20 CV 705 (EK)(RLM)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

J.S.M., *et al.*,

Plaintiffs,

-against-

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

Defendants.

CITY DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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DATE OF SERVICE: July 29, 2022

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PRELIMINARY STATEMENT

Plaintiffs, eleven students who have been classified as students with special education needs and their parents, bring this action on behalf of a certified class, seeking injunctive relief in connection with the operation of the administrative due process hearing system here in New York City. Plaintiffs' primary allegations concern delays in the issuance of decisions by impartial hearing officers in cases that challenge the recommendations made by the New York City Department of Education for students who require special education and related services. By Notice dated May 26, 2022, Plaintiffs now move for partial summary judgment, asking the Court to find all Defendants liable for violations of the Individuals with Disabilities Education Act. Defendants New York City Department of Education and its former Chancellor Richard A. Carranza (collectively, the "City Defendants") submit this memorandum of law in opposition to Plaintiffs' motion.

Plaintiffs' motion should be denied as it pertains to the City Defendants. While City Defendants do not dispute that there have been issues with the administrative due process hearing system, including instances where decisions in these administrative proceedings have been issued after the expiration of regulatory time frames, the Court should not find the City Defendants liable, for two principal reasons. First, the City Defendants, in coordination with co-Defendant the New York State Education Department, have taken, and are taking, steps to improve the administrative system and remedy the issues that led to the filing of the Complaint in early 2020. The world of administrative due process complaints as it existed at that time has changed meaningfully in the intervening years. Most significantly, City Defendants and the State Education Department have executed a memorandum of agreement with the New York City Office of Administrative Trials and Hearings whereby the Office will adjudicate due process proceedings. Impartial hearing officers employed by the Office of Administrative Trials

and Hearings began taking cases earlier this year, and this process is well underway. Also significant, the backlog of cases waiting for assignment to a hearing officer has been reduced from more than 6000, based on statistics relied upon by Plaintiffs, to only 122 as of this week. Second, to the extent that administrative due process decisions have been issued outside of regulatory time frames, the City Defendants do not and cannot control each of the underlying causes. City Defendants are committed to implementing solutions to the underlying issues, but they are not responsible for the causes. For these reasons, and as set forth more fully below, the Court should deny Plaintiffs' motion, at least as to the City Defendants.

STATEMENT OF FACTS

Overview of Plaintiffs' Allegations

In their Amended Complaint, dated March 20, 2020, Plaintiffs first observe that there is a high volume of due process complaints filed pursuant to the Individuals with Disabilities Education Act in New York City, but a small number of impartial hearing officers accepting assignment of these cases, and that many decisions are past due. Amended Complaint at ¶ 7. Plaintiffs note that federal and state statutes and regulations provide that decisions should issue in administrative hearings brought pursuant to the Act within 75 days of the filing of due process complaints, not counting lawful extensions. *See id*. at ¶¶ 48-51, 55, 58. Plaintiffs allege that decisions are frequently not issued in 75 days and that many cases are awaiting assignment of an impartial hearing officer. *Id*. at ¶¶ 71-79.

Plaintiffs assert that there are several causes for these issues – the high volume of due process complaints in New York City, the alleged insistence on the issuance of pendency orders, a low number of impartial hearing officers and frequent recusals, improper extensions of timelines, low compensation for impartial hearing officers, insufficient space in which to conduct hearings, and that cases do not settle promptly. Amended Complaint at ¶¶ 85-132. Plaintiffs

seek declaratory relief and an injunction "directing all Defendants to cease engaging in violations of, and directing them to comply with, the [Individuals with Disabilities Education Act] and its implement regulations," and other statutory provisions. *Id*. at ¶¶ 365-366.

In their papers in support of their motion for partial summary judgment, Plaintiffs assert that statistics provided by both Defendants show that these conditions have continued unabated, through the 2020-2021 school year. Plaintiffs' Memorandum of Law, dated May 26, 2022 ("Plaintiffs' Memorandum"), at 13-17. Plaintiffs argue that both Defendants bear responsibility for these conditions, and that both should therefore be found liable under the Individuals with Disabilities Education Act. *Id*. at 25-33. In making their arguments, Plaintiffs acknowledge, briefly, in a footnote, the plan by which the handling of the administrative due process system will be transferred to the Office of Administrative Trials and Hearings. *Id*. at 6, n.2. But Plaintiffs do not mention the Office, or the plan, again. *See id*. at 1-37.

Brief Overview of Impartial Due Process Hearings in New York City

The Individuals with Disabilities Education Act provides that the parents of a student with a disability may request an impartial due process hearing if they wish to challenge the recommendations made by a school district for the student. 20 U.S.C. §§ 1415(b)(6), 1415(f)(1). The Act, along with both federal and State regulations, sets forth timelines pursuant to which a due process complaint will be adjudicated. First, a hearing officer should be offered appointment to the matter within two business days from the filing of a due process complaint. 8 N.Y.C.R.R. § 200.5(j)(3)(i)(a). Second, the local educational agency shall schedule a resolution session within fifteen days of the filing of a due process complaint. 20 U.S.C. § 1415(f)(1)(b)(i). Third, if the matter is not resolved, a due process hearing may commence after thirty days have

elapsed from the filing of a due process complaint.[1] *Id*. at § 1415(f)(1)(b)(ii). Absent lawful extensions, a hearing must be held and a decision reached within 45 days after the conclusion of the resolution period (or, within 75 days of the filing of the due process complaint). *See* 34 C.F.R. § 300.515(a); *see also* 8 N.Y.C.R.R. § 200.5(j)(5). Extensions can be issued in increments of 30 days[2] and there is no limitation for how many extensions can be lawfully granted. *See* 8 N.Y.C.R.R. § 200.5(j)(5)(i).

It is the Commissioner of the New York State Education Department who trains and certifies impartial hearing officers, sets their maximum compensation, and promulgates the standards by which impartial hearings shall be conducted. N.Y. Educ. Law § 4404(1)(c); 8 N.Y.C.R.R. § 200.1(x)(4); 8 N.Y.C.R.R. § 200.21(a). The City Department of Education maintains a list of certified hearing officers, appoints them to preside over hearings, and provides space for the hearings, among other administrative tasks. 8 N.Y.C.R.R. § 200.2(e)(1)(ii); Declaration of Cheryl Williams, dated July 29, 2022 (the "Williams Declaration") at ¶ 29.

The "OATH Plan"

In an effort to ensure that decisions in due process hearings are decided within the statutory time frames, and to assist with decreasing the number of pending cases, the City Defendants and the State Defendants coordinated with the Office of Administrative Trials and Hearings and executed a Memorandum of Agreement. *See* Exhibit A, attached to the Declaration of Noel R. Garcia ("Garcia Declaration"), dated July 29, 2022. Pursuant to this Memorandum of Agreement, the handling of the impartial hearing system in New York City will

[1] The parent and the local educational agency can agree to waive the resolution session, 20 U.S.C. § 1415(f)(1)(b)(i), or to extend the this period by engaging in mediation. 8 N.Y.C.R.R. § 200.5(j)(3)(iii)(b)(4).

[2] Currently, extension can also be issued in increments of 60 days. 8 N.Y.C.R.R. § 200.5(j)(5)(i).

be transferred to the Office of Administrative Trials and Hearings. The Office has established a new special education unit and will employ as many full-time (and if necessary, part-time) impartial hearing officers as are needed to issue decisions in newly-filed cases within the statutory time frames. The current plan is to hire 46 full-time impartial hearing officers and four additional hearing officers who will be dedicated to helping facilitate settlements. Garcia Declaration at ¶¶ 5-7, 9, 14. This plan was then further memorialized, most recently by an Executive Order signed by Mayor Eric Adams, and ratified by the Chancellor of the Department of Education shortly thereafter. *See* Exhibits B and C, attached to the Garcia Declaration.

Pursuant to this plan, the Office of Administrative Trials and Hearings will supervise the new special education unit and have administrative oversight of the handling of impartial hearings. Among other things, the Office of Administrative Trials and Hearings will ensure that hearing officers issue decisions within regulatory time frames, grant extensions appropriately, and contemporaneously document those extensions. Garcia Declaration at ¶¶ 8, 12.

The Office of Administrative Trials and Hearings is currently ramping up the special education unit. It has hired and onboarded 41 full-time hearing officers, all of whom have been trained and certified by the State. The Office has also hired administrative staff. Garcia Declaration at ¶ 9.

Hearing officers at the Office of Administrative Trials and Hearings began hearing cases in March 2022. As of July 22, 2022, 884 cases have been assigned to these hearing officers. Of those cases, 3 were dismissed before hearing, 12 were consolidated with other cases, 4 were closed due to resolution agreements, 172 cases were settled, 120 cases were otherwise

withdrawn, and 61 final decisions have been issued. 512 cases are currently pending before Office of Administrative Trials and Hearings officers. Garcia Declaration at ¶¶ 9-11.

Decisions are being issued consistent with the regulatory time frames. To the extent that extensions are being issued, they are lawful, and as noted above, they are documented contemporaneously. Further, while Office of Administrative Trials and Hearings officers have recused from some cases, the recusal is appropriate (such as for a professional or personal conflict), and this too is documented. Garcia Declaration at ¶¶ 12-13.

Other Corrective Measures

The Department of Education has taken other corrective measures to help improve the administration of due process hearings. For example, in conjunction with the State Education Department, the Department of Education has streamlined case assignment procedures to avoid administrative delays that resulted from hearing officers rejecting case assignments. The Department of Education now only offers case appointments to hearing officers who have specifically indicated that they are currently available and able to accept cases. The Department puts any excess cases, for which there is not a hearing officer immediately available, on a waitlist for cases awaiting assignment. Again in conjunction with the State Department of Education, and with input from Plaintiffs in this action, the Department of Education implemented a priority structure for assigning cases, which is especially important during periods where there are cases on the waitlist. Pursuant to this structure, parents who file for due process complete an online form and, based on these responses, the Department of Education identifies the cases to be prioritized for assignment to an impartial hearing officer. Students who are not currently placed in special education programs or receiving services are given the highest priority, followed by students who are attending a program recommended on their individualized education program

but not receiving all of the recommended services, then students who are attending a public school program where the parents disagree with the recommendations on the individualized education program, and students who attend private schools but are not receiving some services. Since this system was implemented, the cases for students in these higher priority categories are promptly assigned to hearing officers, while the cases awaiting assignment to hearing officers have been comprised of students who are receiving the private program or services that they are seeking as relief in their complaint. Many of these students' programs are being funded directly by the Department pursuant to the Act's pendency provision. *See* Williams Declaration at ¶¶ 19, 21, 23-26.

The Department of Education and State Education Department have collaborated on efforts to recruit impartial hearing officers, making changes to the qualification requirements and revising the compensation policy to make the position more attractive to potential candidates. The Department has also discontinued a past practice whereby hearings would be required on pendency claims where pendency was uncontested. Now, if the Department and parent agree on a pendency placement or pendency services, the parties execute a form and no hearing is required. Williams Declaration at ¶¶ 8, 10-11.

The Department has also expanded its use of mediation. Both in the 2020-2021 and 2021-2022 school years, the Department has reviewed due process complaints to determine where the case might be suited to mediation, and the Department is looking to identify additional cases that may be appropriate for mediation. Of cases that have gone to mediation, many have settled. Williams Declaration at ¶¶ 12-15. In the 2021-2022 school year, the Department also made written rapid resolution offers to more than 3,000 parents. These offers were made in cases in which parents seek services at what are referred to as "enhanced rates." The Department

plans to continue this practice as well. Declaration of Mia Delane Gurley, dated July 29, 2022 (the "Delane Gurley Declaration"), at ¶ 9.

Payments to impartial hearing officers (those not employed by the Office of Administrative Trials and Hearings) are issued regularly, with payments generally vouchered within thirty days of the submission of an invoice. To the extent this was an issue in the past, it has not been an issue for the past two years. Similarly, the Department of Education's Impartial Hearing Office has resolved any issues connected to hearing space, and the use of remote proceedings has reduced the need for hearing rooms and vastly increased the number of hearings that can be conducted daily. Lastly, and most significantly, the backlog of cases waiting for assignment has diminished substantially. As of July 27, 2022, the waitlist was only 122 cases. Williams Declaration at ¶¶ 26, 28-29.

ARGUMENT

LEGAL STANDARD

"Summary judgment is appropriate when 'the movant shows that there is no genuine dispute as to any material fact' and that she 'is entitled to judgment as a matter of law.'" *Union Mut. Fire Ins. Co. v. Ace Caribbean Mkt.*, No. 18-CV-1570, 2021 WL 4480654, 2021 U.S. Dist. LEXIS 188909, *11 (E.D.N.Y. Sep. 30, 2021) (quoting Fed. R. Civ. P. 56(a)). "A material fact is one that 'can affect the outcome under the applicable substantive law.'" *Union Mut. Fire Ins. Co.*, 2021 WL 4480654 at *11 (quoting *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996)). "A genuine dispute is one that can 'reasonably be resolved in favor of either party.'" *Union Mut. Fire Ins. Co.*, 2021 WL 4480654 at *11 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). "In performing this analysis, the Court must resolve all ambiguities and draw all inferences in favor of the non-moving party." *Union Mut. Fire Ins. Co.*, 2021 WL 4480654 at *11-12 (citing *Gallo v.*

Prudential Residential Servs., Ltd. P'ship, 22 F.3d 1219, 1223 (2d Cir. 1994)). "'If, in this generous light, a material issue is found to exist, summary judgment is improper.'" *Union Mut. Fire Ins. Co.*, 2021 WL 4480654 at *12 (quoting *Nationwide Life Ins. Co. v. Bankers Leasing Ass'n*, 182 F.3d 157, 160 (2d Cir. 1999)).

POINT I

PLAINTIFFS' MOTION SHOULD BE DENIED BASED ON ONGOING IMPROVEMENTS TO THE ADMINISTRATIVE DUE PROCESS SYSTEM

In their motion for partial summary judgement, Plaintiffs rely on facts and circumstances that are decidedly in the past. As noted above, the Department of Education, both independently and in coordination with the State Education Department, has taken steps to improve the operation of the administrative hearing system. These efforts are geared towards insuring more efficient processes, getting cases assigned to hearing officers faster, enabling the issuance of timely decisions, and mitigating any potential harm to students whose parents invoke due process. And this effort is having tangible results.

Most significantly, City Defendants, together with the State Education Department and the Office of Administrative Trials and Hearings, have executed a memorandum of agreement whereby the Office of Administrative Trials and Hearings will adjudicate due process complaints brought under the Individuals with Disabilities Education Act. As set forth above, the Office has created a special education unit and its impartial hearing officers began hearing cases in March 2022. At this point, the Office has 41 full-time hearing officers in place, all of whom have been trained and certified by the State, and the current plan is to have 50 officers on board by September 2022, four of whom will be dedicated to facilitating settlements.

As of this week, 884 cases have been assigned to these hearing officers, and they are taking on additional cases every day. Garcia Declaration at ¶¶ 5-10, 14.

When the Office of Administrative Trials and Hearings' special education unit is fully staffed, and when all the various systems to support the unit are in place,[3] the intent is for the Office to handle all new due process complaints filed in New York City. The Office will oversee the unit and will insure that hearing officers issue timely decisions, that any extensions granted are granted lawfully and that these extensions are documented contemporaneously, and that recusals are limited to valid reasons and are also documented. Moreover, the Office is dedicated to delivering not only timely, but fair decisions that meet the highest standard of excellence. *See* Garcia Declaration at ¶¶ 5-7, 12-13, 15.

Also significant is the fact that the waitlist of cases waiting for the appointment of impartial hearing officers has been reduced significantly. In Plaintiffs' paper in support of their motion for partial summary judgment, Plaintiffs cite to statistics that indicated that there were more than 6000 case on the waitlist. Plaintiffs' Memorandum at 12. But as of this week, Defendant had reduced that waitlist to 122 cases. Further, through the use of the prioritization structure described above, all higher priority cases have been assigned to impartial hearing officers and any cases remaining on this waitlist concern students who are receiving services through pendency and are least harmed by any further delays. *See* Williams Declaration at ¶¶ 24, 26

Additionally, whatever issues were caused in the past by the pace at which impartial hearing officers were paid have been resolved. The Department of Education typically

[3] For example, the Office is developing an electronic case filing system that will help streamline the initiation of due process cases and the steps that follow, including the assignment of impartial hearing officers. *See* Exhibit A, annexed to the Garcia Declaration.

processes payments within 30 days of the receipt of complete invoices. Similarly, if there were issues connected to the space provided by the Department for the conduct of impartial hearings, that, too, has been resolved. In fact, since March 2020, all administrative hearings pertaining to special education within New York City have been held remotely, a practice which has allowed the number of daily hearings to increase more than three-fold. *See* Williams Declaration at ¶¶ 28-29.

As noted above, the Department has discontinued its former practice of requiring hearing for claims concerning pendency placements or services where the pendency entitlement is not contested. The Department is also expanding its use of mediation, and has been making written resolution offers in certain cases. Williams Declaration at ¶¶ 11-15; Delane Gurley Declaration at ¶ 9. These steps help to reduce the number cases and issues that require a hearing, and help bring about more timely decisions.

These facts are important not only because of the benefits they confer to the Plaintiff class, but also in consideration of Plaintiffs' motion. Plaintiffs here seek only injunctive relief. Injunctive relief "is forward looking, not backward looking. If a condition that would have warranted the entry of an injunction has been cured and it is clear that the condition could not reasonably be expected to recur, then there is no basis to enjoin." *J.T. v. de Blasio*, 500 F. Supp. 3d 137, 190 (S.D.N.Y. 2020) (internal citations omitted); *see also Rapa v. City of N.Y.*, No. 15 CV 1916, 2015 WL 5671987, 2015 U.S. Dist. LEXIS 129048, *3 (S.D.N.Y. Sept. 25, 2015) ("It is well established that, to have standing to pursue injunctive relief, which is a forward-looking remedy, a plaintiff may not rely on past injury alone; instead, a plaintiff must show a likelihood of future injury") (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983); *Knife Rights, Inc. v. Vance*, No. 13-4840-CV, 802 F.3d

377, 2015 WL 5559751, *4-5 (2d Cir. Sept. 22, 2015)). In light of the steps taken by the City and State Defendants, and the progress made in improving the administrative due process hearing system, Plaintiffs cannot argue that the conditions that led to the initiation of this action are likely to occur. At the very least, the Court should find that material facts – those being, the functionality of the administrative due process system at issue in this case, and the likelihood of any future issues – are subject to a genuine dispute. Accordingly, injunctive relief is not warranted here, and summary judgment should not be granted to Plaintiffs.

It is also these facts that distinguish the case at bar from *Blackman v. District of Columbia*, 277 F. Supp. 2d 71 (D.C.C. 2003). Plaintiffs cite to *Blackman* to support their argument that not providing timely due process decisions constitutes a "*per se* harm." Plaintiffs' Memorandum at 34-35.[4] There is no discussion in that case, however, that any changes had been made to the administrative system at issue. *See generally Blackman*, 277 F. Supp 2d 71. Indeed, it appears that at the time the Court issued its decision (on plaintiffs' motion for a preliminary injunction), the same conditions that led to the underlying delays persisted. *See id*. That is not the case here.

Similarly, there is no indication that any changes to the challenged practices were undertaken prior the issuance of the decision in *Jose P. v. Ambach*, another case relied on by Plaintiffs. Plaintiffs' Memorandum at 28; *see also Jose P. v. Ambach*, 669 F.2d 865 (2d Cir. 1982). In *Honig v. Doe*, meanwhile, also relied upon by Plaintiffs (Plaintiffs' Memorandum at

[4] Plaintiffs selectively quote the *Blackman* decision, omitting the part of the decision that finds not only that not scheduling a timely hearing constitutes a denial of a free and appropriate public education, but that such a denial occurs when the hearing is not held and a proper placement is not made as a result. *See Blackman*, 277 F. Supp. 2d at 79 ("Where there is a denial of a free appropriate education because no hearing has been held and no determination has been issued, *and a proper placement therefore has not been made*, there results a per se harm to the student…") (emphasis supplied).

28), the court explicitly observed that the school district maintained and defended the challenged practice. *Honig v. Doe*, 484 U.S. 305, 318-319 (1988). Thus, these cases also are distinguishable and inapt.

City Defendants acknowledge that there is still work to be done. For example, as noted elsewhere in City Defendants' opposition papers, the Office of Administrative Trials and Hearings is still hiring staff and putting systems into place to run its special education unit. This process will take additional time. But the City Defendants cannot implement such changes overnight. The fact that these steps have been, and will be, implemented over time is to be expected. This process will continue, however, and the conditions alleged in the Amended Complaint and in Plaintiffs' motion papers will not recur. Or at the least, City Defendants submit that, based on these facts, there is a genuine dispute that they will recur. For all of these reasons, summary judgment against the City Defendants is improper, and Plaintiffs' motion should be denied.

POINT II

CITY DEFENDANTS SHOULD NOT BE HELD LIABLE FOR ISSUES OVER WHICH THEY HAVE NO AUTHORITY OR CONTROL

Additionally, City Defendants should not be found liable, and summary judgment is not appropriate, for issues that are outside the purview and beyond the control of the City Defendants. Here again, at the least, there exists a genuine dispute as to whether City Defendants can be found liable under these facts, and for this reason also, summary judgment against the City Defendants is improper.

For example, Plaintiffs point to historical delays in the appointment of impartial hearing officers to preside over due process complaints. *E.g.*, Plaintiffs' Memorandum at 26. It

is true that the Department of Education, as the local educational agency, must appoint hearing officers. N.Y. Educ. Law § 4404(1)(a). But the Department cannot appoint a hearing officer if no hearing officer is available and willing to accept the case. City Defendant have no control over the number of hearing officers who are trained and certified in New York City. They cannot hire, train, or certify hearing officers. They also cannot compel a hearing officer to accept a case. *See* Williams Declaration at ¶¶ 4, 19, 24.

Similarly, the City Defendants have no control over independent impartial hearing officers once they are appointed to a case. City Defendants have no ability to remedy any improper action on the part of those hearing officers – if they recuse themselves inappropriately, do not schedule hearings, issue improper extensions, do not issue timely decisions[5] – if they take any step that is inconsistent with the lawful and fair adjudication of due process hearings, City Defendants have no recourse. *See* Williams Declaration at ¶ 4. This is one of the motivations behind the formation of the Office of Administrative Trials and Hearings' special education unit. In addition to having the structure and capacity to take on this task, the Office will insure that its hearing officers do not improperly recuse, schedule hearings promptly, issue only lawful extension, and ultimately issue timely decisions. *See* Garcia Declaration at ¶¶ 6, 8, 12-13. But to the extent that the conduct of independent hearing officers is in any way inappropriate, City Defendants have no authority over them.

Plaintiffs also argue that the Department of Education does not hold resolution sessions in many cases. *E.g.*, Plaintiffs' Memorandum at 26-27. Preliminarily, though resolution is mentioned, there is not a claim set forth in the Amended Complaint concerning

[5] Plaintiffs acknowledge that impartial hearing officers, not the Department of Education, have responsibility for managing timelines and issuing decisions "within statutory timelines." Plaintiffs' 56.1 Statement at ¶ 28.

resolution. *See* Amended Complaint. Further, the applicable regulations provide that, if a resolution session is not held, the parties can simply move on to an impartial hearing. 8 N.Y.C.R.R. §§ 200.5(j)(2)(v), (vi)(b). Also, as noted above, this is another area where the Department is implementing improvements, having made written resolution offers in more than 3,000 cases in the 2021-2022 school year.

Relatedly, though Plaintiffs point to alleged issues in the settlement of due process claims, *e.g.* Plaintiffs' Memorandum at 27, any such issues do not deprive a claimant of their right to pursue due process. The Department of Education has no obligation to settle claims, and certainly has no obligation to settle, or resolve, claims for the precise relief sought by parents. *See id*. The Department also cannot unilaterally settle claims. If the parents are uninterested or unreasonable, the matter must proceed to hearing.

Plaintiffs argue at some length about the alleged inappropriateness of what are referred to as "waitlist extensions." *See, e.g.*, Plaintiffs' Memorandum at 22-23. City Defendants do not contend that the issuance of waitlist extensions, whereby the compliance dates on cases that were not timely assigned to hearing officers are extended upon assignments, cures the delay and renders the case timely. This is merely a mechanism that enables the newly assigned hearing officer to take on the case and proceed without having to immediately address compliance deadlines. *See* Williams Declaration at ¶ 20. But importantly, as the waitlist continues to be reduced and is eventually eliminated, this mechanism will not be needed.

In sum, City Defendants should not be found liable for issues that it does not control and cannot remedy. At the least, a genuine dispute exists as to whether City Defendant can be found liable for these issues that are beyond its control.

Lastly, City Defendants note that it would be unfair to grant summary judgment based on the conclusions of Plaintiffs' data analyst, when Defendants have not had an opportunity to depose him and test these conclusions.

For all of these reasons, summary judgment should not be granted, and Plaintiffs' motion should be denied.

CONCLUSION

For all of the foregoing reasons, City Defendants respectfully request that the Court deny Plaintiffs' motion, at least as it pertains to City Defendants, and grant City Defendants such other and further relief as the Court deems just and proper.

DATED: July 28, 2022
New York, New York

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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J.S.M., *et al.*,

Plaintiffs,

-against-

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

Defendants.
---------- x

20 CV 705 (EK)(RLM)

DECLARATION OF MIA DELANE GURLEY

MIA DELANE GURLEY, under penalty of perjury, declares pursuant to 28 U.S.C. § 1746, that the following statements are true and correct:

1. I am Senior Executive Director of Special Education Services and Evaluations, within the New York City Department of Education's Special Education Office. I have been employed in this position since March 2021 and have been with the Department of Education (DOE) since October 2007. I submit this declaration in opposition to Plaintiffs' motion for partial summary judgment.

2. This declaration is based on my personal knowledge, my review of records maintained by DOE, and conversations with other employees of the DOE.

3. Among other things within the purview of the Senior Executive Director of Special Education Services and Evaluation are the Committees on Special Education (CSE) that are staffed with individuals responsible foroverseeing the scheduling and conducting of resolution sessions held after the filing of due process complaints brought pursuant to the Individuals with Disabilities Education Act.

4. The CSEs are responsible for resolution sessions for students for whom they developed the Individualized Education Program (IEP) or individualized Education Support

Plans (IESP). This includes children who are referred by the DOE to attend a state approved non-public school, children whose parents have rejected the DOE's placement and place their children in a private school and seek the DOE to pay tuition, and students in charter schools. Resolution meetings for students who attend New York City public schools are managed by Administrators of Special Education while resolution meetings for students attending District 75 programs are managed by District 75 staff. (District 75 is the Citywide District serving students who cannot be educated in a General Education setting.)

5. The purpose of a resolution session "is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the LEA has the opportunity to resolve the dispute that is the basis for the due process complaint." 34 C.F.R. § 300.510. A successful resolution session avoids the need for a hearing to be conducted; and while the participation of a parent is required at a resolution meeting, a parent cannot be compelled to resolve their complaint.

6. Certain types of cases are particularly amenable to resolution – these include cases in which parents are seeking implementation of services recommended on their child's IEPs or IESP by asking the DOE to agree to pay an enhanced rate (a rate higher than the DOE's standard rate) for Special Education Teacher Support Services (SETSS). Resolution is also a viable approach to address requests for independent evaluations, often at a higher rate than the DOE's standard rate, and claims for make-up and compensatory services, often at an enhanced rate as well. Facilitating the provision of evaluations or services by authorizing the enhanced rate very clearly addresses the dispute that is the basis for the complaint.

7. At the request of the New York State Education Department, in 2021, the DOE undertook a review of the rates which DOE would authorize for SETSS, related services

such as physical therapy and speech therapy, as well as various kinds of evaluations. Based on our review, we modified the maximum rate for neuropsychological evaluations, but did not change our standard rate for other services, finding that the majority of students overall were able to obtain the service at our established rates.

8. In practice, if a parent wants the DOE to agree to pay more than the DOE's standard rate to implement a service on an IEP or IESP or obtain an independent evaluation, ie., an enhanced rate, the parent must make a specific request. That request can be made outside of the impartial hearing process. Many families, however, opt to initiate a due process complaint (DPC) for these requests to be addressed.

9. If a parent files a DPC for an enhanced rate, the claim can be resolved by simply offering or agreeing to the enhanced rate requested by the parent. Accordingly, in lieu of a meeting, during the 2021-22 school year, we implemented a process in which we would submit a rapid resolution agreement by sending a written offer to the parent to pay the enhanced rate requested in the due process complaint. We made over 3,000 resolution offers for the 2021-22 school year. We are expanding this approach for the 2022-23 school year in a continued effort to reduce the number of cases that go to hearing.

Dated: July 29, 2022
New York, New York

DocuSigned by:
Mia Delane Gurley
Mia Delane Gurley
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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J.S.M., *et al.*,

Plaintiffs,

-against-

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

Defendants.

---------- x

20 CV 705 (EK)(RLM)

DECLARATION OF NOEL R. GARCIA

NOEL R. GARCIA, under penalty of perjury, declares pursuant to 28 U.S.C. § 1746, that the following statements are true and correct:

1. I am a Deputy Commissioner of the New York City Office of Administrative Trials and Hearings ("OATH"). Among other things, I oversee the recently established OATH Special Education Hearings Division. I submit this declaration in opposition to Plaintiffs' motion for partial summary judgment.

2. This declaration is based on my personal knowledge, my review of records maintained by OATH, and conversations with other OATH employees.

3. OATH is New York City's independent central tribunal. It was established in 1979 by executive order and was made a Charter agency in 1988. NYC Charter 1048(1).

4. "The purpose of formalizing OATH in the charter is to establish an independent adjudicative body that can be a resource to agencies in conducting their adjudications, while at the same time establishing an independent structure outside of the agency to provide an unbiased assessment of the matters to be adjudicated." The Report of the Charter Revision Commission, Vol. 2 at p. 103 (April 1989).

5. In an effort to address issues in the administrative system whereby claims brought under the Individuals with Disabilities Education Act are adjudicated, the City of New York and the New York City Department of Education coordinated with the State of New York and the New York State Education Department and, on December 1, 2021, executed a Memorandum of Agreement. *See* Exhibit A, annexed to this Declaration. Pursuant to this Memorandum of Agreement, the handling of the special education impartial hearing system was transferred to OATH.

6. The primary goals of this transfer are to ensure that due process hearings are assigned and decided within the regulatory time frames, and to decrease the number of pending cases. This plan was further memorialized in an Executive Order issued by Mayor Bill de Blasio, Executive Order 91, and ratified by the new Chancellor of the Department of Education. Mayor Adams continued the Order by Executive Order 1, and recently signed a revised order that also confers jurisdiction over matters brought under Section 504 of the Rehabilitation Act to OATH (in addition to matter brought under the Individuals with Disabilities Education Act). A copy the revised executive order, and the more recent ratification executed by the Chancellor of the Department of Education are annexed hereto as Exhibits B and C, respectively.

7. OATH has now established a new special education hearings division and will employ as many full-time (and if necessary, part-time) impartial hearing officers as are needed to address existing, unassigned cases and issue decisions in new cases within the regulatory time frames.

8. As required for all impartial hearing officers, OATH hearing officers are trained and certified by the State Education Department. OATH will supervise the new division

to ensure the efficient adjudication of special education cases. OATH hearing officers are impartial adjudicators who have sole discretion to decide the outcome of each case assigned to them. OATH will provide its hearing officers with the resources, training, physical space, and administrative support necessary so that they may perform their duties in a fair and timely manner.

9. This process is well underway. OATH hearing officers began receiving cases on a daily basis on March 23, 2022. As of July 22, 2022, we have brought on 41 hearing officers, all of whom have been trained and certified by the State (some hearing officers were already certified at the time they were hired by OATH). We have also hired 13 individuals to perform administrative functions, with two more to be onboarded shortly.

10. From March to July 22, 2022, 884 cases have been assigned to OATH hearing officers and additional cases are assigned every day.

11. Of those cases, final decisions have been issued in 61 cases, 3 cases were dismissed before a hearing, 12 cases were consolidated, 4 cases closed due to resolution agreements, 172 cases were settled, 120 cases were otherwise withdrawn, and 512 are pending.

12. Decisions are being issued within regulatory time frames. To the extent that extensions are granted, these extensions are lawful, they are few, and they are documented contemporaneously.

13. To the extent that any OATH hearing officers have recused themselves from a case, the recusal is based on appropriate considerations (such as a conflict), and it is documented.

14. OATH continues to interview candidates and the present goal is to have 46 full time hearing officers onboard, trained, and certified, by September 2022. OATH will also hire and train 4 full time settlement officers.

15. We recognize that this is a work in progress, and we are constantly considering how best to staff the special education unit, handle the workflow, and how to insure the system functions effectively and efficiently going forward. OATH is committed, however, to delivering fair and timely decisions that meet the highest standards of excellence.

Dated: July 29, 2022
New York, New York

Noel R. Garcia

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---------- x

J.S.M., *et al.*,

Plaintiffs,

-against-

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

Defendants.
---------- x

20 CV 705 (EK)(RLM)

DECLARATION OF CHERYL WILLIAMS

CHERYL WILLIAMS, under penalty of perjury, declares pursuant to 28 U.S.C. § 1746, that the following statements are true and correct:

1. I am Senior Executive Director of the New York City Department of Education's (DOE) Impartial Hearing Office. I have held that position since February 2020, after serving as Interim Senior Executive Director since July 2019. I have worked in the Impartial Hearing Office since 2011 and have been employed by the DOE since November 2007. I submit this declaration in opposition to Plaintiffs' motion for partial summary judgment.

2. This declaration is based on my personal knowledge, my review of records maintained by the DOE, and conversations with other employees of the DOE.

3. The Impartial Hearing Office handles administrative tasks in connection with the impartial hearing process. Due process complaints are filed with the Office. Once filed, each complaint must be reviewed, information must be entered into the Impartial Hearing System (IHS), creating a case with a unique case number, and the complaint itself uploaded into the system. Every due process complaint must be assigned to an impartial hearing officer. The complaints must then be routed within the DOE to the offices responsible for the resolution process and for litigating the case. As a case progresses, staff in the Impartial Hearing Office are

also responsible for entering hearing dates and extensions into IHS, and entering the final status of a case when a decision is rendered, or when a case is withdrawn or otherwise resolved.

4. Once a case is assigned to a hearing officer, DOE has no oversight of the Hearing Officer, and has no control over when a decision in a case is issued. When a hearing officer extends the "compliance date," meaning the regulatory deadline for issuing a final decision, the IHO staff enter this information into IHS – although staff review the extension for compliance with technical requirements around the dates of extension, the DOE has no authority to question or invalidate the extension or the given reason for the extension.

5. In Fiscal Year 2012 (July 1, 2011 through June 30, 2012) there were 5,751 cases filed in the Impartial Hearing Office. In Fiscal Year 2022 (July 1, 2021, through June 30, 2022), there were 17,880 cases filed in the Impartial Hearing Office. This represents a 210.902% increase in filings over the past ten years.

6. We estimate that 45% of the Fiscal Year 2022 filings were by parents seeking implementation of individualized education services plans (IESPs), which provide for services for students who are attending private schools. I am advised that the students whose parents file complaints seeking implementation of IESPs are not class members in this action. Of the remaining complaints, almost 90% are on behalf of parents who have placed their children in private school and seek an order for DOE to pay the tuition and other costs associated with the school placement. A much smaller percentage of filings (about 4%) are on behalf of children enrolled in New York City public schools, seeking additional services.

7. When a parent files a due process complaint, the student is entitled to pendency in the last agreed upon placement. For example, if the parent has previously been successful in obtaining an order for the DOE to pay tuition or for services, the DOE is legally

obligated to continue these payments once the due process complaint is filed, while the complaint is pending. Once the Impartial Hearing Office receives any document stating that a due process claim is filed, the Office must create a case and process the complaint.

Actions Taken to Streamline Processes

8. Over the past several years, my Office, and the DOE generally, have worked, both internally and with the New York State Education Department (SED), to improve the administration of due process hearings held pursuant to the Individuals with Disabilities Education Act here in New York City. Among other things, we have endeavored to streamline all the related processes with the goal of providing effective and efficient administration of due process complaints.

9. We continue to explore ways to reduce the number of cases that require hearings and the number of hearings required in a particular case, including doing ourreach to parents and their representative on cases that we believe could be ripe for mediation.

10. Among other things, the DOE and SED collaborated on recruitment of hearing officers, changes to the qualifications for hearing officers, and revisions to the compensation policy in response to concerns that the existing policy was negatively impacting the willingness of persons to be certified as hearing officers.

11. The DOE also discontinued a practice of requiring hearings on uncontested pendency – if the DOE and the parent/advocate agree on the pendency placement or services, a form is completed to allow pendency to be put in place. This has dramatically reduced the number of pendency hearings that are needed – a hearing is needed only where there is a dispute.

12. As noted above, the Impartial Hearing Office also worked extensively to expand the use of mediation as an option for families. Either before or after a due process complaint is filed, the parties can opt to work with an independent third party to resolve the issues in the due process complaint. Because state regulations require any agreement in mediation to be reflected in the student's IEP, mediation is not an option where the parent seeks an order requiring the DOE to pay for tuition at a private school that is not state-approved as the remedy for a claim that the DOE did not offer or provide a free appropriate public education (FAPE) to the student.

13. We established a process to review and evaluate cases for mediation. During the 20-21 school year, the mediation team at the Impartial Hearing Office reviewed almost 900 cases for their potential for mediation. We focused on cases in which the parent affirmatively requested mediation (45 cases), cases filed by pro se parents or by an advocate, rather than an attorney. (We omitted the majority of cases from our review because the parties were represented by an attorney; the mediation process does not allow for payment of attorneys fees.) As part of our review, we were able to identify cases that could be addressed through resolution, and those cases were referred for resolution.

14. We achieved a full agreement in 76% and partial agreement in 10% of the cases that went to mediation. Resolution offers were also made in the cases referred for resolution.

15. In school year 2022, we expanded the universe of cases to evaluate for mediation. With regards to cases requesting financial relief, the mediation team is closely examining cases involving requests for independent evaluations, and requests for services including but not limited to enhanced-rate services, transportation, and other payment requests

(such as lunch reimbursement or access to assistive technology). We also began reaching out to legal services organizations to explore the possibility of mediating cases. Even if a case is not referred to mediation, we regularly identified cases that could be referred for resolution.

16. As described in the accompanying declaration of Mia Delane Gurley, dated July 29, 2022, the DOE has undertaken additional steps to facilitate the resolution process in a further attempt to reduce the number of complaints that require a hearing.

17. Most notably, as described below and in the declaration of Noel R. Garcia, dated July 28, 2022, the DOE and SED collaborated on a plan to transition the hearing process to the New York City Office of Administrative Trials and Hearings (OATH) in recognition of the need for more oversight over hearing officers.

18. At the end of 2021, the DOE, SED and Office of Administrative Trials and Hearings entered into an agreement for OATH to hire hearing officers and to assume administration of the hearing process (the full assumption of the hearing process is dependent on the completion of the transition of all hearings to OATH employed hearing officers and development of a system to electronically file due process complaints). *See* Garcia Declaration. Since March, 2022, the Impartial Hearing Office has been assigning cases to hearing officers employed by OATH. We expect to be able to assign an ever increasing number of cases to these hearing officers. I am advised that OATH has implemented a tight management structure and will carefully monitor use of extensions and compliance with regulatory requirements.

Assignment of Due Process Complaints

19. As noted above, when a due process complaint is filed, the Impartial Hearing Office must assign a hearing officer to the case. Prior to March 2022, all hearing officers were per diem hearing officers certified by SED. These hearing officers ("per diem hearing

officers") were under no obligation to accept cases for hearing, other than a regulatory requirement to accept one (1) case within New York State every two (2) years in order to maintain their certification. Until November 2019, the Impartial Hearing Office reached out to all per diem officers on a quarterly basis to obtain information on their availability to accept cases. This information was entered into a calendar functionality with the Impartial Hearing System (IHS) and used to guide the rotational appointment of per diem hearing officers. Using this approach allowed a broad assignment of hearing officers to cases, but there were instances where hearing officers returned a case (or recused themselves) because they were no longer available. On November 18, 2019, SED directed the Impartial Hearing Office to only appoint impartial hearing officers to cases by the date of filing (oldest first) and to daily confirm availability of hearing officers before making an appointment. This change meant that all cases that had been returned by the hearing officers had to be offered before new cases could be assigned. To effectuate this change, the Impartial Hearing Office implemented a process by which, on a daily basis, hearing officers would advise whether and how many cases they could accept. Under this new structure, even though there were over 160 certified hearing officers in 2020 and 2021, there were weeks/days where there were fewer than five hearing officers available to accept new cases. This change created a backlog in assignments.

20. For system management purposes, starting in June 2020, SED directed the DOE to enter an extension into the Impartial Hearing System (IHS) when the case was assigned outside of the regulatory timeframe. These "waitlist extensions" extend from the grant date – thirty (30) days for Committee on Preschool Special Education (CPSE) cases, or forty-five (45) days for Committee on Special Education (CSE) cases. SED explained that this allowed them to assess whether a delay in issuing a decision was the responsibility of the hearing officer; it did

not mean that a case addressed outside the regulatory time frame was now "compliant." If a case was already outside the regulatory time frame when assigned, SED explained that it was not reasonable to make that the responsibility of the hearing office and in fact, we learned that hearing officers would not accept cases without an acknowledgement of this.

21. Because there are only a finite number of hearing officers willing to accept a new case on a given day and with the increase in due process filings, it is not always possible to immediately appoint an available hearing officer for all due process complaints filed in New York City. Accordingly, and in response to the 2019 SED Directive, the Impartial Hearing Office created a waitlist of those due process complaints that were filed but for which there was not yet an available hearing officer.

22. Initially, cases were assigned from the waitlist under a first in, first out method, after accounting for re-filings, potential consolidations of new filings with already existing cases and cases that were remanded by the SED Office of State Review or Federal Court. However, we realized that this resulted in students with more immediate needs waiting for their hearings, while students with pendency who were receiving all their services would have a hearing officer appointed to their cases.

23. Accordingly, SED and DOE, with input from plaintiffs' counsel, created a priority structure for assigning cases on the waitlist. The DOE created a web-enabled, fillable form that filers may complete to notify the DOE of the prioritization category to which case should be assigned. The Impartial Hearing Office retrieves the responses from a spreadsheet where they are automatically captured and use this information in assigning cases to hearing officers.

24. When there are more cases awaiting assignment then can be assigned to available hearing officers, cases are put on the wait list and assigned based on this prioritization. Pursuant to the priority structure, the categories are: (1) Student is not currently receiving any special education programs or services (public or private), (2) Student is attending the program or school recommended on their DOE IEP (including charter school or placement by DOE in a state-approved non-public school) but is not receiving all the services on the DOE IEP, (3) Student attends a public school (or charter school or state-approved non-public school) but parent disagrees with the DOE IEP; OR student attends a private school or receives private services, but is not currently receiving all additional services requested by the parent as relief (either of these events may be coupled with a request for an independent educational evaluation), (4) Student is currently attending (public or private) school and/or receiving services, but does not have pendency in that school program or services and seeks it [an order for tuition or services] as relief, (5) Student is currently receiving a special education program or services and is seeking compensatory education or services for a prior deprivation of a free appropriate public education, (6) Student is currently unilaterally placed in a private school by the parent without DOE consent or is receiving private services, and has pendency in the private school placement or special education program/services being sought, and seeks that private school placement or special education program/services as relief for deprivation of a free appropriate public education.

25. By the end of June, 2022, there was no wait list – all complaints had been assigned to hearing officers.

26. In July, 2022, DOE began receiving due process filings for the 2022-23 school year. The majority of due process filings are received in the early months of the school

year, as families seek to obtain pendency for the upcoming school year while their cases is pending. As of the date of this affidavit, DOE has received over 2400 due process complaints. As we have done in prior years, additional personnel have been assigned to help process complaints. All complaints have been processed and entered in the Impartial Hearing Management System. They have been referred for resolution and assigned for possible litigation or settlement. As of close of business on July 28 2022, there was a small waitlist of 122 unassigned cases which we expect to be assigned before the end of next week. If any of these cases require a pendency agreement or a hearing to address contested pendency, the IHO would be notified of such and would either process a submitted pendency agreement, or reach out to a hearing officer for apoointment case so that the issue of contested pendency hearing could be addressed.

27. I am advised that plaintiffs cite findings in the February 2019 Report – External Review of the New York City Impartial Hearing Office prepared by Deusedi Merced. The Report claims that "in the past… due to insufficient budget allocations by the Department of Education, increases in filings, and spending by the Impartial Hearing Office, the Office had run out of funds which had led to reported lapses in the compensation of hearing officers, which then led to hearing officers removing themselves from rotation." (Please see REPORT EXTERNAL REVIEW OF THE NEW YORK CITY IMPARTIAL HEARING OFFICE. Submitted by: Deusdedi Merced External Reviewer, Special Education Solutions, LLC, February 22, 2019, page 28) (annexed to Plaintiffs' motion papers as Exhibit 8).

28. Since at least as far back as the summer of 2019, this office has not been delayed in vouchering payments on properly prepared invoices. The Impartial Hearing Office reviews all submitted invoices for accuracy and vouchers invoices for payment, with payments to hearing officers being made by the New York City Department of Finance. Invoices are

generally vouchered within thirty (30) days of receipt of a proper voucher. If the invoice does not contain the necessary information or includes improper billing, the IHO communicates with the Hearing Officer to get a corrected invoice. Consistent with the DOE's compensation policy, the DOE does not voucher invoices until a case is concluded.

29. I also understand that plaintiffs cite to the Report to claim that the DOE has insufficient hearing rooms in which to conduct hearings. Prior to the pandemic, there were thirteen (13) hearing rooms at 131 Livingston Street, Brooklyn, New York. When the COVID pandemic began in March 2020, the Impartial Hearing Officer transitioned to remote hearings, using available technology for the hearings. Even with the opening of offices over the past year, hearings continue in large part to be conducted remotely. With the move to remote hearings, the capacity to hold hearings before per diem hearing officers has increased from approximately 180 in person hearings to over 500 remote hearings per day. All parties to the hearing process have indicated a preference for remote hearings, it eliminates the need for travel, and parties do not need to worry about health and safety in order to appear at a hearing The space for hearings is simply not a factor impacting the number of hearings that can be conducted on a given day.

Conclusion

30. We recognize that parents have a right to file due process complaints and that these complaints must be decided. As made clear above, the DOE continues to explore ways to improve the administration of the impartial hearing process and reduce the need to go to hearing or ensure that decisions are rendered timely. The move to OATH represents a significant step forward in tightening the hearing process by implementing a system with oversight of the hearing officers employed by OATH to ensure compliance with regulatory requirements.

By reason of the foregoing, it is respectfully requested that the Court deny plaintiffs' motion for partial summary judgment.

Dated: July 29, 2022
New York, New York

s/Cheryl N. Williams, Esq.
Cheryl Williams

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---------- x

J.S.M., *et al.*,

Plaintiffs,

-against-

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

Defendants.

---------- x

No. 20 CV 705 (EK)(RLM)

CITY DEFENDANTS' RESPONSE TO PLAINTIFFS' RULE 56.1 STATEMENT

Pursuant to Rule 56.1 of the Local Civil Rules of this Court, Defendants the New York City Department of Education and former Chancellor Richard Carranza (the "City Defendants") set forth their responses to the assertions contained in Plaintiffs' Local Civil Rule 56.1 Statement of Material Facts as to Which There is No Genuine Issue to Be Tried, dated May 26, 2022, as follows:

1. Disputed, to the extent that the Department of Education must "arrange" for due process hearings to be "conducted," but it is per-diem, freelance hearing officers, as well as hearing officers employed by the New York City Office of Administrative Trials and Hearings, who conduct due process hearings in New York City. 8 N.Y.C.R.R. § 200.5(j)(3); *see also* Declaration of Noel R. Garcia, dated July 29, 2022, at ¶ 9; Declaration of Cheryl Williams, dated July 29, 2022 ("Williams Declaration") at ¶ 4-5. Notwithstanding these objections, City Defendants do not dispute that New York has a two-tier administrative due process system pursuant to the Individuals with Disabilities Education Act, and that decisions issued by impartial hearing officers can be appealed to the New York State Education Department's Office of State Review. N.Y. Educ. Law § 4404.

2. Not disputed.

3. Not disputed.

4. Not disputed.

5. Not disputed.

6. Disputed, to the extent that the Department of Education cannot "initiat[e] the appointment of an impartial hearing officer" when there are no impartial hearing officers willing or able to accept appointments. Williams Declaration at ¶¶ 19-24. Notwithstanding this objection, City Defendants admit that State regulations provides for the appointment of an impartial hearing officer no later than two business days after receipt of a due process complaint. 8 N.Y.C.R.R. § 200.5(j)(3).

7. Disputed, to the extent that the Department of Education is required to provide procedural safeguards notices to parents in the parent's native language, or by "other mode of communication used by the parent, unless it is clearly not feasible to do so." 8 N.Y.C.R.R. § 200.5(f)(2). Notwithstanding this objection, City Defendants admit that the Department must issue procedural safeguard notices at certain specified times, including after the filing of a due process complaint. 8 N.Y.C.R.R. § 200.5(f).

8. Not disputed.

9. Not disputed.

10. Disputed, to the extent that the factual assertion implies that the Department of Education must "offer the relief sought in the [due process complaint]" to fulfill its obligations in connection with resolution meetings. There is no such requirement in the law. *See* 20 U.S.C. § 1415(f)(1)(B); 8 N.Y.C.R.R. § 200.5(j)(2). Notwithstanding this objection, City Defendants admit that there are instances where the Department does not convene a resolution

session within fifteen days of the filing of a due process complaint, and that at some resolution sessions, the Department does not "offer the relief sought in the [due process complaint]."

11. Disputed, to the extent that hearing officers, not the Department of Education, schedule hearings. *See* Plaintiffs' Exhibit 5 at DOE000105. Notwithstanding this objection, City Defendants admit that the Department of Education notifies parties of scheduled hearings presided over by per-diem impartial hearing officers.

12. Not disputed.

13. Disputed, to the extent that the factual assertion includes conclusions that are not part of the cited portions of the supporting declaration. Notwithstanding this objection, City Defendants admit that there are due process hearings where the Department does not present its own witnesses, does not submit evidence, and/or concedes that the Department did not offer the student a free and appropriate public education.

14. Not disputed.

15. Not disputed.

16. Not disputed that the document cited therein contains the quoted statement.

17. Disputed, to the extent that assertion characterizes the Impartial Hearing Office's obligation as anything more than the ministerial entry of data concerning extension issued by the impartial hearing officers. Williams Declaration at ¶¶ 3-4.

18. Not disputed.

19. Disputed, to the extent the factual assertion states that the State Education Department "must ensure that each public agency in the state" meets obligations connected to the Individuals with Disabilities Education Act. Notwithstanding this objection, City Defendants

admit that the State Education Department's oversight obligations extend to local educational agencies in the State. 20 U.S.C. § 1412(a)(11).

20. Not disputed.

21. Not disputed.

22. Not disputed.

23. Not disputed that the document cited therein contains the quoted statement.

24. Not disputed.

25. Not disputed.

26. Not disputed.

27. Not disputed.

28. Not disputed.

29. Disputed, to the extent the factual assertion can be read to suggest that extensions are limited to thirty, or sixty, days in total. Notwithstanding this objection, City Defendants admit that each individual extension is limited to 30 days, which was then extended to 60 days, but that further 30 (or 60) day extensions can be lawfully granted. 8 N.Y.C.R.R. § 200.5(j)(5)(i).

30. Not disputed.

31. Not disputed that the declarant made the quoted statement.

32. Not disputed that the declarant made the quoted statement.

33. Not disputed that the declarant made the quoted statement.

34. Not disputed that the declarant made the quoted statement.

35. Not disputed.

36. Disputed, to the extent that the Department of Education did check the availability of hearing officers prior to November 2019, albeit on a quarterly basis. Williams Declaration at ¶ 19.

37. Disputed, to the extent that it is not clear what is mean by "significant number" or "associated delays." Notwithstanding this objection, City Defendants admit that, before November 2019, impartial hearing officers recused themselves from due process hearings.

38. Not disputed.

39. Not disputed.

40. Not disputed.

41. Disputed, to the extent that, as of July 28, 2022, the waitlist is now only 122 cases. Williams Declaration at ¶ 26. Notwithstanding this objection, City Defendants admit that in February 2021, there were more than 6000 cases on the waitlist referenced therein, and that an employee of the State Department of Education made the quoted statement.

42. Disputed, to the extent that, as of July 28, 2022, the waitlist is now only 122 cases. Williams Declaration at ¶ 26. Notwithstanding this objection, City Defendants admit that in September 2021, there were more than 6200 cases on the waitlist referenced therein, and that a number of those cases had been waiting for the appointment of an impartial hearing officer for more than 75 days.

43. Not disputed.

44. Not disputed.

45. Not disputed.

46. Not disputed.

47. Not disputed.

48. Not disputed.

49. Disputed, to the extent that the waitlist extension does not artificially make untimely cases timely, but instead incentivizes impartial hearing officers to accept assignment of untimely cases by insuring that impartial officers are able to preside over and resolve cases on the waitlist without having to immediately extend the compliance date. Williams Declaration at ¶ 20. Notwithstanding this objection, City Defendants admit that the document cited therein contains an attachment titled "Tech workaround for bringing late case into compliance." Plaintiffs' Exhibit 14.

50. Disputed, to the extent that the excerpt is misleading – the waitlist extension was meant only to eliminate the need to seek extensions upon assignment, not thereafter. *See* Williams Declaration at ¶ 20. Notwithstanding this objection, City Defendants admit that the document cited therein contains the quoted statement. Plaintiffs' Exhibit 23.

51. Disputed, to the extent that the waitlist extension was intended to insure that impartial officers are able to preside over and resolve cases on the waitlist. Williams Declaration at ¶ 20. Notwithstanding this objection, City Defendants admit that the document cited therein contains the quoted statement. Plaintiffs' Exhibit 14.

52. Disputed, to the extent that City Defendants do not agree that the waitlist extension violates the rights of any party to a due process complaint. Notwithstanding this objection, City Defendants admit that an employee of the State Education Department made the quoted statement. Plaintiffs' Exhibit 26.

53. Not disputed that an employee of the State Education Department made the quoted statement.

54. Not disputed.

55. Not disputed.

56. Not disputed.

57. Not disputed.

58. Not disputed.

59. Not disputed.

60. Not disputed.

61. Not disputed.

62. Not disputed.

63. Disputed, to the extent that the document cited therein refers to cases with "extended timelines," not cases that are "out of compliance with" the Individuals with Disabilities Education Act, as Plaintiffs assert. Plaintiffs' Exhibit 3.

64. Not disputed.

65. Not disputed.

66. Not disputed.

67. Not disputed.

68. Not disputed.

69. Not disputed that the document cited therein contains the quoted statement. *See* Plaintiffs' Exhibit 8.

70. Disputed, to the extent that the Department of Education does not set maximum compensation for impartial hearing officers, to the extent that payments to impartial hearing officers are now processed promptly, and to the extent that there is no evidence that impartial hearing officers declined appointments because of compensation issues. N.Y. Educ. Law § 4404(1)(c); Williams Declaration at ¶ 28; *see also* Plaintiffs' Exhibit 8. Notwithstanding

this objection, City Defendants admit that the document cited therein contains the quoted statement.

71. Not disputed that the document cited therein contains the quoted statement.

72. Not disputed that the document cited therein contains the quoted statement.

73. Not disputed that the document cited therein contains the quoted statement.

74. Not disputed that the document cited therein contains the quoted statement.

75. Not disputed that the document cited therein contains the quoted statement.

76. Disputed, to the extent that the Department of Education does not extend timelines, with or without written orders, or have legal obligations in regards to timelines – the regulations apply to hearing officers. *See* 8 N.Y.C.R.R. § 200.5(j)(5)(i). Notwithstanding this objection, City Defendants admit that the document cited therein contains the quoted statement. *See* Plaintiffs' Exhibit 8.

77. Not disputed.

78. Disputed, to the extent that the Department of Education does not appoint impartial hearing officers who are not available to take on the matter. Williams Declaration at ¶ 19. Notwithstanding this objection, City Defendants admit that previously, impartial hearing officers were assigned to cases rotationally, pursuant to the regulations regardless of their availability, and that the document cited therein contains the quoted statement. *See id*.

79. Not disputed that the document cited therein contains the quoted statement.

80. Not disputed.

81. Not disputed that the document cited therein contains the quoted statement.

82. Not disputed that the document cited therein contains the quoted statement.

83. Not disputed that the document cited therein contains the quoted statement.

84. Not disputed.

85. Not disputed.

86. Not disputed.

87. Not disputed.

88. Not disputed.

89. Not disputed that the document cited therein contains the quoted statement.

90. Not disputed.

91. Not disputed.

92. Not disputed.

93. Not disputed that the document cited therein contains the quoted statement.

94. Disputed, to the extent that the Department of Education does not proceed to hearing on enhanced rate cases or cases concerning independent education evaluations as a

matter of practice, nor improperly place the burden on parents. Declaration of Mia Delane Gurley, dated July 29, 2022 ("Delane Gurley Declaration"), at ¶¶ 6, 8-9; *see also* Williams Declaration at ¶ 15. Notwithstanding these objections, City Defendants admit that the document cited therein contains the quoted statement.

95. Disputed, to the extent that the Department of Education is attempting to resolve or mediate at least some cases concerning enhanced rate or independent education evaluations, and to the extent that the Department of Education cannot unilaterally prevent parents from proceeding to hearing. *See* Delane Gurley Declaration at ¶¶ 6, 8-9; *see also* Williams Declaration at ¶ 15. Notwithstanding these objections, City Defendants admit that the document cited therein contains the quoted statement.

96. Not disputed.

97. Disputed, to the extent that the cited document says that the Department of Education had not yet submitted "its plan to settle cases long awaiting settlement approval…" Plaintiffs' Exhibit 25.

98. Not disputed.

99. Not disputed that the document cited therein contains the quoted statement.

100. Not disputed that the document cited therein contains the quoted statement.

101. Not disputed.

102. Not disputed.

103. Not disputed.

104. Not disputed.

105. Not disputed.

106. Not disputed that the factual assertion is consistent with the declarant's statement.

107. Not disputed.

108. Not disputed.

109. Not disputed.

110. Not disputed that the factual assertion is consistent with the declarant's statement.

111. Not disputed.

112. Not disputed that the factual assertion is consistent with the declarant's statement.

113. Not disputed that the factual assertion is consistent with the declarant's statement.

114. Not disputed.

115. Not disputed that the factual assertion is consistent with the declarant's statement.

116. Not disputed that the factual assertion is consistent with the declarant's statement.

117. Not disputed that the factual assertion is consistent with the declarant's statement.

118. Not disputed that the factual assertion is consistent with the declarant's statement.

119. Not disputed.

120. Not disputed that the factual assertion is consistent with the declarant's statement.

121. Not disputed that the factual assertion is consistent with the declarant's statement.

122. Not disputed that the factual assertion is consistent with the declarant's statement.

123. Not disputed that the factual assertion is consistent with the declarant's statement.

124. Not disputed.

125. Not disputed.

126. Not disputed.

127. Not disputed that upon scheduling a mutually agreed-upon hearing date, the impartial hearing officer noted that the compliance date was less than two weeks thereafter, and asked "is anybody requesting an extension of the compliance date?" Plaintiffs counsel then moved to extend the compliance date, "to allow for attempting to resolve the matter." The Department of Education's counsel joined this motion. *See* Plaintiffs Exhibit 41 at 16 (JSM Plaintiffs 00007297).

128. Not disputed.

129. Not disputed.

130. Not disputed.

131. Not disputed.

132. Not disputed.

133. Not disputed.

134. Not disputed.

135. Not disputed.

136. Not disputed.

137. Not disputed.

138. Not disputed.

139. Not disputed.

140. Not disputed.

141. Not disputed.

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147. Not disputed.

148. Not disputed.

149. Not disputed.

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174. Not disputed.

175. Not disputed.

176. Not disputed.

177. Not disputed.

178. Not disputed.

179. Not disputed.

Dated: July 29, 2022
New York, New York

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