UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

- against -

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

Defendants.

20 Civ. 705 (EK) (RLM)

STATE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGEMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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Defendants the New York State Education Department ("SED") and SED Commissioner Dr. Betty A. Rosa (collectively, "State Defendants") respectfully submit this memorandum of law in support of their motion pursuant to Rule 56 of the Federal Rules of Civil Procedure for partial summary judgment dismissing Plaintiffs' claims under the Individuals with Disabilities Education Act ("IDEA")[1] and in opposition to Plaintiffs' motion for partial summary judgment.

PRELIMINARY STATEMENT

Plaintiffs commenced this action in February 2020 challenging delays in the adjudication of special education due process complaints filed in New York City. Since that time, the entire landscape of that adjudication process in New York City has changed. As of June 30, 2022, the number of cases awaiting assignment to a hearing officer has decreased over 90%, more cases are being resolved, and critically, the cases are being resolved faster.

Significantly, in December 2021, Defendants[2] began the transfer of the due process adjudication system from the New York City Impartial Hearing Office to the New York City Office of Administrative Trials and Hearings ("OATH"). This overhauled the entire due process system and is intended to streamline the process, increase efficiency, and reduce delays. And the progress is already tangible.

Yet Plaintiffs persist in challenging a due process system that has significantly changed and being replaced. Indeed, Plaintiffs' motion papers relegate the OATH transition to a single footnote, and otherwise wholly ignore this material change. But the OATH transition, together with other efforts by State Defendants, have addressed and are already ameliorating many of the

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[1] Per the Court's June 7, 2022 Order, the State Defendants have limited this motion to Plaintiffs' IDEA claims and reserve their rights to move for summary judgment at a later date on Plaintiffs' non-IDEA claims.

[2] The New York City Department of Education ("DOE") and the DOE Chancellor of Education are also named as defendants ("City Defendants") and are represented by the New York City Corporation Counsel.

issues Plaintiffs are challenging, making Plaintiffs' claims stale and unsustainable.

As set forth more fully below, State Defendants, not Plaintiffs, are entitled to summary judgment. First, there is no private right of action against State Defendants under the IDEA. Second, the entire framework of the due process system has changed since Plaintiffs commenced this action, rendering Plaintiffs' claims stale and unripe for review. Third, contrary to Plaintiffs' contention, the IDEA does not provide for strict liability and therefore State Defendants are not automatically liable for delays in the resolution timelines. Finally, State Defendants have satisfactorily discharged their supervisory and monitoring obligations under the IDEA. In sum, the undisputed facts show that SED has been consistently and diligently monitoring and supervising DOE regarding its due process issues, providing technical assistance and directing changes to assist DOE in coming into compliance, to satisfy its obligations under the IDEA.

Accordingly, the Court should grant summary judgment for State Defendants dismissing the IDEA claims and deny Plaintiffs' motion.

STATEMENT OF FACTS

I. The Individuals with Disabilities in Education Act

A. *SED's Supervisory and Monitoring Obligations under the IDEA*

The IDEA is comprehensive legislation that provides federal funding to states that develop plans to assure "all children with disabilities" receive a "free appropriate public education" ("FAPE"). *See* 20 U.S.C. § 1412(a)(1)(A). Responsibilities under the IDEA are divided between local educational agencies ("LEA"), such as DOE, which in most cases are the direct providers of special education programs and services, *see* 20 U.S.C. § 1413(a)(1), and state educational agencies ("SEA"), such as SED, which have general supervisory authority. *See* 20 U.S.C. § 1412(a)(11)(A). New York State receives federal funds under the IDEA and has enacted statutory

and regulatory provisions to meet its obligations under federal law regarding the education of students with disabilities. *See* N.Y. Educ. Law § 4401 *et seq.*; 8 N.Y.C.R.R. § 200.1, *et seq.* SED, as the SEA, is "primarily responsible" for the State supervision of public elementary schools and secondary schools and is responsible for ensuring that the requirements of the IDEA are met. *See* 20 U.S.C. § 1401(32), § 1412 (a)(11)(A). Consistent with the SEA's role, to receive funds under IDEA, each LEA is required to demonstrate to the satisfaction of the SEA that it provides for the education of students with disabilities within its jurisdiction, and has in effect policies, procedures, and programs that are consistent with state standards, policies and procedures established under 20 U.S.C. §§ 1412 and 1413 (a)(1).

SEAs must also monitor compliance with Part 300 of IDEA's implementing regulations. *See* 34 C.F.R. § 300.600. Additionally, the Commissioner of Education is authorized to monitor; conduct inspections; and require reports, information, and data from districts and their schools as necessary to ensure that districts and schools are carrying out the duties and functions of state law and the rules and regulations promulgated thereunder. *See, e.g.*, N.Y. Educ. Law §§ 215, 305(1) and 308. When necessary, SEAs are also required to utilize "appropriate enforcement mechanisms," which include technical assistance, correction action or improvement plans, and/or withholding of funds, in whole or in part. *See* 34 C.F.R. §§ 300.600(3); 300.604.

B. *Statutory and Regulatory Framework Regarding Due Process*

The IDEA was enacted to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living and that the rights of children with disabilities and parents of such children are protected. 20 U.S.C. § 1400(d)(1)(A) and (B). To that end, the IDEA provides procedural safeguards and due process procedures for

parents and children, including an opportunity for an impartial due process hearing conducted by an independent hearing officer ("IHO"). *See* 20 U.S.C. § 1415; 34 C.F.R. §§ 300.507-300.518.

To implement the minimum qualifications for IHOs prescribed by the IDEA, IHO candidates must meet certain regulatory criteria and complete an SED training program. 20 U.S.C. § 1415(f)(3)(A); N.Y. Educ. Law § 4404; 8 NYCRR 200.1(x). To maintain certification, IHOs must attend updated training programs as scheduled by the Commissioner and submit a yearly certification attesting that they meet regulatory requirements. 8 NYCRR 200.1(x)(4). The certification is subject to suspension or revocation for good cause. 8 NYCRR 200.21.

New York State has established a two-tier hearing system with a hearing at the local level and an appeal to a State Review Officer. N.Y. Educ. Law § 4404; 8 NYCRR 200, 201, 279. Prior to initiation of an impartial due process hearing, a parent or school district must submit a complete due process complaint with respect to any matter relating to the identification, evaluation, or educational placement of a student with a disability or a student suspected of having a disability, or the provision of a FAPE to such a student. 8 NYCRR 200.5(i)(1), 200.5(j)(1).

There are alternative dispute resolution methods available to families. After a parent submits a due process complaint, the school district is required to inform the parent of the availability of mediation and, within fifteen days of receiving the due process complaint, convene a resolution session. 8 NYCRR 200.5(j)(1)(ii)-(2).

The Commissioner's Regulations provide that Boards of Education or trustees of each school district shall establish a list of certified IHOs available to serve in the district and appoint an IHO in accordance with a rotational selection process immediately but not later than two business days after receipt of the due process complaint. 8 NYCRR 200.2(e) and 200.5(j)(3).

Due process complaints filed by parents must generally be decided 45 days after the

expiration of the 30-day resolution period, or 45 days after the parties waive the resolution session in writing. 8 NYCRR 200.5(j)(5). IHOs have the discretion to grant requests for extensions in accordance with criteria outlined in the regulations. 8 NYCRR 200.5(j)(5)(ii).

A decision made in a hearing is final, except that any party aggrieved by the decision may appeal the decision to a State Review Officer. 20 U.S.C. § 1415(g); 34 C.F.R. §§ 300.514(a), 300.532(c)(5); N.Y. Educ. Law § 4404(1); 8 NYCRR 200.5(k)(1). A decision made by a State Review Officer is final unless a party appeals to any state court of competent jurisdiction or in a district court of the United States. 20 U.S.C. § 1415(g); 34 C.F.R. §§ 300.514, 300.516, and 300.532(c)(5); N.Y. Educ. Law § 4404(3); 8 NYCRR 200.5(k)(3).

II. SED's Consistent and Escalating Actions Taken Pursuant to its Monitoring and Supervisory Obligations under the IDEA.

A. *The February 2019 Merced Report*

Approximately four years ago, recognizing delays in due process adjudication in New York City, SED concluded that it needed to better understand the functioning of the New York City Impartial Hearing Office and its policies, procedures, and practices specific to special education impartial hearings. Therefore, in 2018, SED engaged Deusdedi Merced of Special Education Solutions, a special education consultant, to conduct a review of the New York City Impartial Hearing Office. Suriano Decl.[3] at ¶ 3. Merced issued a report on his findings in February 2019. Ex. A to Suriano Decl. ("Merced Report").

The Merced Report found that, for school year 2016-17, the number of due process complaints filed in New York State nearly totaled the number of the six next largest states combined (California, Florida, Illinois, New Jersey, Pennsylvania, and Texas). *See* Merced Report at pp. 11-12. Of the due process complaints filed in New York State in 2016-17, approximately

[3] "Suriano Decl." refers to the declaration of Christopher Suriano, dated July 28, 2022.

92% were filed in New York City. *Id*. at 12. The Merced Report also found that between 2014-15 and 2017-18, New York City had a 51% increase in the number of due process complaints filed. *Id*. at 14. After reviewing the Merced Report, SED determined that further action was required and took additional steps consistent with its supervisory role.

B. *SED's Issuance of the May 2019 Compliance Assurance Plan and Ensuing Corrective Action and Technical Assistance*

In May 2019, SED issued a Compliance Assurance Plan to DOE (the "CAP"). Suriano Decl. at ¶ 8; Ex. B to Suriano Decl. ("CAP"). The CAP consists of three related sections; Section III is devoted to procedural safeguards.[4] Suriano Decl. at ¶ 9. Section III of the CAP cited DOE, among other things, for failing to provide parents access to adequate due process after a complaint has been filed and concluded that, essentially, DOE was not maintaining a functioning due process hearing system. Suriano Decl. at ¶ 10; CAP at p. 18. SED then proceeded to take further steps to assist DOE in accomplishing compliance.

Corrective Action Under the CAP

A contributing factor to DOE's failure to maintain a functioning due process hearing is the sheer volume of due process complaints that are filed in New York City. Suriano Decl. at ¶ 11. The volume of due process complaints was (and is) growing exponentially. The CAP documented the steady increase in DOE's due process complaint filings since the 2015-2016 school year (e.g., 5,026 in 2015-16 to 7,448 for only a portion of the 2018-19 school year). Suriano Decl. at ¶ 13; CAP at p. 19.

The objective of SED's directives to DOE in Section III of the CAP was to reduce the

[4] The formal titles of the sections are: Section I: Provision of a FAPE to Preschool Students with Disabilities; Section II: Provision of a FAPE to School-Age Students with Disabilities; and Section III: Affording Students with Disabilities and Their Parents All the Rights and Procedural Safeguards Required by Federal and State Law and Regulations.

number of due process complaints, and in turn, the number of due process complaints that proceeded to a hearing. Suriano Decl. at ¶ 14. SED directed DOE to develop an action plan detailing how it would (1) reduce the volume of due process complaints (including increasing the use of mediation and IEP facilitation) and (2) reduce the number of complaints proceeding to a hearing. Suriano Decl. at ¶ 14; CAP at pp. 22-23. SED also directed DOE to conduct a root cause analysis of why due process complaints were being filed; paying particular attention to cases in which DOE concedes that it has failed to provide the student with a FAPE and why FAPE is not provided or unable to be provided. SED further directed DOE to opine as to whether those cases should be resolved through the settlement process. Suriano Decl. at ¶ 14; CAP at pp. 22-23.

Other corrective actions required by Section III focused on curing dysfunction in the day-to-day operations of DOE's hearing system. For example, SED directed DOE to increase staffing resources to its impartial hearing office ("NYCIHO") and improve or increase hearing space. With respect to IHOs, SED directed DOE to submit a plan on how it would revise its IHO compensation policy to ensure that complaints are resolved in a timely manner. Suriano Decl. at ¶ 15; CAP at pp. 18-21.

The corrective actions in Section III of the CAP gave DOE notice of specific issues within the due process system that needed to be addressed and provided guidance for DOE to achieve compliance with the applicable laws and regulations. SED pledged to provide ongoing and targeted support to aid DOE in developing a plan to achieve the prescribed corrective action. Suriano Decl. at ¶ 16; CAP at pp. 22-24.

C. *SED's Internal Actions and Steps*

SED managed DOE's corrective actions through subsequent meetings and communications, but it also took further steps to improve DOE's hearing system. In addition to

aggressively recruiting IHO candidates, SED staff canvassed all IHOs certified to be appointed to cases in New York City with smaller caseloads to encourage them to take additional cases and also canvassed IHOs who accept cases outside of New York City to ascertain their availability and/or willingness to accept cases in New York City. Suriano Decl. at ¶ 17; Ex. C to Suriano Decl. ("Tahoe Letter dated November 18, 2019").

In accordance with SED's directive, DOE submitted a proposed revised compensation policy. SED reviewed the proposal, found it unsatisfactory, undertook its own analysis, and developed a revised IHO compensation policy. In accordance with its enforcement and monitoring responsibilities, SED directed New York City to implement the SED policy as written. Suriano Decl. at ¶ 18; Ex. D to Suriano Decl. ("Suriano to Bateman Letter dated November 19, 2019").

To address SED's concerns regarding the timely appointment of IHOs, on November 19, 2019, Christopher Suriano, SED's Assistant Commissioner of Special Education, sent a guidance memo to IHOs who conduct hearings in New York City to remind them of proper reasons for recusal. Most recusals were improper because DOE's automatic appointment process led to IHOs being assigned more cases than they could handle and IHOs were using recusals to manage their caseloads. Assistant Commissioner Suriano also notified them of SED's directive that DOE should be ensuring IHO availability before assigning cases. Suriano Decl. at ¶ 19; Ex. E to Suriano Decl. ("November 19, 2019 Guidance Memo").

Regarding pendency,[5] by letter dated, November 18, 2019, SED advised DOE that, as previously outlined and discussed, DOE's practice of holding hearings on cases where pendency is not in dispute causes delays and wastes resources that could be reallocated to claims requiring a

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[5] Pendency is the IDEA-mandated mechanism by which a student "stays put" in the last agreed-upon educational placement during the impartial hearing process; pendency is triggered by the filing of a due process complaint.

hearing. SED reminded DOE that a pendency placement is automatic, cannot be contingent on an IHO order, and that DOE's practice of requiring such violated IDEA. Suriano Decl. at ¶ 21; Tahoe Letter dated November 18, 2019 at p. 2.

SED directed DOE to provide all available data on pendency, including the number of due process cases involving contested and uncontested pendency and a description of the role of IHO orders for uncontested pendency cases. Suriano Decl. at ¶ 21; Tahoe Letter dated November 18, 2019 at p. 2. SED's data indicated that the number of due process complaints that result in a settlement is extremely high, but that settlement takes an inordinate amount of time, "sometimes up to two years" while remaining on an IHO's docket. Suriano Decl. at ¶ 22.

A longstanding explanation for delay in settlement was (and is) the necessity of review of settlements by the Comptroller. Thus, SED required DOE to "arrange for the NYC Comptroller's Office to participate in expedited conversations to address [SED's] ongoing concerns regarding long delayed settlements . . ." and to provide data on, *inter alia*, pending settlements waiting approval from the Comptroller and the length of time between parties' agreement and final settlement. Suriano Decl. at ¶ 22; Tahoe Letter dated November 18, 2019 at p. 2.

D. *IHO Case Assignment Improvements*

One of NYC's longstanding explanations for delay in settlement was (and is) the necessity of review of settlements by the NYC Comptroller. To address the inefficiencies caused by DOE's automatic IHO assignments and the resulting IHO recusals, SED directed DOE to begin assigning cases by the date the complaint was filed (oldest first) to ensure that parents who have experienced multiple recusals but may have filed their due process complaint long ago would be the first to have an IHO assigned. Suriano Decl. at ¶ 22; Tahoe Letter dated November 18, 2019 at p. 1. In December 2019, SED reviewed a representative sampling of IHO decisions to see what types of

complaints were proceeding to hearing, what, if any, defense DOE was presenting, and what type of relief was being ordered by the IHOs. Suriano Decl. at ¶ 23.

E. *SED's NYCIHO Monitor*

In January 2020, SED determined that it was necessary to have a monitor in the NYCIHO to assist with monitoring progress with respect to the CAP. Suriano Decl. at ¶ 24. The monitor's duties included observing hearings, tracking wait times for hearings and room availability, accessing daily hearing schedules, assessing space functionality, serving as a liaison with IHOs, providing assistance and guidance relating to the interplay between DOE's and SED's data systems, monitoring payment disputes and delays between IHOs and the NYCIHO, verifying staffing roles and responsibilities and whether adequate staffing was available at NYCIHO, monitoring efforts regarding increasing the use of mediation and IEP facilitation, monitoring data entry and efforts to come into compliance with timely data entry, monitoring State Complaint findings as they pertain to individuals awaiting assignments of an IHO, and monitoring the list of parents/guardians awaiting appointment of an IHO. Ex. F to Suriano Decl. ("DeCandia to Bateman Letter dated January 29, 2021").

F. *Increasing Pool of Per Diem IHOs*

As an outgrowth to SED's ongoing recruitment of IHO candidates, SED reviewed applications, held interviews, and trained and certified an additional 107 IHOs after holding trainings in March 2020, October 2020 and April 2021. Suriano Decl. at ¶ 25.

During the March 2020 Board of Regents Meeting, SED proposed certain regulatory changes to expand the pool of IHO applications in New York City and clarify certain IHO duties and responsibilities. Suriano Decl. at ¶ 26; Ex. G to Suriano Decl. ("Regents Items Update on the NYC Impartial Hearing System January 2020"); Ex. H to Suriano Decl. ("Proposed Amendments

dated February 28, 2020"). SED hoped that this expansion would help alleviate the backlog of due process complaints awaiting adjudication in New York City.

G. *SED's Continued Monitoring of the CAP's Corrective Action Deliverables*

SED continued to monitor DOE's required corrective action deliverables, in particular, the reduction of the number of complaints that proceed to hearing, especially when DOE did not have a defense to the complaint. Suriano Decl. at ¶ 27. On March 3, 2020, SED also directed DOE to submit documentation regarding the types of cases that proceed to due process, and to submit a plan to address the issue of the lack of DOE representation at hearings. Suriano Decl. at ¶ 27; Ex. I to Suriano Decl. ("Suriano to Goldmark Letter dated March 3, 2020") at pp. 4-5.

SED required DOE to submit a plan addressing how DOE would increase the use of resolution meetings, including an explanation of who conducts the resolution meeting on behalf of DOE and the extent of their authority to settle matters. DOE was also required to provide written confirmation that individuals conducting mediations have the authority to enter into legally binding agreements for both non-monetary and monetary relief. Suriano Decl. at ¶ 28; Suriano to Goldmark Letter dated March 3, 2020 at pp. 2, 5. SED reiterated that DOE's settlement process is protracted and that it is one of the major causes for the excessive amount of open due process cases. Suriano Decl. at ¶ 28; Suriano to Goldmark Letter dated March 3, 2020 at p. 2.

SED again directed DOE to provide data on the number of cases that are pending settlement approval, how long the settlement process takes on average, how long the current outstanding cases have been waiting for settlement, and how soon they are expected to settle. Suriano Decl. at ¶ 29; Suriano to Goldmark Letter dated March 3, 2020 at p. 3, 5. SED also required DOE to submit a plan to revise its settlement process so that it is faster, more efficient, and captures matters DOE does not intend to defend at hearing. Suriano Decl. at ¶ 29; Suriano to Goldmark Letter dated

March 3, 2020 at p. 2. In an effort to provide assistance to DOE regarding staffing at the NYCIHO, SED directed DOE to provide the following information regarding staffing resources: the number of attorneys and non-attorneys that constitute a full staff in DOE's Special Education Unit of DOE Legal ("SEU"); the number of SEU staff members needed to process settlements DOE enters into between its Ten-Day Notice program and the due process complaint system; the number of settlements SEU processed during the 2016-17, 2017-18, and 2018-19 school years; the number of SEU staff members during each of those school years; and the rate of attrition at SEU. Suriano Decl. at ¶ 30; Suriano to Goldmark Letter dated March 3, 2020 at p. 2.

SED continued to oversee issues negatively affecting IHOs and directed DOE to, among other things: implement a scheduling system linked to hearing room availability, provide information on the availability of computers in the hearing rooms, and provide new electronic forms to IHOs in the necessary format to assist with access and navigating the change in procedure. SED also directed DOE to submit: (i) a plan for ensuring that DOE developed a revised compensation policy after appropriate engagement with IHOs, (ii) a timeline for training IHOs on the compensation policy, (iii) a timeline and method for training IHOs on the new forms that DOE requires, and (iv) a plan to ensure that IHOs may submit invoices and be paid on a case before it is fully closed. Suriano Decl. at ¶ 31; Suriano to Goldmark Letter dated March 3, 2020 at pp. 1, 4, 5. As a follow up to SED's ongoing review of IHO decisions and in light of feedback from IHOs that many cases proceeding to a due process hearing involve inadequate funding of special education teacher support services ("SETSS"), SED directed DOE to provide data on how many cases proceeding to a due process hearing involve reimbursement or provision of SETSS; whether DOE instituted a change in practice regarding settling these types of cases and if so, why; and how DOE planned to specifically address these types of cases, including an analysis of whether

increased reimbursement rates are needed to pay the actual rates charged by area providers. Suriano Decl. at ¶ 32; Suriano to Goldmark Letter dated March 3, 2020 at p. 3.

In order to organize outstanding deliverables DOE owed SED, and to correctly reflect revised deadlines, SED developed a chart to track issues, deadlines, and requirements. The chart was provided to DOE and included an outline of SED's prior requests and directives. Suriano Decl. at ¶ 33; Ex. J to Suriano Decl. ("DeCandia to Williams Letter dated April 7, 2020").

SED continued to prioritize a reduction in due process complaints, particularly those that proceeded to hearing. Suriano Decl. at ¶ 34. One area of focus was alternative dispute resolution. SED informed DOE that its approach to alternative dispute resolution, embodied in an "IEP Facilitation" document, was not acceptable and required revision. SED also required DOE submit data on the number of mediations conducted in 2019-2020 and a plan to increase that amount by twenty percent. The plan was required to include an explanation of what authority the individuals conducting mediations have to enter into binding agreements, a description of duties of newly hired staff, and how those staff will increase the number of mediations in New York City. SED also reiterated its directive that DOE submit a plan to increase the use of resolution meetings. Suriano Decl. at ¶ 34; DeCandia to Williams Letter dated April 7, 2020 at pp. 1-2.

SED also focused on settlement and reiterated its directives to DOE to submit both data on SETSS cases and settlements generally and a plan to address the lack of DOE representation at hearings. Suriano Decl. at ¶ 35; DeCandia to Williams Letter dated April 7, 2020 at p. 2.

Since DOE had not made significant progress on overhauling its pendency process, in April 2020, SED required a list of dates and times to hold a meeting to provide technical assistance to ascertain how a pendency system could be implemented without the necessity of an IHO order. Suriano Decl. at ¶ 36; DeCandia to Williams Letter dated April 7, 2020 at p. 5. SED also addressed

retention of IHOs by informing DOE of the poor retention rate of NYC IHOs post-certification and advising that IHOs need to be paid appropriately without excessive delay and treated professionally. SED advised DOE that newly certified IHOs agreed to become IHOs and work in New York City with the understanding that they would be paid pursuant to a new compensation policy. Suriano Decl. at ¶ 37; DeCandia to Williams Letter dated April 7, 2020 at pp. 1-2.

In April 2020, SED adapted the waitlist to address input from the field and requests for certain cases to be assigned outside of chronological order. Suriano Decl. at ¶ 38. SED sent DOE "revised wait list procedures" to prioritize certain cases that needed more immediate attention and directed DOE to assign at least two full-time attorneys from the Special Education Unit of DOE Legal to review cases and the waitlist and triage them for assignment to an IHO based on the likelihood that the delay in the hearing was negatively impacting the student. Suriano Decl. at ¶ 38. For example, SED directed DOE to prioritize students who were not receiving special education placement/program/services to ensure that the cases needing the most urgent attention were expeditiously assigned to an IHO. Suriano Decl. at ¶ 38.

One year following the issuance of the CAP, on May 27, 2020, former SED Deputy Commissioner John D'Agati sent DOE a letter and indicated that more concrete actions were necessary to address DOE's noncompliance. Suriano Decl. at ¶ 39. Specifically, Deputy Commissioner D'Agati noted that DOE should cease requiring certain cases to proceed to hearing, stating that there is "no justifiable reason to proceed to an impartial hearing" where the DOE (1) knows or should know that it has failed to provide a required service on a student's IEP or IESP; (2) relies on a service delivery method that puts the onus on the parents to find a service provider; (3) lacks enough providers who are willing and able to provide the required services at the DOE rate; (4) knowingly contributes to a lack of providers by authorizing a DOE rate that is far below

the market rate for reimbursement of providers; and (5) has no intent to meet its burden of production or defend its failure to deliver services through the impartial hearing process. Suriano Decl. at ¶ 39; Ex. K to Suriano Decl. ("D'Agati to Goldmark Letter dated May 27, 2020") at p. 2. SED noted additional case types that should not proceed to hearing, including cases involving Independent Education Evaluations ("IEE"). SED directed DOE to provide documentation that its rates for evaluations are commensurate with the rate awarded after hearing. Suriano Decl. at ¶ 40; D'Agati to Goldmark Letter dated May 27, 2020 at pp. 2-3. SED also required DOE to eliminate its outstanding 2018-19 and prior settlement cases and reduce its outstanding 2019-20 cases by 50 percent. Suriano Decl. at ¶ 41; D'Agati to Goldmark Letter dated May 27, 2020 at p. 4. SED further reminded DOE that its obligation to provide SED its plan for closing settled cases for the 2018-2019 school year was "critically important" because the students involved in those "long-ago filed due process complaints" are "entitled to resolution." Suriano Decl. at ¶ 42; Ex. L to Suriano Decl. ("DeCandia to Nathan Letter dated June 26, 2020") at p. 1.

At that time, in July 2020, it was crucial to finalize outstanding settlements because DOE was expecting a large influx of complaints stemming from the transition to online learning during COVID-19 and the upcoming school year. DOE's protracted settlement procedure forced a larger than usual number of cases awaiting settlement approval to return to the already overburdened due process system. According to DOE, as of March 1, 2020, settlement had been achieved for only 65% cases that were awaiting settlement from the 2018-2019 school year and prior school years. Suriano Decl. at ¶ 43; Ex. M to Suriano Decl. ("Nathan to DeCandia Letter dated July 8, 2020").

SED continued to emphasize the importance of placing the most urgent cases at the top of the waitlist and, where possible, to eliminate cases on the waitlist through settlement. Suriano Decl. at ¶ 45. SED directed DOE to assess cases for potential consolidation; informed DOE that,

contrary to DOE's interpretation of SED's regulations, consolidation was not limited to cases filed in the same school year; and again directed DOE to review and prioritize cases on the waitlist. Suriano Decl. at ¶ 45; DeCandia to Nathan Letter dated June 26, 2020.

Despite SED's overtures for a plan on pendency implementation, DOE again put the burden on filers instead of evaluating individual cases and making its own determination. DOE stated it would "review and take steps to implement pendency without a hearing if pendency is uncontested." Suriano Decl. at ¶ 48; Nathan to DeCandia Letter dated July 8, 2020. SED then sent memos to NYC IHOs to notify them of waitlist and pendency protocols. Suriano Decl. at ¶ 49; Ex. O to Suriano Decl. ("Memo dated July 17, 2020"); Ex. P to Suriano Decl. ("Memo dated August 10, 2020").

H. *SED's Additional Actions to Supervise DOE and Decrease Delays*

After DOE's progress on the CAP stalled, SED attempted to re-engage DOE. Suriano Decl. at ¶ 50. On December 3, 2020, Commissioner Rosa met with then-Chancellor Carranza, respective senior leadership, and representatives from SED's Office of Special Education. Suriano Decl. at ¶ 50. On December 17, 2020, SED and DOE held an "IDEA meeting," a regularly scheduled meeting attended by leadership at both agencies to discuss a wide range of special education matters, during which SED reviewed DOE's status regarding compliance with CAP requirements. Suriano Decl. at ¶ 51. SED noted that it had nearly doubled the amount of certified IHOs and proposed regulatory changes to expand the pool of candidates eligible to become IHOs and acknowledged that DOE had met some goals, including implementing a revised IHO compensation policy, eliminating uncontested pendency matters from proceeding to hearing and streamlining decision processing. However, it was not enough to correct DOE's cited noncompliance. Suriano Decl. at ¶ 51; Ex. Q to Suriano Decl. ("Suriano to Goldmark Letter dated

January 7, 2021").

SED and DOE held twenty-four formal IDEA meetings between August 2019 and May 2022. The agencies discussed issues relating to due process at twenty of those meetings during that time frame. Suriano Decl. at ¶ 52. This was in addition to less formal meetings, including regular communications between SED and DOE, in which SED continually exercised its monitoring function in an effort to bring DOE into compliance and reduce delays.

I. *SED's Exploration of DOE Process Changes*

Data in and around December 2020-January 2021 indicated that there were more than 13,000 open due process cases and nearly 7,000 cases awaiting appointment of an IHO. Therefore, SED continued to implore DOE to implement process changes to stop requiring certain cases to proceed through the due process system. Suriano Decl. at ¶ 53; Suriano to Goldmark Letter dated January 7, 2021. DOE's only action, other than disputing data and completing staff training, was to increase the maximum reimbursement rate for independent neuropsychological evaluations. Suriano Decl. at ¶ 53; Suriano to Goldmark Letter dated January 7, 2021. DOE claimed that enhanced rate requests could be resolved in resolution because Committee on Special Education supervisors were authorized to resolve such disputes. Suriano Decl. at ¶ 55; Ex. R to Suriano Decl. ("Goldmark to Suriano Letter dated Feb. 11, 2021"). Therefore, SED requested data on the number of successful resolution sessions on cases requesting an enhanced rate. Suriano Decl. at ¶ 55; Ex. T to Suriano Decl. ("LaCrosse to Goldmark Letter dated October 27, 2021").

DOE maintained that it was "working to improve the settlement system" but then indicated, as it long had, that it had to obtain Comptroller authority in each and every case before making an offer to parents. Suriano Decl. at ¶ 56; Goldmark to Suriano Letter dated Feb. 11, 2021. SED reiterated to DOE that this additional approval process impeded resolution and improperly delayed

settlements. Suriano Decl. at ¶ 56; Ex. S to Suriano Decl. ("Suriano to Goldmark Letter dated May 27, 2021"). SED examined DOE's mediation data which indicated that during the 2020-2021 school year there were 14,264 due process complaints filed and only 202 requests for mediation. Therefore, SED required that DOE revise and resubmit its mediation plan since its original submission "clearly [was] not effective." Suriano Decl. at ¶ 57; LaCrosse to Goldmark Letter dated Oct. 27, 2021.

J. *SED's Analysis of Data*

During the October 6, 2021 IDEA meeting, SED shared its analysis of DOE due process data. Impartial hearing requests increased from 3224 in 2002-2003 to 14,264 in 2020-21, nearly 350% over 19 years. Suriano Decl. at ¶ 58; LaCrosse to Goldmark Letter dated Oct. 27, 2021. The majority of due process complaints (76%) originate from seven NYC districts, increasing 500% during the same time frame. Therefore, SED directed DOE to do a root cause analysis of two of the seven districts to identify issues in the complaints and analyze factors contributing to the numbers, including identification of the lack of special education programs and services that are needed in these districts to address student need. Suriano Decl. at ¶ 59; LaCrosse to Goldmark Letter dated Oct. 27, 2021. Put simply, if DOE reviewed complaints to determine what services were necessary to provide FAPE and actually provided those services, the number of hearing requests would decrease. Suriano Decl. at ¶ 59.

K. *SED's Day-to-Day Interactions with DOE*

Beyond all of the actions described above, SED communicates with DOE on a daily basis about myriad issues relating to due process, primarily through SED's Due Process Unit ("DPU"). Suriano Decl. at ¶ 60. Topics addressed in these emails and calls include but are certainly not limited to: IHO appointment questions; data questions; late decision monitoring; individual case

questions; daily numbers of available IHOs; and issues concerning actions taken by IHOs. These are but a sampling of the variety of issues that SED's DPU and DOE discuss on a regular basis and is in addition to meetings between SED and DOE. Suriano Decl. at ¶ 60; Exs. A – F to Veltman Decl.[6] (SED Email Correspondence).

Further, data is transferred from New York City's Impartial Hearing System ("IHS") to the State's Impartial Hearing Reporting System ("IHRS") each night. The information includes various data points regarding due process cases and allows SED to monitor DOE's progress. There are also regularly scheduled IT meetings between the DOE Program and Division of Instructional and Information Technology staff and SED Program and IT staff. During these meetings, the program and IT staff discuss any issues with the File Transfer Protocol ("FTP") log, needed updates to IHS/IHRS, updates to regulations and/or guidance that would require enhancement to IHS and/or IHRS and the FTP process, process changes, any FTP errors and possible work arounds, substantial due process program standards changes, cases closed in IHS that are opened in IHRS, data entry delays of extensions/monitoring, coordination of testing of enhancements to IHRS (ERA), and any other questions or concerns upon which DOE and SED need to collaborate. Ex. G to Veltman Decl. (SED Email Correspondence). At these meetings, the participants discuss mediation, resolution, the process for capturing/reporting the data, and, if necessary, there is follow up later. Exs. H and I to Veltman Decl. (SED Email Correspondence). In short, SED has expended, and continues to expend, vast resources and time supervising DOE and making efforts to improve its due process system.

L. *SED's Additional Actions to Effectuate Comprehensive Systemic Change*

i. SED's Support for Accelerated Due Process Legislation

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[6] Veltman Decl." refers to the declaration of Sharon L. Veltman, dated July 29, 2022.

In July 2021, SED sent a memo to the Governor recommending approval of a bill (S.6682, A.7614) to address DOE's due process waitlist. Suriano Decl. at ¶ 62; Ex. U to Suriano Decl. ("Ten-Day Bill Memo"). The bill was signed by the Governor on December 30, 2021 (Chapter 812 of the Laws of 2021) and became effective on March 29, 2022.[7] Suriano Decl. at ¶ 62. The bill amended N.Y. Education Law Section 4404 to provide a process whereby parents who have been awaiting appointment of an IHO for more than 196 days from the filing of a due process complaint can elect to have an IHO immediately appointed to issue an order based upon a proposed order of relief submitted by the family. It also required that the Commissioner of Education make any required regulatory changes before March 29, 2022, which the Commissioner did. Suriano Decl. at ¶ 62; *see* 8 NYCRR 200.5(o). SED supported this legislation with the hope and expectation that it would allow families to avoid delays and obtain relief on a more expedited basis.

ii. SED's Regulatory Efforts to Address IHO Caseloads

In August/September 2021, SED surveyed IHOs to solicit feedback on due process systems changes. Suriano Decl. at ¶ 63. For example, to address the waitlist, SED considered proposing a regulatory amendment to require IHOs to annually accept a minimum number of due process complaints. SED wanted feedback on what IHOs thought would be an appropriate minimal caseload. Of the IHOs who responded to the survey, 70 IHOs (57%) replied that between 0 and 25 cases would be appropriate and 34 IHOs (28%) replied that 26 or more cases would be appropriate. The majority indicated that they should not be required to accept more than 50 cases.[8] Suriano Decl. at ¶ 63. In November 2021, SED proposed regulatory changes that addressed minimum and

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[7] *See* https://www.nysenate.gov/legislation/bills/2021/S6682. (Last visited July 28, 2022.)

[8] The proposed regulatory amendment is publicly available at: https://www.regents.nysed.gov/common/regents/files/1121p12d2.pdf. (Last visited July 28, 2022.)

maximum IHO caseloads, extensions, and a mandatory filing system for DOE due process complaints. Suriano Decl. at ¶ 64; Ex. V to Suriano Decl. ("November 4, 2021 Proposed Amendments Summary"). The proposed regulations were published, and hearings were held to solicit public comment. SED is currently reviewing the comments and evaluating the current landscape to determine next steps. Suriano Decl. at ¶ 64.

iii. SED's Request for Information Regarding New IHO System

On September 9, 2021, SED issued a request for information ("RFI") in an attempt to solicit information from various sources – including attorneys, law firms, law schools, institutions of higher education, offices of court administration, centers for dispute resolution, non-profit entities, and impartial hearing officers, as well as other State or local agencies – regarding the creation of a new IHO system for special education due process hearings in New York City. Suriano Decl. at ¶ 65; Ex. W to Suriano Decl. ("RFI"). . The RFI noted that SED was considering ways in which contractual or "other relationships" could potentially resolve DOE's outstanding noncompliance. Suriano Decl. at ¶ 65; RFI. In the RFI, SED requested detailed descriptions of a potential new model for the due process system, including information on the feasibility of such a system and identification of similar systems that may already exist. SED also requested that IHOs provide information on whether they would be willing to contract with SED, the structure for payment, and the amount of time they would be willing to devote to this position. Suriano Decl. at ¶ 66.

III. Transition of Adjudication of Due Process Complaints from the NYCIHO to the Office of Administrative Trials and Hearings

Despite SED's persistent monitoring and painstaking efforts to improve the system, as of December 1, 2021, there were 8,985 cases that had not been assigned to an IHO and remained on a waitlist for assignment. Suriano Decl. at ¶ 68. Following diligent monitoring of the situation, continual engagement with DOE, and a review of relevant factors including efforts taken to recruit,

train and certify additional per diem IHOs (who, for the most part, carried small caseloads), SED recognized that more drastic steps needed to be taken in order to address the mounting number of due process complaints in New York City. Suriano Decl. at ¶ 69. In order to improve the effectiveness and efficiency of the system, eliminate the waitlist, and manage increased filings every year, it was clear that a cadre of full-time impartial hearing officers with an administrative support structure - rather than independent contractor IHOs accepting cases on a voluntary basis - was necessary to improve the effectiveness and efficiency of the system. Suriano Decl. at ¶ 70.

To that end, on December 1, 2021, SED entered into a Memorandum of Agreement ("MOA") with the New York City's Office of Administrative Trials and Hearings ("OATH") and DOE that established a Special Education Unit at OATH to adjudicate due process hearings in New York City. Suriano Decl. at ¶ 71; Ex. X to Suriano Decl. ("MOA"). OATH is an excellent fit for this role, as it adjudicates a wide range of issues spanning multiple City agencies. It also has the fundamental structures in place to hire and manage IHOs, maintain a modern case management system, ensure confidentiality where appropriate, and administer an impartial, effective adjudication system. Suriano Decl. at ¶ 71; MOA. SED communicated these changes to the due process hearing system with current IHOs, both in writing and through virtual information sessions. Suriano Decl. at ¶ 72. SED assured the IHOs that a complete transition to OATH could take a year or more and that during any transition period, both independent contractor IHOs and OATH IHOs would continue to be appointed to cases. Suriano Decl. at ¶ 72. SED also encouraged current IHOs interested in a full-time position to apply to OATH. SED promised to examine qualification requirements, including the residency requirement, to determine what obstacles, if any, existed for current IHOs. Suriano Decl. at ¶ 72. On May 24, 2022, the Department of Citywide Administrative Services granted OATH's request to waive the city residency requirement for IHOs

in the Special Education Unit. Therefore, any certified IHOs who are not residents of New York City were eligible to apply and, if selected, serve as OATH special education hearing officers. Suriano Decl. at ¶ 73.

During and after the transition to OATH, SED retains responsibility to train and certify IHOs. Suriano Decl. at ¶ 74. SED also retains its authority to revoke or suspend IHO certification and address IHO complaints consistent with 8 NYCRR 200.21. Suriano Decl. at ¶ 74.

OATH has been hiring and onboarding both new IHO candidates and individuals who were previously certified as IHOs on an ongoing basis. Previously certified IHOs retained their existing caseloads and continue to adjudicate those cases, as well as cases to which they are newly appointed as full-time OATH employees. Suriano Decl. at ¶ 75. OATH has also hired staff to provide administrative support and has allocated office space for both hearing officers and administrative proceedings. OATH is also executing contracts for translation/interpretation and transcription services, developing internal rules and procedures for conducting hearings, and developing a scope of work for an electronic filing system. Suriano Decl. at ¶ 76.

SED provided trainings for OATH IHO candidates on February 22-24; March 22-24; May 9-11; and July 18-20, 2022. Suriano Decl. at ¶ 77. As of July 29, 2022, SED has certified 44 IHOs to work in the Special Education Unit. OATH has onboarded and begun appointing due process complaints to 33 of these IHOs. The remaining 11 OATH IHOs were recently certified and will be appointed cases when they have attended the required OATH training. Suriano Decl. at ¶ 78.

As of June 28, 2022, OATH IHOs were appointed to 755 due process complaints. Of these complaints, 255 have been closed and 91% of those cases have been closed in 75 days or fewer. Suriano Decl. at ¶ 79. As of June 30, 2022, there were 290 cases that had not been assigned to an IHO and remained on a waitlist for assignment, representing a 90% reduction from December

2021. Suriano Decl. at ¶ 80.

STANDARD

Summary judgment must be granted when "the movant shows that there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56. Thus, "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial" cannot survive summary judgment because "[i]n such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (citation omitted). In such cases, "[t]he moving party is entitled to a judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id*. at 323 (citation omitted).

ARGUMENT

I. There is No Private Right of Action Against SED Under the IDEA.

As numerous courts have held, "the IDEA only authorizes a private right of action with respect to a *local* educational authority's alleged failure to provide a prospective plaintiff with a FAPE." *See, e.g., Ventura de Paulino v. N.Y.C. Dep't of Educ.*, No. 19 Civ. 222, 2019 WL 2499204, at *2 n.4 (S.D.N.Y. May 31, 2019) (emphasis added) (quotation marks omitted), *aff'd*, 959 F.3d at 537. The IDEA does not provide a private right of action against *state* education departments—such as SED—in a dispute over a local school district's alleged failure to provide a FAPE. *Id.* Accordingly, Plaintiffs cannot bring an IDEA claim against State Defendants.

As the Second Circuit has recognized, section 1415(i)(2)(A) is the only express private right of action in the IDEA. *See Cnty. of Westchester v. New York*, 286 F.3d 150, 152 (2d Cir.

2002); *see also Scaggs v. N.Y. Dep't of Educ.*, No. 06 Civ. 0799, 2007 WL 1456221, at *9 (E.D.N.Y. May 16, 2007) ("Section 1415 provides the only explicit private right of action under IDEA."). Because the "complaint authorized by Section 1415 is, as here relevant, one with respect to the *local* educational authority's failure to provide a FAPE," courts within this circuit have recognized that "the IDEA only authorizes a private right of action with respect to a local educational authority's alleged failure to provide a prospective plaintiff with a FAPE." *Y.D. v. N.Y.C. Dep't of Educ.*, No. 14 Civ. 1137, 2016 WL 698139, at *4 (S.D.N.Y. Feb. 19, 2016) (emphasis added). Indeed, "every court in this circuit to have considered the question has rejected the argument that the IDEA's private right of action under section 1415 authorizes claims against a state agency rooted in the State's general supervisory role under the IDEA." *Larach-Cohen v. Porter*, No. 19 Civ. 7623, 2021 WL 1203686, at *3 (Mar. 30, 2021) (quotation marks omitted).

Notwithstanding the lack of a private right of action against State Defendants under section 1415, Plaintiffs ostensibly base their claim on a purported failure to exercise their oversight responsibilities under section 1412(a)(11). However, there is no private right of action under section 1412(a)(11).

In "analyzing whether a statute implies a private right of action," the Second Circuit has held that the "'interpretive inquiry begins with the text and structure of the statute and ends once it has become clear that Congress did not provide a cause of action.'" *Moya v. United States Dep't of Homeland Security*, 975 F.3d 120, 128 (2d Cir. 2020) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 288 n.7 (2001)). In recent years, "the Supreme Court has increasingly discouraged the recognition of implied rights of actions without a clear indication of congressional intent." *Duplan v. City of New York*, 888 F.3d 612, 621 (2d Cir. 2018).

"The judicial task is to interpret the statute . . . to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexander*, 532 U.S. at 286. "Without a showing of congressional intent, 'a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.'" *Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 116 (2d Cir. 2007) (quoting *Alexander*, 532 U.S. at 286-87). Plaintiffs bear the burden of showing that Congress intended to make a private cause of action available. *See N.Y.C. Env't Just. All. v. Giuliani*, 214 F.3d 65, 73 (2d Cir. 2000).

Here, the "text and structure" of the IDEA show that Congress did not intend to allow plaintiffs to sue States for violations of section 1412. *Moya*, 975 F.3d at 128. Section 1412 is titled "State Eligibility" and sets forth how a State demonstrates to the federal government that it is in compliance with the IDEA. Specifically, section 1412 provides that "[a] State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions." 20 U.S.C. § 1412(a). One of the enumerated conditions provides, among other things, that "[t]he State educational agency is responsible for ensuring that the requirements of this subchapter are met." *Id.* § 1412(a)(11).

By nesting the State's "general supervision" responsibility within a paragraph setting forth the "assurances" a State must provide to the Secretary of Education, Congress showed its intent that the Secretary of Education—not courts—would assess whether a state educational agency is fulfilling its obligations under the IDEA. That the IDEA delegates "regulatory and enforcement authority to the Secretary of Education . . . weighs heavily against implying a private right of action." *Cnty. of Westchester*, 286 F.3d 150, 152 (2d Cir. 2002); *see also Meadows v. United Services, Inc.*, 963 F.3d 240, 244 (2d Cir. 2020) ("By delegating enforcement authority to the

Secretary of the Department of Health and Human Services, the statute clearly reflects that Congress did not intend . . . to create a private remedy.").

Indeed, section 1412 expressly provides that it is the Secretary of Education that "determines [whether] a State is eligible to receive a grant under this subchapter." 20 U.S.C. § 1412(a). And section 1416 provides that it is the Secretary of Education who "shall monitor implementation of this subchapter through oversight of the exercise of general supervision by the States, as required in section 1412(a)(11) of this title." *Id.* § 1416(a)(1)(A)(i) (emphasis added).[9]

That no private right of action is available under section 1412 does not relieve the State of its responsibility under section 1412(a)(11). It simply means that the authority to oversee that responsibility is vested in the Secretary of Education, as the plain text of the statute contemplates. *See* 20 U.S.C. § 1412(a), (d). As the Second Circuit has held, "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Meadows*, 963 F.3d at 244 (quoting *Alexander*, 532 U.S. at 290).

Section 1412's lack of a private right of action is also apparent from the fundamental structural differences between section 1412 and section 1415. Whereas section 1412 is titled "State eligibility" and lists a number of conditions for approval from the Secretary, section 1415 is titled "Procedural safeguards" and lists in detail the mechanisms that children and parents may use to enforce their rights under the statute—including the explicit private right of action in section 1415(i)(2)(A). That the IDEA includes an express private right of action under section 1415 weighs against finding an implied right of action under section 1412. *See Bellikoff*, 481 F.3d at

[9] Section 1416 also sets forth detailed procedural provisions governing how the Secretary of Education should monitor a state's compliance with section 1412, including the steps the Secretary should take in enforcing the statute if it determines that the State is not complying. *See, e.g., id.* § 1416(a)(1)(B), (e). The IDEA also allows the Secretary to by-pass a state's role under the IDEA if it determines that the state is not in compliance. *Id.* § 1412(f); *see also* 34 C.F.R. § 300.190-198. If the state is "dissatisfied" with the Secretary's actions in enforcing the IDEA, it may seek judicial review of those actions directly in the court of appeals. 20 U.S.C. §§ 1412(d)(3)(B), 1416(e)(8)(a).

116 ("Congress's explicit provision of a private right of action to enforce one section of a statute suggests that omission of any explicit private right to enforce other sections was intentional."). In addition to the structural differences, nothing in the text of section 1412(a)(11), or section 1412 more generally, references a private right of action. For that very reason, the Second Circuit has rejected the argument that there is an implied right of action to enforce the very next subparagraph of section 1412, which governs interagency agreements within a State. *See Cnty. of Westchester*, 286 F.3d at 152 (rejecting argument that IDEA created an implied right of action for a "county, educational agency or any other entity" to sue a state under section 1412(a)(12) because section 1415 provides the only express right of action under the IDEA). Therefore, because "the IDEA did not create a private right of action to remedy violations of section 1412," *Larach-Cohen*, 2021 WL 1203686, at *3, Plaintiffs cannot sue State Defendants for the alleged failure to properly exercise their supervisory authority over DOE.[10]

II. Plaintiffs' IDEA Claims are Based on Outdated Facts and Fail to Show any Current Violation by State Defendants.

Even if Plaintiffs had a private right action against State Defendants, their claims would still fail as a matter of law. Plaintiffs' IDEA claims (and their summary judgment motion) are based entirely upon the alleged deficiencies in the system that was in place to adjudicate due process complaints prior to December 2021. *See, generally,* State Defendants' 56.1 Counterstatement ("56.1 Counterstatement"); Suriano Decl. at ¶ 71. Due to the transition of the

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[10] Plaintiffs rely on *Jose P. v. Ambach*, 669 F.2d 865 (2d Cir. 1982), but in that case, the State had previously consented to an entry of judgment against it, and the court assumed that the state defendants could be held liable under section 1412. *See* 669 F.2d at 870-71; *see also Dorian G. v. Sobol*, No. 93 Civ. 0687, 1994 WL 876707, at *3 (E.D.N.Y. Jan. 28, 1994) (declining to apply *Jose P.* in a case where the State "does not consent in any manner"). The *Jose P.* court had no occasion to evaluate or decide whether Congress intended to make section 1412 enforceable through a private right of action. *See id.* But twenty years later—applying the appropriate touchstone of congressional intent—the Second Circuit affirmatively held that at least one subsection of section 1412 is not privately enforceable. *See Cnty. of Westchester*, 286 F.3d at 153. And since *Jose P.* this Court has not found congressional intent to create a private right of action elsewhere in section 1412. The reasoning of *County of Westchester* thus is controlling here, *Jose P.* notwithstanding.

adjudicative process to OATH and the accompanying changes in rules and regulations, the premise of Plaintiffs' claims, including the data upon which they rely and the underlying factual allegations, no longer reflect the current state of the due process system in New York City. *See id.* Therefore, their claims are stale, and fail as a matter of law.

A. Plaintiffs Cannot Sustain a Claim Based on a System That is Currently Being Replaced.

In 2020, Plaintiffs brought this lawsuit alleging that New York City's system for adjudicating due process complaints suffered from delays that violated the IDEA. *See* ECF No. 1 ("Complaint"). That adjudication apparatus is being completely overhauled. In December 2021, as a result of SED's diligent monitoring, it was clear that a cadre of full-time impartial hearing officers with an administrative support structure - rather than independent contractor IHOs accepting cases on a voluntary basis - was necessary to improve the effectiveness and efficiency of the system. Suriano Decl. at ¶ 71. It was at this time that SED, DOE, and OATH entered into the MOA and initiated the OATH transition. Suriano Decl. at ¶ 72.

It is undisputed that the former system, upon which Plaintiffs base their claims, is in the process of being phased out. Suriano Decl. at ¶¶ 72-73. As such, Plaintiffs' motion for summary judgment asks this Court not to determine the sufficiency of the current adjudication system impacting students and their families, but rather to take action concerning an outdated system that no longer exists.[11] Courts routinely decline to take such an action as it is not a justiciable case or controversy, nor an appropriate use of federal judicial resources.

For example, in *Hosp. Ass'n of N.Y. State, Inc. v. Toia*, 577 F.2d 790, 798 (2d Cir. 1978), a number of hospitals challenged the 1976 regulations promulgated by New York State for Medicaid reimbursements. *See Toia*, 577 F.2d at 792. After the State revised its regulations and

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11 Plaintiffs seek only equitable relief, not damages for prior harms. *See* Amended Complaint at ¶¶ 364 – 68.

formula in 1977, the Second Circuit upheld the dismissal of plaintiffs' claim for an injunction and declaratory relief, finding that there was no basis for any prospective relief due to the changes. *Id.* at 798. The Court of Appeals stated:

> [T]he record on which the hospitals seek injunctive relief is confined to the 1976 methodology for computing the reimbursement formula and, while some features of that methodology remain, it has since been substantially revised. Bearing in mind that "(t)he purpose of an injunction is to prevent future violations," . . . and that there apparently are other actions pending that seek to challenge the validity of the current methodology, we find no abuse of discretion in Judge Lasker's decision to dismiss the claim based solely on the 1976 methodology, whether or not it be labelled moot or the record rendered stale as a result of the 1977 revisions. ***The formula to be tested for prospective purposes should be the current, not an outdated, one.***

Id. (citations omitted) (emphasis added).

Likewise, here, Plaintiffs' claims are entirely premised upon the alleged failures of a system that is in the process of being replaced. Like the methodology in *Toia*, while some features remain, the system has been substantially altered. Because the purpose of the injunctive and declaratory relief sought by Plaintiffs is "to prevent future violations," Plaintiffs' claims based on the "outdated" system are stale. Therefore, prospective relief is inappropriate, and Plaintiffs' IDEA claims should be dismissed.

Similarly, in *Fusari v. Steinberg*, 419 U.S. 379 (1975), the Supreme Court held that courts must evaluate claims in light of the present circumstances. In *Fusari*, the district court had held that Connecticut's procedures for assessing continued eligibility for unemployment violated the Due Process Clause of the Fourteenth Amendment. While the appeal was pending, Connecticut significantly revised its system. *See id.* at 380-381. The Supreme Court acknowledged that the government entity at issue had significantly revised the system that was being challenged and held that it was inappropriate to decide the issues because: "This Court must review the District Court's judgment in light of presently existing Connecticut law, not the law in effect at the time that

judgment was rendered." *Id.* at 387. Similarly, here, Plaintiffs have brought suit and based their motion for summary judgment entirely upon facts relating to a system that has already been significantly revised and, following the transition, will be phased out. It would be inappropriate for the Court to grant Plaintiffs' summary judgment on their challenge to a system that is no longer in place. Instead, Plaintiffs' challenge should be dismissed.

B. Plaintiffs' Claims Should Be Dismissed Under the Principle of Prudential Ripeness

In addition to the Supreme Court and Second Circuit case law mandating dismissal of Plaintiffs' challenge to the former system for adjudicating due process complaints, Plaintiffs' claim should be dismissed under the principle of prudential ripeness. Prudential ripeness is "'an important exception to the usual rule that where jurisdiction exists a federal court must exercise it,' and allows a court to determine 'that the case will be better decided later.'" *New York v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 334, 344 (S.D.N.Y. 2019), *aff'd as modified*, 969 F.3d 42 (2d Cir. 2020) (internal citations and quotations omitted). Prudential ripeness serves "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967) (subsequent history omitted). "At its heart is whether we would benefit from deferring initial review until the claims we are called on to consider have arisen in a more concrete and final form." *Murphy v. New Milford Zoning Com'n*, 402 F.3d 342, 347 (2d Cir. 2005).

The ongoing changes to the due process system are extensive. Indeed, the OATH transition is remodeling the system that forms the basis of Plaintiffs' claims. The new system under OATH is in the early stages, and Defendants continue to work together and with OATH to develop policies and guidance to ensure its success. Suriano Decl. at ¶¶ 73-77. Given these substantial changes, and the ongoing transition, it would be premature and speculative to make any ruling or fashion

relief relating to the new system. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732-735 (1998) (dismissing challenge to administrative policies as unripe when the policies were not finalized and could still be revised in response to day-to-day experience of the agency). Further, Plaintiffs have failed to show that any Named Plaintiff or class member is being harmed by the current system. *See Simmonds v. I.N.S.*, 326 F.3d 351 (2d Cir. 2003) ("[T]he mere possibility of future injury, unless it is the cause of some present detriment, does not constitute hardship" when deciding if dismissing a case for lack of ripeness was appropriate) (internal citations omitted). As the prior system of adjudication is being replaced, the OATH plan is still being developed, and Plaintiffs do not and cannot show that any class member is suffering harm under the revised system, the Court should exercise judicial prudence and dismiss this matter as unripe.

III. State Defendants are Entitled to Summary Judgment Because They Have Satisfied Their Obligations Under the IDEA.

A. The IDEA Does Not Provide for Strict Liability.

As demonstrated in Point I, *supra*, Plaintiffs cannot bring an action against State Defendants for alleged failures of their duty of general supervision under the IDEA. However, even if Plaintiffs did have a private right of action, they cannot sustain a claim against State Defendants based merely on their general supervisory role. *See B.J.S. v. State Educ. Dep't/Univ. of N.Y.*, 699 F. Supp. 2d 586, 602 (W.D.N.Y. 2010); *Y.D.*, 2016 WL 698139, at *5. Indeed, State Defendants have considerable discretion in exercising their supervisory and monitoring authority under the IDEA. *See A.A. ex rel. J.A. and Franklin Alvarez v. Philips*, 386 F.3d 455, 459 (2d Cir. 2004) (noting the absence of specific guidance within the IDEA on how the State should ensure local compliance). As such, section 1412(a)(11) does not make a state the "absolute insurer" for a local educational agency's violations of the IDEA. *Beard v. Teska*, 31 F.3d 942, 954 (10th Cir. 1994) (subsequent history omitted).

The IDEA itself rejects a strict liability standard; the statute explicitly instructs a court to award relief for an IDEA violation only "as the court determines is appropriate" based on a preponderance of the evidence, and not for any conceivable violation of the statute. *See, e.g.*, 20 U.S.C. § 1415(i)(2)(C)(iii). Instead, the Second Circuit has stated that: "It would be odd indeed if the state agency given discretion to monitor compliance with a statute were forced to shoulder the burden of establishing the adequacy of its efforts when confronted with merely a complaint in federal court." *A.A.*, 386 F.3d at 459.

The holding in *A.A. v Bd. of Educ., Cent. Islip Union Free School Dist.*, 255 F. Supp. 2d 119, 126 (E.D.N.Y. 2003), *aff'd sub nom. A.A. ex rel. J.A. v. Philips*, 386 F.3d 455 (2d Cir. 2004), is particularly instructive as to the separate roles and responsibilities of an LEA and SEA under the IDEA. In *A.A.*, plaintiffs alleged that State Defendants failed to monitor and enforce the school district's compliance with special education laws. *See id.* Plaintiffs sought, *inter alia*, a declaration that State Defendants had failed to ensure that the local school district had complied with the IDEA, Section 504, and the New York State Education Law; plaintiffs further sought to enforce compliance by way of Section 1983. *Id*. at 262.

The district court in *A.A.* dismissed plaintiffs' IDEA and Section 504 claims, finding that SED had undertaken numerous actions to bring the LEA into compliance with the IDEA over the course of many years and plaintiffs had "failed to show how the State could have directly handled the special education issues facing the District in any way that would have benefitted the Plaintiff class." *See A.A.*, 255 F. Supp. 2d at 126. The district court also held that while the IDEA "clearly places a supervisory and monitoring role on the SEA, the specific requirements of that role (with the exception of requiring the formulation of policies and procedures), are not set forth in the statute. Instead, the SEA has discretion to work with the LEA to ensure compliance with the

IDEA." *Id.* at 125. In fact, as the court explained, "the [IDEA's] purpose is furthered by a more flexible approach . . . it furthers the mandates of the IDEA, and is in the best interests of school children, to allow flexibility in the SEAs' attempts to monitor and obtain compliance with the IDEA." *A.A.*, 255 F. Supp. 2d at 126.

This is consistent with Second Circuit precedent holding that plaintiffs face a "heavy burden" on claims against State agencies based on their monitoring role. *See Reynolds v. Giuliani*, 506 F.3d 183 (2d Cir. 2007). Indeed, where a state agency is tasked with monitoring or supervising a local agency, the state agency cannot be held liable unless plaintiffs demonstrate that "the state defendants' inadequate supervision actually caused or was the moving force behind the alleged violations." *Id.* at 192-93. Plaintiffs "face[] a heavy burden of proof in showing that the state's response was so patently inadequate to the task as to amount to deliberate indifference[,]" and "[s]uch inadequacy must reflect a deliberate choice among various alternatives, rather than negligence or bureaucratic inaction. *Id.* Where plaintiffs "challenge a many-layered supervisory program spanning several years—rather than an isolated incident of non-supervision—they are required to identify with specificity the inadequacies giving rise to their claim." *Id.* at 193. Here, Plaintiffs cannot meet that burden and their IDEA claims fail as a matter of law.

Plaintiffs' motion focuses on whether DOE complied with IDEA-mandated timelines. But Plaintiffs fail to demonstrate that "the delay in reaching compliance [is] attributable to the failure of SED to fulfill its supervisory and monitoring responsibilities." *A.A.*, 255 F. Supp. 2d at 126. Nor do Plaintiffs establish that State Defendants were "deliberately indifferent." *See Reynolds*, 506 F.3d at 193. Plaintiffs bear this burden and fail to carry it. *See id.*; *A.A.*, 386 F.3d at 459.

Despite this clear precedent, Plaintiffs argue that any delay in adjudication beyond the dates laid out in the IDEA should result in joint liability between the State and City Defendants. *See* Pl.

Mem. at Section III.[12] Plaintiffs' argument completely ignores both the statute's flexibility in determining whether the oversight was appropriate and the Second Circuit's directive that the SEA is not liable simply because the LEA fails to be in full compliance.[13]

It is undisputed that State Defendants have been diligent in their attempts to bring the DOE into compliance, including issuing the CAP, providing regular guidance, supervision, and aid, and ultimately implementing the transition to OATH. *See, generally,* Suriano Decl.; *see also supra* Statement of Facts. And, Plaintiffs have failed to show how State Defendants could have taken alternative actions to benefit the Plaintiff class. Instead, Plaintiffs merely cite outdated data and contend, without support, that past delays alone render all defendants liable. This is inconsistent with controlling precedent, incongruous with the flexibility afforded to SEAs under the IDEA, and wholly contradicted by the undisputable current facts.

The cases to which Plaintiffs cite are inapposite. First, as explained above, the IDEA does not provide for a strict liability standard. *Blackman v. District of Columbia*, 97 Civ. 1629 (PLF) (D.D.C. June 3, 1998), is distinguishable because the District of Columbia Public Schools ("DCPS") operated as the LEA and was therefore responsible for ensuring that FAPE was provided; there was no SEA involved in the *Blackman* case.[14] As DCPS was not acting in a

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[12] Plaintiffs rely on *D.D. ex rel. V.D. v. N.Y.C. Bd. of Educ.*, No. 03 Civ. 2489 (DGT), 2004 WL 633222 (E.D.N.Y. Mar. 30, 2004) (subsequent history omitted), yet that case has no bearing here. *D.D.* involved *inter alia*, a motion to dismiss by the SED Commissioner. 2004 WL 633222, at **22-23. While the court denied the motion, it made no finding concerning the sufficiency of SED's exercise of its oversight role. *Id.* Instead, it merely found that SED was a proper party, and "could" be held responsible if it failed to properly discharge its monitoring responsibilities. *Id.* In fact, the court distinguished the case from *A.A.*, noting that in *A.A.*, there were "extensive findings of fact regarding the measures the state took or could have taken in monitoring the local district's compliance with IDEA." *Id.* Without such findings, the court found that the Commissioner should remain in the case at that juncture. *Id.* Here, where the undisputed facts show that the State Defendants took extensive measures in the exercise of its monitoring duties, there is no basis to impute liability.

[13] Plaintiffs' argument also ignores that there is no private right of action against the State Defendants under the IDEA. *See supra*, Point I.

[14] This is clear as following *Blackman*, in 2007, the District of Columbia created the Office of the State

supervisory role in *Blackman*, the holding does not support liability against State Defendants here. To the contrary, as discussed above, the controlling precedent allows the supervisory entity flexibility in ensuring compliance and requiring Plaintiffs to meet the heavier burden of showing "deliberate indifference," which Plaintiffs here cannot do. *See Reynolds*, 506 F.3d at 192-93; *A.A.*, 255 F. Supp. 2d at 126. Further, in *Blackman*, the decision was based on the system in place at that time; unlike here, the system was static and not undergoing a substantial shift that would impact the facts at issue. *See supra* Point II.

Similarly, *Corey H. v. Bd. of Educ. of City of Chicago*, 995 F. Supp. 900 (N.D. Ill. 1998) and *Bates ex rel. Cordero v. Pennsylvania Dep't of Educ.*, 795 F. Supp. 1352 (M.D. Pa. 1992) are neither binding on this Court nor persuasive.[15] For example, in *Cordero*, the court found that Pennsylvania had "done little to intervene" and that Pennsylvania seemed to interpret its duties under the IDEA "essentially as providing funds, promulgating regulations and reviewing individual complaints." *Cordero*, 795 F. Supp. at 1361-62.[16] Unlike the Pennsylvania State Defendant in *Cordero*, SED did not simply "create[] and publish[] some procedures and then wait[] for the phone to ring." *Id*. at 1362. On the contrary, the undisputed facts show that SED has been

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Superintendent of Education ("OSSE") with the express purpose of OSSE acting as the SEA. *See* https://osse.dc.gov/release/bowser-administration-celebrates-more-decade-osse#:~:text=The%202007%20law%20established%20OSSE,well%20as%20other%20responsibilities%20that (last reviewed July 5, 2022); *see also Thomas v. D.C.*, 773 F. Supp. 2d 15, 20 (D.D.C. 2011).

[15] Plaintiffs also improperly rely on *Engwiller v. Pine Plains Cent. Sch. Dist.*, 110 F. Supp. 2d 236 (S.D.N.Y. 2000), which is inapposite. *Engwiller* involved a single plaintiff with a single claim and the *Engwiller* court explicitly found that it could not "conclude on the record before [it] that SED's procedural framework violates the statutory due process rights of *every* child in *every* IDEA due process hearing before the SED." *Engwiller*, 110 F. Supp. 2d at 250 (emphasis in original). Likewise, *Evans v. Bd. of Educ. of Rhinebeck Central Sch. Dist.*, also relied upon by Plaintiffs, involved a single plaintiff with an individual claim, and did not even include the State as a defendant. 930 F. Supp. 83 (S.D.N.Y. 1996).

[16] Similarly, the Court in *Corey H.* found that while the Illinois SEA "may correctly identify some [] violations, it does not direct the school district to take any effective corrective action." *Corey H.*, 995 F. Supp. at 915. This is in stark contrast to the present case where SED has not only issued the CAP to the DOE but also continued to take measures to bring the DOE into compliance.

actively working on these issues for years. *See infra* Point III.B and *supra* Statement of Facts.

B. SED Has Taken Efforts to Address and Resolve DOE's Due Process Issues.

As discussed above, the IDEA does not include a private right of action under section 1412, Plaintiffs' claims are based on outdated facts, and Plaintiffs fail to present any evidence that the current system is violating the IDEA. Nonetheless, regardless of which system Plaintiffs challenge, State Defendants still prevail. The undisputed facts demonstrate that State Defendants have engaged in regular, consistent, and escalating efforts to bring DOE into compliance. SED's diligence in its supervision and monitoring satisfies the legal standard, and therefore summary judgment should be granted to State Defendants.

The true breadth and depth of the resources SED has devoted to New York City's due process system is unquantifiable; the issues involved are immense, complex, and intertwined; yet it is undisputed that SED has worked, and continues to work, tirelessly to improve due process for students with disabilities. *See, generally,* Suriano Decl. And while SED has consistently and diligently discharged its obligations, it has not done so in a one-size-fits-all manner; rather, SED has remained flexible and creative. The undisputed facts show that SED has discharged its supervisory obligations by, *inter alia*, giving directives, requesting data and analyses, providing direct assistance, and, all the while, being in near constant contact with DOE regarding due process through meetings with leadership and daily phone calls and emails between the individuals directly responsible for navigating due process issues on a day-to-day basis. *See supra* Statement of Facts.

As detailed above, and in the Suriano Declaration, SED has taken the following actions, including many others, in its discharge of its supervisory responsibilities:

i. **Engagement of Consultant.** In 2018, SED engaged Deusdedi Merced of Special Education Solutions, a special education consultant, to conduct a review of the New York City Impartial Hearing Office. Suriano Decl. at ¶ 3.

ii. **Corrective Action Plan.** In May 2019, SED issued a CAP to DOE, requiring DOE

to engage in corrective action to increase efficiency and reduce delays in the due process system. SED pledged to provide ongoing and targeted support to aid DOE in developing a plan to address the issues identified in the CAP and achieve the prescribed corrective action and did so in the subsequent months and years. Suriano Decl. at ¶¶ 8, 16-17; CAP at pp. 22-24.

iii. **Issuance of Specific Directives to DOE.** SED directed DOE to develop action plans on numerous issues, including (a) how DOE would reduce its volume of due process complaints and the number of complaints proceeding to a hearing; (b) a root cause analysis of, *inter alia*, why due process complaints were being filed; and (c) the revision of the IHO compensation policy. SED also directed DOE to increase staffing resources and to ensure IHO availability before appointing IHOs to cases to reduce the number of recusals. Suriano Decl. at ¶¶ 14-15.

iv. **Continued Monitoring of CAP Compliance.** Following the CAP's issuance, SED continued to monitor and assist DOE with its corrective action, including issuing numerous directives to DOE in order to improve the due process system, including: (a) directing that DOE cease requiring certain cases to proceed to hearing; (b) requiring DOE to eliminate certain pending cases and reduce outstanding cases by 50 percent; and (c) developing a "case closure sheet" for settlements so DOE could document how each case was resolved and submit the completed sheets to SED on a monthly basis. Suriano Decl. at ¶¶ 39-44.

v. **Leadership Engagement and Ongoing Communications.** Leadership from SED and DOE held regular formal meetings to discuss issues relating to due process. This was in addition to daily communications between program staff. Suriano Decl. at ¶ 61; Exs. A – I to Veltman Decl. (SED Email Correspondence).

vi. **Actions to Improve Efficiency Related to IHOs.** SED took numerous actions relating to the IHOs:

a. SED revised the IHO compensation policy (and directed DOE to implement the policy) to improve recruitment and retention after evaluating data and soliciting and reviewing feedback from numerous sources. Suriano Decl. at ¶ 18.

b. SED advised DOE that IHOs need to be paid appropriately without excessive delay and treated professionally and with respect. Suriano Decl. at ¶ 37; DeCandia to Williams Letter dated April 7, 2020 at pp. 1-2.

c. SED provided guidance to IHOs on various issues, including on the proper reasons for recusals. Suriano Decl. at ¶ 19.

d. SED certified 107 new IHOs between March 2020 and April 2021 to handle the increasing number of due process complaints, which involved assessing applications, conducting interviews, and holding training and certification sessions. Suriano Decl. at ¶ 25.

e. In November 2021, SED proposed regulatory changes that addressed minimum

and maximum IHO caseloads, extensions, and a mandatory filing system for DOE due process. Suriano Decl. at ¶ 65; November 4, 2021 Proposed Amendments Summary.

vii. **Ongoing Monitoring of the NYCIHO.** SED placed a monitor in the NYCIHO to assist and supervise progress with respect to the CAP. Suriano Decl. at ¶ 24; DeCandia to Bateman Letter dated January 27, 2021.

viii. **Data Collection, Analysis, and Directives Related Mediation and Settlement.** SED took countless actions to improve DOE's mediation and settlement processes, including:

a. SED sought data at numerous junctures to assist in analyzing the DOE's processes and where improvements should be made.

b. SED directed DOE to submit a plan to revise its settlement process to be faster, more efficient, and capture matters DOE does not intend to defend at hearing. Suriano Decl. at ¶ 28; Suriano to Goldmark Letter dated March 3, 2020 at p. 2, 3, 5. SED also directed DOE to take steps to streamline Comptroller approval. Suriano Decl. at ¶ 22; Tahoe Letter dated November 18, 2019 at p. 2.

c. SED required DOE to submit mediation data and a plan to increase the use of mediation by twenty percent and describe the authority of individuals conducting mediations. Suriano Decl. at ¶ 34.

ix. **Reduction and Prioritization of the Waitlist.** SED took steps to reduce the number of cases waiting for assignment to an IHO, and to ensure that the most urgent cases were prioritized. For example:

a. In November 2019, SED directed DOE to begin assigning cases by the date the complaint was filed (oldest first). Suriano Decl. at ¶ 22; Tahoe Letter dated November 18, 2019 at p. 1.

b. In April 2020, SED adapted the waitlist in response to feedback and directed DOE to prioritize certain cases that needed more immediate attention by assigning at least two full-time attorneys to triage cases for assignment where the delay was negatively impacting the student. Suriano Decl. at ¶ 38; DeCandia to Williams Letter dated April 7, 2020, attachment B.

c. In April 2020, SED directed that students with no special education placement/program/services be the first priority for assignment to an IHO to ensure that the cases needing the most urgent attention were not delayed. Suriano Decl. at ¶ 38; DeCandia to Williams Letter dated April 7, 2020, attachment B.

x. **Support For Accelerated Hearing Legislation.** In July 2021, SED supported legislation allowing parents to receive an accelerated hearing in certain circumstances. Suriano Decl. at ¶ 21; Ten-Day Bill Memo.

xi. **Ongoing Solicitation of Information for Further Improvements.** In September 2021, SED issued an RFI to solicit information from various sources regarding the creation of a new IHO system for special education due process hearings in New York City. Suriano Decl. at ¶ 65.

xii. **The OATH Transition.** On December 1, 2021, SED entered into an MOA with OATH and DOE that established a Special Education Unit at OATH to adjudicate due process hearings in New York City. Suriano Decl. at ¶ 71; MOA.

xiii. **Provision of Training for New IHOs.** SED provided trainings for IHO candidates on February 22-24; March 22-24; May 9-11; and July 18-20, 2022. Suriano Decl. at ¶¶ 77.

While some of these efforts were not as effective as SED hoped, they indisputably demonstrate SED's proper exercise of its oversight role. *See A.A*, 255 F. Supp. 2d at 126; *Reynolds*, 506 F.3d at 192-93.

Ultimately, after numerous attempts to bring the DOE into compliance, SED determined that a wholesale reimagining and reallocation of responsibilities was necessary to further DOE's compliance with the IDEA. It is telling that Plaintiffs' brief is nearly silent as to the OATH plan and its current record of compliance that stands in stark contrast to the version of the due process complaint system that Plaintiffs present to the Court. As of June 28, 2022, OATH IHOs have been appointed to 755 due process complaints. Suriano Decl. at ¶ 79. As indicated above, 91% of those cases have been closed in 75 days or fewer. *Id*. Further, the number of due process complaints on the waitlist for assignment to an IHO has plummeted to 290, representing a 90% decrease from December 2021. Suriano Decl. at ¶ 80. Plaintiffs do not provide a shred of evidence to suggest that this success will not continue.

In sum, SED has acted diligently to bring DOE into compliance with respect to due process. Accordingly, there is no genuine issue of material fact showing that SED has satisfied its monitoring and supervisory obligations under the IDEA. Therefore, summary judgment should be granted to State Defendants dismissing Plaintiffs' IDEA claims against them.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for partial summary judgment should be denied and State Defendants' motion for partial summary judgment dismissing Plaintiffs' IDEA claims should be granted.

Dated: New York, New York
July 29, 2022

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

- against -

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

Defendants.

STATE DEFENDANTS' LOCAL RULE 56.1 STATEMENT OF UNDISPUTED FACTS

20 Civ. 705 (EK) (RLM)

Pursuant to Local Civil Rule 56.1 of the United States District Court for the Southern and Eastern Districts of New York, Defendants the New York State Education Department ("SED") and SED Commissioner Dr. Betty Rosa (collectively, "State Defendants"), sued solely in her official capacity, by their attorney, LETITIA JAMES, the Attorney General of the State of New York, submit this statement in support of their motion for partial summary judgment dismissing the Individuals with Disabilities Education Act ("IDEA") claims Plaintiffs have asserted against them in this action and contend that there are no genuine issues as to the following material facts and that they are entitled to summary judgment based thereupon:

The February 2019 Merced Report

1. In 2018, recognizing that the New York City Department of Education ("DOE") was not complying with certain due process timelines set forth in the IDEA and related regulations, SED concluded that it needed to better understand the functioning of the New York City Impartial Hearing Office and its policies, procedures, and practices specific to special education impartial hearings. Suriano Decl. at ¶ 3.

2. In 2018, SED engaged Deusdedi Merced of Special Education Solutions, a special education consultant, to conduct a review of the New York City Impartial Hearing Office, which

culminated in a report dated February 2019 ("Merced Report"). Suriano Decl. at ¶¶ 3, 4; Merced Report (Ex. A to Suriano Decl.[1]).

SED's Issuance of the May 2019 Compliance Assurance Plan and Ensuing Corrective Action and Technical Assistance

3. In May 2019, SED issued a Compliance Assurance Plan to DOE (the "CAP"). CAP (Ex. B to Suriano Decl.).

4. Section III of the CAP, the section relating to due process, cited DOE amongst other things, for failing to provide parents access to adequate due process after a complaint has been filed and that essentially, DOE was not maintaining a functioning due process hearing system. CAP at p. 18 (Ex. B to Suriano Decl.).

5. A contributing factor to DOE's failure to maintain a functioning due process hearing is the sheer volume of due process complaints that are filed in NYC. Suriano Decl. at ¶ 11; CAP at p. 3 (Ex. B to Suriano Decl.).

6. The CAP documented the steady increase in DOE's due process complaint filings since the 2015-2016 school year (e.g., 5,026 in 2015-16 to 7,448 for only a portion of the 2018-19 school year). CAP at p. 19 (Ex. B to Suriano Decl.).

7. Therefore, the objective of certain required corrective action for Section III of the CAP was to reduce the number of due process complaints and/or due process complaints that proceeded to a hearing. Suriano Decl. at ¶ 14.

8. To that end, SED directed DOE to develop an action plan detailing how it will reduce (1) its volume of due process complaints (including increasing the use of mediation and IEP facilitation) and (2) the number of complaints proceeding to a hearing (including ensuring that uncontested pendency matters are not brought before IHOs and to ensure that staff representing

[1] "Suriano Decl." refers to the declaration of Christopher Suriano, dated July 28, 2022.

DOE during the hearing process are authorized to enter into settlement agreements). CAP at pp. 22-23 (Ex. B to Suriano Decl.).

9. SED directed DOE to conduct a root cause analysis of why due process complaints were being filed, paying particular attention to the volume of cases in which DOE concedes that it has failed to provide the student with a FAPE and why FAPE is not provided or unable to be provided and to determine whether those cases should be resolved through the settlement process. CAP at p. 22-23 (Ex. B to Suriano Decl.).

10. Other corrective actions required by Section III of the CAP focused on curing dysfunction in the day-to-day operations of DOE's hearing system. For example, SED directed DOE to increase staffing resources to its impartial hearing office ("NYCIHO") and improve existing hearing space including procuring additional space where hearings could be conducted. CAP at p. 22 (Ex. B to Suriano Decl.).

11. With respect to IHOs, SED directed DOE to submit a plan on how it will revise its IHO compensation policy including how it will allocate resources to ensure regular and prompt payment to IHOs; have IHOs distribute their own decisions to eliminate NYCIHO's role in processing and distributing hearing decisions; and to first ensure IHO availability before automatically appointing IHOs to cases (to reduce the number of improper IHO recusals). CAP at pp. 22-23 (Ex. B to Suriano Decl.).

12. The corrective actions in Section III of the CAP were assigned to give DOE notice of specific issues within the due process system that needed to be addressed and to provide guidance and a roadmap to DOE achieve compliance with law and regulation. SED pledged to provide ongoing and targeted support and technical assistance to aid DOE in developing a plan to address the issues identified in the CAP and achieve the prescribed corrective action. CAP at pp. 22-24 (Ex. B to Suriano Decl.).

13. SED managed DOE's corrective actions through subsequent meetings and communications but also took its own steps to improved DOE's hearing system. Suriano Decl. at ¶ 17.

14. In addition to beginning aggressive recruitment of IHO candidates, SED staff canvassed all IHOs certified to be appointed to cases in NYC with lower caseloads to encourage them to take additional cases and also canvassed IHOs in the rest-of-state to ascertain availability and/or willingness to accept cases in NYC. Suriano Decl. at ¶ 17; Tahoe to Carranza Letter dated November 18, 2019 (Ex. C to Suriano Decl.).

15. After SED was unsatisfied with DOE's proposed compensation policy, SED evaluated data highlighting the problems in DOE's due process system, feedback from IHOs, special education advocates working in NYC and assessments from its special education consultant and developed a compensation policy. Suriano Decl. at ¶ 18; Suriano to Bateman Letter dated November 19, 2019 (Ex. D to Suriano Decl.).

16. In accordance with its enforcement and monitoring responsibilities, SED directed NYC to implement the policy as written (absent technical difficulty or missing/critical elements). Suriano Decl. at ¶ 18; Suriano to Bateman Letter dated November 19, 2019 (Ex. D to Suriano Decl.).

17. To address SED's concern regarding the timely appointment of IHOs, on November 19, 2019, Christopher Suriano, SED's Assistant Commissioner of Special Education, sent a guidance memo to IHOs who conduct hearings in NYC to remind them of proper reasons for recusal. Mr. Suriano also notified them of SED's directive to DOE - that DOE should be ensuring IHO availability before assigning cases. Suriano Decl. at ¶ 19; November 19, 2019 Guidance Memo (Ex. E to Suriano Decl.).

18. To assist SED with providing technical assistance to DOE, SED continued to analyze the information it did have, request additional information from DOE, and provide suggestions and directives (i.e. pendency and settlement). Suriano Decl. at ¶ 20.

19. By letter dated, November 18, 2019, SED advised DOE that, as previously outlined and discussed, DOE's practice of holding hearings on cases in which pendency is not in dispute causes delays for the parties and wastes resources that could be reallocated to claims requiring a hearing. Suriano Decl. at ¶ 21; Tahoe to Carranza Letter dated November 18, 2019 at p. 2 (Ex. C to Suriano Decl.).

20. SED reminded DOE that a pendency placement is automatic and cannot be contingent on an IHO order, and that DOE's practice of requiring such is in violation of IDEA requirements. Suriano Decl. at ¶ 21; Tahoe to Carranza Letter dated November 18, 2019 at p. 2 (Ex. C to Suriano Decl.).

21. SED directed DOE to provide all available data on pendency, including the number of due process cases involving contested pendency and uncontested pendency and a description of the role of IHO orders in cases in which pendency was not contested by DOE. Suriano Decl. at ¶ 21; Tahoe to Carranza Letter dated November 18, 2019 at p. 2 (Ex. C to Suriano Decl.).

22. SED's data indicated that the number of due process complaints that settle is extremely high but that settlement takes an inordinate amount of time, "sometimes up to two years" while remaining on an IHO's docket. Suriano Decl. at ¶ 22.

23. Therefore, SED required DOE to "arrange for the NYC Comptroller's Office to participate in expedited conversations to address [SED's] ongoing concerns regarding long delayed settlements . . ." and to provide data on pending settlements within DOE and waiting approval from the Comptroller as well as data on the length of time between the parties' agreement

and final settlement. Suriano Decl. at ¶ 22; Tahoe to Carranza Letter dated November 18, 2019 at p. 2 (Ex. C to Suriano Decl.).

24. To address the inefficiencies caused by DOE's automatic IHO assignment to cases and the resulting IHO recusals to manage caseloads, SED directed DOE to begin assigning cases by the date the complaint was filed (oldest first) to ensure that parents who have experienced multiple recusals but who may have filed their due process complaint weeks, even months ago, will be the first to have an IHO assigned. Suriano Decl. at ¶ 22; Tahoe to Carranza Letter dated November 18, 2019 at p. 1 (Ex. C to Suriano Decl.).

25. In December 2019, SED began a systematic review of IHO decisions to bring the data to life – to see what types of complaints were being brought and proceeding to hearing, what if any defense DOE was presenting at the hearing and what type of relief was being ordered by the IHOs. Suriano Decl. at ¶ 23.

26. In January 2020, SED determined that it was necessary to have a monitor in the NYCIHO to assist with monitoring progress with respect to the CAP. Suriano Decl. at ¶ 24.

27. The monitor's duties included observing hearings, tracking wait times for hearings to begin and room availability, accessing daily hearing schedules, assessing space functionality, serving as a liaison with IHOs, providing assistance and guidance relating to the interplay between DOE's (Impartial Hearing System) and SED's (Impartial Hearing Reporting System) data systems, monitoring payment disputes and delays between IHOs and the NYCIHO, verifying staffing roles and responsibilities and whether adequate staffing is available at NYCIHO, monitoring efforts regarding increasing the use of mediation and IEP facilitation, monitoring data entry and efforts to come into compliance with timely data entry, monitoring State Complaint findings as they pertain to individuals awaiting assignments of an IHO and monitoring the list of parents/guardians

awaiting appointment of an IHO. Suriano Decl. at ¶ 24; DeCandia to Bateman Letter dated January 27, 2021 (Ex. F to Suriano Decl.).

28. As an outgrowth to SED's ongoing recruitment of IHO candidates, SED assessed applications, held interviews, and trained and certified an additional 107 per diem IHOs after holding trainings in March 2020, October 2020 and April 2021. Suriano Decl. at ¶ 25.

29. During the March 2020 Board of Regents Meeting, SED proposed certain regulatory changes to expand the pool of IHO applications in NYC and clarify certain IHO duties and responsibilities. Suriano Decl. at ¶ 26; Regents Items Update on the NYC Impartial Hearing System January 2020 (Ex. G to Suriano Decl.); Proposed Amendments dated February 28, 2020 (Ex. H to Suriano Decl.).

30. SED continued to monitor required corrective action deliverables, in particular, the reduction of the number of due process complaints that proceed to hearing especially when DOE did not have a defense to the complaint. Suriano Decl. at ¶ 27.

31. On March 3, 2020, SED also directed DOE to submit documentation regarding the types of cases that proceed to due process. and to submit a plan to (i) address the issue of the lack of DOE representation at hearings which will be implemented by the beginning of the 2020-21 school year. Suriano Decl. at ¶ 27; Suriano to Goldmark Letter dated March 3, 2020 at pp. 4-5 (Ex. I to Suriano Decl.).

32. SED required DOE to submit a plan addressing how DOE would increase the use of resolution meetings, including an explanation of who conducts the resolution meeting on behalf of DOE and the extent of their authority to settle matters, both monetary and non-monetary relief. DOE was also required to provide written confirmation that individuals conducting mediations have the authority to enter into legally binding agreements for both non-monetary and monetary

relief. Suriano Decl. at ¶ 28; Suriano to Goldmark Letter dated March 3, 2020 at pp. 2, 5 (Ex. I to Suriano Decl.).

33. SED also reiterated to DOE that DOE's settlement process is protracted and that it is one of the major causes for the excessive amount of open due process cases. Suriano Decl. at ¶ 28; Suriano to Goldmark Letter dated March 3, 2020 at p. 2 (Ex. I to Suriano Decl.).

34. SED again directed DOE to provide data on the number of cases that are pending settlement approval, how long the settlement process takes on average, where the currently pending settlement cases stand in the settlement process, how long the current outstanding cases have been waiting for settlement, and how soon they are expected to settle. Suriano Decl. at ¶ 29; Suriano to Goldmark Letter dated March 3, 2020 at pp. 3, 5 (Ex. I to Suriano Decl.).

35. SED also required DOE to submit a plan to revise its settlement process so that it is faster, more efficient, and captures matters DOE does not intend to defend at hearing. Suriano Decl. at ¶ 29; Suriano to Goldmark Letter dated March 3, 2020 at p. 2 (Ex. J to Suriano Decl.).

36. In an effort to provide technical assistance to DOE on corrective action regarding staffing at the NYC IHO, SED directed DOE to provide the following information regarding staffing resources: the number of attorneys and non-attorneys that constitute a full staff in DOE's Special Education Unit of DOE Legal ("SEU"); the number of SEU staff members needed to process settlements DOE enters into between its Ten-Day Notice program and the due process complaint system; the number of settlements SEU processed during the 2016-17, 2017-18, and 2018-19 school years; the number of SEU staff members during each of those school years; and the rate of attrition at SEU. Suriano Decl. at ¶ 30; Suriano to Goldmark Letter dated March 3, 2020 at p. 3, 5 (Ex. I to Suriano Decl.).

37. SED continued to oversee issues negatively affecting IHOs and directed DOE to implement a scheduling system linked to specific hearing room availability, provide information

on the availability of the computers in each of the hearing rooms to provide its new electronic forms to IHOs in the necessary format to assist with access and that DOE provide assistance to navigate the change in procedure and to DOE to (i) submit a plan for ensuring that DOE developed a revised compensation policy after appropriate engagement with IHOs, (ii) a timeline for training IHOs on the compensation policy, (iii) a timeline and method for training IHOs on the new forms that DOE requires, and (iv) a plan to ensure that IHOs may submit invoices and be paid on a case before it is fully closed. Suriano Decl. at ¶ 31; Suriano to Goldmark Letter dated March 3, 2020 at p. 1, 4, 5 (Ex. I to Suriano Decl.).

38. As a follow up to SED's ongoing review of IHO decisions and in light of feedback from IHOs that many cases proceeding to a due process hearing involve inadequate funding of special education teacher support services ("SETSS"), SED directed DOE to provide data on the following: how many cases proceeding to a due process hearing involve reimbursement or provision of SETSS; whether DOE instituted a change in practice regarding settling these types of cases and if so, why; and how DOE plans to specifically address these types of cases, including an analysis of whether increased reimbursement rates are needed to pay the actual rates charged by area providers. Suriano Decl. at ¶ 32; Suriano to Goldmark Letter dated March 3, 2020 at p. 3 (Ex. I to Suriano Decl.).

39. In order to organize outstanding deliverables DOE owed SED and to correctly reflect revised deadlines, SED developed a chart to track issues, deadlines and requirements. The chart was provided to DOE and included an outline of SED's prior requests and directives. Suriano Decl. at ¶ 33; DeCandia to Williams Letter dated April 7, 2020 (Ex. J to Suriano Decl.).

40. SED continued to prioritize a reduction in due process complaints and/or complaints that proceeded to hearing. Suriano Decl. at ¶ 34.

41. One area of focus was alternative dispute resolution. SED informed DOE that its IEP Facilitation document was not acceptable and required revision. Suriano Decl. at ¶ 34; DeCandia to Williams Letter dated April 7, 2020 at pp. 1-2 (Ex. K to Suriano Decl.).

42. SED also required that DOE submit data on the number of mediations conducted in 2019-2020 and a plan to increase that amount by twenty percent. Suriano Decl. at ¶ 34; DeCandia to Williams Letter dated April 7, 2020 at pp. 1-2 (Ex. J to Suriano Decl.).

43. SED required that DOE's plan include an explanation of what authority the individuals conducting mediations have to enter into binding agreements; a description of duties of newly hired staff and how those staff will increase the number of mediations in NYC. Suriano Decl. at ¶ 34; DeCandia to Williams Letter dated April 7, 2020 at pp. 1-2 (Ex. J to Suriano Decl.).

44. SED also reiterated its directive to submit a plan to increase the use of resolution meetings. Suriano Decl. at ¶ 34; DeCandia to Williams Letter dated April 7, 2020 at pp. 1-2 (Ex. J to Suriano Decl.).

45. SED continued to focus on settlement and reiterated its directives to submit data on SETSS cases and settlements generally and a plan to address the lack of DOE representation at hearings. Suriano Decl. at ¶ 35; DeCandia to Williams Letter dated April 7, 2020 at p. 2 (Ex. J to Suriano Decl.).

46. Since DOE had not made much progress on overhauling its pendency process, SED required a list of dates and times to hold a meeting to provide technical assistance to ascertain how a better pendency system could be implemented as soon as possible without the necessity of an IHO order. Suriano Decl. at ¶ 36; DeCandia to Williams Letter dated April 7, 2020 at p. 5 (Ex. J to Suriano Decl.).

47. SED's April 7, 2020 letter also addressed retention of IHOs. SED informed DOE of the poor retention rate of NYCIHOs post-certification and advised that IHOs need to be paid

appropriately without excessive delay and treated professionally and with respect. SED advised DOE that newly certified IHOs agreed to become IHOs and work in NYC with the understanding that they would be paid pursuant to a new compensation policy. Suriano Decl. at ¶ 37; DeCandia to Williams Letter dated April 7, 2020 at pp. 1-2 (Ex. J to Suriano Decl.).

48. SED also adapted the waitlist to address input from the field and requests for certain cases (i.e. pendency) to be assigned outside of chronological order. Suriano Decl. at ¶ 38.

49. SED sent DOE "revised wait list procedures" to prioritize certain cases that needed more immediate attention and directed DOE to assign at least two full-time attorneys from the Special Education Unit of DOE Legal to review cases and the waitlist and triage them for assignment to an IHO based on the likelihood that the delay in the hearing was negatively impacting the student. Suriano Decl. at ¶ 38; DeCandia to Williams Letter dated April 7, 2020, attachment B (Ex. K to Suriano Decl.).

50. One year following the issuance of the CAP, former SED Deputy Commissioner John D'Agati sent DOE a letter and indicated that more concrete actions would be necessary in order to address the noncompliance outlined in Section III of the CAP. Suriano Decl. at ¶ 39.

51. Specifically, Deputy Commissioner D'Agati noted that DOE should cease requiring certain cases to proceed to hearing, stating that there is "no justifiable reason to proceed to an impartial hearing" where the DOE (1) knows or should know that it has failed to provide a required service on a student's IEP or IESP; (2) relies on a service delivery method that puts the onus on the parents to find a service provider; (3) lacks enough providers who are willing and able to provide the required services at the DOE rate; (4) knowingly contributes to a lack of providers by authorizing a DOE rate that is far below the market rate for reimbursement of providers; and (5) has no intent to meet its burden of production or defend its failure to deliver services through

the impartial hearing process. Suriano Decl. at ¶ 39; D'Agati to Goldmark Letter dated May 27, 2020 at p. 2 (Ex. K to Suriano Decl.).

52. SED noted additional case types that should not proceed to hearing, including cases involving Independent Education Evaluation ("IEE"). Suriano Decl. at ¶ 40; D'Agati to Goldmark Letter dated May 27, 2020 at pp. 2-3 (Ex. K to Suriano Decl.).

53. SED directed DOE to provide documentation that their rates for evaluation which parents go to hearing are commensurate with the rate awarded after hearing. Suriano Decl. at ¶ 40; D'Agati to Goldmark Letter dated May 27, 2020 at pp. 2-3 (Ex. K to Suriano Decl.).

54. SED also required DOE to eliminate its outstanding 2018-19 and prior settlement cases and reduce its outstanding 2019-20 cases by 50 percent. Suriano Decl. at ¶ 41; D'Agati to Goldmark Letter dated May 27, 2020 at p. 4 (Ex. K to Suriano Decl.).

55. SED also reminded DOE that its obligation to provide SED its plan for closing settled cases for the 2018-2019 school year was "critically important" because the students involved in those "long-ago filed due process complaints" are "entitled to resolution." Suriano Decl. at ¶ 42; DeCandia to Nathan Letter dated June 26, 2020 at p. 1 (Ex. L to Suriano Decl.).

56. SED developed a "case closure sheet" for settlements so DOE could document how each case was resolved and submit the completed sheets to SED on a monthly basis. SED intended to use this information, which was not otherwise maintained by DOE, to monitor for systemic changes such as the increased use of resolution sessions and mediation. Suriano Decl. at ¶ 44; DeCandia to Nathan Letter dated June 26, 2020 (Ex. L to Suriano Decl.).

57. SED continued to prioritize reevaluating the placement of complaints on the waitlist to ensure that the neediest of cases received priority attention and, where possible to eliminate cases on the waitlist by settlement or otherwise. Suriano Decl. at ¶ 45.

58. SED directed DOE to assess cases for potential consolidation and that contrary to DOE's interpretation of SED's regulations, consolidation was not limited to cases filed in the same school year. Suriano Decl. at ¶ 45.

59. SED again directed DOE to review and prioritize cases on the waitlist and cautioned DOE that although it had proposed that filers should make certain identifications on their complaint to effectuate prioritization, SED was still directing DOE to make an immediate review and prioritization of cases on the waitlist. Suriano Decl. at ¶ 45; DeCandia to Nathan Letter dated June 26, 2020 (Ex. L to Suriano Decl.).

60. Despite its overtures for a plan on pendency implementation, the latest which set a due date of July 8, 2020, in an effort to begin to implement pendency according to the law and SED's directives, DOE again put the burden on filers instead of evaluating individual cases and making a determination about pendency. It created a form on which parents filing a due process complaint during the 2020-2021 school year could "identify the student's pendency placement, program and/or services, if any, and identify the IEP, IESP, Findings of Facts and Decision, or other basis for that pendency entitlement." DOE stated it would "review and take steps to implement pendency without a hearing if pendency is uncontested." Suriano Decl. at ¶ 48; Nathan to DeCandia Letter dated July 8, 2020 (Ex. M to Suriano Decl.).

61. SED sent memos to NYC IHOs to notify them of waitlist and pendency protocols. Suriano Decl. at ¶ 49; Memos dated July 17, 2020 and August 10, 2020 (Exs. O and P to Suriano Decl.).

62. After DOE's progress on the CAP stalled, SED attempted to re-engage DOE. Suriano Decl. at ¶ 50.

63. On December 3, 2020, Commissioner Rosa met with then-Chancellor Carranza, respective senior leadership, and representatives from SED's Office of Special Education. Suriano Decl. at ¶ 50.

64. On December 17, 2020, SED and DOE had an "IDEA meeting," a regularly scheduled meeting attended by special education leadership at both agencies to discuss a wide range of special education matters, during which SED reviewed DOE's status regarding compliance with CAP requirements. Suriano Decl. at ¶ 51.

65. SED noted that it had nearly doubled the amount of certified IHOs and proposed regulatory changes to expand the pool of candidates eligible to become IHOs and acknowledged that DOE had met some goals, including implementing a revised IHO compensation policy, eliminating uncontested pendency matters from proceeding to hearing and streaming decision processing. However, it was not enough to correct DOE's cited noncompliance. Suriano Decl. at ¶ 51; Suriano to Goldmark Letter dated January 7, 2021 (Ex. Q to Suriano Decl.).

66. In addition to informal meetings and communications, SED and DOE held twenty-four formal IDEA meetings between August 2019 and May 2022. The agencies discussed issues relating to due process at twenty of those meetings during that time frame. Suriano Decl. at ¶ 52.

67. Data in and around December 2020-January 2021 indicated that there were more than 13,000 open due process cases and nearly 7,000 awaiting appointment of an IHO. Therefore, SED continued to direct DOE to implement process changes to stop requiring certain cases to proceed through the due process system. Suriano Decl. at ¶ 53; Suriano to Goldmark Letter dated January 7, 2021 (Ex. Q to Suriano Decl.).

68. DOE maintained that it was "working to improve the settlement system" but then indicated that per a new NYC Comptroller requirement, it was required to seek Comptroller authority before making an offer to parents, "a step that lengthens rather than shortens the

settlement process." Suriano Decl. at ¶ 56; Goldmark to Suriano Letter dated Feb. 11, 2021 (Ex. R to Suriano Decl.).

69. SED reiterated to DOE that this additional approval process continued to impede resolution and delay settlement agreements. Suriano Decl. at ¶ 56; Suriano to Goldmark Letter dated May 27, 2021 (Ex. S to Suriano Decl.).

70. As part of its review of the plan DOE submitted to improve mediation, SED examined mediation data which indicated that during the 2020-2021 school year there were 14,264 due process complaints filed and only 202 requests for mediation. Therefore, SED required that DOE revise and resubmit its plan since its original submission "clearly [was] not effective." Suriano Decl. at ¶ 57; LaCrosse to Goldmark Letter dated Oct. 27, 2021 (Ex. T to Suriano Decl.).

71. During the October 6, 2021 IDEA meeting, SED shared its analysis of DOE due process trend data. Suriano Decl. at ¶ 58; LaCrosse to Goldmark Letter dated Oct. 27, 2021 (Ex. T to Suriano Decl.).

72. SED directed DOE to do a root cause analysis to identify issues in the complaints and analyze factors contributing to the numbers of due process complaints in different districts, including identification of the lack of special education programs and services that are needed in these districts to address student need. Suriano Decl. at ¶ 59; LaCrosse to Goldmark Letter dated Oct. 27, 2021 (Ex. T to Suriano Decl.).

73. In other words, SED advised that if DOE reviewed complaints to determine what services were necessary to provide FAPE and actually provided those services, the number of hearing requests would decrease. Suriano Decl. at ¶ 59.

SED's Day-to-Day Interactions with DOE

74. Beyond all of the actions described above, SED communicates with DOE on a daily basis about myriad issues relating to due process, primarily through SED's Due Process Unit. These communications primarily take place via email, telephone, or both. Suriano Decl. at ¶ 60.

75. Topics addressed in these emails and calls include but are certainly not limited to; IHO appointment questions; data questions; late decision monitoring; individual case questions; daily numbers of available IHOs; and issues concerning actions taken by IHOs. These are but a sampling of the myriad issues that SED's DPU and DOE discuss on a regular basis. Suriano Decl. at ¶ 60; SED Correspondence (Exs. A – F to Veltman Decl.[2]).

76. Further, data is transferred from New York City's Impartial Hearing System ("IHS") to the State's Impartial Hearing Reporting System ("IHRS") each night. The information includes various data points regarding due process cases. Suriano Decl. at ¶ 61.

77. There are also regularly scheduled IT meetings between the DOE Program and Division of Instructional and Information Technology ("DIIT") staff and SED Program and IT staff. During these meetings, the program and IT individuals discuss any issues with the FTP log, needed updates to IHS/IHRS, updates to regulations and/or guidance that would require enhancement to IHS and/or IHRS and the FTP process, process changes, any FTP errors and possible work arounds, substantial due process program standards changes, cases closed in IHS that are opened in IHRS, data entry delays of extensions/monitoring, coordination of testing of enhancements to IHRS, and any other questions or concerns on which DOE and SED need to collaborate. At these meetings, the participants have also started to talk about mediation and

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[2] Veltman Decl." refers to the declaration of Sharon L. Veltman, dated July 29, 2022.

resolution and the process for capturing/reporting this data. Suriano Decl. at ¶ 61; SED Correspondence (Exs. H and I to Veltman Decl.).

78. There is often follow-up after these meetings to address questions and topics discussed at such meetings. SED Correspondence (Exs. H and I to Veltman Decl.).

SED's Additional Actions to Effectuate Further and Comprehensive Systemic Change

SED's Support for Accelerated Due Process Legislation

79. In July 2021, SED sent a ten-day bill memo to the Governor recommending approval of a bill (S.6682, A.7614) to address DOE's due process waitlist. Suriano Decl. at ¶ 62; Ten-Day Bill Memo (Ex. U to Suriano Decl.).

80. The bill was signed by the Governor on December 30, 2021 (Chapter 812 of the Laws of 2021) and became effective on March 29, 2022. Suriano Decl. at ¶ 62.

81. The bill amended New York Education Law Section 4404 to provide a process whereby parents who having been awaiting appointment of an IHO for more than 196 days from the filing of a due process complaint can elect to have an IHO immediately appointed to issue an order based upon a proposed order of relief submitted by the family. It also required that the Commissioner of Education make any required regulatory changes before March 29, 2022, the effective date, which the Commissioner did. Suriano Decl. at ¶ 62.

SED's Regulatory Efforts to Address IHO Caseloads

82. In August/September 2021, SED surveyed IHOs to solicit feedback on due process systems changes. Suriano Decl. at ¶ 63.

83. In November 2021, SED proposed regulatory changes that addressed minimum and maximum IHO caseloads, extensions, and a mandatory filing system for DOE due process. Suriano Decl. at ¶ 64; November 4, 2021 Proposed Amendments Summary (Ex. V to Suriano Decl).

84. The proposed regulations were published, and hearings were held to solicit public comment. SED is currently reviewing the comments and evaluating the current landscape of due process to determine next steps. Suriano Decl. at ¶ 64.

SED's Request for Information Regarding New IHO System

85. On September 9, 2021, SED issued a request for information ("RFI") in an attempt to solicit information from various sources – including attorneys, law firms, law schools, institutions of higher education, offices of court administration, centers for dispute resolution, non-profit entities, and impartial hearing officers, as well as other State or local agencies – regarding the creation of a new IHO system for special education due process hearings in New York City. Suriano Decl. at ¶ 65; RFI (Ex. W to Suriano Decl.).

86. The RFI noted that SED was considering ways in which contractual or "other relationships" could potentially resolve DOE's outstanding noncompliance. Suriano Decl. at ¶ 65; RFI (Ex. W to Suriano Decl.).

87. In response to the RFI, SED specifically requested interested parties to provide detailed descriptions of a potential new model for the special education due process system, including information on the feasibility of such a system and identification of similar systems that may already exist. SED also requested that individual IHOs provide information on whether they would be willing to contract individually with SED, the ways in which their payment should be structured, and the amount of time they would be willing to devote to this new position. Suriano Decl. at ¶ 66.

Transition of Adjudication of Due Process Complaints to from the NYCIHO to the Office of Administrative Trials and Hearings

88. Following diligent monitoring of the situation, continual engagement with DOE, and a review of relevant factors including efforts taken to recruit, train and certify additional per-

diem IHOs (who, for the most part, carried small caseloads), SED recognized that more drastic steps needed to be taken in order to address the mounting number of due process complaints in New York City. Suriano Decl. at ¶ 69.

89. In order to improve the effectiveness and efficiency of the system, eliminate the waitlist, and manage increased filings every year, it was clear that a cadre of full-time impartial hearing officers with an administrative support structure - rather than independent contractor IHOs accepting cases on a voluntary basis - was necessary to improve the effectiveness and efficiency of the system. Suriano Decl. at ¶ 70.

90. On December 1, 2021, SED entered into a Memorandum of Agreement ("MOA") with the New York City's Office of Administrative Trials and Hearings ("OATH") and DOE that established a Special Education Unit at OATH to adjudicate due process hearings in New York City. Suriano Decl. at ¶ 71; December 1, 2021 MOA (Ex. X to Suriano Decl.).

91. OATH was deemed to be an excellent choice in this role, as it adjudicates a wide range of issues spanning multiple City agencies. Suriano Decl. at ¶ 71; December 1, 2021 MOA (Ex. X to Suriano Decl.).

92. OATH also has the fundamental structures in place to hire and manage IHOs, maintain a modern case management system, ensure confidentiality where appropriate, and administer an impartial, effective adjudication system. Suriano Decl. at ¶ 71; December 1, 2021 MOA (Ex. X to Suriano Decl.).

93. A complete transition to OATH could take a year or more and during the transition period, both independent contractor IHOs and OATH IHOs continue to be appointed to cases. Suriano Decl. at ¶ 72.

94. During and after the transition to OATH, SED retains responsibility to train and certify IHOs. Suriano Decl. at ¶ 74.

95. SED retains its authority to revoke or suspend IHO certification and address IHO complaints consistent with 8 NYCRR 200.21. Suriano Decl. at ¶ 74.

96. OATH has been hiring and onboarding both IHO candidates and individuals who were previously certified as impartial hearing officers on an ongoing basis. Previously certified IHOs retained their existing caseloads and continue to adjudicate those cases, as well as cases to which they are newly appointed as full-time OATH employees. Suriano Decl. at ¶ 75.

97. OATH has hired staff to provide administrative support and has allocated office space for both hearing officers and administrative proceedings. Suriano Decl. at ¶ 76.

98. OATH is executing contracts for translation/interpretation and transcription services, developing internal rules and procedures for conducting hearings, and developing a scope of work for an electronic filing system. Suriano Decl. at ¶ 76.

99. SED has provided trainings for IHO candidates on February 22-24; March 22-24; May 9-11; and July 18-20, 2022. Suriano Decl. at ¶ 77.

100. As of July 29, 2022, SED has certified 44 IHOs to work in the OATH Special Education Unit. OATH has onboarded and begun appointing due process complaints to 33 of these IHOs. The remaining 11 OATH IHOs were recently certified and will be appointed cases when they have attended the required OATH training. Suriano Decl. at ¶ 78.

101. As of June 28, 2022, OATH IHOs have been appointed to 755 due process complaints. Of these complaints, 255 have been closed and 91% of those cases have been closed in 75 days or fewer. Suriano Decl. at ¶ 79.

102. As of June 30, 2022, the number of cases on the waitlist was 290. Suriano Decl. at ¶ 80.

Dated: New York, New York
July 29, 2022

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

- against -

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

Defendants.

STATE DEFENDANTS' RESPONSE TO PLAINTIFFS' LOCAL RULE 56.1 STATEMENT OF PURPORTED UNDISPUTED FACTS

20 Civ. 705 (EK) (RLM)

Pursuant to Rule 56.1 of the Local Rules of Civil Procedure for the United States District Court for the Eastern District of New York, Defendants the New York State Education Department ("SED") and Dr. Betty Rosa, in her official capacity as Commissioner of SED (collectively, "State Defendants") hereby respond to 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 ("Pls.' 56.1"), as follows:

I. The Impartial Due Process Hearing System in New York City

1. New York State has a "two-tier" impartial hearing system under the Individuals with Disabilities Education Act ("IDEA"), meaning that impartial hearings are initially conducted at the local level by the local educational agency ("LEA") and then the state educational agency ("SEA") determines appeals. (Ex. 2 (DOE000001) at -003.)

State Defendants' Response to Paragraph 1: Undisputed.

A. The New York City Department of Education

2. Defendant New York City Department of Education ("NYCDOE") is the LEA within the meaning of the IDEA for the City of New York. (Ex. 5 (DOE000090) at -098); Ex. 9 (State Def 147) at -149.)

<u>State Defendants' Response to Paragraph 2</u>: Undisputed.

3. The New York City Impartial Hearing Office ("NYCIHO") is an office within NYCDOE. (Ex. 5 (DOE000090) at -093.)

<u>State Defendants' Response to Paragraph 3</u>: Undisputed.

4. In New York City, students (or school districts) file due process complaints ("DPCs" or "complaints") with NYCIHO by hand-delivery, mail, e-mail, or fax. (Ex. 5 (DOE000090) at -100.)

<u>State Defendants' Response to Paragraph 4</u>: Undisputed.

5. NYCDOE, through the NYCIHO, is responsible for processing complaints "immediately, but no later than two business days after receipt of the" complaint. (Ex. 5 (DOE000090) at -100.)

<u>State Defendants' Response to Paragraph 5</u>: The State Defendants do not dispute that Paragraph 5 is an accurate reflection of the cited document, but state that this is merely a summary of New York State regulations and laws that apply to the education of students with disabilities. Accordingly, State Defendants respectfully refer the Court to N.Y. Educ. Law § 200.j(3) for a full and complete description of its contents.

6. NYCDOE, through the NYCIHO, is responsible for initiating the appointment of an impartial hearing officer ("IHO") "immediately, but no later than two business days after receipt of the" complaint. (Ex. 5 (DOE000090) at -100,-101.)

<u>State Defendants' Response to Paragraph 6</u>: The State Defendants do not dispute that Paragraph 6 is an accurate reflection of the cited document, but state that this is merely a summary of New York State regulations and laws that apply to the education of students with disabilities. Accordingly, State Defendants respectfully refer the Court to N.Y. Educ. Law § 200.5.j(3) for a

full and complete description of its contents.

7. NYCDOE, through the NYCIHO, is responsible for providing a procedural safeguards notice to all parents after the filing of a DPC, in the native language of the parent, if possible. (Ex. 5 (DOE000090) at -104, -105.)

State Defendants' Response to Paragraph 7: The State Defendants do not dispute that Paragraph 7 is an accurate reflection of the cited document, but state that this is merely a summary of New York State regulations and laws that apply to the education of students with disabilities. Accordingly, State Defendants respectfully refer the Court to N.Y. Educ. Law § 200.5.f for a full and complete description of its contents.

8. NYCDOE is responsible for scheduling and holding a resolution session "within 15 calendar days of receipt" of a DPC. (Ex. 13 (DOE_007527) at -532.)

State Defendants' Response to Paragraph 8: The State Defendants do not dispute that Paragraph 8 is an accurate reflection of the cited document, but state that this is merely a summary of New York State regulations and laws that apply to the education of students with disabilities. Accordingly, State Defendants respectfully refer the Court to N.Y. Educ. Law § 200.5.j(2) for a full and complete description of its contents.

9. An NYCDOE representative "who has specific knowledge of the allegations contained in the due process complaint" and decision-making authority must attend the resolution session. (Ex. 13 (DOE_007527) at -536.)

State Defendants' Response to Paragraph 9: Undisputed.

10. According to one practitioner, NYCDOE often fails to convene resolution sessions and, "on many of the occasions when NYCDOE has convened resolution sessions, the representatives appearing on behalf of the NYCDOE at the resolution sessions represented . . .

that they did not have authority to offer the relief sought in the DPC." (Silverblatt Decl. ¶¶ 15–19.)

State Defendants' Response to Paragraph 10: The State Defendants do not dispute that Paragraph 10 is an accurate reflection of the cited declaration, but state that it is immaterial and irrelevant.

11. NYCDOE, through the NYCIHO, is responsible for scheduling impartial hearings and notifying the parties of the hearing. (Ex. 5 (DOE000090) at -105.)

State Defendants' Response to Paragraph 11: The State Defendants do not dispute that Paragraph 11 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. To the extent that the NYCDOE is ultimately responsible for the scheduling of impartial hearings and notifying the parties as the LEA, this statement is undisputed. However, the State Defendants dispute these assertions because for cases assigned to OATH, OATH is responsible for its adjudication system. *See* Suriano Decl.[1] at ¶¶ 71, 76; Ex. X to the Suriano Decl. ("MOA").

12. NYCDOE, through the NYCIHO, is responsible for maintaining physical hearing space, which it does at its offices at 131 Livingston Street in Brooklyn, New York. (Ex. 5 (DOE000090) at -095.)

State Defendants' Response to Paragraph 12: The State Defendants do not dispute that Paragraph 12 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. To the extent that the NYCDOE is ultimately responsible for maintaining a physical hearing space as the LEA, this statement is undisputed. However, to the extent that OATH is now hearing due process

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[1] "Suriano Decl." refers to the declaration of Christopher Suriano, dated July 28, 2022.

complaints, the State Defendants dispute these assertions because for cases assigned to OATH, OATH is responsible for the adjudication system. *See* Suriano Decl. at ¶¶ 71, 76; MOA.

13. At least one practitioner has observed that in many impartial hearings, NYCDOE representatives do not put on any witnesses or submit any evidence to challenge the families' assertions that their children were denied a FAPE, or conceded at the hearing that the children were denied a FAPE, leading to inefficiencies and delays. (Silverblatt Decl. ¶¶ 20–23.)

State Defendants' Response to Paragraph 13: The State Defendants do not dispute that Paragraph 13 is an accurate reflection of the cited document, but state that the assertions are immaterial and irrelevant.

14. NYCDOE, through the NYCIHO, is responsible for processing and delivering decisions issued by IHOs. (Ex. 5 (DOE000090) at -107.)

State Defendants' Response to Paragraph 14: The State Defendants object to the accuracy, materiality, and relevance of the assertions in Paragraph 14 as they are vague as to the meaning of the terms "processing" and "delivering" and to the extent that they conflict with N.Y. Educ. Law § 200.5.j(5), which requires IHOs to mail their own decisions to the parties and submit the decision to the Office of Special Education of the State Education Department, the State Defendants respectfully refer the Court to that regulation for a full and complete description of its contents.

15. NYCDOE, through the NYCIHO, is responsible for paying IHOs in accordance with the IHO compensation policy. (Ex. 5 (DOE000090) at -109.)

State Defendants' Response to Paragraph 15: The State Defendants do not dispute that Paragraph 15 is an accurate reflection of the cited document, but state that the assertions are

immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. To the extent that per diem IHOs are hearing due process complaints, it is undisputed that the NYCDOE is responsible for paying them. However, the State Defendants dispute these assertions as to OATH IHOs because the City of New York is responsible for their payment. *See* Suriano Decl. at ¶ 71; MOA.

16. In December 2018, NYSED noted that "[p]ayments are not made to the IHOs for months at a time every year because NYC did not properly budget due process costs." (Ex. 6 (STATE_DEF_ESI00000014) at 42.)

State Defendants' Response to Paragraph 16: The State Defendants do not dispute that Paragraph 16 is an accurate reflection of the cited document dated December 2018, but dispute that this statement is currently accurate, material, or relevant as the IHO compensation policy was revised in 2021 and the City of New York is responsible for the payment of OATH IHOs. *See* Suriano Decl. at ¶ 71; MOA.

17. NYCDOE, through the NYCIHO, is responsible for documenting extensions of the time for rendering a decision that are granted by an IHO, as well as the new date to issue a decision after the extension is entered. (Ex. 5 (DOE000090) at -106; Ex. 18 (State Def 1216) at -217.)

State Defendants' Response to Paragraph 17: The State Defendants do not dispute that Paragraph 17 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

B. The New York State Education Department

18. Defendant New York State Education Department ("NYSED") is the SEA

within the meaning of the IDEA for the State of New York. (Ex. 9 (State Def 147) at -149; Ex. 2 (DOE000001) at -003.)

State Defendants' Response to Paragraph 18: Undisputed.

19. NYSED has "general supervisory responsibility and authority under [the] IDEA" to ensure that each public agency in the state "establishes, maintains, and implements procedural safeguards that meet the requirements of" the IDEA implementing regulations. (Ex. 9 (State Def 147) at -166.)

State Defendants' Response to Paragraph 19: Undisputed.

20. NYSED is responsible for certifying IHOs. (Ex. 6 (STATE_DEF_ESI00000014) at 19.)

State Defendants' Response to Paragraph 20: Undisputed.

21. NYSED provides training for IHOs throughout the State of New York through a contract with Special Education Solutions, LLC. (Ex. 6 (STATE_DEF_ESI00000014) at 18; Ex. 30 (STATE_DEF_ESI00009812).)

State Defendants' Response to Paragraph 21: Undisputed.

22. NYSED has the authority to suspend or revoke an IHO's certification. (Ex. 6 (STATE_DEF_ESI00000014) at 21; Ex. 17 (STATE_DEF_ESI00011397) at -426.)

State Defendants' Response to Paragraph 22: Undisputed.

23. In 2017, when "contemplat[ing] revoking the certification of 2 IHOs," NYSED concluded that "both were from NYC and the system could not handle the strain of reassigning all of their pending cases so only one IHO was revoked." (Ex. 6 (STATE_DEF_ESI00000014) at 42.)

State Defendants' Response to Paragraph 23: Undisputed.

24. Parties to an impartial hearing may file with NYSED a complaint against the IHO. (Ex. 5 (DOE000090) at -118.)

State Defendants' Response to Paragraph 24: Undisputed.

25. New York State "[e]stablishes maximum rates for compensation of IHOs." (Ex. 17 (STATE_DEF_ESI00011397) at -407.)

State Defendants' Response to Paragraph 25: The State Defendants do not dispute that Paragraph 25 is an accurate reflection of the cited document, but state that this is merely a summary of New York State regulations and laws that apply to the education of students with disabilities and State Defendants respectfully refer the Court to N.Y. Educ. Law § 4404(1)(c), 8 NYCRR §§ 200.1(x), 200.2(b)(9), 200.2(e), 200.5(j)(3), and 200.21(a) for a full and complete description of their contents.

26. NYSED provides guidance to NYCDOE regarding compliance with the timeliness requirements of the state regulations that NYSED has adopted. (Ex. 1 (DOE_013638) at -656.)

State Defendants' Response to Paragraph 26: Undisputed.

27. In December 2018, NYSED noted "possible consequences if changes aren't made" to the New York City impartial hearing system, including "[c]lass action lawsuit (parents not getting timely hearings)" and "[c]ourt monitor may be appointed as in Schmeltzer." (Ex. 6 (STATE_DEF_ESI00000014), at 43.)

State Defendants' Response to Paragraph 27: The State Defendants do not dispute that Paragraph 27 is an accurate reflection of the cited document, but state that the assertions are immaterial and irrelevant.

C. Extensions of the IDEA Impartial Hearing Timeline

28. In New York State, IHOs are responsible for managing the timeline of a case to ensure a decision is rendered consistent with statutory timelines. (Ex. 31 (STATE_DEF_ESI00069681) at -683); Ex. 18 (State Def 1216) at -217.)

State Defendants' Response to Paragraph 28: Undisputed.

29. In New York State, each extension to the compliance deadline was limited to 30 days until April 7, 2020. Pursuant to an emergency regulation passed by the Commissioner of Education during the COVID-19 pandemic, the maximum extension length increased from 30 days to 60 days on April 7, 2020. (Ex. 19.)

State Defendants' Response to Paragraph 29: The State Defendants do not dispute that Paragraph 29 is an accurate reflection of the cited document, but state that the assertions are immaterial and irrelevant.

30. In an internal document prepared in May 2020, NYCDOE employees documented the "failure" on the part of IHOs "to conform practices to requirements of NYS regulations," including a "[g]eneral lack of understanding of regulations" on extension timelines and a practice of "[u]nilateral submission of extensions without requests from parties." (Ex. 21 (DOE_006380) at -382.)

State Defendants' Response to Paragraph 30: The State Defendants do not dispute that Paragraph 30 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

31. At least one practitioner has observed that "IHOs solicit extension requests from the parties, for example, by asking, 'do I have an application for an extension?'" (Silverblatt Decl. ¶ 10.)

<u>State Defendants' Response to Paragraph 31</u>: The State Defendants do not dispute that Paragraph 31 is an accurate reflection of the cited declaration, but state that the assertions are immaterial and irrelevant.

32. At least one practitioner has observed that he has "felt that refusing to seek an extension of the Compliance Date might displease the IHO that would continue to preside over my client's DPC, risking adverse consequences to the client's case." (Silverblatt Decl. ¶ 12.)

<u>State Defendants' Response to Paragraph 32</u>: The State Defendants do not dispute that Paragraph 32 is an accurate reflection of the cited declaration, but state that the assertions are immaterial and irrelevant.

33. At least one practitioner has "observed, on one or more occasion, that extensions have been entered that were not requested by either party, that multiple extensions were entered at one time, and that extensions were entered retroactively." (Silverblatt Decl. ¶ 13.)

<u>State Defendants' Response to Paragraph 33</u>: The State Defendants do not dispute that Paragraph 33 is an accurate reflection of the cited declaration, but state that the assertions are immaterial and irrelevant.

34. At least one practitioner has observed that some IHOs do not ask the parties about "the factors that New York regulations direct IHOs to consider when granting extensions," "instead granting an extension solely on the basis of the request itself." (Silverblatt Decl. ¶ 14.)

<u>State Defendants' Response to Paragraph 34</u>: The State Defendants do not dispute that Paragraph 34 is an accurate reflection of the cited declaration, but state that the assertions are

immaterial and irrelevant.

35. NYSED training materials from March 2020 explain that if "it becomes clear that the 45-day timeline cannot be met, . . . the hearing officer can explore with the parties whether either party (or both) desire(s) an extension of the 45-day timeline, provided that any of the mandated factors noted above do not outweigh the need for an extension." (Ex. 18 (State Def 1216) at -225.)

State Defendants' Response to Paragraph 35: The State Defendants do not dispute that Paragraph 35 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

D. New York City's Waitlist and the Waitlist Extension

36. Before November 2019, when a DPC was filed, the NYCIHO "automatically appointed any IHO on the rotation list, without checking their availability." (Ex. 24 (STATE_DEF_ESI00011456) at -457.)

State Defendants' Response to Paragraph 36: The State Defendants do not dispute that Paragraph 35 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

37. Before November 2019, there were a significant number of recusals on the basis of unavailability and associated delays in hearings in New York City. (Ex. 24 (STATE_DEF_ESI00011456) at -457); *see also* Ex. 12 (STATE_DEF_ESI00009487); Ex. 11 (STATE_DEF_ESI00011331).)

<u>State Defendants' Response to Paragraph 37</u>: The State Defendants do not dispute that Paragraph 35 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

38. In November 2019, NYSED required that the NYCIHO change the IHO appointment policy so that "only IHOs who are available and able to accept cases will be assigned to a case, thereby substantially reducing the number of recusals," and limited the circumstances under which an IHO was permitted to recuse. (Ex. 24 (STATE_DEF_ESI00011456) at -457; *see also* Ex. 12 (STATE_DEF_ESI00009487); Ex. 11 (STATE_DEF_ESI00011331).)

<u>State Defendants' Response to Paragraph 38</u>: Undisputed.

39. On November 19, 2019, in light of this revised assignment system, NYCDOE implemented a "waitlist" of complaints not yet assigned to IHOs. (Ex. 27 (DOE_007235) at -235; Ex. 24 (STATE_DEF_ESI00011456) at -457.)

<u>State Defendants' Response to Paragraph 39</u>: The State Defendants do not dispute that Paragraph 35 is an accurate reflection of the cited document, but state that the assertions are immaterial and irrelevant.

40. Cases on the waitlist are not assigned an IHO until one is available. (Ex. 29 (DOE_016577) at -578.)

<u>State Defendants' Response to Paragraph 40</u>: The State Defendants do not dispute that Paragraph 40 is an accurate reflection of the cited document, but state that the assertions are immaterial and irrelevant.

41. As of February 5, 2021, the waitlist had grown to "over 6000 cases," and an

NYSED employee expressed to NYCDOE employees that the waitlist "may overwhelm the revised offer/appointment process, resulting in failure, perhaps even collapse, of the system." (Ex. 29 (DOE_016577) at -578.)

State Defendants' Response to Paragraph 41: The State Defendants do not dispute that Paragraph 41 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. As of June 30, 2022, there were 290 cases on the waitlist. *See* Suriano Decl. at ¶ 80.

42. As of September 8, 2021, the waitlist of cases had grown to 6,297—at least 62 percent of which had been waiting for an IHO appointment for over 75 days. (Ex. 35 (STATE_DEF_ESI00047218).)

State Defendants' Response to Paragraph 42: The State Defendants do not dispute that Paragraph 42 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. As of June 30, 2022, there were 290 cases on the waitlist. *See* Suriano Decl. at ¶ 80.

43. In early May 2020, NYCDOE and NYSED jointly implemented a "waitlist extension" for cases receiving an IHO appointment off the waitlist. (Ex. 23 (STATE_DEF_ESI00066460); Ex. 32 (STATE_DEF_ESI00031731).)

State Defendants' Response to Paragraph 43: The State Defendants do not dispute that Paragraph 43 is an accurate reflection of the cited document, but state that the assertions are immaterial and irrelevant.

44. The waitlist extension was implemented to "adjust the compliance date" "[i]n response to the concerns of NYC hearing officers at being appointed to waitlisted cases which are already late upon appointment." (Ex. 16 (DOE_006616) at -617.)

<u>State Defendants' Response to Paragraph 44</u>: The State Defendants do not dispute that Paragraph 44 is an accurate reflection of the cited document, but state that the assertions are immaterial and irrelevant.

45. A waitlist extension is an "extension[] granted by SED to cases in which an IHO is appointed from the waitlist" so that an IHO "is not appointed to a case that is already past compliance." (Ex. 32 (STATE_DEF_ESI00031731).)

<u>State Defendants' Response to Paragraph 45</u>: The State Defendants do not dispute that Paragraph 45 is an accurate reflection of the cited document, but state that the assertions are immaterial and irrelevant.

46. Specifically, "[f]or cases that involve school-age students (CSE)," NYSED "authorized" the NYCIHO "to adjust the compliance date to 45 days after the date of [the IHO's] appointment." (Ex. 23 (STATE_DEF_ESI00066460).)

<u>State Defendants' Response to Paragraph 46</u>: The State Defendants do not dispute that Paragraph 46 is an accurate reflection of the cited document, but state that the assertions are immaterial and irrelevant.

47. Similarly, "[f]or cases that involve preschool students," NYSED "authorized" NYCIHO "to adjust the compliance date to 30 days after the date of [the IHO's] appointment." (Ex. 23 (STATE_DEF_ESI00066460).)

<u>State Defendants' Response to Paragraph 47</u>: The State Defendants do not dispute that Paragraph 47 is an accurate reflection of the cited document, but state that the assertions are immaterial and irrelevant.

48. A granted waitlist extension is recorded in NYSED's Impartial Hearing Reporting System data system ("IHRS") with the code "WAITLISTED CASE – NEW

APPOINTMENT." (Ex. 16 (DOE_006616) at -617; Ex. 36 (State Def 1) at -10.)

State Defendants' Response to Paragraph 48: The State Defendants do not dispute that Paragraph 48 is an accurate reflection of the cited document, but state that the assertions are immaterial and irrelevant.

49. NYSED described the waitlist extension as a "[t]ech workaround for bringing late case[s] into compliance." (Ex. 14 (DOE_006469) at -469.)

State Defendants' Response to Paragraph 49: The State Defendants do not dispute that Paragraph 49 is an accurate reflection of the cited document, but state that the assertions are immaterial and irrelevant.

50. NYSED explained to IHOs in announcing the waitlist extension to them that this extension "negates the need to seek extensions from the parties, whose cases have already been delayed and reduces the amount of effort required to bring the case into compliance in [the NYCDOE and NYSED data systems]." (Ex. 23 (STATE_DEF_ESI00066460).)

State Defendants' Response to Paragraph 50: The State Defendants do not dispute that Paragraph 50 is an accurate reflection of the cited document, but state that the assertions are immaterial and irrelevant.

51. This change sought to address the problem that "IHOs are being appointed to cases that are already late due to the backlog." (Ex. 14 (DOE_006469) at -471.)

State Defendants' Response to Paragraph 51: The State Defendants do not dispute that Paragraph 51 is an accurate reflection of the cited document, but state that the assertions are immaterial and irrelevant.

52. In meeting notes from an August 20, 2020 meeting, a NYSED employee wrote that the "SED Waitlist extension" "[c]ould be violating a parties' right to an expeditious

hearing." (Ex. 26 (STATE_DEF_ESI00070041) at -042.)

State Defendants' Response to Paragraph 52: The State Defendants do not dispute that Paragraph 52 is an accurate reflection of the cited document, but state that the assertions are immaterial and irrelevant.

53. In meeting notes from an August 20, 2020 meeting, a NYSED employee wrote that "[w]e need to set standards as to when to utilize this SED Waitlist extension" because "[t]he Waitlist Extensions are not regulatory." (Ex. 26 (STATE_DEF_ESI00070041) at -042.)

State Defendants' Response to Paragraph 53: The State Defendants do not dispute that Paragraph 53 is an accurate reflection to the extent that the cited document contains those quotations, but State Defendants dispute the characterization that the two separate, quoted sentences are reliant upon or related to one another. The document itself does not state that the standards need to be set "because" the extensions are not regulatory, and respectfully refer the Court to the document for a complete and accurate statement of its contents. Further, these assertions are immaterial and irrelevant.

II. Reviews of the New York City Impartial Hearing System

A. The 2014 Two-Tier Study

54. NYSED commissioned a study by Gail ImObersteg, Esq. regarding reforms to the impartial hearing system that was published in December 2014 (the "Two-Tier Study"). (Ex. 2 (DOE000001).)

State Defendants' Response to Paragraph 54: Undisputed.

55. The Two-Tier Study examined whether NYSED should abandon New York's "two-tier" due process hearing system in favor of a "one-tier" system where all due process hearings would be managed by the State. (Ex. 2 (DOE000001) at -022 to -023.)

<u>State Defendants' Response to Paragraph 55</u>: Undisputed.

56. Based on a review of data from 2004–2005 through 2011–2012, the Two-Tier Study concluded that "New York State has been unable to attain 100% or even substantial compliance with timely adjudicated hearings" during the period studied. (Ex. 2 (DOE000001) at -006.)

<u>State Defendants' Response to Paragraph 56</u>: The State Defendants do not dispute that Paragraph 56 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

57. The Two-Tier Study found that in 2012–2013, approximately 92% of DPCs in New York State were filed in New York City and "[a]s such, New York's hearing system is predominantly influenced by the operation of the system in New York City." (Ex. 2 (DOE000001) at -011.)

<u>State Defendants' Response to Paragraph 57</u>: The State Defendants do not dispute that Paragraph 57 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

58. The Two-Tier Study also concluded that "the overall operation of the conduct of the New York State special education hearing system is in need of substantial restructuring to be an efficient and timely system consistent with standard, and ideally, best legal practices." (Ex. 2 (DOE000001) at -017.)

<u>State Defendants' Response to Paragraph 58</u>: The State Defendants do not dispute that Paragraph 58 is an accurate reflection of the cited document, but state that the assertions are

immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

B. The 2016 OSEP Review

59. In 2016, the U.S. Department of Education's Office of Special Education Programs ("OSEP") conducted an audit of the timeliness of New York's due process hearing decisions. (Ex. 3 (STATE_DEF_ESI00000255) at -255; (Ex. 6 (STATE_DEF_ESI00000014) at 26.)

State Defendants' Response to Paragraph 59: The State Defendants do not dispute that Paragraph 59 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

60. OSEP identified New York as a State with at least 75 percent of decisions after fully adjudicated hearings issued within an extended timeline for the reporting periods of 2012–2013 and 2013–2014. (Ex. 3 (STATE_DEF_ESI00000255) at -255; (Ex. 6 (STATE_DEF_ESI00000014) at 26.)

State Defendants' Response to Paragraph 60: The State Defendants do not dispute that Paragraph 60 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

61. In September 2016, OSEP publicly issued its report of this audit, New York Monitoring and Support Visit Summary and Next Steps ("2016 OSEP Review"). (Ex. 3 (STATE_DEF_ESI00000255) at -255.)

<u>State Defendants' Response to Paragraph 61</u>: The State Defendants do not dispute that Paragraph 61 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

62. The 2016 OSEP Review thus concluded that "above 75% of fully adjudicated hearings" for the 2012–2015 reporting years had "extended timelines," and that "the State does not have procedures in place to ensure that [IHOs] are granting extensions consistent with" applicable law. (Ex. 3 (STATE_DEF_ESI00000255) at -258.)

<u>State Defendants' Response to Paragraph 62</u>: The State Defendants do not dispute that Paragraph 62 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

63. The 2016 OSEP Review thus concluded that more than 75% of New York State's fully adjudicated DPCs were out of compliance with the IDEA. (Ex. 3 (STATE_DEF_ESI00000255) at -258.)

<u>State Defendants' Response to Paragraph 63</u>: The State Defendants do not dispute that Paragraph 63 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

64. The 2016 OSEP Review found that "[b]ased on the review of documents, analysis of data, and interviews with State and local personnel, . . . the State does not have procedures in place to ensure that independent hearing officers . . . are issuing due process hearing decisions within the 45-day timeline required by [the IDEA]." (Ex. 3

(STATE_DEF_ESI00000255) at -259.)

<u>State Defendants' Response to Paragraph 64</u>: The State Defendants do not dispute that Paragraph 64 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

65. The 2016 OSEP Review concluded that New York State does not have procedures in place to ensure that DPCs are resolved in the timeline permitted under the IDEA. (Ex. 3 (STATE_DEF_ESI00000255) at -259.)

<u>State Defendants' Response to Paragraph 65</u>: The State Defendants do not dispute that Paragraph 65 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

C. The 2019 NYSED Merced Report

66. In 2018, NYSED hired Deusdedi Merced, Esq. to conduct an independent review of the New York City impartial hearing system with NYSED's "full authority." (Ex. 8 (State Def 240) at -246; Ex. 4 (STATE_DEF_ESI_00008950).)

<u>State Defendants' Response to Paragraph 66</u>: The State Defendants do not dispute that Paragraph 66 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

67. Mr. Merced's findings are set forth in his *External Review of the New York City Impartial Hearing Office* dated February 22, 2019 ("NYSED Merced Report"). (Ex. 8 (State Def 240).)

<u>State Defendants' Response to Paragraph 67</u>: Undisputed.

68. NYSED later published the Merced Report on its website. See Jan. 7, 2020 Memorandum from Kimberly Young Wilkins, att. D, https://www.regents.nysed.gov/common/regents/files/120p12d3.pdf.

<u>State Defendants' Response to Paragraph 68</u>: The State Defendants do not dispute that Paragraph 68 is an accurate reflection of the cited document, but state that the assertion is immaterial and irrelevant.

69. The NYSED Merced Report concluded that "[t]he average number of days a case is open in New York State," which the Report found to be 225 days in the 2018–2019 school year, "far exceeds the abbreviated timeline established in the IDEA," and the number of DPCs in New York City in particular "raises valid questions of the school district's ability to offer [FAPE] to its students with disabilities." (Ex. 8 (State Def 240) at -257 to -258).)

<u>State Defendants' Response to Paragraph 69</u>: The State Defendants do not dispute that Paragraph 69 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

70. The NYSED Merced Report found that a partial cause of delays was that NYCDOE failed to promptly and adequately compensate IHOs, resulting in IHOs "taking themselves off rotation, declining appointments of cases, or seeking other work, leaving an insufficient number of IHOs" compared to the volume of cases. (Ex. 8 (State Def 240) at -278 to -279.)

<u>State Defendants' Response to Paragraph 70</u>: The State Defendants do not dispute that Paragraph 70 is an accurate reflection of the cited document, but state that the assertions are

immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

71. The NYSED Merced Report concluded that the "substantial deficiencies in the policies, procedures and practices specific to special education impartial hearings in New York City . . . present[] a threat to due process" and "render an already fragile hearing system vulnerable to imminent failure and, ultimately, collapse." (Ex. 8 (State Def 240) at -261.)

State Defendants' Response to Paragraph 71: The State Defendants do not dispute that Paragraph 71 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

72. The NYSED Merced Report concluded that "[t]he validity of reported timeliness in New York City cannot be assumed." (Ex. 8 (State Def 240) at -274.)

State Defendants' Response to Paragraph 72: The State Defendants do not dispute that Paragraph 72 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

73. The NYSED Merced Report additionally found that "[i]t is more likely than not that New York City has a greater number of untimely cases than reported and that the incidence of IHOs unilaterally extending timelines or soliciting extensions from parties is considerable." (Ex. 8 (State Def 240) at -282 to -283.)

State Defendants' Response to Paragraph 73: The State Defendants do not dispute that Paragraph 73 is an accurate reflection of the cited document, but state that the assertions are

immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

74. The NYSED Merced Report characterized the number of extensions issued in New York State as "exceptionally high," with New York City accounting for the overwhelming majority of those extensions. (Ex. 8 (State Def 240) at -255 to -256.)

State Defendants' Response to Paragraph 74: The State Defendants do not dispute that Paragraph 74 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

75. The NYSED Merced Report described the high number of extensions as reflective of "systemic deficiencies" in the impartial hearing system in New York City, which were "symptomatic of an unhealthy hearing system that requires immediate intervention." (Ex. 8 (State Def 240) at -259.)

State Defendants' Response to Paragraph 75: The State Defendants do not dispute that Paragraph 75 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

76. The NYSED Merced Report found that NYCDOE failed to meet the basic legal requirements surrounding extensions, including that the "[p]revalent practice in New York City is to extend the timeline without a written order meeting the requirements" of the relevant New York State regulations. (Ex. 8 (State Def 240) at -274.)

State Defendants' Response to Paragraph 76: The State Defendants do not dispute that Paragraph 76 is an accurate reflection of the cited document, but state that the assertions are

immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

77. The NYSED Merced Report described incidences of IHOs "unilaterally extending timelines" or "soliciting extensions from the parties." (Ex. 8 (State Def 240) at -275.)

State Defendants' Response to Paragraph 77: The State Defendants do not dispute that Paragraph 77 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

78. The NYSED Merced Report also concluded that NYCDOE's "practice of automatically appointing an IHO to a due process complaint without first confirming his/her availability," contributed to hearing delays. (Ex. 8 (State Def 240) at -282.)

State Defendants' Response to Paragraph 78: The State Defendants do not dispute that Paragraph 78 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

79. The Supervisor of the Due Process Unit at NYSED wrote to Mr. Merced after reading the NYSED Merced Report, "You did an excellent job in your review and in the report. I especially like how you identified current practices that violate IDEA, delay due process to the parties, delay services to students, increase litigation costs to parents, etc." (Ex. 7 (STATE_DEF_ESI00000920).)

State Defendants' Response to Paragraph 79: The State Defendants do not dispute that Paragraph 79 is an accurate reflection of the cited document, but state that the assertions are

immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

III. Compliance Assurance Plan

80. In May 2019, NYSED issued a Compliance Assurance Plan (the "CAP") to NYCDOE. (*See* Ex. 9 (State Def 147).)

State Defendants' Response to Paragraph 80: Undisputed.

81. NYSED issued the CAP to NYCDOE because, according to NYSED, "NYCDOE ha[d] been identified as not meeting the requirements of IDEA," including the IDEA's "requirements to ensure proper procedural safeguards to students and parents" such as impartial hearing timelines. (Ex. 9 (State Def 147) at -149, -150.)

State Defendants' Response to Paragraph 81: Undisputed.

82. Under Section III of the CAP, NYCDOE was required to "provide to NYSED a corrective action plan to correct its failure to provide students with disabilities and their parents all the rights and procedural safeguards required by federal and State law and regulations" by June 17, 2019. (Ex. 9 (State Def 147) at -170.)

State Defendants' Response to Paragraph 82: Undisputed.

83. The CAP required that the NYCDOE corrective action plan include steps to "[e]nsure IHO availability before appointment," "[e]nsure uncontested pendency matters are not brought before IHOs," and "[e]nsure that staff representing NYCDOE at due process hearings are authorized to enter into settlement or may do so subject to approval, which approval will take no longer than 30 days after request for approval, which request will be made no later than 5 days after agreement has been reached," among other requirements. (Ex. 9 (State Def 147) at -170 to -171.)

<u>State Defendants' Response to Paragraph 83</u>: Undisputed.

84. On June 17, 2019, Karin Goldmark, NYCDOE Deputy Chancellor of School Planning & Development, sent a letter to NYSED Assistant Commissioner Christopher Suriano in response to the CAP. (Ex. 10 (STATE_DEF_ESI00042284).)

<u>State Defendants' Response to Paragraph 84</u>: Undisputed.

85. This June 17 letter stated that NYCDOE "understand[s] that NYSED would like for NYCDOE to reduce unnecessary hearings by authorizing staff to enter into settlements at impartial hearings" and maintaining that "NYCDOE cannot authorize its staff to enter into monetary settlements of due process complaints at impartial hearing." (Ex. 10 (STATE_DEF_ESI00042284) at -286.)

<u>State Defendants' Response to Paragraph 85</u>: Undisputed.

86. Additionally, the June 17 letter stated that parents "are experiencing major delays due to a shortage in NYSED-certified hearing officers available to hear cases and other issues." (Ex. 10 (STATE_DEF_ESI00042284) at -285.)

<u>State Defendants' Response to Paragraph 86</u>: The State Defendants do not dispute that Paragraph 86 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

87. The letter identified "an urgent need to address [the IHO] shortage," given that, "[a]s of Friday, June 14, 2019, there were nine impartial hearing officers in rotation with over 9,000 due process claims filed for school year 2018-2019." (Ex. 10 (STATE_DEF_ESI00042284) at -285.)

<u>State Defendants' Response to Paragraph 87</u>: The State Defendants do not dispute that Paragraph 87 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

88. On March 3, 2020, NYSED Assistant Commissioner Christopher Suriano sent a letter to Deputy Chancellor Goldmark identifying issues that NYSED required NYCDOE to address as part of the CAP. (Ex. 15 (STATE_DEF_ESI00009195) at -195.)

<u>State Defendants' Response to Paragraph 88</u>: Undisputed.

89. The requirements set forth by Assistant Commissioner Suriano in his March 3 letter included the requirement that NYCDOE submit a plan "as to how it will increase the use of resolution meetings, which must also include an explanation on who conducts the resolution meeting on behalf of the NYCDOE and the extent and details of their authority to settle matters, both monetary and non-monetary." (Ex. 15 (STATE_DEF_ESI00009195) at -196.)

<u>State Defendants' Response to Paragraph 89</u>: Undisputed.

90. On April 24, 2020, Josh Morgenstern, on behalf of the NYCDOE Special Education Office, sent a letter to Assistant Commissioner Suriano responding to his March 3, 2020 letter. (Ex. 20 (State Def 626).)

<u>State Defendants' Response to Paragraph 90</u>: Undisputed.

91. Mr. Morgenstern stated that "NYCDOE staff responsible for resolutions have the authority to enter into resolution agreements regarding certain . . . matters," but "[t]he following items cannot be agreed upon through resolution: non-approved private school tuition; assessments and services at rates that exceed those typically necessary to procure the

assessment/service; issues with broad legal or policy implications; attorneys' fees." (Ex. 20 (State Def 626) at -627.)

State Defendants' Response to Paragraph 91: Undisputed.

92. On May 27, 2020, John D'Agati, on behalf of NYSED, sent a letter to Deputy Chancellor Goldmark. (Ex. 22 (State Def 639).)

State Defendants' Response to Paragraph 92: Undisputed.

93. Mr. D'Agati stated that "[c]ases involving a particular student and issues such as classification, evaluation, elements of an IEP or IESP, public or private educational placements (approved or not), charter schools and special education, Carter reimbursement disputes, service delivery and IEP or IESP implementation disputes and attorney fees are all proper subjects of the resolution process and an individual with decision making authority to bind the district . . . should be present at a resolution meeting[.]" (Ex. 22 (State Def 639) at -641.)

State Defendants' Response to Paragraph 93: Undisputed.

94. The May 27, 2020 letter additionally identifies other NYCDOE actions that the letter indicated impede compliance with the IDEA's timing requirements for impartial hearings, including the NYCDOE practice of proceeding to hearings on enhanced rate cases and on independent educational evaluations, which "unjustifiably clogs the due process system with cases that lack any defense" and "improperly places the burden on the parent." (Ex. 22 (State Def 639) at -640 to -641.)

State Defendants' Response to Paragraph 94: Undisputed.

95. The May 27, 2020 letter directed NYCDOE to stop "proceeding to hearing on certain cases such as 'enhanced rate' cases" and "cases involving independent

educational evaluations." (Ex. 22 (State Def 639) at -640.)

State Defendants' Response to Paragraph 95: Undisputed.

96. On June 26, 2020, Louise DeCandia, on behalf of NYSED, sent a letter to Judy Nathan, Executive Deputy Counsel at NYCDOE. (Ex. 25 (STATE_DEF_ESI00065915).)

State Defendants' Response to Paragraph 96: Undisputed.

97. Ms. DeCandia stated that NYCDOE had failed to provide "its plans to settle cases long awaiting settlement approval," including cases settled in the 2018–2019 school year awaiting finalization. (Ex. 25 (STATE_DEF_ESI00065915) at -917.)

State Defendants' Response to Paragraph 97: Undisputed.

98. On January 7, 2021, Assistant Commissioner Suriano sent a letter to Deputy Chancellor Goldmark to follow up on John D'Agati's May 27, 2020 letter. (Ex. 28 (STATE_DEF_ESI00011186).)

State Defendants' Response to Paragraph 98: Undisputed.

99. The January 7, 2021, letter stated that "[t]he current data indicates that changes to your processes were not implemented to address this matter" and thus "NYCDOE is now being directed to implement these changes and any other changes proposed by the NYCDOE and approved by NYSED, to immediately reduce the number of open due process cases." (Ex. 28 (STATE_DEF_ESI00011186) at -186.)

State Defendants' Response to Paragraph 99: Undisputed.

100. The January 7, 2021 letter also stated that "the delays for an IHO appointment are so lengthy that parents are being denied FAPE." (Ex. 28 (STATE_DEF_ESI0001186) at -188.)

State Defendants' Response to Paragraph 100: The State Defendants do not dispute that Paragraph 100 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, ignore the ongoing transition to OATH, and are an improper, inadmissible legal conclusion. *See* Suriano Decl. at ¶¶ 71-80.

IV. Data Maintained by Defendants Shows the Impartial Hearing System in New York City Fails to Comply with the IDEA's Timelines

A. State and City Data Systems

101. NYSED maintains the IHRS data system to track case compliance data. (*See* Ex. 33 (NYSED Response to Plaintiffs' Interrogatory No. 3) (stating that the Impartial Hearing Reporting System "receives [data] from school districts"); Ex. 36 (State Def 1) (spreadsheets containing data tracking information for IHRS).)

State Defendants' Response to Paragraph 101: Undisputed.

102. NYCDOE maintains the IHS data system to track case compliance data. (*See* Ex. 34 (NYCDOE Response to Plaintiffs' Interrogatory No. 4).)

State Defendants' Response to Paragraph 102: Undisputed.

103. NYSED receives regular transfers of case data from IHS. (*See* Ex. 33 (NYSED Response to Plaintiffs' Interrogatory No. 3).)

State Defendants' Response to Paragraph 103: Undisputed.

104. NYSED produced data from IHRS showing the status of DPCs filed between January 3, 2017 and December 30, 2021 as of January 21, 2022, the date the data was extracted from IHRS. (Steinkamp Decl. ¶¶ 20b n.15, 39.)

State Defendants' Response to Paragraph 104: The State Defendants do not dispute that Paragraph 104 is an accurate reflection of the cited document, but state that the assertions are immaterial and irrelevant.

105. The full school years captured in the data that NYSED produced include 2017–2018 through 2020–2021, or July 1, 2017 through June 30, 2021. (Steinkamp Decl. ¶ 21.)

State Defendants' Response to Paragraph 105: The State Defendants do not dispute that Paragraph 105 is an accurate reflection of the cited document, but state that the assertions are immaterial and irrelevant.

106. Stout's analysis focused on cases that were (i) filed during the four full school years captured in the data that NYSED produced; and (ii) either remained open as of January 21, 2022, the date the data was extracted from IHRS, or were closed due to an actual decision, settlement, or were withdrawn ("Relevant Cases"). (Steinkamp Decl. ¶¶ 39–41.)

State Defendants' Response to Paragraph 106: The State Defendants do not dispute that Paragraph 106 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

107. Certain fields in IHRS directly track the compliance dates required by the IDEA. (Steinkamp Decl. ¶ 29.)

State Defendants' Response to Paragraph 107: Undisputed.

108. The "CURR_COMP_DATE" field in the "Cases" table of IHRS tracks the NYSED-calculated deadline for when a case is due to be completed based on other timeline-impacting factors, such as the entry of extensions, resolution period waivers, or amendments to the DPC ("Current Compliance Date"). (Steinkamp Decl. ¶ 29c.)

State Defendants' Response to Paragraph 108: Undisputed.

B. Conclusions from Defendants' Data

109. The Relevant Cases took an average of 284 days to complete, and untimely

closed DPCs took an average of over 300 days to complete. (Steinkamp Decl. ¶¶ 66-67.)

State Defendants' Response to Paragraph 109: The State Defendants do not dispute that Paragraph 109 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

110. For Relevant Cases closed during the 2020–2021 school year, the average case length was 320 days. (Steinkamp Decl. ¶ 67.)

State Defendants' Response to Paragraph 110: The State Defendants do not dispute that Paragraph 110 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

111. Of DPCs filed in the 2020–2021 school year, 3,113 remained outstanding as of January 21, 2022. (Steinkamp Decl. ¶ 44.)

State Defendants' Response to Paragraph 111: The State Defendants do not dispute that Paragraph 111 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

112. If every recorded extension was valid, approximately 38 percent of Relevant Cases were closed after the Current Compliance Date. (Steinkamp Decl. ¶ 43.)

State Defendants' Response to Paragraph 112: The State Defendants do not dispute that Paragraph 112 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

113. On average, these cases were 69 days beyond the Current Compliance Date when they were closed. (Steinkamp Decl. ¶ 45.)

State Defendants' Response to Paragraph 113: The State Defendants do not dispute that Paragraph 113 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

114. IHRS tracks which extensions are "waitlist extensions." (Steinkamp Decl. ¶¶ 46–47.)

State Defendants' Response to Paragraph 114: Undisputed.

115. A total of 10,028 waitlist extensions were entered for Relevant Cases that were open on or after May 1, 2020 ("Waitlist Extension Relevant Cases"). (Steinkamp Decl. ¶ 58.)

State Defendants' Response to Paragraph 115: The State Defendants do not dispute that Paragraph 115 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

116. Those 10,028 waitlist extensions averaged 202 days each. (Steinkamp Decl. ¶ 59.)

State Defendants' Response to Paragraph 116: The State Defendants do not dispute that Paragraph 116 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

117. If waitlist extensions are removed, *i.e.*, if the compliance date is recalculated without extending the deadline for the waitlist extension, then 57.6 percent of Waitlist

Extension Relevant Cases were either untimely closed or remained open and untimely. (Steinkamp Decl. ¶ 60.)

State Defendants' Response to Paragraph 117: The State Defendants do not dispute that Paragraph 117 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

118. Similarly, if waitlist extensions are removed, the percentage of DPCs closed untimely has increased every year since the 2017-2018 school year. (Steinkamp Decl. Ex. 2.4.)

State Defendants' Response to Paragraph 118: The State Defendants do not dispute that Paragraph 118 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

119. NYSED's data contains data tables for CASE_ISSUE_DATA and ISSUE_DECISIONS, which track, among other things, whether issues were determined in the parents' favor. (Steinkamp Decl. ¶¶ 23, 30.)

State Defendants' Response to Paragraph 119: Undisputed.

120. In 78 percent of the Relevant Cases that went to an actual decision, the IHO resolved all issues fully in the parents' favor, and the IHO resolved an additional 11 percent of Relevant Cases at least partially in the parents' favor. (Steinkamp Decl. ¶ 70.)

State Defendants' Response to Paragraph 120: Undisputed.

121. In 22,072 Relevant Cases, at least one extension was granted retroactively, comprising 54.2% of all Relevant Cases, and 65.2% of the Relevant Cases with at least one extension. (Steinkamp Decl. ¶¶ 62, 75.)

State Defendants' Response to Paragraph 121: The State Defendants do not dispute that Paragraph 121 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

122. In 4,405 Relevant Cases, or 10.8% of all Relevant Cases, more than one extension was granted simultaneously. (Steinkamp Decl. ¶¶ 64, 75.)

State Defendants' Response to Paragraph 122: The State Defendants do not dispute that Paragraph 122 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

123. For 34,727, or 85.2% of, Relevant Cases, the resolution period ended because it elapsed after 30 days without any resolution meeting being held. (Steinkamp Decl. ¶¶ 73–75.)

State Defendants' Response to Paragraph 123: The State Defendants do not dispute that Paragraph 122 is an accurate reflection of the cited document, but state that the assertions are immaterial, irrelevant, outdated, and ignore the ongoing transition to OATH. *See* Suriano Decl. at ¶¶ 71-80.

V. Named Plaintiffs

A. A.N.

B. A.S.

C. B.M.

D. C.G.

E. J.S.M.

F. K.M.E.

G. P.W.

H. Q.T.

I. S.F.

J. S.S.

K. W.W.

L. Consistent Issues in Named Plaintiff Cases

State Defendants further submit that to the extent that any of the purported facts in Plaintiffs' 56.1 Statement ignore or fail to recognize that changes in the due process system, including the transfer of many duties from the New York City Department of Education to the New York City Office of Administrative Trials and Hearings, have happened, are happening now, or will be happening in the near future, they are disputed, immaterial, and fail to support Plaintiffs' motion for partial summary judgment.

Dated: New York, New York
July 29, 2022

LETITIA JAMES
Attorney General
State of New York
Attorney for State Defendants
By:

s/
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

- against -

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

Defendants.

DECLARATION OF CHRISTOPHER SURIANO IN SUPPORT OF STATE DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

20 Civ. 705 (EK) (RLM)

CHRISTOPHER SURIANO, pursuant to 28 U.S.C. § 1746, declares under penalty of perjury as follows:

1. I am the Assistant Commissioner of Special Education at the New York State Education Department ("SED"). I have served in this role since September 2016. As Assistant Commissioner of Special Education, I oversee SED's Office of Special Education's efforts to promote educational equity and excellence for students with disabilities, provide general supervision and monitoring of all public and private schools serving New York State preschool and school-age students with disabilities, and provide technical assistance to parents and school districts. The Due Process Unit, SED's unit that is responsible for overseeing due process, is housed within SED's Office of Special Education. I have worked in special education services in various capacities for over thirty years, including as a special education teacher, Supervisor and Regional Coordinator in SED's Office of Special Education, and as the Executive Director of Specialized Services in the Rochester City School District.

2. I am familiar with the facts set forth herein based on personal knowledge and my review of SED records, which are kept in the ordinary course of business, and some of which are attached to this declaration.

The February 2019 Merced Report

3. Recognizing that the New York City Department of Education ("DOE") was not complying with certain due process timelines set forth in the IDEA and related regulations, SED concluded that it needed to better understand the functioning of the New York City Impartial Hearing Office and its policies, procedures, and practices specific to special education impartial hearings. Therefore, in 2018, SED engaged Deusdedi Merced of Special Education Solutions, a special education consultant, to conduct a review of the New York City Impartial Hearing Office.

4. Merced issued a report on his findings in February 2019 ("Merced Report"). A true and correct copy of the Merced Report is attached as Exhibit A.

5. The Merced Report found that, for school year 2016-17, the number of due process complaints filed in New York State nearly totaled the number of the six next largest states combined (California, Florida, Illinois, New Jersey, Pennsylvania, and Texas). *See* Ex. A (Merced Report) at pp. 11-12.

6. Of the due process complaints filed in New York State in 2016-17, approximately 92% were filed in New York City. *Id.* at 12. In 2017-18, that number increased to 94% and in 2018-19 (as of the date of the report), approximately 96% of the due process complaints filed in New York State were filed in New York City. *Id.*

7. The Merced Report also found that between 2014-15 and 2017-18, New York City had a 51% increase in the number of due process complaints filed and that between 2014-15 and 2018-19. *Id.* at 14.

SED's Issuance of the May 2019 Compliance Assurance Plan and Ensuing Corrective Action and Technical Assistance

8. In May 2019, SED issued a Compliance Assurance Plan to DOE (the "CAP"). A true and correct copy of the CAP is attached as Exhibit B.

9. The CAP consists of three related sections; Section I: Provision of a FAPE to Preschool Students with Disabilities; Section II: Provision of a FAPE to School-Age Students with Disabilities and Section III: Affording Students with Disabilities and Their Parents All the Rights and Procedural Safeguards Required by Federal and State Law and Regulations.

10. Section III of the CAP cited DOE amongst other things, for failing to provide parents access to adequate due process after a complaint has been filed and that essentially, DOE was not maintaining a functioning due process hearing system. *See* Ex. B (CAP) at p. 18.

11. A contributing factor to DOE's failure to maintain a functioning due process hearing is the sheer volume of due process complaints that are filed in NYC. *See* Ex. B (CAP) at p. 3.

12. For example, in describing DOE's noncompliance, the CAP noted that DOE received the largest number of due process complaints filed with a local educational agency in the United States and that it represented over 90% of the due process complaints filed in New York State were filed in New York City. *See* Ex. B (CAP) at pp. 18-19.

13. Additionally, the volume of due process complaints was growing exponentially. The CAP documented the steady increase in DOE's due process complaint filings since the 2015-2016 school year (e.g., 5,026 in 2015-16 to 7,448 for only a portion of the 2018-19 school year). *See id.* at p. 19.

14. Therefore, the objective of certain required corrective action for Section III was to reduce the number of due process complaints and/or due process complaints that proceeded to a hearing. To that end, SED directed DOE to develop an action plan detailing how it will reduce 1) its volume of due process complaints (including increasing the use of mediation and IEP facilitation) and 2) the number of complaints proceeding to a hearing (including ensuring that

uncontested pendency matters are not brought before IHOs and to ensure that staff representing DOE during the hearing process are authorized to enter into settlement agreements). SED also directed DOE to conduct a root cause analysis of why due process complaints were being filed, paying particular attention to the volume of cases in which DOE concedes that it has failed to provide the student with a FAPE and why FAPE is not provided or unable to be provided[1] and to determine whether those cases should be resolved through the settlement process. *See id.* at pp. 22-23.

15. Other corrective actions required by Section III focused more on curing dysfunction in the day-to-day operations of DOE's hearing system. For example, SED directed DOE to increase staffing resources to its impartial hearing office ("NYCIHO") and improve existing hearing space including procuring additional space where hearings could be conducted. With respect to IHOs, SED directed DOE to submit a plan on how it will revise its IHO compensation policy including how it will allocate resources to ensure regular and prompt payment to IHOs; have IHOs distribute their own decisions to eliminate NYCIHO's role in processing and distributing hearing decisions; and to first ensure IHO availability before automatically appointing IHOs to cases (to reduce the number of improper IHO recusals). *See id.*

16. The corrective actions in Section III of the CAP were assigned to give DOE notice of specific issues within the due process system that needed to be addressed and to provide guidance and a roadmap to DOE to achieve compliance with law and regulation. SED pledged to provide ongoing and targeted support and technical assistance to aid DOE in developing a plan to address the issues identified in the CAP and achieve the prescribed corrective action. *See id.* at pp. 22-24.

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[1] Sections I and II of the CAP focused on DOE's provision of FAPE and should have informed DOE's analysis as to how to increase access to FAPE. *See* Ex. B (CAP) at pp. 4-17.

17. As set out in the letter from Interim Commissioner Shannon Tahoe to Chancellor Carranza, SED managed DOE's corrective actions through subsequent meetings and communications but also took its own steps to improve DOE's hearing system. In addition to beginning aggressive recruitment of IHO candidates, SED staff canvassed all IHOs certified to be appointed to cases in NYC with smaller caseloads to encourage them to take additional cases and also canvassed IHOs in the rest-of-state to ascertain availability and/or willingness to accept cases in NYC. *See* Tahoe to Carranza Letter dated November 18, 2019, a true and correct copy of which is attached as Exhibit C.

18. Unsatisfied with DOE's proposed compensation policy, SED endeavored to develop its own compensation policy. In developing this policy, SED evaluated data highlighting the problems in DOE's due process system, feedback from IHOs, special education advocates working in NYC and assessments from its special education consultant. By letter dated November 19, 2019, in accordance with its enforcement and monitoring responsibilities, I then directed NYC to implement SED's policy as written (absent technical difficulty or missing/critical elements). A true and accurate copy of my letter to Carrie Bateman, dated November 19, 2019, is attached as Exhibit D.

19. To address SED's concern regarding the timely appointment of IHOs, I sent a guidance memo to IHOs who conduct hearings in NYC to remind them of proper reasons for recusal. Most recusals were improper because DOE's automatic appointment process led to IHOs being assigned more cases than they could handle so IHOs were using recusals to manage their caseloads. I also notified them of SED's directive to DOE – that DOE should be ensuring IHO availability before assigning cases. *See* November 19, 2019 Guidance Memo, a true and correct copy of which is attached as Exhibit E.

20. To assist SED with providing technical assistance to DOE, SED's Office of Special Education continued to analyze the information it did have, request additional information from DOE, and provide suggestions and directives (i.e., pendency and settlement).

21. By letter dated, November 18, 2019, SED advised DOE that, as previously outlined and discussed, DOE's practice of holding hearings on cases in which pendency is not in dispute causes delays for the parties and wastes resources that could be reallocated to claims requiring a hearing. SED reminded DOE that a pendency placement is automatic and cannot be contingent on an IHO order, and that DOE's practice of requiring such is in violation of IDEA requirements. SED directed DOE to provide all available data on pendency, including the number of due process cases involving contested pendency and uncontested pendency and a description of the role of IHO orders in cases in which pendency was not contested by DOE. *See* Ex. C (Tahoe Ltr. dated Nov. 18, 2019) at p. 2.

22. Because SED's data indicated that the number of due process complaints that settle is extremely high but that settlement takes an inordinate amount of time, "sometimes up to two years[2]" while remaining on an IHOs docket, to address this delay, SED required DOE to "arrange for the NYC Comptroller's Office to participate in expedited conversations to address [SED's] ongoing concerns regarding long delayed settlements . . ." and to provide data on pending settlements within DOE awaiting approval from the Comptroller as well as data on the length of time between the parties' agreement and final settlement. *See* Ex. C (Tahoe Ltr. dated Nov. 18, 2019) at p. 2. To address the inefficiencies caused by DOE's automatic IHO assignment to cases and the resulting IHO recusals to manage caseloads, SED directed DOE to begin assigning cases by the date the complaint was filed (oldest first) to ensure that parents who have experienced

[2] In its letter dated December 9, 2019 from Karin Goldmark to me, DOE admitted that "the settlement process can take 18-24 months."

multiple recusals but who may have filed their due process complaint weeks, even months ago, will be the first to have an IHO assigned. *See id.* at p. 1.

23. In December 2019, SED began a systematic review of IHO decisions to bring the data to life – to see what types of complaints were being brought and proceeding to hearing, what if any defense DOE was presenting at the hearing and what type of relief was being ordered by the IHOs.

24. As set out in a letter from Louise DeCandia, SED's Chief of Special Education Services, to Carrie Bateman, DOE's Chief Operating Officer, Division of School Planning and Development, on January 29, 2020, in January 2020, SED's Office of Special Education determined that it was necessary to have a monitor in the NYCIHO to assist with progress monitoring of the CAP. The monitor's duties included observing hearings, tracking wait times for hearings to begin and room availability, accessing daily hearing schedules, assessing space functionality, serving as a liaison with IHOs, providing assistance and guidance relating to the interplay between DOE's (Impartial Hearing System) and SED's (Impartial Hearing Reporting System) data systems, monitoring payment disputes and delays between IHOs and the NYCIHO, verifying staffing roles and responsibilities and whether adequate staffing is available at NYCIHO, monitoring efforts regarding increasing the use of mediation and IEP facilitation, monitoring data entry and efforts to come into compliance with timely data entry, monitoring State Complaint findings as they pertain to individuals awaiting assignments of an IHO and monitoring the list of parents/guardians awaiting appointment of an IHO. *See* DeCandia to Bateman Letter dated January 29, 2021, a true and correct copy of which is attached as Exhibit F.

25. As an outgrowth to SED's ongoing recruitment of IHO candidates, SED assessed applications, held interviews, and trained and certified an additional 107 per diem IHOs after holding trainings in March 2020, October 2020 and April 2021.

26. During the March 2020 Regents Meeting, as a follow up to a discussion item presented to the Board of Regents during its January meeting, SED proposed certain regulatory changes to expand the pool of IHO applications in NYC and clarify certain IHO duties and responsibilities. *See* Regents Items Update on the NYC Impartial Hearing System January 2020, a true and correct copy of which is attached as Exhibit G; Proposed Amendments dated February 28, 2020, a true and correct copy of which is attached as Exhibit H.

27. SED continued to monitor required corrective action deliverables, in particular, the reduction of the number of due process complaints that proceed to hearing especially when DOE did not have a defense to the complaint. On March 3, 2020, I wrote to DOE setting out SED directives. Specifically, SED directed DOE to submit documentation regarding the types of cases that proceed to a due process hearing and to submit a plan to address the issue of the lack of DOE representation at hearings (which would be implemented by the beginning of the 2020-21 school year). *See* Suriano to Goldmark Letter dated March 3, 2020, a true and correct copy of which is attached as Exhibit I, at pp. 4-5.

28. SED required DOE to submit a plan addressing how DOE would increase the use of resolution meetings, including an explanation of who conducts the resolution meeting on behalf of DOE and the extent of their authority to settle matters, both monetary and non-monetary relief. DOE was also required to provide written confirmation that individuals conducting mediations have the authority to enter into legally binding agreements for both non-monetary and monetary relief. *See id.* at pp. 2, 5. SED also reiterated to DOE that DOE's settlement process is protracted

and that it is one of the major causes for the excessive amount of open due process cases. *See id.* at p. 2.

29. SED again directed DOE to provide data on the number of cases that are pending settlement approval, how long the settlement process takes on average, where the currently pending settlement cases stand in the settlement process, how long the current outstanding cases have been waiting for settlement, and how soon they are expected to settle. *See id.* at pp. 3, 5. SED also required DOE to submit a plan to revise its settlement process so that it is faster, more efficient, and captures matters DOE does not intend to defend at hearing. *See id.*

30. In an effort to provide technical assistance to DOE on corrective action regarding staffing at the NYCIHO, SED directed DOE to provide the following information regarding staffing resources: the number of attorneys and non-attorneys that constitute a full staff in DOE's Special Education Unit of DOE Legal ("SEU"); the number of SEU staff members needed to process settlements DOE enters into between its Ten-Day Notice program and the due process complaint system; the number of settlements SEU processed during the 2016-17, 2017-18, and 2018-19 school years; the number of SEU staff members during each of those school years; and the rate of attrition at SEU. *See id.*

31. SED continued to oversee issues negatively affecting IHOs and directed DOE to do the following: implement a scheduling system linked to specific hearing room availability, provide information on the availability of the computers in each of the hearing rooms, and provide new electronic forms to IHOs in the necessary format to assist with access and to assist with navigating the change in procedure. SED also directed DOE to submit (i) a plan for ensuring that DOE developed a revised compensation policy after appropriate engagement with IHOs, (ii) a timeline for training IHOs on the compensation policy, (iii) a timeline and method for training IHOs on the

new forms that DOE requires, and (iv) a plan to ensure that IHOs may submit invoices and be paid on a case before it is fully closed. *See id.* at pp. 1, 4, 5.

32. As a follow up to SED's ongoing review of IHO decisions and in light of feedback from IHOs that many cases proceeding to a due process hearing involve inadequate funding of special education teacher support services (SETSS), SED directed DOE to provide data on the following: how many cases proceeding to a due process hearing involve reimbursement or provision of SETSS; whether DOE instituted a change in practice regarding settling these types of cases and if so, why; and how DOE plans to specifically address these types of cases, including an analysis of whether increased reimbursement rates are needed to pay the actual rates charged by area providers. *See id.* at p. 3.

33. In order to organize outstanding deliverables DOE owed SED and to correctly reflect revised deadlines, SED developed a chart to track issues, deadlines and requirements, as set out in a letter from Louise DeCandia to Cheryl Williams on April 7, 2020. The chart was provided to DOE and included an outline of SED's prior requests and directives. *See* DeCandia to Williams Letter dated April 7, 2020, a true and correct copy of which is attached as Exhibit J.

34. SED continued to prioritize a reduction in due process complaints and/or complaints that proceeded to hearing. One area of focus was alternative dispute resolution. SED informed DOE that its IEP Facilitation document was not acceptable and required revision. SED also required that DOE submit data on the number of mediations conducted in 2019-2020 and a plan to increase that amount by twenty percent. The plan was required to include an explanation of what authority the individuals conducting mediations have to enter into binding agreements; a description of duties of newly hired staff and how those staff will increase the number of

mediations in NYC. SED also reiterated its directive to submit a plan to increase the use of resolution meetings. *See id.* at pp. 1-2.

35. SED also focused on settlement and reiterated its directives to submit data on SETSS cases and settlements generally and a plan to address the lack of DOE representation at hearings. *See id.* at p. 2.

36. Since DOE had not made much progress on overhauling its pendency process, SED required a list of dates and times to hold a meeting to provide technical assistance to ascertain how a better pendency system could be implemented as soon as possible without the necessity of an IHO order. *See id.* at p. 5.

37. The letter also addressed retention of IHOs. SED informed DOE of the poor retention rate of NYCIHOs post-certification and advised that IHOs need to be paid appropriately without excessive delay and treated professionally and with respect. SED advised DOE that newly certified IHOs agreed to become IHOs and work in NYC with the understanding that they would be paid pursuant to a new compensation policy. *See id.* at pp. 1-2.

38. SED also adapted the waitlist to address input from the field and requests for certain cases (i.e. pendency) to be assigned outside of chronological order. SED sent DOE "revised wait list procedures" to prioritize certain cases that needed more immediate attention and directed DOE to assign at least two full-time attorneys from the Special Education Unit of DOE Legal to review cases and triage them for assignment to an IHO based on the likelihood that the delay in the hearing was negatively impacting the student. For example, SED directed that students with no special education placement/program/services be the first priority, while students receiving services but seeking increased fees for those services be the last priority. *See id*. at Attachment B.

39. As set out in a letter from former Deputy Commissioner John D'Agati to Karin Goldmark, which was also sent to me, one year following the issuance of the CAP, former Deputy Commissioner John D'Agati indicated that more concrete actions would be necessary in order to address the noncompliance outlined in Section III of the CAP. Specifically, Deputy Commissioner D'Agati noted that DOE should cease requiring certain cases to proceed to hearing, stating that there is "no justifiable reason to proceed to an impartial hearing" where the DOE 1) knows or should know that it has failed to provide a required service on a student's IEP or IESP; 2) relies on a service delivery method that puts the onus on the parents to find a service provider; 3) lacks enough providers who are willing and able to provide the required services at the DOE rate; 4) knowingly contributes to a lack of providers by authorizing a DOE rate that is far below the market rate for reimbursement of providers; and 5) has no intent to meet its burden of production or defend its failure to deliver services through the impartial hearing process. *See* D'Agati to Goldmark Letter dated May 27, 2020, a true and correct copy of which is attached as Exhibit K, at p. 2.

40. SED noted additional case types that should not proceed to hearing, including cases involving Independent Educational Evaluation (IEE). SED directed DOE to provide documentation that their rates for evaluation which parents go to hearing are commensurate with the rate awarded after hearing. *See id.* at pp. 2-3.

41. SED also required DOE to eliminate its outstanding 2018-19 and prior settlement cases and reduce its outstanding 2019-20 cases by 50 percent. *See id.* at p. 4.

42. SED also reminded DOE that its obligation to provide SED its plan for closing settled cases for the 2018-2019 school year was "critically important" because the students involved in those "long-ago filed due process complaints" are "entitled to resolution." *See*

DeCandia to Nathan Letter dated June 26, 2020, a true and correct copy of which is attached as Exhibit L, at p. 1.

43. In July 2020, DOE informed SED that as of March 1, 2020, settlement had been reached for only 65% cases that were awaiting settlement from 2018-2019 school year and prior, and as of July 8, 2020, DOE had "approximately 100" attorneys to work on settlements. *See* Nathan to DeCandia Letter dated July 8, 2020, a true and correct copy of which is attached as Exhibit M.

44. Upon receiving this information, SED developed a "case closure sheet" for settlements so DOE could document how each case was resolved and submit the completed sheets to SED on a monthly basis. SED intended to use this information, which was not otherwise maintained by DOE, to monitor for systemic changes such as the increased use of resolution sessions and mediation. *See* Ex. L (DeCandia to Nathan Ltr. dated June 26, 2020).

45. SED continued to prioritize reevaluating the placement of complaints on the waitlist to ensure that the neediest of cases received priority attention and, where possible to eliminate cases on the waitlist by settlement or otherwise. SED directed DOE to assess cases for potential consolidation and that contrary to DOE's interpretation of SED's regulations, consolidation was not limited to cases filed in the same school year. SED again directed DOE to review and prioritize cases on the waitlist and cautioned DOE that although it had proposed that filers should make certain identifications on their complaint to effectuate prioritization, SED was still directing DOE to make an immediate review and prioritization of cases on the waitlist. *See id.*

46. DOE informed SED that it refused to triage cases on the waitlist stating that it "was simply not feasible." Instead, DOE proposed having filers identify the student's status to determine waitlist prioritization. DOE did not even want to communicate with families about their

questions or concerns and instead suggested that SED designate an ombudsman to address requests from parents. *See* Nathan to DeCandia Letter dated July 13, 2020, a true and correct copy of which is attached as Exhibit N.

47. On July 1, 2020, DOE notified SED that, per the CAP requirement, it had redacted and submitted all 2019 final decisions and states of agreements and orders.

48. Despite its overtures for a plan on pendency implementation - the latest which set a due date of July 8, 2020 - DOE again put the burden on filers instead of evaluating individual cases and making a determination about pendency. It created a form on which parents filing a due process complaint during the 2020-2021 school year could "identify the student's pendency placement, program and/or services, if any, and identify the IEP, IESP, Findings of Facts and Decision, or other basis for that pendency entitlement." DOE stated it would "review and take steps to implement pendency without a hearing if pendency is uncontested." *See* Ex. M (Nathan to DeCandia Ltr. dated July 8, 2020).

49. SED sent memos to NYC IHOs to notify them of waitlist and pendency protocols. *See* Memo dated July 17, 2020, a true and correct copy of which is attached as Exhibit O; Memo dated August 10, 2020, a true and correct copy of which is attached as Exhibit P.

50. After DOE's progress on the CAP stalled, SED attempted to re-engage DOE. On December 3, 2020, Commissioner Rosa met with then-Chancellor Carranza, respective senior leadership, and representatives from SED's Office of Special Education. I attended this meeting.

51. On December 17, 2020, SED and DOE had an "IDEA meeting," a regularly scheduled meeting attended by special education leadership at both agencies to discuss a wide range of special education matters, during which SED reviewed DOE's status regarding compliance with CAP requirements. I attended this meeting. SED noted that it had nearly doubled

the amount of certified IHOs and proposed regulatory changes to expand the pool of candidates eligible to become IHOs and acknowledged that DOE had met some goals, including implementing a revised IHO compensation policy, eliminating uncontested pendency matters from proceeding to hearing and streamlining decision processing. However, it was not enough to correct DOE's cited noncompliance. On January 7, 2021, I informed DOE of its noncompliance. *See* Suriano to Goldmark Letter dated January 7, 2021, a true and correct copy of which is attached as Exhibit Q.

52. SED and DOE held twenty-four (24) IDEA meetings between August 2019 and May 2022. The agencies discussed issues relating to due process at twenty (20) of those meetings during that time frame.

53. Due to data in and around December 2020-January 2021 that indicated that there were more than 13,000 open due process cases and nearly 7,000 awaiting appointment of an IHO, SED continued to direct DOE to implement process changes to stop requiring certain cases to proceed through the due process system. DOE's only action, other than disputing data and completing staff training, was to increase the maximum reimbursement rate for independent neuropsychological evaluations. *See* Ex. Q (Suriano to Goldmark Ltr. dated January 7, 2021).

54. As set forth in letters between me and DOE, DOE continued to refuse to increase the rate paid for SETSS, stating that the standard rate for SETSS was sufficient for approximately 85% of students receiving SETSS from an independent provider. DOE did not account for the rapidly rising number of students receiving SETSS from a provider who would only accept an enhanced rate (compare 1404 students in the 2017-2018 school year to 2,175 students in the 2019-2020 school - an increase of over 50%). *See* Goldmark to Suriano Letter dated February 11, 2021,

a true and correct copy of which is attached as Exhibit R; Suriano to Goldmark Letter dated May 27, 2021, a true and correct copy of which is attached as Exhibit S.

55. DOE also claimed that enhanced rate requests could be resolved in resolution because CSE supervisors were authorized to resolved enhanced rate services during the first resolution meeting. *See* Ex. R (Goldmark to Suriano Ltr. dated Feb. 11, 2021). Therefore, SED requested data on the number of successful resolution sessions on cases requesting an enhanced rate. *See* LaCrosse to Goldmark Letter dated October 27, 2021, a true and correct copy of which is attached as Exhibit T.

56. DOE maintained that it was "working to improve the settlement system" but then indicated that, per a new NYC Comptroller requirement, it was required to seek Comptroller authority before making an offer to parents, "a step that lengthens rather than shortens the settlement process." *See* Ex. R (Goldmark to Suriano Ltr. dated Feb. 11, 2021). SED reiterated to DOE that this additional approval process continued to impede resolution and delay settlement agreements. *See* Ex. S (Suriano to Goldmark Ltr. dated May 27, 2021).

57. As part of its review of the plan DOE submitted to improve mediation, SED examined mediation data which indicated that during the 2020-2021 school year there were 14,264 due process complaints filed and only 202 requests for mediation. Therefore, SED required that DOE revise and resubmit its plan since its original submission "clearly [was] not effective." *See* Ex. T (LaCrosse to Goldmark Ltr. dated Oct. 27, 2021).

58. During the October 6, 2021 IDEA meeting, SED shared its analysis of DOE due process trend data. Impartial hearing requests increased from 3,224 in 2002-2003 to 14,264 in 2020-21, nearly 350 percent over 19 years. *See id.*

59. The majority of due process complaints (76%) originate from seven NYC districts, increasing 500% in 19 years. Therefore, SED directed DOE to do a root cause analysis of two of the seven districts to identify issues in the complaints and analyze factors contributing to the numbers, including identification of the lack of special education programs and services that are needed in these districts to address student need. *See id.* In other words, if DOE reviewed complaints to determine what services were necessary to provide FAPE and actually provided those services, the number of hearing requests would decrease.

SED's Day-to-Day Interactions with DOE

60. In addition to the actions described above, SED's Due Process Unit communicates with DOE on a daily basis about myriad issues relating to due process. These communications take place primarily via email and/or telephone. Topics addressed in these emails and calls include, but are certainly not limited to; IHO appointment questions; data questions; late decision monitoring; individual case questions; daily numbers of available IHOs; and issues concerning actions taken by IHOs.

61. Further, data is transferred from New York City's Impartial Hearing System ("IHS") to the State's Impartial Hearing Reporting System ("IHRS") each night. The information includes various data points regarding due process cases. There are also regularly scheduled IT meetings between the DOE Program and Division of Instructional and Information Technology ("DIIT") staff and SED Program and IT staff.

SED's Additional Actions to Effectuate Further and Comprehensive Systemic Change

SED's Support for Accelerated Due Process Legislation

62. In July 2021, SED sent a ten-day bill memo to the Governor recommending approval of a bill (S.6682, A.7614) to address DOE's due process waitlist. A true and correct copy

of the Ten-Day Bill Memo is attached as Exhibit U. The bill was signed by the Governor on December 29, 2021 (Chapter 812 of the Laws of 2021) and became effective on March 29, 2022. The bill amended New York Education Law Section 4404 to provide a process whereby parents who have been awaiting appointment of an IHO for more than 196 days from the filing of a due process complaint can elect to have an IHO immediately appointed to issue an order based upon a proposed order of relief submitted by the parents. It also required that the Commissioner of Education make any required regulatory changes before March 29, 2022, the effective date, which the Commissioner did. SED generally refers to the bill as "accelerated review," "accelerated relief" or "accelerated due process."

SED's Regulatory Efforts to Address IHO Caseloads

63. In August/September 2021, SED surveyed IHOs to solicit feedback on due process systems changes. For example, to address the waitlist, SED was considering proposing a regulatory amendment to require IHOs to annually accept a minimal number of due process complaints. SED wanted feedback on what IHOs thought would be an appropriate minimal caseload. Of the IHOs who responded to the survey, 70 IHOs (57%) replied that between 0 and 25 cases would be appropriate and 34 IHOs (28%) replied that 26 or more cases would be appropriate. The majority indicated that they should not be required to accept more than 50 cases. *See* November 4, 2021 Proposed Amendments Summary, a true and correct copy of which is attached as Exhibit V.

64. In November 2021, SED proposed regulatory changes that addressed minimum and maximum IHO caseloads, extensions and a mandatory filing system for DOE due process. *See* Ex. V (November 4, 2021 Proposed Amendments Summary). The proposed regulations were

published, and hearings were held to solicit public comment. SED is currently reviewing the comments and evaluating the current landscape of due process to determine next steps.

SED's Request for Information Regarding New IHO System

65. On September 9, 2021, SED issued a request for information (RFI) in an attempt to solicit information from various sources – including attorneys, law firms, law schools, institutions of higher education, offices of court administration, centers for dispute resolution, non-profit entities, and impartial hearing officers, as well as other State or local agencies – regarding the creation of a new IHO system for special education due process hearings in New York City. The RFI noted that SED was considering ways in which contractual or "other relationships" could potentially resolve DOE's outstanding noncompliance. *See* RFI, a true and correct copy of which is attached as Exhibit W.

66. In response to the RFI, SED specifically requested interested parties to provide detailed descriptions of a potential new model for the special education due process system, including information on the feasibility of such a system and identification of similar systems that may already exist. SED also requested that individual IHOs provide information on whether they would be willing to contract individually with SED, the ways in which their payment should be structured, and the amount of time they would be willing to devote to this position.

67. Responses to the RFI were due by November 8, 2021. SED received approximately 30 total responses from the field, the vast majority of which were from current IHOs who responded that the current cadre of IHOs could manage the backlog, offered explanations as to why the DOE due process system is dysfunctional, and/or generally opposed a new special education due process system.

Transition of Adjudication of Due Process Complaints to from the NYCIHO to the Office of Administrative Trials and Hearings

68. As of December 1, 2021, there were 8,985 cases that had not been assigned to an impartial hearing officer and remained on a waitlist for assignment.

69. Following diligent monitoring of the situation, continual engagement with DOE, and a review of relevant factors including efforts taken to recruit, train and certify additional per-diem IHOs (who, for the most part, carried small caseloads), SED recognized that more drastic steps needed to be taken in order to address the mounting number of due process complaints in New York City.

70. In order to improve the effectiveness and efficiency of the system, eliminate the waitlist, and manage increased filings every year, it was clear that a cadre of full-time impartial hearing officers with an administrative support structure - rather than independent contractor IHOs accepting cases on a voluntary basis - was necessary to improve the effectiveness and efficiency of the system.

71. To that end, on December 1, 2021, SED entered into a Memorandum of Agreement ("MOA") with the New York City's Office of Administrative Trials and Hearings ("OATH") and DOE that established a Special Education Unit at OATH to adjudicate due process hearings in New York City. OATH was deemed to be an excellent choice in this role, as it adjudicates a wide range of issues spanning multiple City agencies. It also has the fundamental structures in place to hire and manage IHOs, maintain a modern case management system, ensure confidentiality where appropriate, and administer an impartial, effective adjudication system. A true and correct copy of the MOA is attached as Exhibit X.

72. SED communicated these changes to the due process hearing system with current IHOs, both in writing and through virtual information sessions. SED assured the IHOs that a complete transition to OATH could take a year or more and that during any transition period, both

independent contractor IHOs and OATH IHOs would continue to be appointed to cases. SED also encouraged current IHOs interested in a full-time position to apply to OATH. SED promised to examine qualification requirements, including the residency requirement, to determine what obstacles, if any, existed for current IHOs.

73. On May 24, 2022, the Department of Citywide Administrative Services granted OATH's request to except the city residency requirement for IHOs in the Special Education Unit. Therefore, any certified IHOs who are not residents of NYC were eligible to apply and, if selected, serve as OATH special education hearing officers.

74. It is important to note that the transition of the NYC impartial hearing system to OATH does not have any impact on SED's supervision and monitoring responsibilities. Although OATH has hiring discretion, SED retains responsibility to train and certify IHOs. Thus, any IHO employed by OATH and adjudicating due process hearings in its Special Education Unit is trained and certified by SED. SED also retained its authority to revoke or suspend IHO certification and address IHO complaints.

75. OATH has been hiring and onboarding both IHO candidates and individuals who were previously certified as impartial hearing officers on an ongoing basis. Previously certified IHOs retained their existing caseloads and continue to adjudicate those cases, as well as cases to which they are newly appointed as full-time OATH employees.

76. OATH has also hired staff to provide administrative support and has allocated office space for both hearing officers and administrative proceedings. OATH is also executing contracts for translation/interpretation and transcription services, developing internal rules and procedures for conducting hearings, and developing a scope of work for an electronic filing system.

77. SED has provided trainings for IHO candidates on February 22-24; March 22-24; May 9-11; and July 18-20, 2022.

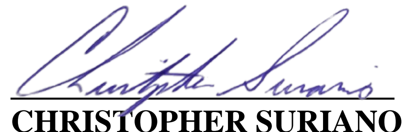
78. As of July 29, 2022, SED has certified 44 IHOs to work in the OATH Special Education Unit. OATH has onboarded and begun appointing due process complaints to 33 of these IHOs. The remaining 11 OATH IHOs were recently certified and will be appointed cases when they have attended the required OATH training.

79. As of June 28, 2022, OATH IHOs have been appointed to 755 due process complaints. Of these complaints, 255 have been closed and 91% of those cases have been closed in 75 days or fewer.

80. As of June 30, 2022, the waitlist number is 290.

81. While I have attempted to provide a highly detailed account in this affidavit of SED's efforts to address DOE's continued noncompliance, and SED's monitoring and oversight thereof, it should be noted that, this is not an exhaustive list. SED's Office of Special Education often has daily contact with the DOE on various issues related to due process. As a result, providing an exhaustive list would not be practical or feasible. However, SED has been committed, and remains committed, to dutifully exercising its oversight and supervisory role pursuant to the IDEA with respect to New York City's adjudication of due process complaints.

Executed in Albany, New York, this 28th day of July 2022.



CHRISTOPHER SURIANO

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J.S.M., *et al.*, Plaintiffs, - against - NEW YORK CITY DEPARTMENT OF EDUCATION, *et al.*, Defendants.	**DECLARATION OF SHARON L. VELTMAN IN SUPPORT OF STATE DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** 20 Civ. 705 (EK) (RLM)

SHARON VELTMAN, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am employed in the Due Process Unit of the New York State Education Department ("SED"). I submit this declaration for the sole purpose of providing true and accurate copies of the listed exhibits.

2. A true and accurate copy of emails dated between April 5 and 9, 2021 between individuals at SED and DOE, including me (STATE_DEF_ESI00066513), are annexed hereto as Exhibit A.

3. A true and accurate copy of emails dated between May 1 and 10, 2019 between individuals at SED and DOE, including me (STATE_DEF_ESI00067792), are annexed hereto as Exhibit B.

4. A true and accurate copy of emails dated December 13, 2019 between individuals at SED and DOE, including me (STATE_DEF_ESI00077950), are annexed hereto as Exhibit C.

5. A true and accurate copy of emails dated October 16, 2019 between individuals at SED and DOE, including me (STATE_DEF_ESI00068519), are annexed hereto as Exhibit D.

6. A true and accurate copy of emails dated between January and March 2020 between individuals at SED and DOE, including me (STATE_DEF_ESI00080258), are annexed hereto as Exhibit E.

7. A true and accurate copy of the email dated October 6, 2021 that I sent to Joanne LaCrosse (STATE_DEF_ESI00068005), with attachments (STATE_DEF_ESI00068006 – STATE_DEF_ESI00068009), is annexed hereto as Exhibit F.

8. A true and accurate copy of IT meeting agendas, including cover emails, for April 30, 2020, May 28, 2020, and June 27, 2021 between individuals at SED and DOE, including me (STATE_DEF_ESI00067278; STATE_DEF_ESI00067279; STATE_DEF_ESI00067280; STATE_DEF_ESI00024569; STATE_DEF_ESI00024570; STATE_DEF_ESI00024571; STATE_DEF_ESI00029914; STATE_DEF_ESI00029915), are annexed hereto as Exhibit G.

9. A true and accurate copy of the emails dated between October and December 2020 between individuals at SED and DOE, including me (STATE_DEF_ESI00071650 – STATE_DEF_ESI00071655), are annexed hereto as Exhibit H.

10. A true and accurate copy of the email dated November 2, 2021 that I sent to Joanne LaCrosse (STATE_DEF_ESI00067989), with attachments (STATE_DEF_ESI00067990 – STATE_DEF_ESI00067995), is annexed hereto as Exhibit I.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed in Albany, New York, this 28th day of July, 2022.

SHARON L. VELTMAN