

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

Z.Q., by his parent, G.J. et al.,
Plaintiffs,

v.

NEW YORK CITY DEPARTMENT OF
EDUCATION, et al.,
Defendants.

Civ. Action No. 20-cv-0986 (ALC)

**Brief of Amicus Curiae The Legal Aid Society in Opposition to Defendant’s Motion to
Dismiss**

Statement of Interest for ZQ Amicus

The Legal Aid Society (“Legal Aid”) is the nation’s oldest and largest private not-for-profit organization, providing free legal services to low-income individuals and families for over 140 years. The Legal Aid Society consists of three practices, which together represent clients throughout New York City in over 300,000 matters annually, including thousands of children each year. The Criminal Defense Practice (CDP), New York City’s primary provider of indigent defense, represents individuals as young as 13 charged in adult court. The Civil Practice provides comprehensive legal assistance to clients with a range of problems including those involving family law, disability-related assistance, health law, education law, and community development legal assistance. The Juvenile Rights Practice (JRP), provides comprehensive representation as attorneys for children who appear before the New York City Family Court in abuse, neglect, juvenile delinquency, and other proceedings affecting children’s rights and welfare. Our Criminal, Civil and Juvenile practices engage in educational advocacy for our clients, in the areas of special

education, school discipline, school placement and programming. In addition to representing these children each year in administrative, trial and appellate courts, we also pursue impact litigation and other law reform initiatives on behalf of our clients.

The Legal Aid Society has a unique perspective on the issue before the Court in this matter. JRP's Education Advocacy Project (EAP), CDP's Adolescent Intervention and Advocacy Project (AID), and the Civil Practice's Education Law Project (ELP) together provide early intervention, general education, special education, and suspension hearing advocacy for children and youth in New York City. As the primary provider of representation for children charged with juvenile delinquency in New York City, JRP is intimately familiar with the barriers to education these clients face, including clients held in detention and placement. In addition, JRP is the primary provider of representation for children whose parents are charged with abuse and neglect in New York City. As a result, JRP can speak to the challenges children in foster care and their families and foster families face in accessing educational services. ELP not only serves any eligible students in the community, but it also collaborates with mental health provider partners to ensure that students receive the emotional, behavioral and academic supports they need to succeed in school. AID, EAP and ELP routinely collaborate with City and State agencies to ensure the development of laws, regulations, policies and procedures that address the challenges that children and families face when trying to access educational services. Each year, EAP and ELP directly represent over 600 children in matters pertaining to education and provide brief consultations in over 1,000 cases. In addition, The Legal Aid Society serves as class counsel in *Handberry v. Thompson*, No. 96-cv-6161 (S.D.N.Y.) (GDB), which secures general and special education for high-school eligible youth confined by the New York City Department of Correction (DOC).

Even before the pandemic, many New York City students had significant educational needs, and The Legal Aid Society represented children and youth with the highest needs—the vast majority of our clients are children of color who struggle with poverty, have a history of trauma, and are diagnosed with learning, developmental and/or emotional disorders; many are also English Language Learners. The pandemic has only exacerbated the needs of these clients, who by and large live in communities that have been most profoundly affected by loss arising from COVID-19.

Accordingly, The Legal Aid Society is uniquely positioned to provide essential information for the Court on the nature and scope of the failures of the NYC DOE to provide timely access to the necessary special education services that allow students to obtain a Free and Appropriate Public Education (FAPE) and the ability of children and families to gain redress. As laid out below, based upon our extensive experience representing students with disabilities, and particularly students in the child welfare, juvenile and adult criminal legal systems, it is apparent that the impartial hearing system is currently unable to provide timely relief to the tens of thousands of students with disabilities in need of compensatory educational services. As a result, exhaustion of this process is futile and the Defendants' motion to dismiss should be denied.

I. NYC Students Have A Great Need For Compensatory Educational Services

There is no question that tens of thousands of students with disabilities have not been receiving the full mandate of the special education services to which they are entitled during the COVID-19 school closures.¹ Sweeping numbers of students are entitled to special educational

¹ See Alex Zimmerman and Chalkbeat, *One in Four NYC Students with Disabilities Missing Out on Mandated Special Education Services, Data Shows*, The City (Feb. 10, 2021), <https://www.thecity.nyc/2021/2/10/22277505/nyc-students-disabilities-special-education-covid>; Kelsey Bakken and et al., *Special Education and COVID-19 School Closures*, The Century Foundation (Apr. 7, 2020), <https://bit.ly/3evkJbe>; Angela Nelson, *How COVID-19 Has Affected Special Education Students*, TuftsNow (Sept. 29, 2020), <https://now.tufts.edu/articles/how-covid-19-has-affected-special-education-students>.

services. According to New York City Department of Education (DOE) statistics, 13.2 percent of NYC students are English Language Learners, 20.2 percent—about 200,000 students—have been identified as students with disabilities, and 72.8 percent are economically disadvantaged.² Consistent with the experiences of Legal Aid clients, the overlap between students with disabilities and those economically disadvantaged is high. For students with initial referrals for special education evaluations, almost 60% qualified for free lunch, which is a main indicator of poverty. For students undergoing Individualized Education Program (IEP) reevaluations, almost 80 percent of students qualify for free lunches.³ Seventy-seven percent of all students receiving special education services identify as Black or Hispanic.⁴ The link between race, poverty, and disability status is clear. And, as laid out below, students in foster care and in the juvenile and adult criminal legal systems have higher incidences of learning disabilities and economic disadvantage than the general population.

Not surprisingly, low-income students with unmet special education needs face dire outcomes. Both anecdotal experience in the field and ample research point to a connection between unmet special education needs of low-income students with disabilities and a resulting inability to complete high school due to dropping out, suspensions, and expulsions. Often the behaviors that lead to suspensions and involvement in the juvenile and criminal legal systems are manifestations of student disabilities that have not been adequately addressed by schools. Students whose special education needs go unmet are more likely to experience academic failures, leading

² DOE Data at a Glance, NYC Dep't. Of Educ., <https://www.schools.nyc.gov/about-us/reports/doe-data-at-a-glance>.

³ *Id.*; NYC Department of Education Annual Special Education Data Report, School Year 2018–2019, Annual School Age Special Education Report, 2019-2020 <https://bit.ly/3xhZrqc>

⁴ *Id.*

to poor outcomes that include delayed graduation, dropping out of school entirely, and justice system involvement.⁵

Students in the Child Welfare, Juvenile and Criminal Legal Systems

The Juvenile Rights Practice of the Legal Aid Society represents approximately 90% of the children who appear before the New York City Family Court in abuse, neglect, juvenile delinquency, and other proceedings affecting children's rights and welfare. Children with court involvement have higher levels of need than those who have not had court involvement and face significant hurdles in receiving the special education services to which they are legally entitled.

In 2019, there were 7,804 children in foster care in New York City.⁶ These children are a vulnerable group of learners. Nationally, between 35% and 47% of children and youth in foster care have been identified as students with disabilities who require special education services.⁷ Seventeen- and eighteen-year-old students in foster care have an average 7th grade reading level.⁸ Children in foster care are also less likely to graduate from high school than their peers.⁹ The Legal Aid Society sees a similar prevalence of learning disabilities and educational challenges amongst our clients in foster care.

⁵ Keeping Kids In School and Out of Court: Report and Recommendations, New York City School-Justice Partnership Task Force, p.10 (May 2013), available at <https://www.nycourts.gov/ip/justiceforchildren/PDF/NYC-School-JusticeTaskForceReportAndRecommendations.pdf>.

⁶ New York City Administration for Children's Services Division of Policy, Planning and Measurement, Office of Research and Analysis, Unpublished CCRS Data (2013 - 2018); Children in Foster Care by Borough/CD of Foster Care Placement (2019) <https://www1.nyc.gov/assets/acs/pdf/data-analysis/2020/incarefostercare.pdf>.

⁷ National Working Group on Foster Care and Education "Fostering Success in Education: National Factsheet on the Educational Outcomes of Children in Foster Care" April 2018 <http://fosteringchamps.org/wp-content/uploads/2018/04/NationalEducationDatasheet2018-2.pdf>; Courtney, M.E., Terao, S., & Bost, N. (2004). Midwest evaluation of the adult functioning of former foster youth: Conditions of youth preparing to leave state care. P 40 Chicago, IL: Chapin Hall Center for Children at the University of Chicago.

⁸ *Id.* at 2.

⁹ New York City does not make data readily available to make a direct comparison, but see <https://bit.ly/3xoxWeA>.

Children in foster care face particular challenges accessing special education services. The very nature of foster care makes the process of identifying the need for special education services and the process of advocating for those services more difficult. Schools often have difficulty determining who the educational decision maker is for a child in foster care or may not know how to contact the child's parent. As long as parental rights are intact, a foster parent may not sign consents for evaluations or services unless they have been assigned as a surrogate parent (which happens only when the parent's whereabouts are unknown). Often birth parents of children in foster care feel powerless or may be unable or unavailable to advocate on their child's behalf due to challenges they are facing involving their own past trauma, learning disabilities, psychiatric or substance abuse issues. Foster parents may not have the same interest as a student's parent in advocating for the child or may not know whether they have authority to advocate on behalf of the children in their care at an IEP meeting.

Indeed, a study of children in foster care and in special education in a large urban Oregon school district found that the IEPs of the foster youth were of poorer quality and less likely to include goals related to postsecondary education or to the development of independent living skills than those of special education students not in foster care. The study also found that foster youth were also less likely than other special education students to have an advocate present during their transition planning meetings.¹⁰ According to the National Education Datasheet, "While screening youth in foster care for special education needs has been shown to increase the chance that youth receive needed services, one study showed 84% of the youth whose screenings indicated potential

¹⁰ *Id.* at 19, *citing* Geenen, S. et al., Research Consortium to Increase the Success of Youth in Foster Care, (2015). A randomized field-test of a model for supporting young people in foster care with mental health challenges to participate in higher education. 42(2) *J. of Behavioral Health Services Research* 150-71.

special education needs did not receive related services within 9-12 months.”¹¹ A significant part of the advocacy done by The Legal Aid Society is done to ensure that our clients in foster care receive the services to which they are entitled.

Children and youth in the juvenile and criminal legal systems, as with children in foster care, face particular challenges in accessing educational services. The vast majority of youth charged as juvenile delinquents, adolescent offenders or young adults are vulnerable youth who have experienced adverse childhood experiences and trauma.¹² The juvenile and criminal justice systems have a significantly higher percentage of students with special education needs than in the general New York City student population. Nationally, at least 1 in 3 youth in the justice system qualifies for special education services under IDEA—almost four times the rate in public schools—and less than half receive the requisite special education while in custody. In New York City, the educational needs of children in the juvenile and criminal systems are even greater. Passages Academy and East River Academy (Rikers) are schools for students held in juvenile detention and juvenile placement (the equivalent to juvenile jail) centers and in jail and they offer the opportunity to obtain either a high school diploma or a High School Equivalency (HSE) diploma. At a recent New York City Council hearing, the DOE’s Executive Superintendent who oversees the DOE’s Alternative Schools District, which includes these schools, testified that approximately 65% of Passages students were identified as having disabilities and an IEP which

¹¹ *Id.* at 7, citing Petrenko, C.L.M., Culhane, S.E., Garrido, E.F., Taussig, H.N., “Do youth in out-of-home care receive recommended mental health and educational services following screening evaluations?” *Children and Youth Services Review*, 33(10), 1911-18 (2011).

¹² Jennifer Fratello, Annie Salsich and Jennifer Jensen Ferone, *Juvenile Detention Reform*, Vera Inst. of Just. (Jan. 2014) <https://bit.ly/3sO1WNn>, at 12 (in 2014 “approximately 85 percent of young people assessed in secure detention intake reported at least one traumatic event, including sexual and physical abuse, and domestic or intimate partner violence. Furthermore, one in three young people screened positive for Post-Traumatic Stress Disorder (PTSD) and/or depression.”); *see also* Essential Elements, The National Child Traumatic Stress Network (last visited Apr. 23, 2021), <https://www.nctsn.org/trauma-informed-care/trauma-informed-systems/justice/essential-elements>.

mandated special education services.¹³ This reflects a rate more than three times higher than that in the general community of New York City students.¹⁴ Many additional youth involved in the juvenile or criminal legal systems are academically behind, but have not been identified as having a disability—often because they have never been evaluated.

Many incarcerated youth have been held over multiple times, are over-age for their grade and have become disengaged from school. In fact, 58% of seventh and eighth graders at Passages Academy were three or more years over-age for their grade, as compared to 4.1% of middle school students citywide.¹⁵ Given the lack of adequate educational services for incarcerated youth during the pandemic, it would not be surprising to see an increase in the number of held back students in the coming school year.

In addition, many juvenile justice-involved students have been repeatedly suspended from school. School failure and justice system involvement are circularly linked: school failure leads to justice system involvement; which, in return, leads back to school failure. Cycles of school failure and juvenile justice involvement continue into adulthood. According to a 2008 survey of inmates in state and federal prisons, more than half did not earn a high school diploma or a GED.¹⁶ In New York, specifically, approximately two-thirds of State prison inmates with learning

¹³ Testimony of Dr. Tim Lisante, NYC Department of Education Superintendent, District 79 at Oversight: Educational Programming in Jails and Juvenile Detention; Joint Hearing Before New York City Council's Committees on Education, Criminal Justice, and General Welfare. April 21, 2021.

¹⁴ It is estimated that approximately 19% of New York City students have IEPs. What are the Countours of NYC's Special Education Landscape?, The Research Alliance for New York City Schools, New York Univ. (last visited Apr. 23, 2021) <https://bit.ly/3gGN51A>. Earlier reporting with respect to East River Academy finds about 39% of students had IEPs. Rikers Island Education Report: Educational Programming for Adolescents and Young Adults at Rikers Island - Local Law 168 of 2017, N.Y.C. Dep't. of Educ., available at <https://bit.ly/3dTZPmU>.

¹⁵ Sixteen Going on Seventh Grade: Over-Age Students in New York City Middle Schools, Advocates for Children, p.16 (Sept. 2014), <https://bit.ly/3xmv0PE>.

¹⁶ Peter E. Leone, Michael Wilson, and Michael P. Krezmien, *Understanding and Responding to the Education Needs of Special Populations in Adult Corrections*, Paper Presented at the John Jay Roundtable on Education (Mar. 31 - Apr. 1, 2008), <http://johnjay.jjay.cuny.edu/files/ReentryRoundtableonEducation.pdf>.

disabilities did not complete high school or a GED.¹⁷ The number is likely greater partially because “correctional systems do not effectively and consistently identify individuals who have cognitive disabilities” and their number may be “sizable . . . [ranging] up to 19% in some correctional institutions.”¹⁸ The correlation between school failure and criminal legal involvement demonstrates the existence of the school to prison pipeline,¹⁹ which pushes students out of school and into the criminal legal system, disproportionately targeting youth of color and youth with disabilities.²⁰

Effects of the COVID-19 Pandemic on Incarcerated Students

The COVID pandemic has had a disproportionate effect on incarcerated youth. Many students throughout the City have had decreased access to educational services during the pandemic, but incarcerated youth have suffered extreme challenges.

From March 16, 2020 through the summer of 2020, students attending Passages Academy did not have any contact with their teachers.²¹ Instead, their education was comprised solely of worksheets and computerized assignments. Not surprisingly, this was especially inadequate to serve students with special education needs or those who needed individualized help to complete assignments. By September 2020, students at Passages Academy were able to see and hear their

¹⁷ Education and Correctional Populations, Special Report, U.S. Dep’t. of Just., p.9 (Jan. 2003), *available at* <http://www.bjs.gov/content/pub/pdf/ecp.pdf>.

¹⁸ Victoria Hay, *Educational Requirements as Barriers to Release for Incarcerated People with Cognitive Disabilities*, HRLR Online (Apr. 12, 2021), <http://hrlr.law.columbia.edu/hrlr-online/educational-requirements-as-barriers-to-release-for-incarcerated-people-with-cognitive-disabilities/#post-1677-footnote-24>.

¹⁹ Cynthia Boateng, Research Illustration: The School-to-Prison Pipeline (Oct. 26, 2016), <https://prezi.com/c3ocifmy0e5h/research-illustration-the-school-to-prison-pipeline/>.

²⁰ REPORT: A, B, C, D, STPP: HOW SCHOOL DISCIPLINE FEEDS THE SCHOOL-TO-PRISON PIPELINE, NYCLU (Oct. 29, 2013), <https://bit.ly/3noEvJn>.

²¹ See, e.g., Eileen Grench, *Students in Juvenile Detention Finally Being Heard, But Not Seen*, The City (Feb. 18, 2021), <https://www.thecity.nyc/2021/2/18/22290594/students-in-juvenile-detention-finally-being-heard-but-not-seen>.

teachers. While this was an improvement, it still denied students the ability to ask questions, other than by text, and deprived teachers of the opportunity to speak in real time with their students and check for understanding. By February 2021, students at Passages were finally able to speak with their teachers through the microphones in their devices.

Students at Passages Academy are now receiving hybrid instruction, meaning they are able to receive in person instruction for approximately 2 ½ hours a couple of days per week. The rest of their educational services are delivered via remote instruction. Although Passages Academy has come a long way since the early days of the pandemic, the lack of instruction (either synchronous or asynchronous) from March to September 2020 suggests these students suffered even more learning loss than students at other New York City public schools, a loss that is no doubt exacerbated for students with disabilities.

For students incarcerated in the adult criminal system, who receive education through East River Academy, existing educational deficiencies have only worsened since the pandemic began. First, Committees on Special Education (CSE) have not met. Therefore, many students are being educated pursuant to outdated evaluations of their present levels of performance, individual needs, and measurable goals. Second, since March 2020, DOE staff vacated Rikers, leaving to the NYC Department of Correction (DOC) the task of facilitating access to remote educational programming.²² From March 2020 until a few weeks ago when some in person classes resumed, students received only telephone- and tablet-based education programming in the jails. Throughout this period, students report this programming has been unreliable, due in part to DOC's failure to facilitate access to it. Some students have reportedly gone without education

²² Rosa Goldensohn, *Students on Rikers Island Locked Out of Remote Learning Video Chat with Teachers*, THE CITY, Dec. 16, 2020, available at <https://www.thecity.nyc/education/2020/12/16/22179869/students-on-rikers-island-locked-out-of-remote-learning-video>.

programming since the beginning of the pandemic due to the City's failure to provide information about eligibility and enrollment. Many of those who have enrolled have gone without meaningful instruction or consistent contact with teachers. Students similarly report that special education services have been largely discontinued during the pandemic. Students in segregated housing, including students with disabilities, have not even received remote learning, receiving only packets of worksheets²³

The Impartial Hearing System Fails To Provide Timely Determinations

The IDEA grants parents certain procedural rights regarding their child's school placement and services, including the right to an impartial due process hearing. New York State has a two-tier administrative system for the review of Individualized Education Programs (IEPs). First, parents who are dissatisfied with a proposed IEP may seek review by an impartial hearing officer (IHO). If unsatisfied by the IHO's determination, a parent may appeal to a state review officer (SRO). Any parent who remains aggrieved can challenge the SRO's decision in state or federal court.

The expectation that a parent is available and able to advocate to ensure children receive needed special education services places many children in the foster care, juvenile and criminal legal systems at a significant disadvantage. These children often lack adults who are able to pursue due process remedies on their behalf. Not only do parents or caretakers of children in foster care face the challenges of being aware of and able to participate in educational proceedings for their

²³ Testimony of Dr. Tim Lisante, NYC Department of Education Superintendent, District 79 at Oversight: Educational Programming in Jails and Juvenile Detention; Joint Hearing Before New York City Council's Committees on Education, Criminal Justice, and General Welfare, April 21, 2021.

children,²⁴ they must contend with onerous special education due process procedures. These procedures are especially difficult to navigate in New York City because statutory and regulatory timelines are rarely observed. Furthermore, the DOE maintains a bevy of full-time attorneys for the express purpose of litigating IDEA claims. Parents who have experienced Family Court as respondents are frequently intimidated by the legal process and are ill equipped to proceed pro-bono in due process proceedings on their children's behalf. Moreover, because families living in poverty are overrepresented in both the foster care and juvenile and criminal legal systems, these families have less access to educational advocates or attorneys to assist them in the impartial hearing process than wealthier families. The availability of free legal representation to lower income families is extremely limited; The Legal Aid Society is able to provide direct advocacy in education cases to only about 600 students per year.

Even prior to the pandemic, the DOE's Impartial Hearing Office faced a tremendously high volume of requests for impartial hearings via special education due process complaints, dwarfing that of entire states. In the 2017-18 school year, the DOE alone received 7,635 due process complaints, more than all of California, Florida, Illinois, Pennsylvania and Texas combined.²⁵ Yet as of mid-January 2020, the DOE employed only 69 hearing officers certified by New York State Education Department (NYSED), and only a handful of these officers were active and available for assignment at any time with many recusing themselves to manage their staggering caseloads.²⁶

²⁴ See *infra*, and Geenen, S. et al., Research Consortium to Increase the Success of Youth in Foster Care, (2015). A randomized field-test of a model for supporting young people in foster care with mental health challenges to participate in higher education. 42(2) J. of Behavioral Health Services Research 150-71.

²⁵ Deuseddi Merced, Report on External Review of The New York City Impartial Hearing Office, Spec. Educ. Solutions, LLC (filed on Feb. 22, 2019), <https://politi.co/3noxHeM>.

²⁶ *Id.*; see also Alex Zimmerman and Yoav Gonen, 1,713 Cases, *One Hearing Officer: How NYC's Special Ed Complaint System Has Reached a Breaking Point*, Chalkbeat: New York (Dec. 5, 2019), <https://ny.chalkbeat.org/2019/12/5/21121751/1-713-cases-one-hearing-officer-how-nyc-s-special-ed-complaint-system-has-reached-a-breaking-point> (“City education department officials confirmed that for long stretches . . . only one [hearing officer] on a rotating list of 69 state-authorized hearing officers . . . accept[ed] new cases.”).

As a result, according to the External Review of the New York City Impartial Hearing Office, commissioned by the NYSED, “[t]he failure to have an adequate number of available IHOs impede[d] the timely administration of due process complaints,”²⁷ while the IDEA’s 75-day timeline for hearing due process complaints and issuing decisions was routinely ignored. The average number of days between impartial hearing filings and the issuance of final decisions in New York City in the 2018-19 school year was 225, compared to 140 in the rest of the state, both numbers far exceeding the 75-day timeline contemplated by the IDEA.²⁸

The harm to students created by these delays was so widespread and egregious that in 2020, a class action lawsuit was filed. *See J.S.M. v. New York City Department of Education* (1:20-cv-00705) District Court, E.D. New York (February 7, 2020). Plaintiffs in that suit, children entitled to receive special education services, seek to compel the DOE to abide by the timelines set out in the IDEA, noting that the average length for an IDEA case in NYC was by then 259 days. In their Complaint, plaintiffs assert that a landscape of policy decisions and unlawful barriers have burdened the DOE caseload resulting in tens of thousands of open cases on the docket. Plaintiffs also rely on an external review of the DOE impartial due process system commissioned by the NYSED. The NYSED review detailed the detrimental effects of various DOE policy decisions and concluded “[t]hat it has not yet collapsed is remarkable given the staggering numbers of due process complaints filed in New York City.”²⁹

Based on the experience and observations of our staff, it is apparent that the delays in assigning IHOs and completing due process hearings have significantly worsened over the course of the pandemic. One striking example of the terrible effects of these delays involves a 4-year-old

²⁷ Merced, *supra* note 23, at 34.

²⁸ *Id.* at 19.

²⁹ *Id.* at 22.

boy with Cerebral Palsy who The Legal Aid Society represented over the past year and a half. The student is non-verbal, non-ambulatory and requires intensive treatment to develop physical and communication skills. Last spring, while planning for the student's transition from Early Intervention into a preschool program, the DOE developed an IEP that did not include daily related services (e.g., Occupational, Speech, and Physical Therapy). In September, the student was only permitted to attend preschool part-time—two days one week, three days the next—and on several occasions the school was closed due to a positive COVID test from a staff member or student. While the student attempted to engage in some of his services through teletherapy, his need for hands-on work made those sessions ineffective. By late winter, the student had regressed in a number of areas, including his core strength and in developing some of his self-care skills.

The Legal Aid Society had already filed a due process complaint in June 2020, to address deficiencies in the IEP and request that the student receive more frequent related services. No hearing officer was assigned until December 2020—after the student's regression was already apparent. Because so much time had already passed, and new information was available, The Legal Aid Society had to file an amendment to the original complaint, which slowed down the process even more. A hearing was finally held at the end of March 2021, after which the DOE was ordered to provide daily related services during school as well as several hundred hours of compensatory services. Had the hearing been completed within IDEA timelines, the student would have received daily services starting in September, and he likely would have made progress rather than regressed.

This is only one of many cases where hearing office delays have had a grave impact on a child's education. For cases filed by The Legal Aid Society during 2020, the length of time between the filing of a due process complaint and the assignment of a hearing officer ranged from

three to nine months. Some hearing officers, once assigned, quickly schedule hearing dates while others have delayed, sometimes for many months at a time. Similarly, hearing officers are vastly inconsistent with respect to the elapsed time between closing the hearing record and issuing a decision. Altogether, children and families can face waits of a year or more before they get relief ordered.

The New York State Education Department's review makes it clear that the NYC DOE Impartial Hearing Office's "rapid, continuing decline" prevented it from providing timely review and resolution of 7,000 pre-pandemic due process complaints per year.³⁰ Yet Defendants argue that a systemic solution to addressing the widespread deprivation of education rights is unnecessary, because this same dysfunctional office will somehow be able to provide meaningful, timely due process to the nearly 200,000 New York City students who currently have IEPs and who may not have received their full complement of services through the Covid-19 pandemic. This argument is untenable: in order for New York City students with disabilities to receive the compensatory services to which they are entitled, it is necessary that a non-litigious process for efficiently and fairly providing compensatory services be developed.

Timely Relief Is Unavailable Even After the Impartial Hearing Process

Winning compensatory services via an impartial hearing does not guarantee that the services will be timely provided because the implementation process is as dysfunctional as the other parts of the impartial hearing process. In fact, a special master was recently appointed in a 17-year-old class action lawsuit, *L.V. v. New York City Department of Education*, to address implementation delays.³¹ The *L.V.* order stems from a 2003 lawsuit in which plaintiffs sought

³⁰ Merced, *supra* note 23, at 44.

³¹ No. 03-CV-9917 (LAP), 2021 WL 663718, at *1 (S.D.N.Y. Feb. 18, 2021).

relief from DOE because it “repeatedly fail[ed] to implement final [o]rders” issued by impartial hearing officers³²

In response to the COVID-19 pandemic, the DOE, already behind in meeting the court ordered implementation deadlines, wholly abandoned these benchmarks. Among other actions, the DOE “cit[ed] changed circumstances and a general obligation to safeguard the public coffers . . . [and] refused to pay tuition to private schools whose remote-learning plans did not receive DOE approval.”³³ In granting *L.V.* plaintiffs' request for a special master to oversee the timely implementation of hearing orders, the court found this policy to be unlawful.³⁴

Once again, The Legal Aid Society's experience with this aspect of the impartial hearing office—untimely implementation of orders for relief—is powerful and instructive. In recent years, an increasing number of The Legal Aid Society's hearing decisions have required escalation to the *L.V.* monitoring team due to delays. An extreme example involves two cases decided during the summer of 2020, where payments to special education programs have only just been processed more than six months after the relief was ordered, and only after multiple attempts by Legal Aid attorneys to secure implementation. Pendency decisions—which guarantee that students cannot be moved away from their previously agreed-upon programs while an impartial hearing is underway—have been routinely ignored during the current school year, jeopardizing students' ability to remain in their programs.

Delays in implementing awards of compensatory services severely harm students. While some service providers are willing to commence compensatory sessions based on a hearing decision alone, more often, they require confirmation from the implementation unit that they will

³² *Id.* (“After almost four years of litigation, the parties agreed to a Stipulation and Agreement of Settlement[.]”).

³³ *L.V. v. New York City Dep't of Educ.*, 2021 WL 663718, at *1.

³⁴ *L.V. v. New York City Dep't of Educ.*, 2021 WL 663718.

be paid before they will start working with students. In one Legal Aid case, decided in the summer of 2019, the DOE was ordered to pay for a 10-year-old student to have compensatory services with a private reading specialist. The student began receiving the assistance he needed, but the services were interrupted after the Covid-19 pandemic began and when the DOE stopped paying the private provider. The family did not have the financial resources to pay the provider themselves and had to reach out to their Legal Aid attorney to request help in enforcing the order. The student lost weeks of tutoring in the meantime. Furthermore, while attorneys and advocates representing parents at hearings know how to expedite the implementation process as much as possible, unrepresented parents are more likely to wait, and have their children suffer even greater harm as a result.

The Available Systemic Relief Is Insufficient To Address the Scope of All Necessary Compensatory Services

Even if impartial hearings were timely held and compensatory services were awarded accordingly, it would still be unreasonable for New York City or New York State to require children and families to exhaust the impartial hearing process because they would be unable to access the relief necessary. In practice, exhaustion would be futile because the City and State are currently failing to offer relief sufficient to remedy the entire scope of the lost services. According to the New York State Education Department's Office of Special Education, for each student with a disability, an IEP team must determine appropriate "compensatory services," defined as "educational programs and services . . . to remedy the past denial of appropriate services that were not originally provided to enable to student to make appropriate progress . . . including any loss in skills . . . as a result of a student not receiving education or services due to school closures during

COVID-19.”³⁵ The purpose of compensatory services is “to place the student in a position that he or she would have been in if there had been no violations under the IDEA.”³⁶ To determine what compensatory services a student is entitled to, the state lists a comprehensive set of individualized questions to be asked by IEP teams that are aimed at determining how much instruction was lost, and whether the student failed to make progress or regressed as a result.³⁷ Given the complexity of the questions to be addressed for each student with a disability, even the State acknowledges that such a goal “may not be a realistic option” for some districts, which may need to resort to subjective judgment calls to determine the appropriate compensatory services.³⁸

While encouraging school districts to address every student’s needs individually looks good on paper, the State has failed to provide any concrete guidelines on how the City could realistically undertake reviews of almost 200,000 students’ IEPs. Nor does it instruct school districts on how to monitor progress data and calculate the appropriate quantity of compensatory services. To date, the City has issued no publicly-available guidance to its special education staff on when and how it must address this issue—which is the very reason that Plaintiffs filed this lawsuit. Clients currently represented by The Legal Aid Society have not received any communication indicating that compensatory services will be addressed at the school level, and

³⁵ Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State, Supplement 2, Office of Spec. Educ., N.Y. State Educ. Dep’t. (June 20, 2020), <http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-2-covid-qa-memo-6-20-2020.pdf>.

³⁶ COVID-19, Lessons Learned About the Special Education Conundrum, from 24th Annual Pre-Convention School Law Seminar (Oct. 22, 2020), https://www.nyssba.org/clientuploads/nyssba_pdf/Events/precon-law-2020/05_Special_Education_Conundrum_-_outline.pdf.

³⁷ Questions to be considered include the length of school closure, availability of online instruction, any new needs that are the result of COVID-19 related trauma, and whether the student would require extended school year services in order to avoid further regression. *Id.*

³⁸ *See id.*

none of our clients report compensatory education discussions occurring at IEP meetings or elsewhere since the State's guidance was released.

In contrast to New York, however, other states have recommended concrete methods and sources of information to be relied upon for determining the need for compensatory services. For example, Ohio created a detailed framework that requires schools to determine if a student requires compensatory services, "recovery services," and/or extended school year services.³⁹ Prior to the start of the 2020-2021 school year, Louisiana instructed schools to immediately determine eligibility for and arrange compensatory services for students with disabilities who had missed special education instruction during the spring 2020 shutdowns.⁴⁰ Massachusetts set a deadline of mid-December, 2020 for schools to identify which of its highest-needs students with disabilities were eligible for compensatory services.⁴¹ Finally, California settled a class action lawsuit to allow both parents and students to immediately demand IEP services be implemented and to file a lawsuit against the school district for failures to provide such services.⁴²

With over 200,000 students with IEPs, New York City far exceeds any other school district in the nation. In fact, the number of New York City students with IEPs exceeds the total population of all but the top six school districts in the nation.⁴³ In order to ensure that New York City Students with disabilities who have missed special education instruction are provided with the

³⁹ See Students with Disabilities Guidance, Ohio Dep't of Educ. (Dec. 22, 2020), <https://education.ohio.gov/Topics/Reset-and-Restart/Students-with-Disabilities>.

⁴⁰ Strong Start Compensatory Services Guidelines for Students with Disabilities, Louisiana Dep't. of Educ. (June 18, 2020), <https://bit.ly/3es7JTN>

⁴¹ Family Fact Sheet: COVID-19 Compensatory Services and Recovery Support for Students with IEPs During the COVID-19 Pandemic, Massachusetts Dep't. of Educ. (Sept. 2020), <https://www.doe.mass.edu/covid19/sped/family-fact-sheet/>.

⁴² Sheila C. Bayne, *Special Ed Suit Against CA, Newsom Settled, Acknowledging Federal and State Law Requires In-Person Services for Students with Special Needs*, Newswise (Mar. 5, 2021), <https://bit.ly/3er90um>.

⁴³ Maya Riser Kositsky, *Education Statistics: Facts About American Schools*, Education Week (last updated Feb. 22, 2021), <https://www.edweek.org/leadership/education-statistics-facts-about-american-schools/2019/01>.

compensatory services to which they are entitled, it is necessary that the DOE develop, implement and fund an expedited process to remedy the DOE's failure to provide FAPE dating from the Spring 2020 shutdowns until the present. A procedure to identify which of its highest-needs students did not receive mandated services, and to efficiently and fairly provide them with compensatory services will benefit The Legal Aid Society clients who are amongst the most vulnerable students in New York City, including students with disabilities who are living in poverty, who are the subject children in abuse and neglect proceedings against their parents (including children living in foster care) and children with disabilities who have juvenile or adult court involvement and are in danger of being pushed into the school to prison pipeline. At the same time, the creation of this system should not affect the ability of individual students to pursue federally guaranteed due process procedures under the IDEA

Conclusion

Amici respectfully submit that Defendants' motion to dismiss should be denied.

Dated: April 26, 2021

Respectfully submitted,

/S/

JANET SABEL
Attorney-in-Chief/Chief Executive Officer
The Legal Aid Society
199 Water Street
New York, NY 10038
JSabel@legal-aid.org

CERTIFICATE OF SERVICE

I certify that, on April 26, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF.

/S/

JANET SABEL
Attorney-in-Chief/Chief Executive Officer
The Legal Aid Society
199 Water Street
New York, NY 10038
JSabel@legal-aid.org