at risk of suffering more, and that such risk is real and imminent. Even if the Court finds such presumption does not apply here, Plaintiffs can still demonstrate that Plaintiff-Students have already sustained irreparable harm and is further at risk of additional irreparable harm. Given the fact that pendency was intended to be an automatic injunction, Defendants have already harmed Plaintiff-Students by delaying the educational programming as per the Plaintiff-Students' pendency. *See M.G. v. New York City Dep't of Educ.*, 982 F. Supp. 2d 240, 247 (S.D.N.Y. 2013) ("[p]endency has the effect of an automatic injunction, which is imposed without regard to such factors as irreparable harm, likelihood of success on the merits, and a balancing of the hardships.").

[30] See *Honig v. Doe*, 484 U.S. at 326-27 (noting that because "parents may bypass the administrative process where exhaustion would be futile or inadequate . . . we have no reason to believe that Congress meant to require schools alone to exhaust in all cases, no matter how exigent the circumstances").

Also, courts have found "added risk" to be a form of irreparable harm. *See, e.g., Sierra Club v. Marsh*, 872 F.2d 497, 500-01 (1st Cir. 1989) (citing *Comm. of Mass. v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983)). In *Sierra Club, supra*, the First Circuit explained that the added risk to the environment of governmental decision-makers making up their minds without prior public comment is potentially irreparable given the goal of NEPA being to minimize the risk of uninformed choice. *Id.* The court stressed that such "added risk," which is akin to the added risk of the regression and atrophy of the continued denial of Plaintiff-Students' educational services, is not merely "procedural harm." Id. at 500. In short, Plaintiffs continue to suffer from irreparable harm in the form of a violation of Plaintiffs' procedural right pursuant to 20 U.S.C. §1415(j).

BALANCE OF EQUITIES

Concerning the issue of equitable considerations that Defendants are likely to raise, it should be noted that, given the framework of the IDEA's stay-put provision, 20 U.S.C. § 1415(j), and the inherent immediacy of pendency, Defendant-School Districts cannot abrogate the automatic injunction that is at the heart of pendency simply by making allegations concerning equity – such as its argument that it is unfair for it to have to fund pendency for Plaintiff-Students when it may ultimately prevail. *See Marcus I. ex rel. Karen I. v. Dep't of Educ., supra*, 2012 WL 3686188, at **10-11 (*rejecting* district's argument that it will suffer irreparable harm if forced to comply with stay-put order because, if successful on appeal, it will be unable to recoup the pendency funds it has already paid). What is even more significant –Congress *intended it that way*. *See, e.g., John M. v. Bd. Of Educ.*, Civil Action No. 05-C-6720, 2006 U.S. Dist. LEXIS 73826, at *20 (N.D. Ill. September 26, 2006).

PUBLIC INTEREST

In *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195 (2d Cir. 2002), while seeking an administrative ruling on the appropriate placement for their child, the parents went directly to the district court on the issue of pendency. *Id.* at 198. The Second Circuit found that the district court had jurisdiction, despite the parents' failure to exhaust administrative remedies. *Id.* at 199-220. Then-Judge Sotomayor held that a plaintiff need not exhaust a "stay put" related claim because, "as a practical matter, access to immediate interim relief is essential for the vindication of this particular IDEA right.' *Id.* at 200; *see also Doe, supra*, 790 F. 3d at 455; *Avaras*

v. Clarkstown Cent. Sch. Dist., No. 15 CV 9679 (NSR), 2018 WL 4103494, at *3 (S.D.N.Y Aug. 28, 2018); *Bd. of Educ. of Uniondale Union Free Sch. Dist. v. J.P.*, No. CV181038JMAAYS, 2018 WL 3946507, at *4-5 (E.D.N.Y. June 21, 2018), report and recommendation adopted, No. 18CV1038JMAAYS, 2018 WL 3941945 (E.D.N.Y Aug 15, 2018). The 'administrative process is 'inadequate' to remedy violations of [the 'stay put' provision], given [its] 'time sensitive nature." *Murphy*, 297 F.3d at 199. 'Since the purpose of the stay-put provision is to keep the child in an existing placement until all proceedings -- administrative and judicial -- have run their course, there is no evident reason why administrative proceedings should have to be recommenced to that end,' *Doe*, 790 F.3d at 455."

POINT III

PLAINTIFF-STUDENTS ARE ENTITLED TO PENDENCY

PENDENCY PLACEMENT STANDARD

As stated above, 20 U.S.C. §1415(j) enables a student to remain in his or her "then current educational placement" during the pendency of the due process proceeding. This term is not defined by the IDEA. Nevertheless, the courts have determined the parameters and application of this term.

A student's "last agreed-upon IEP" is most commonly afforded status as the "then current educational placement" for pendency purposes. *Arlington Central School Dist. v. L.P.*, F. Supp.2d 692, 696-97 (S.D.N.Y. 2006). The Second Circuit has expanded the scope of this designation. In *Dervishi v. Stamford Bd. of Educ.*, 2016 WL 3548246 at *2 (2d Cir. 2016), the Court held that the "then current educational placement" may include: (1) the placement described in the student's most recently implemented or agreed to IEP; (2) the operative placement actually functioning at the time when the pendency provision of the IDEA was invoked; and (3) the placement at the time of the previously implemented IEP." *See also, Avaras*, S.D.N.Y., 18-CV-6964 (NSR), Docket Entry No. 30 (August 27, 2018); *Doe*, 790 F.3d at 452.

As noted above, a school district is obligated to maintain the student's then-current educational placement during the pendency of the proceedings. *See* 20 U.S.C. §1415(j). This obligation also extends to private schools. *See E. Z.-L. ex rel. R.L. v. New York City Dep't of Educ.,* 763 F. Supp. 2d 584, 599 (S.D.N.Y. 2011), *aff'd sub nom., R.E. v. New York City Dep't of Educ.,*

694 F.3d 167 (2d Cir. 2012) ("If the student's current educational placement is in private school, the responsibility for private school tuition stays put as well.").

The term "educational placement" encompasses at least three components." *See Letter to Rieser,* EHLR 211:403 (July 17, 1986).[31] The first involves the type of placement – in the instant case, a self-contained classroom; the second is the "educational program contained in the IEP including annual goals, short-term objectives and related services;" and, the "third and final component is the specific school or facility which the child attends." *Id. Letter to Rieser* continued that "these are all ingredients in the 'status quo' which the courts interpreting the statute have required be maintained during the pendency of proceedings."

"To allow a new LEA to place the child in a regular education program or provide an interim IEP *without parental consent would defeat the purpose of the statutory provision* – 'to guarantee a coherent educational experience for a disabled child until conclusion of review of a contested IEP [emphasis added].'" *Letter to Rieser, supra.*

Over the course of several decades, the Second Circuit has consistently defined "educational placement" as meaning the student's "educational program." *T.M., supra,* 752 F.3d at 171 ("Under our precedent, the term 'educational placement' refers only to the general type of educational program in which the child is placed.") (quoting *Concerned Parents v. NYC Dep't of Educ.,* 629 F.2d 751, 753 (2d Cir. 1980)) (emphasis added); *T.Y. v. N.Y.C. Dept. of Educ.,* 584 F.3d 412, 419 (2d. Cir. 2009) ("'Educational placement' refers to the general educational program - such as the classes, individualized attention and additional services a child will receive...").

A student's educational placement does <u>not</u> mean the "bricks and mortar" of the school location, but rather the elements of a student's educational program. *T.Y., supra,* at 419. Thus, it has been held that a change from one school building to another (i.e., a change in location), without more, does not necessarily constitute a change in educational placement (*Concerned Parents, supra,* 629 F.2d at 753-54).

In *Letter to Fisher,* 21 IDELR 992 [OSEP 1994], the United States Department of Education's Office of Special Education Programs ("OSEP") specifically addressed the question of what constitutes a "change in educational placement" and opined that consideration should be

[31] See *Honig v. Doe*, 484 U.S. 305, FN 8 (1988) (deferring and adopting OSEP's construction of the term "change in placement" for purposes of pendency, finding that OSEP is the agency "charged with monitoring and enforcing the statute").

given to whether a change in educational placement has occurred on a case-by-case basis, as it is a very fact specific inquiry (*Letter to Fisher*, 21 IDELR 992 [OSEP 1994]). OSEP concluded that whether a change in educational placement has occurred turns on "whether the proposed change would substantially or materially alter the child's educational program" *(Id*.). OSEP set forth the following factors to be considered in determining whether a change in educational placement has occurred: whether the educational program set out in the child's IEP has been revised; whether the child will be able to be educated with nondisabled children to the same extent; whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative placements (*Letter to Fisher*, 21 IDELR 992).

The preponderance of record evidence clearly supports that ALL of these changed in the Plaintiff-Students' educational program when the Defendants unilaterally forced the students home, without proper notice, and required "remote learning" without any in-person services.

The "then-current educational placement" more generally refers to the educational program, which is a point along the continuum of placement options and, in many instances, does not refer to a particular institution or building where the program is implemented (*see T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412, 419-20, *cert. denied,* 130 S. Ct. 3277 (2010); *L.M. v. Pinellas County Sch. Bd.*, 2010 WL 1439103 at *1-*2 (M.D. Fla. Aug. 11, 2010)).

Specifically in New York State, it is noted in SRO Decision 14-098, "In this regard I note that a change from a BOCES-operated class in a public school to a district-operated class in a public school constitutes a "change in program" per New York State regulations (see 8 NYCRR 200.1[g]),[9] and a BOCES is also a different placement on the "continuum of placement options" in the State (see, e.g., "Continuum of Special Education Services for School-Age Students with Disabilities," Office of Special Educ. Memo [Nov. 2013], at p. 3, available at http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf)."

A "change in program" is defined as a "change in any one of the components of the [IEP] of a student as described in [8 N.Y.C.R.R.] section 200.4(d)(2)." (8 N.Y.C.R.R. 200.1[g][9]. This includes a change in a student's placement (8 NYCRR 200.4[d][2][xii]). As noted in New York State Education Department ("SED") guidance, an assignment to a BOCES-operated classroom in a public school is considered a different "placement" than an assignment to a district-operated classroom (see "Guide to Quality Individualized Education Program (IEP) Development and

Implementation," Office of Special Educ. Mem. [Dec. 2010], at p. 57, available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf; "Questions and Answers on Individualized Education Program (IEP) Development, the State's Model IEP Form and Related Requirements," Office of Special Educ. Mem. [Apr. 2011], at p. 47, available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf).

Courts have held that if a student's then current educational placement becomes unavailable, then a district is required to provide a "similar" educational placement (*Knight v. District of Columbia*, 877 F.2d 1025, 1028 [D.C. Cir 1989]; *McKenzie v. Smith*, 771 F.2d 1527, 1533 & n.13 [D.C. Cir. 1985]; *see also Wagner v. Bd. Of Educ.*, 335 F.3d 297 at 301-02 (4th Cir. 2003) (holding that it is not appropriate to direct a district to provide an "alternative placement" if the task at hand is to identify a student's then current educational placement). Other courts have stated that a change in educational placement has been defined as a "fundamental change in, or elimination of, a basic element of the educational program" (*see Sherri A.D. v. Kirby*, 975 F.2d 193, 206 (5th Cir. 1992); *see also Erickson v. Albuquerque Public Schools*, 199 F.3d 1116, 1121 (10th Cir. 1999).

However, the pendency provision does not require a student to receive services at the same school site or location, or from the same service providers; rather, pendency "entitles the [student] to receive the same general type of educational program." *T.M.*, 752 F.3d at 171 (2d Cir. 1980); *see also Concerned Parents & Citizens for the Continuing Ed. at Malcolm X (PS 79) v. New York City Bd. of Ed.*, 629 F.2d 751, 753 (2d Cir. 1980) ("[T]he term 'educational placement' refers only to the general type of educational program in which the child is placed."); *White ex rel. White v. Ascension Par. Sch. Bd.*, 343 F.3d 373, 379 (5th Cir. 2003) ("'Educational placement,' as used in the IDEA, means educational program—not the particular institution where that program is implemented."). In sum, a child's "educational placement" should be understood as the "current special education and related services provided in accordance with a child's most recent [basis for pendency]," and not as a specific physical location or school. *Application of a Student with a Disability*, S.R.O. Appeal No. 12-098 (2012).

Whether a student's educational placement has been maintained under the meaning of the pendency provision depends on whether the educational program is "substantially and materially the same" as the student's educational program for the prior school year. *Letter to Fisher*, 21 IDELR 992 [OSEP 1994]; *see also Concerned Parents, supra*, 629 F.2d at 753 (finding that there

is no change in "placement" where a student is transferred from one educational program to another educational program that is substantially similar); *Application of the Bd. of Educ.*, S.R.O. Appeal No. 02-031 (2002) (finding that, in order to change her son's private school for pendency purposes, parent only had to prove that the "educational programs of the two schools are substantially similar"); *Application of a Student with a Disability*, S.R.O. Appeal No. 16-020 (2012) (citations omitted) (because the record did not establish that the student's current placement was substantially similar to the educational program at the preschool he previously had been attending, it could not be his placement for pendency purposes).

The term "placement" in this context should not be interpreted literally; instead, a child's "then-current placement," as it relates to pendency relief under the "stay put" provision of the IDEA, rather than being defined as a particular physical location or school, should be understood as the "current special education and related services provided in accordance with a child's most recent [[basis for pendency]]." *Application of a Student with a Disability*, S.R.O. Appeal No. 12098, *supra*, p. 9 (2012) (citing *Letter to Baugh*, 211 IDELR 481 (OSEP 1987)). The legal standard for when such pendency relief should be granted has been determined to be when "the educational program at issue is 'substantially and materially the same' as the student's educational program for the prior school year." *Id.*

A *temporary* lack of a single related service does not constitute a change of a student's "educational placement". *See Lunceford v. District of Columbia Bd. of Education*, 745 F.2d 1577, 1984 U.S. App. LEXIS 17688, 241 U.S. App. D.C. 1 (D.D.C. Aug. 16, 1984) ("the *Concerned Parents* reasoning to the text of the note suggests that appellee must identify, **at a minimum**, a fundamental change in, or **elimination** of a basic element of the education program in order for the change to qualify as a change in educational placement.") (emphasis added); *see also Oliver C. v. State Dep't of Educ.*, 2019 U.S. App. LEXIS 6627, Fed. Appx., 2019 WL 1048906 (March 5, 2019) ("a change in placement occurs "when there is a significant change in the student's program."). The situation confronted by the Plaintiff-Students herein is not a temporary lack of a single related service, but rather their entire educational program including related services were materially and substantially altered, if not eliminated.

This is not a case of hampering the school districts' ability to implement changes to a student's educational program. *See Concerned Parents, supra*, 629 F.2d at 756 ("While not explicitly stated, it appears that the district court considered the removal of any of the above

programs … to constitute a change in "educational placement" requiring prior notice and a hearing under §1415(b). Such an interpretation of the Act would virtually cripple the Board's ability to implement even minor discretionary changes within the educational programs provided for its students"); *see also Cavanagh v. Grasmick*, 75 F. Supp. 2d 446, 1999 U.S. Dist. LEXIS 18912 ("an interpretation of change in 'educational placement' that would include every curriculum change 'would virtually cripple [PGCPS'] ability to implement even minor discretionary changes within the educational programs provided for its students.'"); *Lunceford*, 745 F.2d at 1582 n.5 (citing *Concerned Parents*, 629 F.2d at 754)); *AW v. Fairfax County Sch. Bd.*, 372 F.3d 674, 680 (4th Cir. 2004) ("The Court has also indicated that the IDEA was not intended to 'leave educators hamstrung.'… To that end, the Court has held that the 'stay-put' provision is not so limiting as to prevent school officials from resorting to temporary changes short of exclusion, including 'the use of study carrels, timeouts, detention, or the restriction of privileges.… According to the Court, such options constitute only minor departures from prior assignments and 'do not carry the potential for total exclusion that Congress found so objectionable.' Thus, any definition of 'educational placement' must reflect the fact that the 'stay-put' provision is not implicated by *temporary* changes that track previous assignments as closely as possible and do not affect a student's FAPE…") (emphasis added).

Indeed, "the Supreme Court has clarified that temporary changes in location do not violate the "stay-put" provision provided they do not result in a diminution of the educational services to which the student is entitled." *A.W. v. Fairfax County Sch. Bd.*, 372 F.3d at 681.

The maximum amount of time a school district can displace a student and change the educational program without triggering a violation of 20 U.S.C. § 1415(j) is 10 school days based on *Honig v. Doe*, 484 U.S. 305, 325, 325-26 n.8, 98 L. Ed. 2d 686, 108 S. Ct. 592 (1987). (*See Footnote #11)*

Even counsel which represents independent and public schools throughout Connecticut and the northeast, Attorney Michael P. McKeon of the law firm Pullman & Comley posted the following legal advice related to school districts' obligations during the coronavirus crisis:

> With respect to these federal obligations, it is informative to consider the Office of Special Education and Rehabilitative Services' November 20, 2012 Letter to Geary. OSERS' letter was issued in response to inquiries from the New York State Education Department requesting "flexibility in light of the damage caused to some New York School districts by Hurricane Sandy." The flexibility sought by New York included "timelines for . . . annual review meetings."

> OSERS replied to that query by noting: "In general, the [Department] does not have the authority to waive the requirements in Part B of the IDEA. Therefore, the Department cannot extend timelines for the above requirements" (emphasis added). Thus, despite the devastating consequences of Hurricane Sandy on New York City and surrounding communities, the United States Department of Education declined to waive school districts' obligations to adhere to IDEA timelines.
>
> In fact, in the course of noting one limited exception pertaining to Individualized Education Programs ["IEPs"], OSERS implicitly declined to waive timelines for convening PPT meetings. Specifically, OSERS cited 34 C.F.R. §300.323(c), which provides that a PPT meeting to develop an IEP must be conducted within thirty days of the determination that a student qualifies for special education and related services, adding that such services are to be made available to the student "as soon as possible following development of the IEP." OSERS construed Section 300.323(c)'s use of "as soon as possible" as allowing districts some leeway in the initial provision of services in "some isolated circumstances" resulting from catastrophic events, although it promptly advised that "once a school is open, the LEA must make every effort to make available special education and related services to the child in accordance with the child's IEP.
>
> It is probably safe to assume that the current COVID-19 public health crisis would qualify as one of the oddly labeled isolated circumstances." Nonetheless, while recognizing the consequent delay in the initiation of services, OSERS does not note any similar flexibility with respect to the actual holding of the PPT meeting. On a related note, it would be ill-advised to take OSERS' reference to "once a school is open" literally; rather, it should more reasonably be read as meaning "once instruction resumes." In short, nothing in this language would permit a school district to unilaterally cancel or otherwise indefinitely postpone PPT meetings."[32]

PENDENCY VOUCHER

If the Defendant-School Districts do not agree to immediately remedy their violations of Plaintiffs' rights by implementing the educational program as per the Plaintiff-Students' pendency rights, Plaintiffs seek the issuance of a Pendency Voucher as an alternative. The Pendency Voucher will provide Plaintiff-Parents a prospective set amount of money to pay directly to providers or other private, independent or religious[33] programs to fulfill the educational program

[32] https://schoollaw.pullcomblog.com/archives/how-about-never-COVID-19-school-closures-and-planning-and-placement-team-meetings/

[33] A recent Supreme Court decision permits the use of public funds to religious organizations, *see Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246*

or as much of the educational program they are able to do independent of the Defendant-School District. The amount of money can be easily calculated based on the breakdown of services within the Plaintiff-Students' pendency program and the amount Medicaid pays for those services. Medicaid is the primary funding source to Defendant-School Districts for payment of the health-related services provided under IDEA.[34]

Former U.S. Solicitor General Paul Clement argued in an amicus brief[35] filed in support of the rights of parents to determine the education of their child in *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, that not only is having the parents direct the education of their child constitutionally sound, it is also better for the student. As articulated in his brief, parents have a constitutionally protected liberty interest to the best educational opportunity for their children. Empowering parents to exercise their constitutional right results in better educational outcomes as evidenced by numerous studies on brain science and individual learning.

> "As the Court explained, "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Id. at 535. Thus, "[i]n a long line of cases," this Court has held that "the'liberty' specially protected by the Due Process Clause includes the right[] … to direct the education and upbringing of one's children." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). "Research has shown that educational choice programs "improve academic outcomes … positively impact graduation rates, college enrollment, civic engagement, crime rates, and improve parental and student satisfaction." Tim Keller, As School Choice Programs Grow, We Must Debunk Myths About How Choice Works, HomeRoom (Jan. 23, 2019) available at 12 https://bit.ly/2kmWZ12. It has likewise confirmed that private schools "often narrow [the] academic achievement gaps, create social capital, and foster democratic behavior." Ashley Berner, Education for the Common Good, EducationNext (Nov. 30, 2017) available at https://bit.ly/2lOYDc5. And it has demonstrated that religiously affiliated schools in particular have a positive impact on student achievement, attendance, and civic engagement. Alliance for Catholic Education, Research on the Case for Catholic Schools, University of Notre Dame, available at https://bit.ly/2m0eDYE.

It is the Defendant-School Districts' obligation to provide a pendency placement that can implement a student's then-current educational placement and their responsibility to secure a seat at a school that can do so. By not reopening or securing a seat at any school that could potentially

[34] CMS Medicaid School-based Administrative Claiming Guide (May 2003): https://www.cms.gov/Research-Statistics-Data-and-Systems/Computer-Data-and-Systems/MedicaidBudgetExpendSystem/Downloads/Schoolhealthsvcs.pdf

[35] https://edreform.com/wp-content/uploads/2019/10/18-1195-Espinoza-CER-amicus-brief.pdf

implement Plaintiff-Students' then-current educational program, the Defendant-School Districts are providing no choice but to allow the Plaintiff-Parents the opportunity to select a school or put together a program that could implement Plaintiff-Students' then-current educational program or as much of it as possible. *See Gabel v. Bd. of Educ., supra, 368* F. Supp. 2d at 325. If Defendant-School District has an issue with such Pendency Voucher, it should promptly reopen its school or secure a seat at any school it thought could implement Plaintiff-Students' then-current educational placement, and then put forth a prima facie showing that such school was actually able to implement the recommended educational program.

Because of the legal mandate, established by 20 U.S.C. §1415(j), that all special education students are entitled to pendency, the Defendant-School Districts had the responsibility of ensuring Plaintiff-Students' pendency entitlement was more than just "on paper." In short, it is the Defendant-School Districts' burden to: 1) secure Plaintiff-Students a pendency placement; and 2) put forth a prima facie showing that such placement can implement the then-current educational placement. *See M.O. v. New York City Dep't of Educ.,* 793 F.3d 236, 244-45 (2d Cir. 2015) (citing *T.Y. v .New York City Dep't of Educ.,* 584 F.3d 412, 420 (2d Cir. 2009) ("School districts do not have 'carte blanche' to assign a child to a school 'that cannot satisfy the IEP's requirements.'")).

Even assuming, *arguendo,* Defendant-School Districts had no obligation to secure Plaintiff-Students a seat at any institution for pendency purposes, as a practical matter, without a Pendency Voucher, the Plaintiff-Students will not have *any* pendency placement at all. That would be an "impossible result" under the law and therefore must be avoided. *Gabel v. Bd. of Educ., supra*, 368 F. Supp. 2d at 325 (finding the idea of there being no pendency placement for a student to be "an impossible result.").

Pendency is not an all-or-nothing right. Therefore, if the Plaintiff-Parents are unable to match service for service with the educational program, they should be permitted to self-cure as much as they can. Where it is found that only portions of a student's current program or services have a basis for pendency, then pendency may be granted for those portions alone. *See Doe,* 790 F.3d at 453 (2d Cir. 2015) (holding that the "stay put provision" can be applied to portions of a parent's requested pendency); *Application of a Student with a Disability,* S.R.O. Appeal No. 08-050 at 12 (2008) (ordering district to fund part of student's then-current placement under pendency because student's withdrawal from a private school "only frustrates a portion of his then-existing placement").

Further, implicit in maintaining the status quo is the requirement that the school district continue to finance the educational placement that was in place at the time the parent requested a due process hearing. Otherwise, to cut off funding would amount to a prohibited unilateral change in placement. *See Mackey v. Bd. of Educ. of the Arlington Central School Dist.*, 386 F.3d 158, 163 (2d Cir. 2004) (citing *Zvi v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982)).

Federal law has consistently determined that transportation is a related service. See 20 U.S.C. §1401[26](A) ("The term 'related services' means ***transportation***, and such developmental, corrective, and other supportive services ... as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.") (emphasis added); *see also* 34 CFR §300.34[a] ("Related services means ***transportation*** and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education...") (emphasis added); 34 CFR §300.34[c][16](i) ("The State must ensure the following: Nonacademic and extracurricular services and activities may include counseling services, athletics, ***transportation***, health services, recreational activities, ...") (emphasis added).

EQUITABLE POWERS

District Courts have the equitable power to review and enjoin administrative "stay-put" orders immediately, notwithstanding the fact that they are interim orders. *See M.K. v. Roselle Park Bd. of Educ.*, 2006 WL 3193915 *9 citing *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 199 (2d Cir. 2002). As the Supreme Court stated in *Honig v. Doe*, 484 U.S. 305, 108 S. Ct. 592 (1988), the court has the equitable power to order a change in placement upon a sufficient showing. *id.* at 327-28 (interpreting the "stay put" provision of the EHA – former name of the IDEA). See 20 U.S.C. § 1415(i)(2)(C)(iii), §1439(a)(1).

POINT IV: PLAINTIFF-STUDENTS ARE ENTITLED TO INDEPENDENT EVALUATION

INDEPENDENT EVALUATIONS

As a result of the violations committed by the Defendants, Plaintiff-Parents seek independent evaluations for the purpose of determining the extent to which the Plaintiff-Students exhibit regression and/or loss of competencies and abilities due to the loss of, or substantial change

to, the Plaintiff-Students' educational program. As described by the Illinois State Board of Education (ISBE), "Addressing the impact of remote learning. Under *Endrew F.[v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S. 137 S. Ct. 988 (2017)]* and Department of Education guidance, IEP teams ***should convene if a student is not making expected progress and changes to the IEP may be warranted.*** Upon return to in-person instruction, teams should convene if the student is not on track to meet IEP goals. Revisions related to goals, services, placement, or methodology may be considered to ensure the student is receiving FAPE."[36] (emphasis added). Due to the Defendants bad faith with respect to the violations of the procedural rights of Plaintiff-Parents and the civil rights of Plaintiff-Students, an independent evaluation is required.

"School districts have a "natural advantage" in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them. *See School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359, 368, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985). As noted above, parents have the right to review all records that the school possesses in relation to their child. § 1415(b)(1). They also have the right to an "independent educational evaluation of the[ir] child." Ibid. The regulations clarify this entitlement by providing that a "parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency." 34 C.F.R. § 300.502(b)(1) (2005). IDEA thus ensures parents access to an expert who can evaluate all the materials that the school [*61] must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition." *Schaffer v. Weast*, 546 U.S. 49, 60

"In addition to the initial evaluation to determine if a child has a disability, 20 U.S.C. § 1414(a)(1)(B), schools must also "conduct periodic re-evaluations if the school determines that one is warranted, or if a teacher requests one, or if the child's parent or guardian requests one," as well as "at least once every three years . . . unless the parents and school agree that such a reevaluation is not necessary." *D.S. by and through MS. v. Trumbull Bd. of Educ.*, 357 F. Supp. 3d 166, 171 (D. Conn. 2019) (citing 20 U.S.C. § 1414(a)(2)(A)(i)—(ii); id. (a)(2)(B))." *See F.C. v.*

[36] https://www.jdsupra.com/legalnews/cheat-sheet-for-isbe-s-faq-for-special-47954/#:~:text=Under%20Endrew%20F.,the%20IEP%20may%20be%20warranted.&text=Revisions%20related%20to%20goals%2C%20services,the%20student%20is%20receiving%20FAPE.

Montgomery Cnty Pub. Sch., No. TDC-14-2562, 2016 U.S. Dist. LEXIS 83460, 2016 WL 3570604, at *3 (D. Md. June 27, 2016) This court continued in its decision by clarifying the procedures for conducting such evaluations.

The Plaintiff-Parents have a right to independent evaluations of the Plaintiff-Students whether the Defendant-School Districts response to Plaintiffs' allegations is (a) accept responsibility they denied Plaintiff-Students a FAPE when they unilaterally, materially and substantively altered the educational program that was in their IEPs, or (b) defend that they provided Plaintiff-Students a FAPE when Defendants unilaterally, materially, and substantively altered the educational program that was in their IEPs. In the first instance, where the Defendant-School District concedes they failed to provide a FAPE, it would based on either a faulty evaluation or the lack of any evaluation. In the second instance, where the Defendant-School District is defending its actions, then the change in educational programming must have been done based upon an evaluation(s), which the Plaintiff-Parents disagree with such evaluation(s) that justified materially and substantively altering the last agreed upon IEP. As such, the Defendant would be required to defend its evaluation was appropriate. "If the parents disagree with a school's evaluation, they may request an IEE at public expense." 34 C.F.R. § 300.502(b)(2). The school board may then either pay for the IEE or file "a due process complaint to request a hearing to show that its evaluation is appropriate," 34 C.F.R. § 300.502(b)(2). Parents may also file a due process complaint of their own, "relating to the [*10] identification; evaluation or educational placement of a child with a disability, or the provision of FAPE to the child," under a separate regulation, 34 C.F.R. § 300.507." *See L.D. v. Anne Arundel Cty. Pub. Sch.*, 2019 U.S. Dist. LEXIS 202104 (D. Md. April 6, 2020)

"As the words of the IEE regulation make clear and as multiple courts within this District and elsewhere have recognized, the IDEA does not create a freestanding right to a publicly financed IEE upon parental demand. Instead, the right to a publicly financed IEE must be premised on an actual disagreement with an evaluation that the school district has conducted. See 34 C.F.R. § 300.502(b)(1); [*176] *Genn v. New Haven Bd. of Educ.*, 219 F. Supp. 3d 296, 317-18 (D. Conn. 2016) (school district "must be afforded the opportunity to conduct the initial evaluation with professionals satisfactory to the school before the Parent may disagree and request an independent evaluation"); *R.L. ex rel. Mr. L. v. Plainville Bd. of Educ.*, 363 F. Supp. 2d 222, 234 (D. Conn. 2005) (Droney, J.) (applying both federal and Connecticut law to conclude that parents do not have

right to IEE at public expense where they desired it "as an additional source of information on [student's] program, not because they disagreed with any of the defendant's evaluations"); *see also P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 740 (3d Cir. 2009) (parents do not have right to IEE at public expense where parents arranged for IEE prior to when school district knew or should have known of the need for an evaluation and not as a result of a disagreement with [**18] school's evaluation); *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 275 (3d Cir. 2007) (parents do not have right to IEE at public expense where parents actually agreed with the school's evaluation); *Edie F. ex rel. Casey F. v. River Falls Sch. Dist.*, 243 F.3d 329, 335 (7th Cir. 2001) (parents do not have right to IEE at public expense where their disagreement was with the result of the child's individualized education program not with particular diagnosis or methodology of evaluation); *N.D.S. by & Through de Campos Salles v. Acad. for Sci. & Agric. Charter Sch.*, 2018 U.S. Dist. LEXIS 200987, 2018 WL 6201725, at *5-*7 (D. Minn. 2018) (where parents request IEE to challenge obsolete evaluation, they are entitled to due process hearing limited only to whether the evaluation was appropriate at the time it was completed; if parents wish for a publicly funded IEE with respect to their child's current condition, then they must allow the school district to conduct a current reevaluation and then request an IEE if they disagree). *See D.S. v. Trumbull Bd. of Educ.*, 357 F. Supp. 3d 166 (D. Conn. 2019)

Circuits across the country have upheld the rights of parents in seeking independent evaluations for their children. *See Board of Educ. v. Illinois State Bd. of Educ.*, 41 F.3d 1162; *Evans v. District No. 17*, 841 F.2d 824; and *Hudson v. Wilson*, 828 F.2d 1059

POINT V: PLAINTIFF-STUDENTS ARE ENTITLED TO COMPENSATORY EDUCATION

COMPENSATORY EDUCATION

In *Burlington School Committee v. Mass. Dept. of Educ.*, the Supreme Court held that a student who fails to receive appropriate services at any time in which he is entitle to them may be awarded compensation in the form of additional services “compensatory education” at a later time. As a result of the gross violations committed by the Defendants, Plaintiff-Parents seek compensatory damages from their respective LEAs. Compensatory education is an award of educational services designed to remedy a deprivation in the child’s education. *Doe v. E. Lyme Bd. Of Educ.*, 790 F.3d 440, 445 (2d Cir. 2015). An award of compensatory education serves to

correct a violation of the IDEA that resulted in the child's regression. Regression refers to the failure to maintain an acquired skill in an identified goal area of concern as a result of an interruption of special education instruction or support services. In *Sabatini v. Corning-Painted Post Area Sch. Dist.*, 190 F. Supp. 2d 509, the Court granted a preliminary injunction directing a school district to pay compensatory education in the form of reimbursement for college tuition.

Plaintiffs herein seek a minimum award of compensatory education for all of the services as outlined in the Plaintiff-Students' IEP that the Defendant-School Districts failed to provide since March 2020. However, based upon the results of the independent evaluations, additional services may be required. For example, a Plaintiff-Student may need more than simply the services missed, but may need an additional year of eligibility beyond 21 years of age. In *Barnett v. Memphis City Schs*, 113 Fed. Appx. 124, the court held the student was entitled to compensatory education past the age of 21.

For any Plaintiff-Student who has turned 21 or graduated since the start of the new school year and may no longer be eligible to receive special education services, the courts across various circuits have upheld the proposition that compensatory education is a proper relief to remedy past violations of FAPE who are no longer enrolled in public school or have graduated. *See Pihl v. Massachusetts Dept. of Educ.*, 9 F.3d 184, 189 (1st Cir. 1993); *M.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 395 (3d Cir. 1996); *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402, 407 (6th Cir. 1991); *Bd. of Educ. of Oak Park v. Ill. State Bd. of Educ.*, 79 F.3d 654, 660 (7th Cir. 1996); *Miener v. Missouri*, 800 F.2d 749, 753 (8th Cir. 1986).

POINT VI: PLAINTIFF-STUDENTS ARE ENTITLED TO AN UPDATED IEP RECONVENE TO UPDATE IEP

As a result of the violations committed by the Defendants, Plaintiff-Parents seek to have their respective LEAs' Committee on Special Education promptly convene after the completion of the requested independent evaluations for the purpose of ascertaining the Plaintiff-Students' current needs and abilities to develop modified IEPs reflecting the loss or substantial and material alterations of Plaintiff-Students' special education and/or related services. In *O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, the court reaffirmed the school districts are required to revise the IEP as appropriate to address any lack of expected progress towards the annual goals.

POINT VII: PLAINTIFF-PARENTS ARE ENTITLED TO COMPENSATORY AND PUNITIVE MONETARY AWARDS

COMPENSATORY AND PUNITIVE MONETARY AWARDS

The Supreme Court clarified the difference between the availability of a private right of action with the availability of various remedies. "Although we examine the text and history of a statute to determine whether Congress intended to create a right of action, we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 66, 112 S. Ct. 1028 (1992) (citation omitted) (monetary damages available as remedy in action to enforce Title IX). The Court went on to announce the "general rule" that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Id.* 503 U.S. at 70-71.

The Second Circuit in *Polera v. Bd. of Educ.*, 288 F.3d 478, 491 (2d Cir. 2002), has reaffirmed, "We have held that monetary damages are available in claims brought pursuant to 42 U.S.C. § 1983 for denial of access to administrative remedies under the IDEA's predecessor statute, the EHA. *Quackenbush v. Johnson City Sch. Dist.*, 716 F.2d 141, 148 (2d Cir. 1983), *cert. denied*, 465 U.S. 1071, 79 L. Ed. 2d 750, 104 S. Ct. 1426 (1984). District courts in this Circuit have followed *Quackenbush*, holding that damages are available on claims brought under Section 1983 for violations of the IDEA. See, e.g., *M.H. v. Bristol Bd. of Educ.*, 169 F. Supp. 2d 21, 29-30 (D. Conn. 2001); *R.B. v. Bd. of Educ. of the City of New York*, 99 F. Supp. 2d 411, 418 (S.D.N.Y. 2000); *Cappillino v. Hyde Park Cent. Sch. Dist.*, 40 F. Supp. 2d 513, 515-16 (S.D.N.Y. 1999)." Other Circuits have approved § 1983 actions to enforce IDEA rights. *See Angela L. v. Pasadena Independent Sch. Dist.*, 918 F.2d 1188, 1193 n.3 (5th Cir. 1990) (§ 1983 and § 504 "permit parents to obtain relief which otherwise is unavailable from the EHA"); *Digre v. Roseville Sch. Independent Dist.*, 841 F.2d 245, 250 (8th Cir. 1988) (injunctive relief); *Mrs. W. v. Tirozzi*, 832 F.2d 748, 753 (2d Cir. 1987) (declaratory and injunctive relief); *Jackson v. Franklin County Sch. Bd.*, 806 F.2d 623, 631-32 (5th Cir. 1986) (compensatory damages or remedial education). *See also Hunt v. Bartman*, 873 F. Supp. 229, 245 (W.D.Mo. 1994) (injunctive relief).

The Eighth Circuit has concluded that "money damages are available under §504." *Rodgers v. Magnet Cove Public Schools*, 34 F.3d 642, 645 (8th Cir. 1994). *See also Lue v. Moore*, 43 F.3d 1203, 1205 (8th Cir. 1994) (same). The Eighth Circuit reasoned that the Rehabilitation Act incorporates the remedies of Title VI of the Civil Rights Act of 1964, Title IX is also modeled after Title VI, and thus "the Court's holding on Title IX in *Franklin* applies equally to Title VI and Section 504 cases." *Rodgers*, 34 F.3d at 644. *See* 29 U.S.C. § 794(a)(2).

The Ninth Circuit has concluded compensatory damages are available under the Rehabilitation Act using the deliberate indifference standard applying to show discriminatory intent, *see Ferguson v. City of Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998); *Lovell v. Chandler*, 303 F.3d 1039, 1056 (9th Cir. 2002).

The Third Circuit in *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995), examined monetary damages solely through IDEA and concluded, "even were we to limit our focus to IDEA itself, we discern nothing in the text or history suggesting that relief under IDEA is limited in any way, and certainly no "clear direction" sufficient to rebut the presumption that all relief is available. The expansive language of § 1415(f), which was enacted in the shadow of Smith and tracks the broad grant of remedial power allowed a district court reviewing a direct IDEA appeal, see 20 U.S.C. § 1415(e)(2), contains no restrictions on forms of relief. Nor does the legislative history of § 1415(f) suggest a congressional intent that damages be unavailable. In fact, Congress expressly contemplated that the courts would fashion remedies not specifically enumerated in IDEA. See House Report at 7 (excusing § 1415(f) exhaustion requirement where "the hearing officer lacks the authority to grant the relief sought")." While not recommending monetary damages in *W.B.*, the Court concluded, "However, we do not preclude the awarding of monetary damages and leave to the district court in the first instance the task of fashioning appropriate relief."

The Fifth Circuit, in *Salley v. St. Tammany Parish School Board*, 57 F.3d 458 (5th Cir. 1995), affirmed a damages award for a procedural violation of the IDEA, but the damages were merely nominal because it concluded the "violations did not affect Salleys' decisions regarding the education of Danielle." The clear indication is if the procedural violations had impacted the student's education, then the award would have been greater than nominal.

In *Stellato v. Bd. of Educ. of the Ellenville Cent. Sch. Dist.*, 842 F. Supp. 1512, 1516-17 (N.D.N.Y. 1994), the court identified the two "exceptional circumstances" whereby damages are

available solely under the IDEA: where there is a danger to the physical health of the child or ***where the school district acts in bad faith.*** Both exceptions are present herein.

As the Supreme Court stated in *Honig v. Doe*, 484 U.S. 305, 108 S. Ct. 592 (1988), the court has the equitable power to order a change in placement upon a sufficient showing. *id.* at 327-28 (interpreting the "stay put" provision of the EHA – former name of the IDEA).

In the instant matter, the Plaintiff-Parents are seeking compensatory damages due to the deliberate indifference, intentional and willful actions of the Defendants. Plaintiff-Parents were required to fill in and compensate for the failure of their school district (LEA) and either lost income, incurred out-of-pocket expenses, and/or experienced loss of employment.

Defendants discriminated against Plaintiff-Students, who are qualified individuals under the ADA, by prohibiting the provision of in-person academic and related services the opportunity to participate or benefit from such services. "Remote learning" is not "equal" to the "aid, benefit or service" nor is it as effective as in-person services that were provided to other special education students.[37]

As a result of the deliberate indifference, intentional and willful violations committed by the Defendants, Plaintiff-Parents respectfully request both compensatory damages and punitive damages.

CONCLUSION

In light of the foregoing, plaintiffs respectfully request that this Court issue an order granting all of the relief sought herein and any other relief the Court finds just, proper and equitable.

Dated: New York, New York
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Respectfully submitted,

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[37] Title II of the American with Disabilities Act ("ADA"), 42 U.S. Code § 12182