CASE NOS. 18-1778, 18-1813, 18-1867, and 18-1976
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

THE PARENT/PROFESSIONAL ADVOCACY LEAGUE; DISABILITY LAW CENTER, INC.; M. W., a minor, by his parents, L.N. and A.N., on behalf of himself and other similarly situated students *Plaintiffs - Appellants/Cross-Appellees* S. S., a minor, by his mother, S.Y., on behalf of himself and other similarly situated students *Plaintiff* v. CITY OF SPRINGFIELD, MASSACHUSETTS; SPRINGFIELD PUBLIC SCHOOLS *Defendants - Appellees/Cross-Appellants* DOMENIC SARNO, in his official capacity as Mayor of City of Springfield; SUPERINTENDENT DANIEL J. WARWICK, in his official capacity as Superintendent of Springfield Public Schools *Defendants*.	On Appeal from a Judgment and Orders of the United States District Court for the District of Massachusetts

BRIEF OF APPELLANTS/CROSS-APPELLEES

Jeff Goldman
MORGAN, LEWIS & BOCKIUS LLP
1 Federal Street
Boston, MA 02110
(617) 951-8000

Alison Barkoff
CENTER FOR PUBLIC REPRESENTATION
22 Green Street
Northampton, MA 01060
(413) 586-6024

Ira Burnim
BAZELON CENTER FOR MENTAL HEALTH LAW
1101 15th Street, N.W., Suite 1212
Washington, D.C. 20005
(202) 467-5730

CORPORATE DISCLOSURE STATEMENT

Plaintiffs DLC and PPAL are both Massachusetts nonprofit corporations, and neither has a parent company or is more than 10% owned by a public company.

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I. JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. § 1331, as the sole claim in this case arises under federal law. This appeal was filed twenty (20) days after the District Court's July 2018 order granting Springfield judgment on the pleadings, and in anticipation of the District Court's subsequent entry of judgment in Springfield's favor as to the entire case. M.W. filed an additional notice of appeal five (5) days after the District Court granted his motion to intervene for purposes of appeal. This Court therefore has appellate jurisdiction under 28 U.S.C. § 1291.

II. STATEMENT OF THE ISSUES

1. Did the District Court err in holding that, in cases involving public schools, the Individuals with Disabilities Education Act ("IDEA") substantively "limits" the equality guarantee and integration mandate of the Americans with Disabilities Act ("ADA"), and undercuts the established preference for resolution of systemic ADA claims through class actions and actions by Protection and Advocacy systems ("P&As") such as Plaintiff DLC?

2. Did the District Court err in holding that, notwithstanding *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 754 (2017), the IDEA exhaustion rule in 20 U.S.C. § 1415(*l*) applies here, even though Plaintiffs are not seeking relief that is

available under the IDEA, and even though pursuing administrative relief would be futile?

3. Even assuming the IDEA exhaustion rule applies here, did the District Court err in using the IDEA exhaustion rule to dismiss the claims of organizational Plaintiffs DLC and PPAL, where there was no administrative recourse available to organizations, and where an individual constituent of DLC and PPAL had already exhausted administrative remedies regarding the same claims?

4. Did the District Court err in holding that an ADA case arising in a public school setting, seeking structural changes in the school district—and no individually-tailored relief from the court for any child—cannot be prosecuted as a class action under Fed. R. Civ. P. 23(b)(2) because the remedy would affect individual student placement decisions made under the IDEA?

III. STATEMENT OF THE CASE

This case is brought on behalf of Springfield, Massachusetts public school students who have mental health disabilities that manifest as behavioral difficulties. ECF No. 55; *see also* ECF No. 158-1, ¶ 84. These students are capable of learning the same content as other public school students. ECF No. 55, ¶ 7. Their disabilities do not limit their ability to take part in arts, sports, or other co-curricular activities. ECF No. 55, ¶ 68; ECF No. 158-1, ¶¶ 70-71. Nor do their

disabilities justify their being separated from the general school population. ECF No. 55, ¶ 7; ECF No. 158-1, ¶ 70.

Springfield, however, has a practice of assigning these students to the "Public Day School," a "special school," on a separate campus, isolated from the neighborhood schools serving other Springfield public school students. ECF No. 55, ¶¶ 1-2, 63; ECF No. 158-1, ¶¶ 68-74. The Public Day School offers a significantly more limited curriculum than Springfield's neighborhood schools and almost no extra-curricular activities. ECF No. 55, ¶¶ 3-4, 67; ECF No. 158-1 ¶¶ 75-81. Nor does the Public Day School offer therapeutic or clinical services designed to help students rejoin the neighborhood schools. ECF No. 55, ¶¶ 69-73; ECF No. 158-1, ¶ 84. Instead, students are punished for behavior that is symptomatic of their disabilities. ECF No. 158-1, ¶ 84. Insofar as Springfield follows IDEA protocols, Public Day School Students are generally given "boilerplate" individual educational plans ("IEPs") that do not reflect the students' individual needs. ECF No. 158-, ¶¶ 47-49.

Students assigned to the Public Day School tend to stay at the Public Day School for many years. They often fail to graduate from high school. ECF No. 55, ¶ 65. On average, they have significantly lower educational attainment than students in Springfield's neighborhood schools. ECF No. 158-1, ¶ 80.

Most parents of the students assigned to the Public Day School oppose their child's placement there and would prefer for their children to be educated at a neighborhood school. ECF No. 158-1, ¶ 95; *see also* ECF No. 159-10, ¶¶ 11-12; ECF No., 15911, ¶ 14; ECF No. 158-8, ¶¶ 20-21, ECF No. 159-35, ¶¶ 11, 14, 15; ECF No. 159-9, ¶¶ 14, 20; ECF No. 159-12, ¶ 14; ECF No. 159-13, ¶ 12.

On behalf of these students, Plaintiffs are seeking to enforce the equality guarantee and integration mandate of the ADA. 42 U.S.C § 12132; 28 C.F.R. §§ 35.130(b)(1) (equality guarantee); 28 C.F.R. § 35.130(d) (integration mandate). Plaintiffs allege that, in violation of the ADA's guarantees of "full inclusion" and "equal educational opportunity," Springfield subjects Public Day School students to unnecessary segregation and provides them with educational opportunities inferior to those provided in Springfield's neighborhood schools.

Plaintiffs seek *only* a systemic, structural remedy for Defendants' ADA violations: an injunction recognizing that the children now routinely placed in the Public Day School can and should be educated in neighborhood schools, and requiring that Springfield provide the supports used by other school districts that successfully integrate children with disabilities in neighborhood schools. ECF No. 55, ¶ 11. Plaintiffs contend, more specifically, that the Public Day School would be largely or entirely unnecessary if Springfield provided, in its neighborhood schools, supports such as access to mental health clinicians, individually-tailored

behavioral plans, and coordination with families and community healthcare providers. ECF No. 55, ¶ 7. Plaintiffs further contend that these school-based behavioral services—which for simplicity Plaintiffs refer to collectively as "SBBS"—are reasonable accommodations required under the ADA. ECF No. 55, ¶ 7.

Prior to filing this lawsuit, the original named plaintiff, S.S., fully exhausted his administrative remedies at the Massachusetts Bureau of Special Education Appeals ("BSEA"). *Id*., ¶¶ 14-19. In the administrative process, he raised individual and systemic claims on his own behalf and on behalf of similarly situated students, relying on both the IDEA and the ADA. *Id*. As it does in every similar case, the BSEA refused to hear S.S.'s ADA claims. *Id*., ¶ 18; *see also* ECF No. 63-1, p. 3-5. The BSEA hearing officer also refused to entertain S.S.'s claims that Springfield's schools have systemic deficiencies, writing:

> [T]he charge of the BSEA Hearing Officer is to determine the ***individual*** student's specific special education needs, and to determine whether or not the school can appropriately address those ***individual needs***. Unlike the federal courts (see Rule 23 of the Federal Rules of Civil Procedure), the BSEA has no statute or regulation or rule providing for class action claims. The BSEA has never engaged in class wide fact finding and ***does not have the experience, expertise, or institutional capacity to provide administrative fact finding on class action claims which could be of assistance to the federal court in any potential, subsequent class action litigation***.

Ruling, BSEA # 1309716, Oliver, H.O. Oct. 15, 2013 at 2, *available at* https://www.mass.gov/files/documents/2016/07/rk/13-09716r.pdf (emphasis added); *see also* ECF No. 55, ¶ 16.

Nonprofit corporations the Disability Law Center ("DLC") and the Parent Professional Advocacy League ("PPAL") are also Plaintiffs.

DLC is the "protection and advocacy system for individuals with mental illness" ("P&A") for Massachusetts, under the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI"). 42 U.S.C. § 10801(b)(2). Accordingly, DLC is funded in part through the U.S. Department of Health and Human Services and has a Congressional mandate to "protect and advocate the rights of such individuals through activities to ensure the enforcement of the Constitution and Federal and State statutes." *Id.*

PPAL is composed of families and professionals who advocate for improved access to services for children with mental health disabilities. In the twelve months prior to the filing of the original Complaint, more than 150 Springfield families, including S.S.'s family, sought help from PPAL. ECF No. 55, ¶ 21. Many of those families sought help in connection with children who have been placed in the Public Day School or were at risk of being transferred into the Public Day School. *Id.*

Shortly after this case was filed, Defendants filed a motion to dismiss, arguing principally that since the BSEA had found no IDEA violation in S.S.'s case, it was impossible for S.S. to show an ADA violation. ECF No. 33. The United States filed a Statement of Interest urging the District Court to reject the City's motion to dismiss. The United States argued:

> [A] plaintiff whose facts implicate both IDEA and the ADA may opt to proceed in federal court under both statutes. Or, as here**, *that plaintiff may choose to pursue a complaint only under the ADA,*** which may require different or additional measures to avoid discrimination against children with disabilities than the measures that are required to comply with IDEA.

ECF No. 40, p. 2 (emphasis added). The District Court denied the motion to dismiss, largely adopting the United States' rationale. ECF No. 102.

After limited discovery, Plaintiffs sought certification of a class consisting of all students Springfield has assigned (now or in the past) to the Public Day School, and whom Springfield is not educating in a neighborhood school. ECF No. 157.[1] Again, Springfield's arguments revolved around the interplay between the ADA and IDEA. The District Court denied the motion to certify. ADD_001. Its apparent reasoning was that (1) certification should be denied until every one of the more than two hundred students in the plaintiff class separately exhausted his/her administrative remedies under the IDEA; (2) the Plaintiffs' allegations of

[1] The proposed class definition is: "All students with a mental health disability who are or have been enrolled in Springfield Public Day School who are not being educated in a Springfield neighborhood school." ECF No. 55, ¶ 39; ECF No. 157.

systemic ADA violations did not create a common question of fact or law because each affected child has his or her own IEP; and (3) even if the alleged violations were remedied at a systemic level, the City would still need to tailor services for each child through the IDEA process. Plaintiffs sought review from this court under Fed. R. Civ. P. 23(f). Their petition had been pending for approximately eighteen months when this appeal was filed and was subsequently deemed moot.

After class certification was denied, S.S. continued to press individual claims, and DLC and PPAL continued to press systemic claims on behalf of all Public Day School students. Springfield filed a motion for judgment on the pleadings, arguing that DLC and PPAL lacked Article III standing to bring ADA claims on behalf of Public Day School students. The motion for judgment on the pleadings remained pending for fifteen (15) months before a decision.

Over Plaintiffs' objection, the District Court stayed discovery until the motion for judgment on the pleadings was decided, essentially freezing the case in its tracks. While the parties waited for a decision on the motion, S.S. turned 18. Although S.S. remained (and remains) a Springfield public school student, he no longer wished to act as a class representative or to press his individual claims. S.S.'s claims were consequently dismissed without prejudice.

Simultaneously with S.S.'s withdrawal, another student, S.B.—who had also exhausted administrative remedies and filed an ADA lawsuit—sought to intervene

in this case. ECF No. 230. S.B. also moved to intervene as a petitioner in the pending Fed. R. Civ. P. 23(f) petition. No. 17-8001, ECF No. 117227815. Ultimately, S.B.'s motions to intervene in the District Court and this Court were withdrawn before they could be acted upon.

Subsequently, other children sought to intervene in the Fed. R. Civ. P. 23(f) petition but did not seek to intervene in the District Court action. As the District Court later acknowledged, it would have been futile for these children to seek intervention in the District Court: based on its class certification ruling, the District Court would have rejected any effort by those children to intervene because they had not pursued the IDEA administrative process. ADD_001. There was continuously at least one open motion to intervene in this Court, but none of the motions were acted upon before this appeal was filed.

Ultimately, after supplemental briefing, the District Court granted Springfield's motion on the pleadings, holding that DLC and PPAL did have Article III standing but that their claims should be dismissed on the basis that DLC and PPAL had not sought administrative relief from the BSEA. ADD_025. That decision resolved the case in its entirety and led to the first notice of appeal.

An additional child, M.W., asked the District Court for permission to intervene solely for the purpose of appealing the District Court's ruling on class certification and related holding that no child—by intervention or otherwise—

could become a plaintiff in this case unless that child had completed a BSEA appeal. The District Court allowed M.W.'s motion to intervene for those purposes, and M.W. subsequently filed a notice of appeal. ECF No. 279, ECF No. 281.

IV. SUMMARY OF THE ARGUMENT

The District Court repeatedly refused to apply the ADA correctly—as it was written by Congress, implemented through Department of Justice regulations, and interpreted by the Supreme Court.

Congress created the private right of action under Title II of the ADA so that people with disabilities can obtain judicial relief when states and municipalities fail to provide equal access and opportunity. Longstanding Department of Justice regulations, repeatedly upheld, explain that the ADA's equality guarantee and integration mandate require schools to provide equal access and equal educational opportunity to their students with disabilities. When the Supreme Court held that the IDEA limited students' rights to seek relief under predecessor statutes to the ADA, Congress promptly overturned that holding by amending the statute. Subsequent decisions by the Supreme Court have recognized that the ADA and IDEA guarantee different rights and that school districts can—and must—fully abide by both statutory schemes simultaneously. Yet the District Court held doggedly, and without authority, to its opinion that the IDEA substantively "limits" the reach of the ADA in public schools.

The District Court also misapplied the IDEA exhaustion rule. The Supreme Court explained, in a decision issued during the pendency of this lawsuit, that the IDEA does not require exhaustion of the types of claims asserted here. The District Court misunderstood that ruling. The District Court also failed to apply longstanding precedent that the IDEA exhaustion rule does not apply when exhaustion would be futile. Few cases have come to this Court with better evidence of futility: the responsible state agency has specifically said that it will not entertain the claims at issue.

Other of the District Court's errors stem from its refusal to recognize well-established mechanisms for enforcing the ADA on behalf of groups of people: suits by P&As and civil rights class actions. Congress created, funded, and empowered P&As, such as Plaintiff DLC, to, among other things, seek judicial relief on behalf of groups of people with mental health disabilities. The District Court improperly limited DLC's ability to do so by requiring it to first pursue a nonexistent administrative remedy. Similarly, Rule 23 was drafted specifically to allow class-action challenges to policies or practices causing discrimination against defined groups of people, such as the children affected in this case. The District Court misapplied Rule 23 in holding that S.S. could not pursue class-wide relief under the ADA because each child in the proposed class has his or her own IEP.

In sum, the District Court's decisions had the combined effect of making it essentially impossible for anyone, including the responsible P&A, to obtain relief on behalf of the group of Springfield students with mental health disabilities who are unnecessarily placed in a segregated, unequal school and denied appropriate services in neighborhood schools.

The ADA and the other rules, regulations, and statutes at issue in this case were meant to be used for the opposite end: to facilitate lawsuits like this one.

V. STANDARDS OF REVIEW

Review of the District Court's decision on the motion for judgment on the pleadings is "*de novo* . . . tak[ing] the well-pleaded facts and the reasonable inferences therefrom in the light most favorable to the [Plaintiffs]." *Doe v. Brown Univ.*, 896 F.3d 127, 130 (1st Cir. 2018). Insofar as they are based on application of correct statements of the law, denials of class certification are reviewed for abuse of discretion; however, in appealing the denial of class certification here, Plaintiffs seek review of the District Court's determinations of law, which are reviewed *de novo*. *See Garcia-Rubiera v. Calderon*, 570 F.3d 443, 460 (1st Cir. 2009).

VI. ARGUMENT

A. The District Court's Decisions Were Infected by its Misunderstanding of the ADA and IDEA.

The IDEA may *not* "be construed to restrict or limit the rights, procedures, and remedies available under . . . the [ADA]." 20 U.S.C. § 1415(*l*). Indeed, Congress enacted Section 1415(*l*) in order to overturn *Smith* v. *Robinson*, 468 U.S. 992 (1984), which held that claims related to the provision of services to children in public schools could only be brought under the IDEA, and to "reaffirm . . . the viability of" other antidiscrimination provisions as "*separate* vehicles for ensuring the rights of handicapped children." H.R. Rep. No. 99-296 at 4 (1985) (emphasis added). The District Court acknowledged this principle when it denied Springfield's motion to dismiss. *S.S. et al. v. Springfield et al.*, 146 F. Supp. 3d 414, 424 (D. Mass. 2015) ("*S.S. I*").

However, the District Court later termed its motion to dismiss "narrow" and declared that the IDEA actually *does* "impose[]" "limits" "on efforts to bring an ADA claim related to the provision of educational services in a public school setting." ECF No. 265, p. 4. Similarly, in its order denying class certification, the District Court wrote that the ADA's integration mandate and guarantee of equal educational opportunity must be limited, in public school cases, in order to be "harmonized" with the "far more specific" IDEA. ECF No. 191, p. 22. These were errors of law.

The District Court also held that if Springfield was following the procedures prescribed under the IDEA, Plaintiffs could not pursue their ADA claims against Springfield unless *every* affected child *not only* completes the IDEA administrative appeal process *but also* identifies "some support," "required" under the ADA for that child "as a reasonable accommodation"—but "not required under the IDEA"—"that would have enabled [the child] to attend a neighborhood school and receive to receive [a] FAPE." ECF No. 265, p. 14. This holding, too, was erroneous.

1. The District Court Erred in Holding that the IDEA "Limits" the ADA's Applicability in Public Schools.

The core guarantees of the ADA are equality and integration. "Congress passed the [ADA] in 1990 to 'assure equality of opportunity, full participation, independent living, and economic self-sufficiency' for individuals with disabilities." *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 848 (6th Cir. 2018) (quoting 42 U.S.C. § 12101(a)(8) (pre-2008 amendments)). Neither the statutory language of the IDEA and ADA, nor any precedential decision we could find, suggests that the IDEA diminishes the ADA's guarantees of "equality of opportunity" and "full participation" in public schools. Yet, in holding that the ADA requires public schools to provide—at most—a "reasonable accommodation, that would [] enable[] [children] to receive [a] FAPE," the District Court

essentially eliminated equality from the ADA's mandate and made "full participation" an empty ideal.

a. The IDEA Does Not "Limit" the ADA's Promise of Equality in Public Services.

A "basic promise of equality in public services [] animates [Title II of] the ADA." *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 510 (4th Cir. 2016). Unlawful discrimination under the ADA therefore includes "[a]fford[ing] a qualified individual with a disability an opportunity . . . that is not equal to that afforded others" or "[p]roviding a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others." 28 C.F.R. § 35.130(b)(1)(ii) - (iii).

The Supreme Court and the courts of appeals have held, uniformly, that this equality guarantee provides public school children substantive rights different than, and in addition to, those provided under the IDEA. *See Fry*, 137 S.Ct. at 754 (confirming that the ADA can "*require* the accommodation" not required under the IDEA) (emphasis in original); *K.M ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1097 (9th Cir. 2013), *cert denied*, 134 S. Ct. 1493 (2014) (recognizing that "the IDEA and Title II [of the ADA] differ in both ends and means" and holding that ADA required school to provide student with auxiliary aids not required by IDEA); *Argenyi v. Creighton Univ.*, 703 F.3d 441, 449 (8th Cir. 2013)

(holding that the ADA provides a student with disabilities "an equal opportunity to gain the same benefit as his nondisabled peers."); *see also Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 1001 (2017) (rejecting the argument that the IDEA requires schools provide educational opportunities that "are substantially equal to the opportunities afforded to children without disabilities"); *Doe v. Cape Elizabeth Sch. Dist.*, 832 F.3d 69, 88 (1st Cir. 2016) (Lipez, J., concurring) (explaining limited reach of IDEA as to equal opportunity).[2]

The District Court pointedly refused to entertain the "equal access" claims in this case. ADD_039 (limiting the case to educational "services" rather than equal educational opportunity). In fact, the District Court declared that the quality of education provided to students at the Public Day School was "not relevant" to the case. To the District Court, the plaintiffs were entitled to equality only insofar as they were entitled to a FAPE. ADD_039 ("reasonable accommodation, that would [] enable[]d [children] to … receive FAPE"). This was simply wrong.

b. The IDEA Does not "Limit" the ADA's Integration Mandate.

The integration mandate is also core to the ADA:

[2] Accordingly, as the United States told the District Court in this case, "[T]he ADA[ ] . . . may require school districts to take different or additional measures . . . than . . . required under IDEA." Statement of the United States 15, ECF No. 40. The United States' interpretation of the ADA is entitled to deference. *See M.R. v. Dreyfus*, 663 F.3d 1100, 1117 (9th Cir. 2011) (recognizing that DOJ interpretation of ADA, a stated in an amicus brief, warrants deference), *reh'g en banc denied*, 697 F.3d 706 (9th Cir. 2012).

> In an attempt to remedy society's history of discriminating against the disabled—discrimination that included isolating, institutionalizing, and segregating them—the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." [42 U.S.C.] § 12132; *accord* 29 U.S.C. § 794(a). The Department of Justice has promulgated regulations implementing the ADA. *See* 42 U.S.C. § 12134(a). One of the regulations is the so-called "integration mandate," providing that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). The "most integrated setting" is the one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." *Id.* App. B pt. 35 (2011)

M.R. v. Dreyfus, 663 F.3d at 733 (9th Cir. 2011). The Supreme Court applied the integration mandate in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600–01 (1999), holding that "unjustified institutional isolation of persons with disabilities is a form of discrimination." As a result, cases challenging the unnecessary segregation of individuals with disabilities are often called "*Olmstead* cases."

"[T]he integration mandate's maximalist language . . . demands 'the most integrated setting appropriate,'" meaning the setting that allows "interaction with non-disabled persons 'to the fullest extent possible.'" *Steimel v. Wernert*, 823 F.3d 902, 911 (7th Cir. 2016) (quoting 28 C.F.R. § 35.130(d) and 28 C.F.R. app. B. pt. 35 (2011)). "[T]he mandate . . . applies to all settings, not just to institutional settings. It bars unjustified segregation of persons with disabilities, wherever it takes place." *Id.*

The "maximalist language" of the integration mandate does not permit a construction whereby courts incorporate other federal statutes as implicit "limits" on the integration mandate—as the District Court did here. ADD_029. Like the equality guarantee, the integration mandate has been recognized as binding states and municipalities independently of, and in addition to, other statutory schemes providing substantive rights to government services. *See, e.g., Davis v. Shah*, 821 F.3d 231, 264 (2d Cir. 2016) ("A state's duties under the ADA are wholly distinct from its obligations under the Medicaid Act.").

Neither this Court, nor the Supreme Court, nor any court of appeals decision of which we are aware has suggested that the IDEA contradicts or diminishes the reach of the ADA's integration mandate in public schools. Nonetheless, the District Court appears to have determined that the IDEA's requirement that students be provided a FAPE in the "least restrictive environment" ("LRE") and the procedures by which that IDEA requirement is implemented acted as a restriction on the ADA's integration mandate. The LRE requirement of the IDEA has been described as setting forth "a preference for integration of disabled children in the general education schools [if] beneficial to the disabled child, given the nature and severity of his disability." *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 847 (9th Cir. 2016).

Contrary to the District Court's holding, the fact that a school has provided a FAPE in the LRE does not preclude a claim of unlawful segregation under the ADA. *See K.M.*, 725 F.3d at 1102; *Ellenberg v. New Mexico Military Inst.*, 478 F.3d 1262, 1281-82 (10th Cir. 2007). To the contrary, "even if [a] plaintiff[] conceded that [a state or municipality] fully satisfied its IDEA obligations with respect to [the plaintiff], they could pursue claims under the ADA . . . on the grounds that [the plaintiff] was precluded from receiving a state benefit . . . provided to her non-disabled peers." *Ellenberg*, 478 F.3d at 1281-82. In deciding an ADA claim filed alongside an IDEA claim, or in lieu of an IDEA claim, a district court must determine the school district's compliance with the ADA integration mandate independently from any determination of whether the school has complied with the IDEA's LRE requirement. *See Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Ross*, 486 F.3d 267, 278 (7th Cir. 2007). Likewise, the ADA, independent of the IDEA, "entitles [a plaintiff] to whatever relief may be justified by the proof." *Id.; see also K.M.*, 725 F.3d at 1102.[3]

[3] In addition to asserting that the IDEA supersedes the ADA, Springfield has also argued that its assignment of children to the Public Day School is insulated from ADA review because the Public Day School has been licensed by the Massachusetts Department of Elementary and Secondary Education. That argument is baseless. *See Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 508-09 (4th Cir. 2016) (collecting cases and recognizing that the ADA "trumps state regulations that conflict with its requirements").

The District Court's assertion that the IDEA "limits" the integration mandate, or confines the reach of *Olmstead* in public schools, thus has no basis in the IDEA, the ADA or the decisions applying them.

2. The District Court Erred in Using the IDEA Hearing Officer's Decision to Preclude ADA Claims.

The District Court's holdings also incorporated an erroneous assumption that all of the constituents of DLC and PPAL, as well as S.S. and all of the other members of the proposed class, were, in fact, already receiving a FAPE in the LRE, as required under the IDEA. The District Court set forth its basis for this assumption in a footnote to its decision dismissing DLC and PPAL: "In this case, Plaintiffs have not challenged that students were placed at the Public Day School pursuant to IEPs which met the requirements of IDEA, meaning they provided FAPE in the LRE." ADD_038. This was faulty logic. Bringing an ADA lawsuit, rather than an IDEA lawsuit, does not constitute a concession that all IDEA requirements have been met or establish that there was no IDEA violation. The United States had told the District Court as much in its statement of interest.

S.S. exhausted IDEA administrative remedies before bringing this ADA case, but he did not bring an IDEA claim in the District Court. Bringing an ADA claim, but not an IDEA claim, following exhaustion of IDEA remedies did not constitute an implicit acknowledgement that a FAPE in the LRE had been

provided.[4] Moreover, the BSEA hearing officer's decision regarding the IDEA was not the "law of the case" for purposes of S.S.'s ADA lawsuit. The "law of the case" doctrine only applies when a superior court has issued a mandate to an inferior court. *Remexcel Managerial Consultants, Inc. v. Arlequin*, 583 F.3d 45, 53 (1st Cir. 2009).

In fact, this Court has held that an IDEA hearing officer's decision *does not* have a preclusive effect on an ADA claim. "State agency findings that are *not reviewed* by a state court are not entitled to any preclusive effect" in an ADA case. *Thomas v. Contoocook Valley Sch. Dist.*, 150 F.3d 31, 39 - 40 n.5 (1st Cir. 1998). "Every court of appeals to have addressed the issue has likewise determined that unreviewed state agency findings do not have preclusive effect in later federal court proceedings under the ADA." *Smith v. Perkins Bd. of Educ.*, 708 F.3d 821, 828 (6th Cir. 2013) (collecting cases); *see also Cortes v. MTA New York City Transit*, 802 F.3d 226, 231-32 (2d Cir. 2015) ("[W]e do not give preclusive effect to state agency decisions . . . in an ADA action."); *C.M. v. Bd. of Educ. of Union Cty Reg'l High Sch. Dist.*, 128 F. App'x 876, 880 n.3 (3d Cir. 2005) ("IDEA

[4] In *Pollack v. Reg'l Sch. Unit 75*, 886 F.3d 75, 83 (1st Cir. 2018) (internal quotation marks omitted), this Court encountered a situation where, very much unlike in this case, "[t]he parties agree[d], and we therefore assume[d], that we afford the findings at issue, which were the product of an adjudicatory proceeding in a Maine administrative agency, the same preclusive effect to which [they] would be entitled in the State's courts." *Pollack* does not govern here because there is no similar agreement among the parties that a preclusion analysis is appropriate. (Further, the *Pollack* analysis was performed under Maine law).

proceedings do not have a preclusive effect upon the federal court system") (citation omitted); *JSK ex rel. v. Hendry Cnty. Sch. Bd.*, 941 F.2d 1563, 1569 (11th Cir. 1991) ("[J]udicially unreviewed state administrative [IDEA] hearings have no preclusive effect in the federal court system.").

In the few other cases where defendants in ADA and Rehabilitation Act cases have made a similar argument (that previous findings by an IDEA administrative hearing officer preclude an ADA claim), the court has rejected the effort. *See N.T. ex rel. Trujillo v. Espanola Pub. Sch.*, No. 04-0415-NCA/DJS, 2005 WL 6168483, at *6-7 (D.N.M. June 21, 2005) ("IDEA's statutory scheme abrogates common-law preclusion doctrines with respect to the judicially unreviewed findings of the [IDEA hearing officer], such that they do not have any preclusive effect on Plaintiff's related claims under the ADA"); *see also I.D. v. Westmoreland Sch. Dist.*, 788 F. Supp. 634, 641 (D.N.H. 1992) (Stahl, J.) ("hearing officer's decisions in IDEA cases should not be given preclusive effect in federal courts" including in subsequent Rehabilitation Act claim).[5]

[5] Further, as three courts of appeals have explained, even when IDEA claims are presented to a district court and resolved through a final judgment (which did not happen here), issue preclusion applies in a subsequent ADA case *only* where the ADA and IDEA claims are based upon "*identical*" regulatory requirements. *See K.M.*, 725 F.3d at 1101 (emphasis added) (holding that previous judicial resolution of IDEA claims did not bar litigation of ADA claims seeking same accommodation, because ADA regulations on point differed from IDEA regulations on point); *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 290–97 (5th Cir. 2005) (*en banc*); *Indep. Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556, 562 (8th Cir. 1996).

As to the rest of the children potentially affected by this lawsuit, the District Court's assumption was entirely baseless. There has been no finding by any tribunal that the constituents of DLC and PPAL affected by this lawsuit, or the members of the proposed class, are receiving a FAPE in the LRE at the Public Day School.

3. The District Court Erred in Holding that the IDEA Limits Plaintiffs' Right to Group Adjudication of ADA Claims.

Courts around the country have recognized that class adjudication is uniquely appropriate for litigating *Olmstead* cases. By their nature, *Olmstead* cases challenge policies or practices that unduly rely on institutions and other segregated settings for the delivery of services. The Public Day School is a classic segregated setting very much like that encountered in the original *Olmstead* case and the many that have followed. The core contention in this case is that, rather than provide "full inclusion" and equality to children with mental health disabilities, Springfield unnecessarily segregates many of them in the inferior Public Day School.

a. ADA Cases Like This One Are Particularly Appropriate for Class Certification.

Civil rights cases were a driving force behind Fed. R. Civ. P. 23. As the Advisory Committee that drafted the modern Fed. R. Civ. P. 23 explained, the paradigm cases for certification under Rule 23(b)(2) are "various actions in the civil-

rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." Fed. R. Civ. P. 23(b)(2), advisory committee's note, 1966 amendment.

Moreover, the Supreme Court has encouraged that *Olmstead* cases be litigated as class actions. *Olmstead,* 527 U.S. at 606. Similarly, in *Olmstead*, the Court crafted a fundamental alteration defense designed for cases seeking systemic relief on behalf of a class. *Id.* at 603-04.

Certification of classes in *Olmstead* cases is common and almost without exception. That is precisely because these cases typically arise out of a common course of conduct by defendants, require a resolution of structural deficiencies in a state or municipal service system, and pose common questions including whether the defendants' systemic policies and practices result in the plaintiffs' unnecessary segregation. Appendix A to Plaintiff's Supplemental Motion for Class Certification lists many recent *Olmstead* and other systemic ADA cases in which class certification has been deemed appropriate. ECF No. 157-1; *see also, e.g., Steward v. Janek*, 315 F.R.D. 472 (W.D. Tex. 2016) (certifying a class challenging the segregation of people with intellectual disabilities in nursing homes and seeking expansion of community services); *Kenneth R. v. Hassan*, 293 F.R.D. 254 (D.N.H. 2013) (certifying a class challenging the segregation of people with mental illness in psychiatric hospitals and seeking expansion of community-based mental health

services); *Lane v. Kitzhaber*, 283 F.R.D. 587 (D. Or. 2012) (certifying a class challenging the segregation of people with intellectual disabilities in sheltered workshops and seeking an expansion of integrated employment services).

Class certification is routine in Title II integration cases because they raise the common question of whether defendants' policies or practices systemically result in needless segregation. In addition, relief can be afforded in a single injunction that requires the public entity to modify its programs to end the offending policies or practices and provide the services individuals need to live, work or be educated in "the most integrated setting." Thus, the court can, "in one stroke," correct the federal legal violations and provide class members the opportunity to receive services in integrated settings.[6] *See Wal-Mart Stores v. Dukes*, 564 U.S. 338, 350 (2011). The District Court's contrary conclusion defies the collective wisdom of the many courts that have certified classes in ADA integration cases, as well as other systemic ADA cases.

b. Systemic ADA Cases Are Also Appropriately Prosecuted by P&As and Associational Plaintiffs.

[6] In these cases, the court does not decide the precise mix of services that each class member will receive. After the court enters its injunction, such decisions continue to be made by defendants, but freed from the fetters of the policies or practices that offend the ADA. *See Steward*, 315 F.R.D. at 492 ("[O]nce reformed in accordance with [the Court's] orders, Defendants' own administrative machinery—not the Court—will be capable of conducting assessments of individual [ ] needs…"; *see also infra at* Section D.3.a.

Congress created protection and advocacy systems (P&As) in part to enforce federal law on behalf of adults and children with mental illness. 42 U.S.C. § 10800 *et seq*. (the "PAIMI Act"). Congress specifically authorized P&As to "pursue administrative, legal and other appropriate remedies to *ensure the protection of individuals with mental illness.*" 42 U.S.C. § 10805(a)(1)(B); *see also* 42 U.S.C. § 10801(b) (emphasis added). Courts have consistently recognized P&A standing to bring claims on behalf of groups of individuals. *See e.g., Oregon Advocacy Ctr. v. Mink,* 322 F.3d 1101, 1113 (9th Cir. 2003). ("[I]n light of the role Congress assigned by statute to advocacy organizations," Congress intended for P&As to have organizational standing); *Doe v. Stincer*, 175 F.3d 879, 882 (11th Cir. 1999) (P&As have standing to bring claims for which their individual constituents have standing). Moreover, P&A standing is commonly recognized in cases, like this one, seeking systemic relief for ADA violations. *See Pa. Prot. & Advocacy, Inc. v. Dep't of Pub. Welfare*, 402 F.3d 374 (3d Cir. 2005) (directing district court to enter partial summary judgment on behalf of P&A with respect to *Olmstead* claims brought on behalf of constituents with mental illness); *see also*, *e.g.*, *Dunn v. Dunn*, No. 2:14-cv-601, 2016 U.S. Dist. LEXIS 166251 (M.D. Ala. Nov. 25, 2016) (allowing P&A to challenge systemic constitutional violations of rights of prisoners with mental illness); *Conn. Office of Prot. & Advocacy for People with Disabilities v. Connecticut*, 706 F. Supp. 2d 266, 279-84 (D. Conn. 2010)

(allowing P&A to bring *Olmstead* claims on behalf of people with mental illness segregated in nursing homes); *N.J. Prot. and Advocacy v. Davy*, No. 05–1784, 2005 WL 2416962, *2-3 (D.N.J. Sept. 30, 2005) (allowing P&A to bring *Olmstead* claims on behalf of its constituents with mental illness in state hospitals).

The Department of Justice's *Olmstead* guidance provides additional support for P&A enforcement of *Olmstead* obligations. *See* Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* (June 2011) *available at* https://www.ada.gov/olmstead/q&a_olmstead.pdf ("P&As have played a central role in ensuring that the rights of individuals with disabilities are protected, including individuals' rights under title II's integration mandate. The Department of Justice has supported the standing of P&As to litigate Olmstead cases.").

4. The District Court Erred in Refusing to Recognize Plaintiffs as the "Master of the Complaint."

The end result of these errors was that the District Court treated this as an IDEA case, rather than an ADA case. Since the IDEA does not preempt or displace the ADA, the District Court's refusal to entertain this case as a *bona-fide* ADA claim was contrary to the longstanding rule that *plaintiffs*, not defendants or district courts, are empowered to choose which rights to assert in a lawsuit and which rights to leave aside. As the Supreme Court held in *Caterpillar Inc. v. Williams*, "the plaintiff is the master of the complaint . . . and [] the plaintiff may,

by eschewing [some available] claims" determine under which legal regime a case will be decided. 482 U.S. 386, 398-99 (1987). "[T]hat principle extends to a plaintiff's decision as to which causes of action to bring and what jurisdictional arguments to press." *Connectu LLC v. Zuckerberg*, 522 F.3d 82, 93 (1st Cir. 2008).

B. The Claims Made in this Case Are Not Subject to the IDEA Exhaustion Rule.

The applicability of the IDEA exhaustion requirement is a separate question from whether the District Court impermissibly treated this ADA case as an IDEA case. Although the IDEA exhaustion requirement does apply in some ADA cases arising in public school settings, the IDEA exhaustion rule should not have been applied, at all, in this case. There are two main reasons: first, the statutory language of the IDEA exhaustion rule simply does not cover claims that a school district must make systemic reforms in order to provide equal educational opportunity for children with disabilities and equal access to neighborhood schools; second, exhausting administrative remedies in this case would be, and demonstrably was, futile.

1. The District Court Used the Wrong Standard in Finding that the IDEA Exhaustion Rule Applies.

The IDEA requires litigants to exhaust administrative remedies before filing a civil action only insofar as they are "*seeking relief that is also available under [the IDEA]*." 20 U.S.C. § 1415(*l*) (emphasis added). *See* ADD_050. The Supreme

Court explained in *Fry*, 137 S. Ct. at 753, that this "IDEA exhaustion rule" cannot, consistent with Congressional intent, be applied in blanket fashion to all ADA cases arising from public schools. Rather, when a school district claims exhaustion is required under Section 1415(*l*), a court must inquire whether the "gravamen" of plaintiff's claim is that he or she was denied the FAPE that IDEA provides. *Fry,* 137 S. Ct at 755.

In determining that the IDEA exhaustion requirement applied to this case, the District Court relied heavily on earlier interpretations of the IDEA exhaustion rule that the Supreme Court expressly rejected in *Fry,* including most notably the rationale underlying *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52 (1st Cir. 2002). *See* ADD_036-37. In *Frazier,* the First Circuit required exhaustion and the creation of an administrative record in virtually every case related to an education setting. *See Frazier*, 276 F.3d at 61 ("Exhaustion [under the IDEA] is beneficial . . . [because it] facilitates the compilation of a fully developed record by a factfinder versed in the educational needs of disabled children" . . . . The *Fry* Court rejected that standard, holding that § 1415(*l*) is *not* triggered in every case where "the suit arises directly from a school's treatment of a child with a disability—and so could be said to relate in some way to her education." *Fry*, 137 S. Ct. at 754.

Under *Fry* (unlike under *Frazier*)[7] exhaustion is not required simply because a case "has some articulable connection to the education of a child with a disability," *Fry*, 137 S. Ct. at 753. Thus a district court may not require administrative exhaustion—as the District Court did here—merely because it would like to have "the benefit of an administrative record assembled by educational experts." ADD_039.

Under *Fry*, plaintiffs cannot be required to submit their claims to an IDEA hearing officer if "the hearing officer cannot provide the requested relief." *Fry*, 137 S. Ct. at 754.

> And that is true even when the suit arises directly from a school's treatment of a child with a disability—and so could be said to relate in some way to her education. A school's conduct toward such a child—say, some refusal to make an accommodation—might injure her in ways unrelated to a FAPE, which are addressed in statutes other than the IDEA. A complaint seeking redress for those other harms, independent of any FAPE denial, is not subject to § 1415(*l*)'s exhaustion rule because, once again, the only "relief" the IDEA makes "available" is relief for the denial of a FAPE.

Fry, 137 S. Ct. at 754–55. So the District Court should have determined whether Plaintiffs were seeking a remedy available under the IDEA—an accommodation the IDEA hearing officer could provide—not whether the hearing officer's

[7] In addition, the Court in *Frazier* held the § 1415(*l*) exhaustion requirement was analogous to the strict exhaustion requirement in the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), *Frazier*, 276 F.3d at 62. *Fry* explicitly rejected this comparison, noting that the PLRA's exhaustion requirements are "stricter" than the IDEA's. *See Fry*, 137 S. Ct. at 755.

findings might, in some fashion, be useful to the court. The District Court did not undertake that analysis.

2. Plaintiffs Do Not Seek Relief Available Under the IDEA.

The IDEA exhaustion rule does not apply here because, in *Fry*'s words, an IDEA hearing officer considering Plaintiffs' claims "would have to send [them] away empty-handed." *Id.* At 754. This is because the Plaintiffs are not seeking to remedy the denial of a FAPE, or a denial of FAPE in the LRE, but rather Springfield's failure to provide educational opportunities that "are substantially equal to the opportunities afforded to children with disabilities"—which the Supreme Court said just last year an IDEA hearing officer *cannot* provide. *Endrew F.*, 137 S. Ct. at 1001. Importantly, no Plaintiff in this case has ever asked the District Court to provide individualized relief for any specific child. Success in this case would not directly overrule any child's IEP or require the District Court to make any individualized order pertaining to the education of the named plaintiff.

Further, Plaintiffs have never understood or framed this case as an IDEA claim, which is key because, under *Fry*, Plaintiffs are "the master of the claim." *Fry*, 137 S. Ct. at 743. The Supreme Court in *Fry* explicitly said that cases under the ADA seeking to "root out disability-based discrimination, enabling each covered person (sometimes by means of reasonable accommodations) to participate equally to all others in public facilities and federally funded programs"

are not subject to the IDEA exhaustion rule. *Fry*, 137 S. Ct. at 756. This case is exactly the type of case the Supreme Court was referring to, when it wrote that sentence.

3. Persuasive, Post-*Fry* Cases Hold That Claims Like These Are Not Subject to the IDEA Exhaustion Rule.

Post-*Fry* courts have held that ADA claims like Plaintiffs' are not claims for denial of FAPE, and thus not subject to the IDEA exhaustion rule. For example, the Eleventh Circuit has held that ADA claims challenging discriminatory segregation—those alleging "unjustified institutional isolation of persons with disabilities" in school settings—are *not* IDEA claims for denial of a FAPE. *J.S., III v. Houston Cty. Bd. of Educ.*, 877 F.3d 979, 986 (11th Cir. 2017).[8] Similarly, in *Abraham P. v. Los Angeles Unified Sch. Dist.*, the court held that, in light of *Fry*, IDEA exhaustion is *not* required before bringing an ADA case alleging discriminatory segregation in public schools. No. CV 17-3105-GW (FFMx), 2017 WL 4839071, at *4 (C.D. Cal. Oct. 5, 2017).

Courts post-*Fry* have similarly found that claims of unequal treatment, like Plaintiffs' claim that students at the Public Day School are receiving educational opportunities inferior to their non-disabled peers, are not subject to exhaustion under 20 U.S.C. § 1415(*l*). *See, e.g., K.G. ex. rel. Gosch v. Sergeant Bluff-Luton*

[8] While *J.S.* was not specifically about the exhaustion requirement, it relied heavily on *Fry* and its logic demonstrates that exhaustion is not required here.

Cmty. Sch. Dist., 244 F. Supp. 3d 904, 922 (N.D. Iowa 2017) (holding no exhaustion required when the "'gravamen' of the ADA claim is discrimination and creation of a hostile educational environment"); *GM ex rel. Mason v. Lincoln Cnty. Sch. Dist.*, No. 6:16-CV-01739-JR, 2017 WL 2804996, at *4 (D. Or. Apr. 21, 2017) *report and recommendation adopted*, No. 6:16-CV-01739-JR, 2017 WL 2804949 (D. Or. June 28, 2017) ("Plaintiff alleges discrimination, not inadequate individualized educational services, and thus his claims fall outside the IDEA.").

4. *Fry*'s "Clues" Suggest that Plaintiffs' Claims Are Not Subject to the IDEA Exhaustion Rule.

The *Fry* Court also suggested that, in some cases, it may be useful for courts considering § 1415(*l*) to look at a two "clues" in determining whether the IDEA exhaustion rule applies: "First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library? And second, could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance?" *Fry*, 137 S. Ct. at 756 (emphasis in original). While the *Fry* clues may not always be determinative, *see J.S.*, 877 F.3d at 986, 986 n. 3 (an ADA claim for discriminatory segregation "does not fit neatly into *Fry*'s hypotheticals" and "this may be one of those circumstances in why *Fry's* hypotheticals could lead us astray") (internal quotations and brackets omitted), they help illuminate why the IDEA exhaustion rule should not apply in this case.

As to the first clue—whether a similar claim could be brought about services provided in a public library—the answer is yes. Title II of the ADA applies to all of a public entity's services, programs and activities, not just schools or educational programs. 42 U.S.C. § 12132. The same claims could be brought if Springfield had a separate, inferior public library for individuals with mental health disabilities. The issue would be whether Springfield, having chosen to provide public library services, can require people with disabilities to use a separate inferior library, even though the affected people could access the regular library with appropriate accomodations. *See Lawton v. Success Acad. Charter Schs., Inc.*, 323 F. Supp. 3d 353, 362 (E.D.N.Y. 2018) ("disabled children would have a claim against a public library that placed them on a list of excluded patrons, used strict disciplinary rules to remove them on a daily basis . . .").

Similarly, Title II of the ADA applies to all individuals with disabilities, not just children. 42 U.S.C. § 12131. Disabled adults could bring ADA claims similar to those here if Springfield provided *adult* education services for its residents but arranged for disabled adults to receive those services in a separate setting, where the courses offered were of poor quality. This case would look exactly the same in an adult-education context, even though the IDEA does not apply to adult education. Thus, both *Fry* clues cut against application of the IDEA exhaustion rule.

5. Pursuit of IDEA Remedies Would Have Been Futile.

Another reason the IDEA exhaustion rule does not apply here—and another reason an IDEA hearing officer considering Plaintiffs' claims "would have to send [them] away empty-handed"—is that Plaintiffs seek systemic relief. Plaintiffs ask the court to enjoin Springfield to make structural changes in the way it provides services to students with mental health disabilities. Plaintiffs do not seek to have the Court devise an educational plan for any individual student.

As this Court has long recognized, statutory schemes requiring exhaustion (including the IDEA) implicitly excuse parties from seeking administrative relief "where the pursuit of administrative remedies would be futile or inadequate." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 190 (1st Cir. 1993); *see also Rose v. Yeaw*, 214 F.3d 206, 210–11 (1st Cir. 2000) (exhaustion requirement does not apply when "the administrative remedies afforded by the [administrative] process are inadequate given the relief sought"). Any requirement that Plaintiffs exhaust was excused because it would have been futile for them to seek systemic reform of Springfield's schools for violations of the ADA through the BSEA administrative process.

The BSEA itself has held that it has no jurisdiction to adjudicate *either* claims seeking systemic reform[9] *or* claims brought under the ADA.[10] Indeed, the BSEA dismissed S.S.'s ADA and systemic claims when he tried to raise them in the administrative process. *See* ECF No. 34-1.

Confronting other state agency restrictions similar to the BSEA's, several other courts of appeals have held that in cases seeking systemic relief the IDEA administrative exhaustion rule does not apply. *See Beth V. by Yvonne V. v. Carroll*, 87 F.3d 80, 89 (3d Cir. 1996) (holding that the IDEA exhaustion requirement does not apply in a case where the plaintiffs "allege systemic legal deficiencies and, correspondingly, request system-wide relief that cannot be provided (or even addressed) through the administrative process"); *Mrs. W. v. Tirozzi*, 832 F.2d 748, 757 (2d Cir. 1987) (recognizing that IDEA exhaustion is not required in cases "alleging systematic [IDEA] violations") (citing *Jose P. v. Ambach*, 669 F.2d 865, 869-70 (2d Cir.1982)); *Doe by Gonzales v. Maher*, 793 F.2d 1470, 1490 (9th Cir. 1986) (exhaustion under the IDEA not required in case seeking systemic relief because administrative relief would be inadequate); *see*

[9] *See* ECF No. 245-3, p. 5 ("With respect to Parents' request that I order systemic relief, I find that I have no authority to do so."); *see also* ECF No. 245-4, p. 9 (same); ECF No. 245-5, p. 6-7 (same).

[10] *See* ECF No. 245-6 2 n.2 ("[T]he BSEA does not have jurisdiction over the ADA."); *see also* ECF No. 245-4, p. 9; ECF No. 245-7, p. 12 n.5 (same); ECF No. 248-8, p. 4-6.

also Michigan Prot. & Advocacy Serv., Inc. v. Flint Cmty. Schs., 146 F. Supp. 3d 897, 906 (E.D. Mich. 2015) (finding futility in case brought by P&A organization in light of "two decisions of administrative law judges holding that they had no authority to consider or address alleged systemic failures by a school district to provide appropriate services . . ."); *New Jersey Prot. & Advocacy, Inc. v. New Jersey Dept. of Educ.*, 563 F. Supp. 2d 474, 485-486 (D.N.J. 2008) (recognizing P&A organization need not pursue administrative relief in case "alleging systematic failures and seeking system-wide relief").

Further, the legislative history of § 1415(*l*) shows that Congress did not intend for there to be an exhaustion requirement in cases, like this one, where Plaintiffs are seeking not individualized services but systemic changes in a school district's practices. *See* H.R. Rep. No. 99-296, at 7 (1985) (no exhaustion required where "an agency has . . . pursued a practice of general applicability that is contrary to the law").

Finally, there is no policy reason for this Court to break new ground and require administrative exhaustion here. A primary purpose of administrative exhaustion is to allow an agency "to apply its expertise to a problem" before a court intervenes. *Ezratty v. Com. of Puerto Rico*, 648 F.2d 770, 774 (1st Cir. 1981). This "application of expertise" rationale does not apply here, foremost, because the Supreme Court in *Fry* said it cannot. In addition, the BSEA, by its

own admission, does not have the requisite expertise to hear and make findings regarding ADA claims. ECF No. 245-4, p. 10 ("The limited jurisdiction of the BSEA does not extend to claims brought under the ADA . . . Not only does the BSEA lack specific statutory authority over such claims, it also lacks both expertise and experience in th[is] area[s] of the law to evaluate and adjudicate such claims."); ECF No. 245-8 (same).

Fundamentally, rules requiring administrative exhaustion are not supposed to be enforced in a manner that would require "empty formalit[ies]." *See Panetti v. Quarterman*, 551 U.S. 930, 946 (2007). Requiring IDEA exhaustion of ADA claims such as this one would improperly turn the administrative process into an "empty formality," benefitting neither the courts of this Circuit nor the administrative agencies of its constituent states. *See id*.

C. The Claims of DLC and PPAL Should Not Have Been Dismissed for Failure to Exhaust.

Even if *Fry* required exhaustion in the circumstances present here, and even if an attempt to obtain the relief sought through the BSEA would not have been futile—neither of which is the case—the District Court still should not have dismissed DLC and PPAL from this suit for failure to exhaust administrative remedies. This is because (1) any effort by DLC or PPAL to invoke administrative remedies would have been shut down, as the BSEA has stated clearly that it will not entertain complaints by organizations or on behalf of groups of students, and

(2) one of DLP's and PPAL's constituents—namely, S.S.—did in fact exhaust the administrative remedies available to him, which was sufficient under the IDEA exhaustion rule, to the extent it applied at all.

1. DLC and PPAL Were Not Required To Exhaust Because They Had No Available Administrative Avenue.

The IDEA administrative process was established to entertain arguments from individual students, the parents of individual students, and school systems seeking to obtain approval for contested IEPs for individual students. It was not designed to hear claims, especially systemic claims, brought by organizations like DLP and PPAL. 20 U.S.C. § 1415(f)-(g). Accordingly, consistent with the IDEA, Massachusetts regulations only allow the student, the parent(s), or an individual acting as the student's parent or legal representative to obtain a BSEA hearing on behalf of a student. *See* ECF No. 245-2; *see also* ECF No. 245-1, p. 4. ("The BSEA's jurisdiction is . . . limited to resolving disputes and providing relief for individual students.").

In sum, the District Court directed PPAL and DLC to make a legal filing that PPAL and DLC had no legal grounds to make. The District Court should, instead, have followed the reasoning in *Dunn v. Dunn*, 219 F. Supp. 3d 1163, 1176 (M.D. Ala. 2016). In *Dunn*, the court held that even under the PLRA exhaustion scheme (which the *Fry* Court recognized to be stricter than the IDEA exhaustion rule),

Alabama's P&A organization was not required to make any administrative claim, because it had no administrative rights.

2. S.S. Satisfied Any Administrative Exhaustion Requirement Applicable to DLC and PPAL.

Further, even if DLC and PPAL were subject to the IDEA exhaustion rule, they satisfied that rule when their constituent S.S. exhausted all available administrative remedies prior to bringing this case. As discussed in detail below, in cases involving group adjudication, exhaustion by a single member of the group is adequate to meet any exhaustion requirements.

D. The District Court Erred in Denying Class Certification.

The District Court also erred in its decision denying S.S.'s motion for class certification.

First, the District Court erred in linking class membership to the IDEA exhaustion rule. Even assuming that the IDEA exhaustion rule applies in this case, the District Court's assertion that "IDEA exhaustion is required of all class members" was contrary to settled law because, in class actions, the named plaintiff's exhaustion of administrative remedies suffices. For the same reason, the District Court was wrong to hold that the typicality and adequacy requirements of Fed. R. Civ. P. 23(a) required that the class representative and the unnamed class members have the same exhaustion status.

Second, the District Court misunderstood the "commonality" requirement in Fed. R. Civ. P. 23(a)(2). The central question on class certification *should have been* whether the conduct of which S.S. complained —Springfield's reliance on the segregated and unequal Public Day School—was a common practice that violated the ADA to the detriment of the proposed class. Yet the District Court called the question of whether Springfield engaged in such a course of conduct "not relevant" to the class certification motion. ADD_004.

Third, while the District Court placed its analysis under the heading of "commonality," it also erred in holding that the relief Plaintiffs seek is not a "final injunctive relief or corresponding declaratory relief [] appropriate respecting the class as a whole," as required under Fed. R. Civ. P. 23(b)(2).

1. The District Court Erred in Requiring that Each Class Member File His or Her Own Appeal Through the BSEA.

Even if exhaustion were required of S.S., which it was not (*see supra*), there was no basis for the District Court's conclusion that each and every class member must individually pursue administrative remedies before a class can be certified. Such a requirement would undermine the foundations of Rule 23. It would also conflict head-on with Supreme Court precedent.

a. Only the Class Representative Must Exhaust.

Every court of appeals that has considered the issue has held that unnamed class members in ADA and IDEA class actions need not exhaust administrative

remedies, so long as the named plaintiff(s) have done so. *See, e.g., Handberry v. Thompson*, 446 F.3d 335, 344 (2d Cir. 2006) (class of students not required to exhaust, as individual administrative remedies would be insufficient to address defendants' systemic failures); *Ass'n for Cmty. Living in Colo. v. Romer,* 992 F.2d 1040, 1045 (10th Cir. 1993) (IDEA requires at most exhaustion of "a few representative claims" in the class context); *Hoeft v. Tucson Unified Sch. Dist.,* 967 F.2d 1298, 1309 (9th Cir. 1992) (IDEA does not require that absent class members exhaust before bringing suit for systemic violations seeking systemic relief).[11]

These cases reflect the norm in civil rights class actions because the Supreme Court has held that where exhaustion is required, it is only the named plaintiff—and not each member of the proposed class—that must exhausts administrative remedies. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975) (relief "may be awarded on a class basis under Title VII without exhaustion of administrative procedures by the unnamed class members"); *see also Lewis v. City of Chicago*, 560 U.S. 205, 211 n.4 (2010) (same); *Arizona ex rel.*

[11] District courts in three additional circuits have reached the same conclusion. *See Adam v. North Carolina*, No. 5:96-CV-554-BR, 1997 U.S. Dist. LEXIS 17166, at *13 n.4 (E.D.N.C. Sept. 19, 1997) ("It should be noted, however, that, to satisfy exhaustion requirements, all putative members of the class are not obligated to pursue administrative remedies to the full extent."); *T.R. v. Sch. Dist. of Phila.,* 223 F. Supp. 3d 321, 330 n. 7 (E.D. Pa. 2016) (class need not exhaust where students with disabilities challenged a system-wide policy); *L.M.P. ex rel. E.P. v. Sch. Bd. of Broward Cty., Fla.*, 516 F. Supp. 2d 1294, 1304-05 (S.D. Fla. 2007) (class members need not exhaust in IDEA case alleging policy of denying certain services to children diagnosed with autism spectrum disorder).

Horne v. Geo Grp., Inc., 816 F.3d 1189, 1202 (9th Cir. 2016) ("unnamed class members in a private class action need not exhaust administrative remedies").

Requiring each member of the class to exhaust would also be contrary to the BSEA's determination—in S.S.'s case—that he and other members of the proposed class were *required* to pursue their claims of systemic violations through a class action in federal court, not through administrative appeals:

> [T]he charge of the BSEA Hearing Officer is to determine the individual student's specific special education needs, and to determine whether or not the school can appropriately address those individual needs. Unlike the federal courts (see Rule 23 of the Federal Rules of Civil Procedure), the BSEA has no statute or regulation or rule providing for class action claims. ***The BSEA has never engaged in class wide [sic] fact finding and does not have the experience, expertise, or institutional capacity to provide administrative fact finding on class action claims which could be of assistance to the federal court in any potential, subsequent class action litigation***.

Ruling, BSEA # 1309716, Oliver, H.O. Oct. 15, 2013 at 2, *available at* https://www.mass.gov/files/documents/2016/07/rk/13-09716r.pdf (emphasis added).

b. Exhaustion Does Not Impact Adequacy or Typicality.

As discussed above, the Supreme Court has held that only the named plaintiff in a class action needs to exhaust. From this, it necessarily follows that a class cannot fail under Fed. R. Civ. P. 23(a)'s adequacy and typicality requirements merely because the class representative and unnamed class members

have different exhaustion status. Without citing any authority, the District Court held otherwise. That erroneous ruling should be reversed.

2. Plaintiffs Satisfied Rule 23(a)'s Commonality Requirement by Alleging Common Contentions Capable of Class-wide Resolution

Commonality is present when class members "depend upon a common contention . . . capable of classwide resolution." *Wal-Mart*, 564 U.S. at 350. The commonality prong is satisfied when there is "even a single question . . . common," the resolution of which will likely "generate common *answers* apt to drive the resolution of the litigation." *Id.* at 350, 376 n.9 (internal quotation marks, citations, and brackets omitted). In Fed. R. Civ. P. 23(b)(2) classes like the one proposed in this case, the common contention capable of class-wide resolution is usually that the defendant has a policy or practice that harms all class members. That common practice or policy acts as the "glue" that hold a class together. *Id*. at 352.

Here, the harm to class members stems from the same source and involves the same central common question to which there is a common answer: whether Springfield discriminates against the class, in violation of the ADA, by failing to provide SBBS in neighborhood schools and instead placing them in the inferior Public Day School where they are segregated and deprived of educational opportunities equal to those provided to their peers without a disability. This case, thus, will rise or fall on whether Plaintiffs prove a common violation of law that

harms each and every class member. As several district courts in this circuit have recognized in very similar cases, that common violation and class-wide harm satisfies Fed. R. Civ. P. 23(a)(2)'s commonality requirement. *See Kenneth R.*, 293 F.R.D. at 267 (holding that plaintiffs had satisfied commonality because defendants' policies and practices "created a systemic deficiency in the availability of community-based mental health services, and that that deficiency is the source of the harm alleged by all class members"); *Connor B. ex rel. Vigors v. Patrick,* 272 F.R.D. 288, 295 (D. Mass. 2011) ("[T]he unreasonable *risk* of harm created by these alleged systemic failures . . . and applicable to the entire Plaintiff class is sufficient to satisfy the requirement of commonality.") (emphasis in original); *Risinger ex. rel. Risinger v. Concannon*, 201 F.R.D 16, 20-21 (D. Me. 2001) (same).

Class actions are appropriate in cases challenging a common policy or practice, even if the policy or practice is applied on an individualized basis. Thus, commonality is not defeated by the fact that Springfield's (common) illegal practices affect each member of the proposed class individually, and are applied to each child in separate IEPs. In analogous circumstances, the Seventh Circuit explained:

> [T]he Supreme Court's *Wal–Mart* decision . . . demonstrate[s] that a company-wide practice is appropriate for class challenge even where some decisions in the chain of acts challenged as discriminatory can be exercised by local managers with discretion—at least where the

> class at issue is affected in a common manner, such as where there is a uniform policy or process applied to all.

Chicago Teachers Union, Local No. 1 v. Bd. of Educ. of City of Chicago, 797 F.3d 426, 437 (7th Cir. 2015). Similarly, the Fourth Circuit has held that:

> *Wal–Mart* did not set out a per se rule against class certification where subjective decision-making or discretion is alleged. Rather, where subjective discretion is involved, *Wal–Mart* directs courts to examine whether all managers exercise discretion in a common way with some common direction. Thus, to satisfy commonality, a plaintiff must demonstrate that the exercise of discretion is tied to a specific [] practice, and that the subjective practice at issue affected the class in a uniform manner.

Scott v. Family Dollar Stores, Inc., 733 F.3d 105, 113 (4th Cir. 2013) (internal citations and brackets omitted), *cert. denied*, 134 S.Ct. 2871 (Mem.) (2014). Here, Plaintiffs allege (and, as explained below, have presented evidence) that to the extent the IEP process in Springfield is individualized and subject to discretionary decisions, Springfield "exercise[s] discretion in a common way"—by placing children in the segregated, inferior Public Day School who could be educated in neighborhood schools if offered SBBS.

In analogous circumstances, courts have found no obstacle to class certification in civil rights class actions where the defendant repeatedly applies a common practice in individualized circumstances. For instance, after *Wal-Mart*, a district court in this Circuit certified a class in an ADA integration case similar to this one, rejecting defendants' argument that commonality was defeated by

"dissimilarities in class member needs and preferences for community-based services . . . ." *Kenneth R.*, 293 F.R.D. at 268. Other courts of appeals have affirmed similar holdings. *See Yates v. Collier*, 868 F.3d 354, 363 (5th Cir. 2017) (affirming certification of civil rights class action alleging excessive heat in prison even though "no two individuals have the exact same risk" from exposure to excessive heat) (internal quotation marks and brackets omitted); *Parsons v. Ryan*, 754 F.3d 657, 676 (9th Cir. 2014) (holding that class certification was appropriate in case alleging systemic failure to provide adequate healthcare to prisoners, even though each prisoner had different healthcare needs).

Accordingly, Springfield cannot sidestep the common harms caused by Springfield's common practices on the ground that each child in the proposed class has his or her own IEP and is entitled to an individualized determination as to school placement. What matters in determining commonality, instead, is that each child's IEP and school placement decision are affected in a similar way by the lack of SBBS in Springfield's neighborhood schools and by the fact that Springfield has chosen to devote its resources to a segregated, inferior Public Day School for children with mental health disabilities.

Moreover, in this case, Plaintiffs offered essentially unrebutted *evidence* that Springfield engages in common practices of disability discrimination and that those practices create harms common to the children in the proposed class. *See*

ECF No. 158-1. Dr. Peter Leone, a nationally-renowned professor of education from the University of Maryland, interviewed more than a dozen children and parents of children who had been placed in the Public Day School. *Id*. He reviewed more than 100 IEPs of children who had been placed in the Public Day School. *Id*. His selection and review were appropriate from a statistical perspective. *Id*. The District Court did not find otherwise.

Dr. Leone found that the children in the proposed class have similar disabilities and require a similar set of services. *Id*. He found that Springfield has a common practice of failing to provide Public Day School students with services—routinely available in other school districts—that would have allowed the children to attend neighborhood schools. *Id*. He found that Springfield made common (incorrect) assumptions about the class members and offered them a common set of (insufficient) services. *Id*. He found that *all* the children whose files he reviewed could successfully attend neighborhood schools if appropriate services were provided. *Id*. He also found that the quality of education in the Public Day School—for every child there—was markedly inferior to the quality of education the children in the potential class would have received in neighborhood schools. *Id*. And he found that the children in the proposed class also suffered negative effects from the fact of their segregation from peers in the neighborhood schools.

Dr. Leone's evaluation was more than sufficient to provide evidence of a common practice and common harm. Moreover, Springfield was in no position to demand more evidence of commonality. Springfield refused Dr. Leone access to its facilities, so he could not conduct an in-person evaluation of the Public Day School. And Springfield took the position that, unless class certification were granted, Dr. Leone would not be given open access to the educational records of the putative class members.

3. Plaintiffs Seek Relief Appropriate Under Rule 23(b)(2).

At Springfield's urging, the District Court erroneously found that the plaintiff class's ADA claims were not appropriate for class certification because each student's school placement decision is ultimately made through the "individualized process already required by the IDEA." ADD_023. While the District Court made this determination in the course of explaining its views on the Fed. R. Civ. P. 23(a)(2) commonality requirement, its analysis appears to have been based in part on Fed. R. Civ. P. 23(b)(2)'s provision for certification of classes where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

a. Plaintiffs Seek a Single Remedy

The District Court was incorrect in suggesting that there could not be "a single remedy" in cases where students' individual service needs and placement decisions are made through the IDEA process. ADD_023. Plaintiffs have, in fact, requested "a single remedy applicable to the whole class"—an injunction recognizing that the children now routinely placed in the Public Day School can and should be educated in neighborhood schools, and requiring that Springfield provide the SBBS used in other districts that more successfully integrate children with disabilities.

The individualized planning process becomes relevant only after Springfield is enjoined to provide these services. Springfield, not the District Court, will then determine precisely what specific type and amount of SBBS each student will be provided, pursuant to the individualized planning processes that already exist in the school system. Plaintiffs have in essence asked that the District Court enjoin Springfield to add SBBS to the menu of options available to IEP teams. Plaintiffs *have not* asked the District Court to re-write any child's IEP.

Other courts have certified Rule 23(b)(2) classes in similar circumstances, holding that Rule 23(b)(2) encompasses cases where "plaintiffs' primary goal is . . . to require the defendant to do or not do something that would benefit the whole class," *Chicago Teachers Union*, 797 F.3d at 441, even if implementing the

remedy would require the defendant to make renewed, individualized determinations for the class members. In *Chicago Teachers Union*, for instance, the Seventh Circuit explicitly rejected an argument that a class of teachers "seeking the same declaratory and injunctive relief for everyone," namely an injunction to end a discriminatory policy, could not be certified under Fed. R. Civ. P. 23(b)(2) because individual relief for teachers and staff would need to be subsequently determined. The *Chicago Teachers Union* court stated that once the district court found that "[p]laintiff's request for a declaration that the [ ] policy violates federal law would apply class-wide," that "should have ended the matter and convinced the court to certify the 23(b)(2) class." *Id.* at 441-42 (internal quotation marks omitted). Similarly, the court in *Kenneth R.* certified a class, recognizing that the injunctive relief for community-services sought by Plaintiffs would ultimately be implemented through the state's individual service planning process. 293 F.R.D. at 269-70 (citing *Voss v. Rolland*, 592 F.3d 242, 253 (1st Cir. 2010) (approving class settlement increasing community services for people with disabilities and leaving for the State's individual service planning process, placement decisions that would take individual preferences into account)); *accord Steward* 315 F.R.D. at 492 ("[P]laintiffs are not asking the Court to order individual relief, but seek injunctions targeted at the deficiencies they allege exists within Defendants' [ ]

service system . . .. Defendants' own administrative machinery—not the Court—will be capable of conducting assessments of individual [ ] needs . . ..").

b. The Efficacy of SBBS Is Not a Class Certification Issue.

Finally, the District Court erred in demanding evidence, especially at so early a stage in the case, that the particular remedy proposed in the Complaint—implementation of SBBS in Springfield's neighborhood schools— would successfully integrate *every* member of the class. The proper inquiry on class certification is not whether Plaintiffs have proved that providing SBBS in neighborhood schools would result in the integration of every child—or whether the case will affect each child in the same manner—but whether Plaintiffs have shown that they will be seeking a single remedy to remedy the class-wide harm caused by Springfield's reliance on the Public Day School, rather than SBBS, to educate children with mental health disabilities.

The efficacy of SBBS is a merits inquiry—and fundamentally a part of the determination whether Springfield's segregation of children in the Public Day School is truly necessary. "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen, Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013); *see also In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 (1st Cir. 2015).

And, even on the merits, proof of the alleged ADA violations does not require a showing that the remedy proposed by Plaintiffs will result in the integration of every child in the proposed class. The basis for class certification here is different. It is that a substantial number of children are placed in a segregated, unequal school, unnecessarily, because Springfield has refused to provide those students appropriate services in neighborhood schools. While not every class member may be able immediately to transfer to a neighborhood school if Springfield were enjoined to provide intensive mental health services in neighborhood schools, without such an injunction the children in the class have little hope of ever receiving an equal education, as the ADA demands.

VII. CONCLUSION

The District Court's orders denying class certification and entering judgment on the pleadings should both be reversed. The case should be remanded for appointment of a new class representative and other, further proceedings.

Dated: November 30, 2018

Respectfully submitted,

THE PARENT/PROFESSIONAL ADVOCACY LEAGUE; DISABILITY LAW CENTER, INC.; M. W., a minor, by his parents, L.N. and A.N., on behalf of himself and other similarly situated students,

By their Attorneys,

/s/ Matthew T. Bohenek

Robert E. McDonnell, Bar No. 56450
Michael D. Blanchard, Bar No. 70496
Jeff Goldman, Bar No. 1143598
Elizabeth Bresnahan, Bar No. 1155088
Matthew T. Bohenek, Bar No. 1171734
MORGAN, LEWIS & BOCKIUS LLP
1 Federal Street
Boston, MA 02110
(617) 951-8000
robert.mcdonnell@morganlewis.com
michael.blanchard@morganlewis.com
jeff.goldman@morganlewis.com
elizabeth.bresnahan@morganlewis.com
matthew.bohenek@morganlewis.com

Alison Barkoff, Bar No. 1185185
Deborah A. Dorfman, Bar No. 117774
Sandra J. Staub, Bar No. 88423
CENTER FOR PUBLIC REPRESENTATION
22 Green Street
Northampton, MA 01060
(413) 586-6024
abarkoff@cpr-ma.org
ddorfman@cpr-ma.org
sstaub@cpr-ma.org

Of Counsel:

Ira Burnim (application of First Circuit admission filed)
Jennifer Mathis
BAZELON CENTER FOR MENTAL HEALTH LAW
1101 15th Street, N.W., Suite 1212
Washington, D.C. 20005
(202) 467-5730
jenniferm@bazelon.org
irab@bazelon.org

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/s/ Matthew T. Bohenek
Matthew T. Bohenek
Attorney for Plaintiffs - Appellants/Cross-Appellees
Dated: November 30, 2018

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I, Matthew Bohenek, hereby certify that I have caused this brief, with a corrected addendum, to be served via ECF on December 10, 2018 (and the original brief to have been served on November 30, 2018) on all registered participants of the CM/ECF System, including:

Edward M. Pikula
Lisa Caryl deSousa
Melinda Marsh Phelps
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Cynthia A. Young
Karen L. Goodwin
Michelle L. Leung
Stephen L. Holstrom

/s/ Matthew T. Bohenek
Matthew Bohenek

ADDENDUM TABLE OF CONTENTS

Addendum A

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

S.S., a minor, by his mother, S.Y., on behalf of himself and other similarly situated students; the PARENT/PROFESSIONAL ADVOCACY LEAGUE; and the DISABILITY LAW CENTER,	*	
Plaintiffs,	*	
v.	*	
	*	Civil Action No. 14-30116-MGM
CITY OF SPRINGFIELD, MASSACHUSETTS; DOMENIC SARNO, in his official capacity as Mayor of City of Springfield; SPRINGFIELD PUBLIC SCHOOLS; DANIEL J. WARWICK, in his official capacity as Superintendent of Springfield Public Schools,	*	
Defendants.	*	

MEMORANDUM AND ORDER ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND DEFENDANTS' MOTIONS TO EXCLUDE OR LIMIT AND FOR EVIDENTIARY HEARING

(Dkt. Nos. 96, 162, and 171)

December 16, 2016

MASTROIANNI, U.S.D.J.

I. INTRODUCTION

Plaintiffs bring this proposed class action on behalf of all students who have been diagnosed with mental health disabilities and enrolled not in a neighborhood school but in one of several schools operated by Defendant, Springfield Public Schools ("SPS"), and collectively referred to in this litigation as the Springfield Public Day School ("SPDS"). "Neighborhood school" is a term used in this litigation to refer to elementary and middle schools which primarily enroll students based on

their residential address and high schools which enroll students through the High School Choice Plan. Each student enrolled at the SPDS has been formally diagnosed with a mental health disability. Plaintiffs assert students attending the SPDS are not only segregated from nondisabled students, but also receive educational services that are demonstrably inferior to those offered at neighborhood schools, are unable to access extracurricular activities available at neighborhood schools, and are subjected to dangerously punitive discipline.

Plaintiffs' allegations paint a picture of the SPDS which is both troubling and vigorously disputed by Defendants. Despite the concerning allegations, Plaintiffs have not brought claims arising directly from the operation of the SPDS, including claims Defendants failed to provide students who attended SPDS with educational services that met the requirements of the Individuals with Disabilities in Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq*. Instead, Plaintiffs contend Defendants violated Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, *et seq.*, by adopting a policy and practice of not providing students with mental health disabilities with necessary services in neighborhood schools. As a result of that policy or practice, a portion of students with mental health disabilities have been segregated at the SPDS, rather than attending neighborhood schools where they could have access to educational services that is equal to that enjoyed by non-disabled students.

Specifically, Plaintiffs assert Defendants enrolled members of the proposed class at the SPDS rather than offer services in those neighborhood schools that would enable members of the proposed class to be educated in neighborhood schools. Central to Plaintiffs claims are their contentions, supported by the opinions of Dr. Peter Leone, Plaintiffs' proffered expert, that Defendants have violated the ADA by failing to offer "school-based behavior services" or "SBBS" in its neighborhood schools and that all members of the proposed class would be able to attend

neighborhood schools if SBBS were offered. Plaintiffs thus seek an order compelling Defendants to provide SBBS in its neighborhood schools.

On November 19, 2015, this court denied Defendants' motions to dismiss. (Dkt. No. 102.) Prior to the court's ruling, Plaintiffs filed their Motion for Class Certification (Dkt. No. 96). Following a period of discovery, the parties filed supplemental briefing on the Motion for Class Certification in July and August of 2016. Defendants subsequently filed a Motion to Exclude or Limit the Testimony of Peter Leone, Plaintiffs' proffered expert (Dkt. No. 162), and a separate Motion for an Evidentiary Hearing (Dkt. No. 171), which Plaintiffs have opposed. For the reasons discussed below, Plaintiffs' motion will be denied and Defendants' motions will be found moot.

II. FACTUAL BACKGROUND

In this section, the court briefly summarizes the factual background relevant to this decision. This includes an overview of the way SPS provides services to members of the proposed class; a description of SBBS, as that term is used both to describe Defendants' alleged shortcomings and Plaintiffs' proposed remedy; and brief portraits of the individual members of the proposed class who have been identified by the parties. The court does not recite the concerning, and contested, allegations Plaintiffs make regarding the operation of the SPDS because such facts are relevant only to establish that students attending the SPDS do not have access to educational services equal to their counterparts who attend neighborhood schools, an issue that is not relevant to Plaintiffs' Motion for Class Certification.

A. Overview of SPS Services for Students with Mental Health Disabilities

During the 2015-16 school year, SPS enrolled 25,479 students who attended academic programs in sixty different buildings. (Dkt. No. 166, Supp. Mem. in Opp. to Class Cert. 3.) The majority of these students attend a neighborhood school. Approximately 5,000, or 20% of all SPS students, were students with disabilities. (Dkt. No. 97, Mem. in Support of Mot. for Class Cert. 2.) Dkt. No. 166 at 3.) In 2014, between 600 and 700 students were classified by SPS as having a mental health disability that interferes with their education. (Dkt. No. 97 at 2.) Approximately one-third of these students, or about 1% of SPS students, were enrolled at the three separate schools which comprise the SPDS. (*Id.*) As of May 1, 2016, 86 students were enrolled at the elementary school, 61 at the middle school, and 99 at the high school. (Dkt. No. 166-5, Aff. of Rhonda Jacobs 1.) Only students diagnosed with a mental health disability attend the SPDS. Each student placed at the SPDS receives services pursuant to an Individual Education Program ("IEP").

The majority of SPS students with mental health disabilities are not enrolled at the SPDS. (Dkt. No. 166 at 5.) Some portion of these students attend neighborhood schools and are enrolled in a Social Behavioral Support ("SEBS") program. The SEBS program provides an increased level of academic support to students who "exhibit significant and pervasive emotional and behavioral disabilities which affect overall psychological and academic functioning over a long period of time." (Dkt. No. 166 at 4.) For elementary and middle school students, the SEBS program is delivered using separate, "pull-out" classrooms. (*Id.*) High school students are provided with "behavioral and therapeutic supports throughout the day." (*Id.*) The SEBS program is offered in most, but not all, neighborhood schools. (*Id.*)

SPS has also adopted a Positive Behavioral Interventions and Supports ("PBIS") program, though the program has not yet been implemented at all schools. The PBIS program is intended to provide "proactive systems for improving student academic and behavioral outcomes for all

students." (*Id.*)The PBIS program is not one particular intervention, but rather is a "framework that guides selection, integration, and implementation of the best evidence-based academic and behavioral practices for improving important academic and behavior outcomes for all students." (*Id.*)

Plaintiffs allege SPS has not adequately implemented the programs they do offer. Plaintiffs have submitted email correspondence between various SPS employees who provide or coordinate special education evaluations and services to students. Among the issues documented in these emails are instances in which staff at a particular school failed to act in a manner consistent with SPS policies (Dkt. 159-3, 159-5, 159-6); staff at a particular school sought to have difficult students placed at the SPDS without properly documenting the need for such a placement (Dkt. 159-4, Dkt. 159-15); incomplete records may have prevented a student from receiving services (Dkt. 159-7); and students received inadequate behavior intervention plans ("BIPs") or their BIPs were inadequately implemented (159-14, 159-16). Many, if not all, of the issues raised by the emails arose in the context of activities related to SPS's compliance with its obligations under the IDEA. Plaintiffs assert the lapses documented in these emails also support their position that policies or practices existed within SPS which violated the ADA.

B. SBBS

In addition to alleging SPS has not adequately implemented the programs they offer, Plaintiffs assert those programs are inadequate to provide equal access to educational services to students with mental health disabilities. As defined by Plaintiffs, SBBS does not consist of a particular intervention or protocol. Instead, Plaintiffs define SBBS as a combination of four separate services: "(a) comprehensive assessment, including determination of the purpose and triggers for the child's behavior; (b) a school-based intervention plan that relies on positive support, social skills

building, a care coordinator, and adjustments as needed to the curriculum or schedule; (c) training for school staff and parents in implementing the plan; and (d) coordination with non-school providers involved with the child." Plaintiffs assert, and their proffered expert, Peter Leone, Ph.D., has opined, that all members of the proposed class could be educated in neighborhood schools if Defendants provide SBBS. Dr. Leone has also opined that members of the proposed class require SBBS and that there exists "a professional consensus" that students like those in the proposed class require SBBS in order to be educated in neighborhood schools and to have equal access to educational services. Though Plaintiffs and Dr. Leone discuss SBBS as though the term refers to a single program that has been formally studied and found effective for students like those in the proposed class, Plaintiffs conceded, at the hearing, that the term SBBS was created for this litigation. Though invited to do so by the court, Plaintiffs have not provided the court with any peer-reviewed studies establishing the effectiveness of programs similar to SBBS.

C. Members of the Proposed Class

Plaintiffs seek certification of a class comprised of all students who have been diagnosed with mental health disabilities and enrolled at the SPDS, rather than a neighborhood school. They have named one plaintiff, S.S. who is a member of this class. In addition, they have submitted declarations from the parents of D.S., J.R., J.C., and L.P., each of whom is a member of the proposed class. Dr. Leone provided brief descriptions of four other members of the proposed class: A.Mu., K.L., K.H., and W.C. Defendants have supplemented the information about some of these proposed class members and have provided declarations from the parents of L.C., J.M., and Z.A., three other members of the proposed class. The court briefly summarizes the information it has received regarding each of these students.

S.S.

S.S., the one named plaintiff who is part of the proposed class, has mental health disabilities including depression, attention deficit hyperactivity disorder, attention deficit disorder, and a mood disorder. He attended various neighborhood elementary schools from first grade through fourth grade. He was initially evaluated by SPS in second grade, but was not found to be eligible for special education services at that time. During fourth grade, S.S. experienced emotional and behavioral problems at school. SPS performed a psychoeducational evaluation, and S.S. also received a private psychological evaluation. SPS found S.S. eligible for special education services at that time and proposed an IEP for him. His mother accepted the IEP and S.S. began attending the SPDS elementary school at the beginning of his fifth grade year. S.S. continued to have difficulties while attending the SPDS and eventually SPS proposed S.S. be placed in an even more restrictive program within the SPDS. After consenting to the placement, S.S.'s mother filed an appeal using the administrative process provided for by the IDEA. As part of her appeal, she raised class claims similar to those raised here; however those claims were later dismissed by agreement of the parties.

While the administrative process was pending, SPS placed S.S. at the SEBS program at Chestnut Accelerated Middle School ("Chestnut"), a neighborhood school, for an extended evaluation. At the end of the extended evaluation period SPS returned S.S. to the SPDS. The administrative process initiated by S.S.'s mother concluded with a finding that S.S.'s placement at the SPDS satisfied the requirements of the IDEA and a less restrictive placement in the SEBS program at Chestnut would not have done so. S.S. has not appealed that finding, but has exhausted the administrative process available under the IDEA.

D.S.

D.S. is a member of the proposed class. He attended a neighborhood elementary school prior to being enrolled at the SPDS. (Dkt. No. 159-8, Declaration of D.S., father of D.S.) While a

student at the neighborhood school, D.S. was disciplined for certain behaviors. (*Id.*) His father does not remember the staff at the neighborhood school making any effort to determine whether the behavior was the result of D.S.'s disability; however, Defendants assert D.S. was in a SEBS program, received a Functional Behavioral Assessment ("FBA"), and had a BIP while attending his neighborhood school. When D.S. was in fourth grade, his mental health disability resulted in a one-week hospitalization. (*Id.*) Following the hospitalization, D.S. was placed at the SPDS. (*Id.*) The placement was later made permanent. D.S.'s father was not aware of any efforts made to coordinate care between the school and outside providers or to determine whether D.S. could return to his neighborhood school with proper supports. (*Id.*). Despite providing SPS with documentation from D.S.'s therapist recommending he be moved out of the SPDS, D.S. remains at the SPDS. He is currently placed in the Transitions program at the SPDS high school pursuant to an Agreement Reached Through Mediation signed by D.S.'s father.

Plaintiffs do not contend D.S. has exhausted the administrative process available under the IDEA.

J.R.

J.R. is a member of the proposed class. He has a mental health disability and began attending school at the SPDS during the 2015-16 school year. Prior to being transferred to the SPDS, J.R. attended school at the Chestnut Accelerated Middle School ("Chestnut"), a neighborhood school. While attending Chestnut, J.R. was frequently suspended from school for behavioral problems related to his mental health disability. J.R.'s father, P.R., received phone calls, but was not provided any documentation related to the suspensions.

On one occasion, staff at Chestnut called a crisis services team to provide J.R. with emergency care, but did not communicate directly with J.R.'s father. J.R. was placed in a partial hospitalization and when he was discharged from the partial hospitalization program, SPS

unilaterally placed him at the SPDS. J.R. dislikes SPDS and wishes to return to a neighborhood school.

Defendants state J.R. received an IEP, FBA, BIP, and Speech Language Evaluation when he was in second grade at his neighborhood school. Additionally, they assert he was first placed at the SPDS in 2012 for a six-week evaluation with the consent of his parents. Following the evaluation period and the examination of data collected during that time, J.R.'s IEP team recommended he return to the SEBS program at his neighborhood school. He attended that program during fourth and fifth grade before being placed at the SPDS pursuant to his IEP.

Plaintiffs do not contend J.R. has exhausted the administrative process available under the IDEA.

J.C.

J.C. is a 19-year-old resident of Springfield and member of the proposed class. He previously attended the SPDS, but dropped out without receiving a high school diploma. Prior to attending the SPDS he was enrolled in the SEBS program at the High School of Science and Technology ("Sci. Tech."), a neighborhood school. While in the SEBS program, J.C. had behavioral problems. In response, SPS transferred him to the SPDS. Although his mother wanted him transferred to another neighborhood school or a vocational program, she consented to the transfer because she did not believe she had any other choice. Defendants assert the transfer was made at the recommendation of the IEP team, following the evaluation of data collected by a behavioral specialist and a neuropsychologist. After attending the SPDS for a period of time, J.C. asked to go back to Sci. Tech. or another neighborhood high school. His request was denied and soon after he stopped attending school.

Plaintiffs do not contend J.C. has exhausted the administrative process available under the IDEA.

L.P.

L.P. was an eighth grader at the SPDS during the 2015-16 school year, has a mental health disability, and is a member of the proposed class. Prior to attending the SPDS, L.P. attended elementary school at three different neighborhood schools. When he was in fifth grade, L.P. had an FBA and a BIP. L.P. attended middle school at Chestnut. While at Chestnut, L.P. enjoyed reading and math classes, but struggled to understand his school work because of his disability. L.P. is well-behaved outside of school, but he began having behavioral problems at school. The staff at Chestnut responded to L.P.'s behavioral problems by threatening him with court or probation. L.P. was physically restrained and, on one occasion, was hit by staff at Chestnut. After that incident, L.P.'s mother, M.P., applied for a criminal complaint. The application was denied by the clerk magistrate after the Chestnut principal explained that the incident happened while L.P. was having a mental health crisis.

After M.P. filed her application for a criminal complaint, she received notice that staff at Chestnut had initiated delinquency proceedings against L.P.; M.P. believes that action was initiated in retaliation. Around the same time, SPS reassigned L.P. to the SPDS. Since M.P. was concerned about the way L.P. had been treated at Chestnut, she consented to the transfer. M.P. has tried to have L.P. moved back to a neighborhood school, but has been unsuccessful. It is her understanding that SPS would have placed L.P. back at a neighborhood school if she was willing to waive any claims for special education services for him.

Plaintiffs do not contend L.P. has exhausted the administrative process available under the IDEA.

A.Mu.

A.Mu. is fourteen years old, was enrolled at the SPDS from 2013 through June of 2015, and is a member of the proposed class. Plaintiffs' offered expert, Dr. Leone, reviewed A.Mu.'s school

records and found comments indicating that multiple SPS employees viewed his difficulties as stemming from lack of effort or motivation, rather than his disability.

Plaintiffs do not contend A.Mu. has exhausted the administrative process available under the IDEA.

K.L.

K.L. is a member of the proposed class. Prior to attending the SPDS, she was enrolled in the SEBS program at Commerce High School. During an altercation with another student, K.L. hit a police officer in the thigh while the officer attempted to place her in handcuffs. K.L. was charged with disturbing a school, assault and battery on a police officer, and resisting arrest. Plaintiff's offered expert, Dr. Leone, reviewed her records and opined that a school using SBBS would have had other tools available to help K.L. and would not have called the police or attempted to criminalize behavior that was connected to a student's mental health disability.

Plaintiffs do not contend K.L. has exhausted the administrative process available under the IDEA.

K.H.

K.H. was enrolled in the SEBS program at Van Sickle Middle School during the 2010-11 academic year and is a member of the proposed class. An IEP developed for him in January of 2011 stated that he could complete grade level curriculum with help from support staff and that he was consistently able to participate in some integrated classes. Plaintiffs' expert, Dr. Leone, opines that K.H. could have remained at a neighborhood school had he been provided with SBBS. Dr. Leone does not, however, describe particular areas of difficulty for K.H. or indicate how implementation of SBBS would have addressed his needs.

Plaintiffs do not contend K.H. has exhausted the administrative process available under the IDEA.

W.C.

W.C. is a member of the proposed class. In elementary school he was placed in a SEBS program. His records indicate he had academic and behavioral difficulties in that program. Those difficulties continued as he attended middle school at Chestnut. However, Plaintiffs' proposed expert, Dr. Leone, has reviewed his school records and concluded that W.C. received no meaningful assessment or evaluation of his behavioral challenges until he was in eighth grade. When a psychological evaluation was conducted, the recommended services included a "behavior management plan." The first BIP in W.C.'s school records was dated March 1, 2011. Just days later, before there was sufficient time to meaningfully implement the BIP, W.C. was transferred from Chestnut to the SPDS.

Plaintiffs do not contend W.C. has exhausted the administrative process available under the IDEA.

L.C.

L.C. is a member of the proposed class. He suffers from Post-traumatic Stress Disorder and Attention Deficit Hyperactivity Disorder ("ADHD"). Currently, L.C. is enrolled in the 8th grade at the SPDS. In 2008 he attended kindergarten for a second time at his neighborhood elementary school, Brightwood Elementary in a Partial Inclusion Program. He had difficulty with large groups and was behind academically. The following year he attended his neighborhood school, Mary O. Pottenger Elementary School, and was again placed in a SEBS program. He had a difficult time adjusting and was suspended for hitting, biting, and kicking staff and other students. L.C. often isolated himself from the rest of his class. From 2010 to 2014, L.C. attended the SEBS program at Gerena Elementary School, which was his neighborhood school.[1] During these years, L.C.

[1] The record is silent as to reason L.C. had three different neighborhood schools while in elementary school, but the court observes that students in transient living situations are likely to experience transitions among neighborhood schools.

continued to be aggressive towards staff and other students. He continued to self-isolate and his academics suffered. At an IEP Team meeting at the end of the 2013-14 school year, L.C.'s SPS Case Manager proposed to L.C.'s parents that he attend the SPDS middle school.

Plaintiffs do not contend L.C. has exhausted the administrative process available under the IDEA.

J.M.

J.M is a member of the proposed class and is currently a student at the SPDS middle school. He is diagnosed with ADHD and Asperger's syndrome. In 2013, while attending a Partial Inclusion Program at his neighborhood elementary school, Glickman Elementary School, J.M experienced difficulties with changes to routines, working with classmates, and high noise levels. He was often disruptive. In November of 2013, J.M. was hospitalized. When he returned from the hospital, J.M.'s SPS Case Manager proposed to his mother that he be placed at the SPDS elementary school. She agreed with the recommendation.

Plaintiffs do not contend J.M. has exhausted the administrative process available under the IDEA.

Z.A.

Z.A. is a member of the proposed class. He suffers from seizures, Post-traumatic Stress Disorder, Anxiety, Depressive Disorder, Mood Disorder and Oppositional Defiant Disorder. In the spring of 2012 he attended his neighborhood elementary school in a Partial Inclusion Program. The following fall he transitioned to a SEBS program at Marcus Kiley Middle School, his neighborhood middle school. While in the SEBS program, Z.A. had a number of difficulties. He had difficulty completing assignments and transitioning between tasks. Z.A. was argumentative with authority figures and referred to other students using inappropriate language and racial slurs. When he was

upset he would become destructive: climbing on furniture, throwing furniture, and punching walls. At some point in 2012, Z.A. was hospitalized.

At a 2013 IEP meeting, Z.A.'s mother insisted Z.A. be placed at the SPDS; the IEP Team had proposed that Z.A. remain at the neighborhood middle school. Z.A. attended the SPDS from 2013 until 2015. During that time, his use of inappropriate language decreased, he increased the percentage of assignments he completed, and his destructive behaviors diminished significantly. In January of 2016, Z.A. transitioned back to the SEBS program at his neighborhood middle school, which at that time was Van Sickle Academy.

Plaintiffs do not contend Z.A. has exhausted the administrative process available under the IDEA.

III. DISCUSSION

A. Statutory Background

As the court described in more detail in its Memorandum and Order denying Defendants' Motion to Dismiss (Dkt. No. 102), both the ADA and the IDEA impose obligations on public school districts relating to the provision of services to disabled students. Title II of the ADA is a broadly applicable civil rights statute which bars public entities from discriminating against a "qualified individual with a disability" or excluding them from participation in or denying them "the benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. Pursuant to Title II, when a public entity provides an "aid, benefit, or service," it cannot, on account of disability, give disabled individuals an "opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others." 28 C.F.R. § 35.130(b)(1)(ii). A public entity is required to "make reasonable modifications in policies, practices, or procedures" when necessary to avoid discrimination on the basis of disability unless it "can demonstrate that making the

modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7); *see also* 42 U.S.C. § 12182(b)(2)(A)(ii). The ADA does not specify how public entities must meet their general obligation to provide equal access.

The IDEA, on the other hand, imposes a detailed set of substantive and procedural obligations on school districts receiving federal funds in order to ensure school districts provide appropriate educational services to students with disabilities. Under the IDEA, the adequacy of a placement is not measured against what is provided to other students. *See, e.g. C.G. ex rel. A.S. v. Five Town Comm. Sch. Dist.*, 513 F.3d 279, 284 (1st Cir. 2008); *Bd of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 181-82 (1982). Instead, school districts are required to follow specific procedures to create, and implement, an "individualized educational program" ("IEP") for each disabled student. Substantively, each IEP must provide the disabled student with "[a] free appropriate public education," ("FAPE"). *Burlington v. Dept. of Educ.*, 736 F.2d 773, 788-89 (1st Cir. 1984). The FAPE requirement "establishes a basic floor of education." *Id.* School districts are required to "provide an adequate and appropriate education," but are not "under a compulsion to afford a disabled child an ideal or an optimal education." *C.G.*, 513 F.3d at 284.

The regulations implementing the IDEA further require that a FAPE be provided in "the least restrictive environment" ("LRE"), meaning that "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are nondisabled." 20 U.S.C. § 1412(a)(5)(A). The LRE requirement encourages placements that give disabled students access to the same educational experiences available to nondisabled students, as long as such a placement provides a FAPE, even if a disabled student might better maximize his or her educational potential in a more restricted environment. *See Roland M. v. Concord Sch. Comm.,* 910 F.2d 983, 993 (1st Cir. 1990). Under the IDEA, an appropriate educational plan must balance "the marginal benefits to be gained or lost on both sides of the maximum benefit/least restrictive fulcrum." *Id.* As with all

aspects of the development of IEPs under the IDEA, such a balancing must be based on the specific needs of the individual child.

A set of procedures are available to help parents and school districts resolve disputes related to matters governed by the IDEA. Any party is entitled to make a formal complaint about "any matter relating to the identification, evaluation, or educational placement of [a] child, or the provision of a free appropriate education to such child." 20 U.S.C. § 1415(b)(6). A complaining party "has recourse to an impartial due process hearing," either conducted by a state educational agency or conducted at the local level with an opportunity to appeal to a state educational agency. *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 58 (1st Cir. 2002). Following a due process hearing, a dissatisfied party can bring suit in state or federal court. *Id.* at 59.

The IDEA requires that a party exhaust their administrative remedies before filing suit in order to ensure the educational agency has the opportunity "to develop a factual record, to apply its expertise to the problem, to exercise its discretion, and to correct its own mistakes," prior to litigation. *Christopher W. v. Portsmouth Sch. Comm.*, 877 F.2d 1089, 1094 (1st Cir. 1989). Exhaustion is not only required before a party can litigate issues arising under the IDEA; a litigating party must also exhaust before bringing suit "pursuant to a different statute so long as the party is seeking relief that is available under subchapter II of IDEA." *Rose v. Yeaw*, 214 F.3d 206, 210 (1st Cir. 2000). Absent an exception, these procedures must be exhausted before a party can litigate a claim under the IDEA. *Id.*

Exhaustion is not required if it would be futile or inadequate. *Honig v. Doe*, 484 U.S. 305, 327 (1988) (interpreting the requirement under the predecessor statute). At the same time, "[a]llowing plaintiffs to bypass the IDEA's administrative process en route to state or federal court disrupts [the IDEA's] carefully calibrated balance and shifts the burden of factfinding from the educational specialists to the judiciary" in a manner that "is directly at odds with the method of the IDEA."

Frazier, 276 F.3d at 61. The First Circuit has balanced these competing interests by requiring exhaustion of administrative remedies where the advantages of exhaustion apply, "even though the administrative process does not offer the specific form of relief sought by the plaintiff." *Id.* A party seeking an exception to the exhaustion requirement bears the burden to demonstrate that such an exception applies. *Id.* at 59.

B. Exhaustion

As this case involves a dispute regarding the provision of special education services, the court must first determine how the IDEA administrative exhaustion requirement applies. While S.S. exhausted his administrative remedies prior to this litigation, Plaintiffs have not limited the proposed class to include only those who have exhausted their IDEA procedural remedies. Plaintiffs also have not argued that there is an exception to the exhaustion requirement applicable simply because Plaintiffs have framed this litigation as a class action, and the court has found no such exception. *See, e.g.*, *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 494 n.3 (7th Cir. 2012) (considering whether futility exception could be applied "to excuse the plaintiffs' failure to exhaust administrative remedies prior to bringing a class-action suit"); *Hoeft v. Tucson Uni. Sch. Dist.*, 967 F.2d 1298, 1304 (9th Cir. 1992) (declining to recognize a separate exhaustion exception for cases involving challenges to policies applied to all members of a proposed class). The court therefore considers whether exhaustion is required and, if so, whether an established exception applies.

When a plaintiff brings a suit under a statute other than the IDEA, exhaustion is still required if the relief sought is also available under the IDEA; however, consideration of the futility exception "overlaps with the 'relief available' language of § 1415(*l*) in the sense that relief is not available within the meaning of § 1415(*l*) if the due process hearing provided by subchapter II of IDEA does not provide relief that addresses the claim of the complainant." *Weber v. Cranston Sch.*

Comm., 212 F.3d 41, 52 (1st Cir. 2000). Thus, a plaintiff is not required to "participate in an IDEA due process hearing," before bringing a claim under the ADA, "if the relief available through such a hearing would not address the claim of the party." *Id.* However, even if an IDEA due process hearing cannot provide the exact relief sought by the party, exhaustion may be required if the underlying purposes of the exhaustion requirement will be served. *Frazier*, 276 F.3d at 61.

For example, in *Frazier*, the First Circuit ruled that a plaintiff was required to exhaust remedies available under the IDEA before filing a suit seeking money damages under 42 U.S.C. § 1983, based on violations of the IDEA, even though the specific remedy sought, money damages, is not available through the IDEA administrative process. The First Circuit reviewed the rationale behind the exhaustion requirement and determined the benefits provided by the requirement, most importantly the creation of an evidentiary record by educational professionals with specialized knowledge, would accrue where the underlying claims concerned topics relevant to the IDEA, such as "the evaluation and education of those with special needs." *Id.*

While Plaintiffs do not need to demonstrate a violation of the IDEA in order to prevail on their ADA claim, their claim does concern the delivery of services to students whose educational programs are governed by IEPs. To the extent there are flaws in the IEPs or the implementation of IEPs of members of the proposed class, requiring administrative exhaustion ensures "that educational agencies will have an opportunity to correct shortcomings in a disabled student's . . . IEP," before the dispute reaches litigation and consistent with the regulatory scheme established under the IDEA. *Id.* For example, the mother of L.P. asserts that SPS was willing to return L.P. to a neighborhood school if she waived claims to special education services; if this is accurate, it is possible that L.P. is placed at the SPDS in violation of the IDEA and administrative exhaustion could provide L.P. a remedy that would remove him from the proposed class. Similarly, if W.C. was, in fact, placed at the SPDS just days after his first BIP was drafted, exhausting his IDEA remedies

could result in a placement at a neighborhood school where the BIP can be properly implemented. Since the members of the proposed class may achieve a remedy through an IDEA administrative hearing related to the claims raised here, the court finds the IDEA exhaustion requirement applies to individual members of the proposed class.

The exhaustion requirement provides one basis for denying Plaintiffs' Motion for Class Certification. Some of the same concerns that lead the court to that decision also demonstrate that Plaintiffs have not met their burden to establish the elements required for class certification.

C. Class Certification Standard

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). This exception is justified only when there is a class representative who is part of the class and shares the same interest and injury as other class members. *Id.* Rule 23 sets out the requirements for class certification. A party seeking certification of a class bears the burden of demonstrating the proposed class meets all four of the requirements under Rule 23(a) and one of the additional requirements under Rule 23(b).[2] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011). The four requirements of Rule 23(a) are (1) numerosity, meaning the class is so numerous that joinder of all members is impracticable; (2) commonality, meaning there are questions of law or fact that are common to the class; (3) typicality, meaning there are claims or defenses available to the representative parties that are typical of those available to the other class members; and (4) adequacy, meaning the representative parties have interests sufficiently aligned with the interests of class members, and that the representatives are able

[2] In addition, counsel for the class must also demonstrate they are qualified and capable of representing the class. Fed. R. Civ. P. 23(g). This last element has not been contested by Defendants and the court, seeing no basis for any contest, finds counsel for the proposed class qualified and capable.

to fairly and adequately protect the interests of the class. Of the several requirements under Rule 23(b), Plaintiffs assert their claim satisfies 23(b)(2), which requires that the opposing party "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). When a plaintiff cannot meet their burden as to any of these elements, class certification is not warranted.

The First Circuit describes the first element, numerosity, as presenting a "low threshold," generally met where the proposed class includes at least forty members. *García-Rubiera v. Calderón*, 570 F.3d 443, 460 (1st Cir. 2009) (citing *Steward v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001)). Absent the exhaustion requirement, Plaintiffs proposed class easily meets the numerosity requirement. More than two hundred students are currently enrolled at the SPDS and there are other students who have dropped out rather than attend the SPDS. In the absence of this court's ruling regarding exhaustion, Plaintiffs would certainly have established numerosity.

Historically, the second element, commonality, has also been treated as setting a "low bar." *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F.3d 6, 19 (1st Cir. 2008). More recently, the Supreme Court has clarified that though Rule 23(a) frames the second element as requiring only a demonstration that "there are questions of law or fact common to the class," commonality requires "the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart*, 564 U.S. at 349-50. Following *Wal-Mart*, it is not sufficient for a plaintiff to allege merely that all class members have suffered a violation of the same law; plaintiffs' "claims must depend upon a common contention" and "[t]hat common contention . . . must be of such a nature that it is capable of classwide resolution." *Id.* at 350. A contention is capable of classwide resolution if the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

Here, Plaintiffs assert "that Springfield's systemic denial of SBBS 'harms all students in the class,'" the failure to offer SBBS either violated the ADA as to all students or no students, and, therefore, an order requiring SPS to provide SBBS at all neighborhood schools would resolve the case for all class members. (Dkt. No. 157 Pls.' Supp. Mem. in Supp. of Mot. for Class Cert., quoting Dkt. 158-1, Leone Statement, at ¶ 54.) The court does not find this framing persuasive. Plaintiffs have placed SBBS at the center of their claim, alleging a failure to provide it caused a common harm to all members of the proposed class and that an order requiring Defendants to provide it would provide a classwide remedy. Implicit in the framing is the presumption that SBBS is a term that refers to a well-defined program that can be implemented in a manner that will benefit all members of the proposed class regardless of the specific histories, diagnoses, and behaviors of individual class members. Yet, at the hearing, Plaintiffs conceded that SBBS is only a term they put forth for this litigation to refer to a specific set of obvious, best-practice-related services. Plaintiffs were unable to direct the court to any academic studies that include the concept of an actual SBBS program as they framed it.

Plaintiffs' admission that SBBS is not an identifiable program or even a term used within the wider special education field directly undercuts Dr. Leone's assertions that there the exists "a professional consensus" that students like the proposed class members "require SBBS" in order to access educational services equal to those available to students without disabilities and could only be successfully educated in neighborhood schools if SBBS were provided. (Dkt. No. 158-1, Leone Statement ¶ 41.) It also raises the question of how Defendants could have had a policy or practice with respect to the provision of SBBS, prior to the initiation of this suit, which could form the basis of an ADA violation.

Looking past the packaging, the court finds insufficient evidence to establish all SPDS placements of members of the proposed class could have been prevented by the provision of the

services comprising SBBS. The court further finds insufficient evidence these SBBS phrased services could provide a single remedy applicable to the whole class. The four services comprising SBBS are described by Plaintiffs in extraordinarily broad terms, consistent with common sense but offering no insight into practical application. Each service would need to be implemented using the same type of individualized process already required under the IDEA. Even if these services could, in theory, provide a universally positive outcome, the diversity of circumstances affecting members of the proposed class will create a myriad of unique challenges that will have to be overcome on a student by student basis in order to implement each of these entwined services. For example, determining behavioral triggers may prove to be a very difficult undertaking for some members of proposed class and implementing parental training will be difficult, if not impossible, for some members of the proposed class. Additionally, while the ADA obligates school districts to make accommodations necessary to provide equal access to educational services to all students regardless of disability, that obligation must be harmonized with the far more specific obligations imposed by the IDEA. *U.S. v. Lahey Clinic Hospital, Inc.*, 399 F.3d 1, 10 (1st Cir. 2005) (stating federal statutes are to be read harmoniously, unless Congress has clearly and unambiguously expressed a contrary intent). Each member of the class was placed following the creation of an IEP and any alternative placement would have to satisfy both the equal access obligation under the ADA and the individualized obligations under the IDEA, a determination that must be made separately for each student. In short, Plaintiffs have failed to demonstrate that all SPDS placements could have been prevented by the provision of or that SBBS could be applied to effect a classwide remedy.

Having concluded that Plaintiffs have not met their burden with respect to the commonality element for class certification, the court could end its analysis here. However, for reasons similar to those underlying the court's conclusion that IDEA exhaustion is required of all plaintiffs in this case, the court determines that Plaintiffs have also failed to establish the third and fourth requirements of

Rule 23(a): typicality and adequacy. Prior to bringing this suit, Plaintiff first exhausted his IDEA remedies. This process included a finding that SPS had met its obligations to provide S.S. with a FAPE in the LRE. Plaintiffs have not challenged that determination and so it is the law of this case with respect to S.S., distinguishing the claims available to S.S. from those that may be available to other members of the proposed class. Similarly, the fact S.S. has exhausted his IDEA remedies sets his claims apart from those of other members of the proposed class who have not exhausted, and prevents Plaintiffs from demonstrating that S.S. can fairly and adequately represent the class. *See Miller v. Board of Ed. Of Albuquerque Pub. Sch.*, 455 F. Supp. 2d 1286, 1294 (D. N.M. 2006).

IV. CONCLUSION

For the reasons discussed above, the court denies Plaintiffs' Motion for Class Certification. For purposes of reaching this ruling the court has considered the opinions of Plaintiffs' proffered expert, without first deciding whether such consideration is warranted. As Defendants' have achieved their desired outcome as to the Motion for Class Certification, the court finds moot their Motion to Exclude or Limit and their Motion for an Evidentiary Hearing.

It is So Ordered.

_/s/ Mark G. Mastroianni_____
MARK G. MASTROIANNI
United States District Judge

Addendum B

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

S.S., a minor, by his mother, S.Y., on behalf of himself and other similarly situated students; the PARENT/PROFESSIONAL ADVOCACY LEAGUE; and the DISABILITY LAW CENTER, Plaintiffs, v. CITY OF SPRINGFIELD, MASSACHUSETTS; DOMENIC SARNO, in his official capacity as Mayor of City of Springfield; SPRINGFIELD PUBLIC SCHOOLS; DANIEL J. WARWICK, in his official capacity as Superintendent of Springfield Public Schools, Defendants.	*	Civil Action No. 14-30116-MGM

MEMORANDUM AND ORDER ON DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

(Dkt. No. 203)

July 19, 2018

MASTROIANNI, U.S.D.J.

I. INTRODUCTION

Following this court's rulings denying Defendants' motion to dismiss and denying Plaintiffs' motion for class certification, Defendants filed a Motion for Judgment on the Pleadings. Defendants assert in their motion, that each of the association plaintiffs, the Parent/Professional Advocacy League ("PPAL") and the Disability Law Center ("DLC"), lack standing in this case. For the reasons set forth below, the court finds the allegations in the Amended Complaint, previously detailed in the

court's order denying Defendants' Motion to Dismiss, are sufficient to establish that PPAL and DLC have associational standing in this case. Upon concluding PPAL and DLC have associational standing, the court analyzes whether concerns regarding exhaustion warrant entry of judgment on the pleadings in favor of Defendants as to these association plaintiffs. The issue of exhaustion was first raised by Defendants in the context of the standing argument and later briefed separately in response to a request by this court. For the reasons explained below the court will enter judgment for Defendants.

II. PROCEDURAL HISTORY

On June 27, 2014, PPAL and S.S., by his mother S.Y., as an individual and representative of a proposed class of students with mental health disabilities who attend or in the future could attend the Public Day School,[1] filed this action against the City of Springfield, Springfield Public Schools ("SPS"), and the mayor of Springfield and superintendent of SPS, each in their official capacity. (Compl., Dkt. No. 1.) The one-count complaint alleged Defendants violated Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 *et seq.*, with respect to S.S. and members of the proposed class by failing to provide the educational programs and services that would have allowed them equal access to the educational resources offered students attending neighborhood schools.[2] Instead, the complaint alleged, SPS places members of the proposed class at the Public Day School, a school operated by SPS and attended only by students with mental health disabilities. The plaintiffs sought preliminary and permanent injunctions requiring Defendants to provide the proposed class with "the school-based behavior services they need to enjoy equal

[1] The court continues to use the term Public Day School to refer collectively to the elementary, middle, and high school Public Day School programs as any distinctions between them are not relevant to the court's current analysis.

[2] Neighborhood schools are elementary and middle schools which primarily enroll students based on their residential address and high schools which enroll students through the High School Choice Plan.

educational opportunity and receive educational programs and services in the most integrated setting, as required by Title II of the ADA."[3] (Compl. Dkt. No. 1, 20.) In addition to allegations related to the experiences of S.S., the complaint included allegations related to various deficiencies at the Public Day School that had been identified in reports made by the Department of Elementary and Secondary Education ("DESE").

Defendants responded by collectively filing a motion to dismiss (Dkt. No. 34) asserting that the plaintiffs had failed to "state a claim on which relief can be granted." Fed. R. Civ. P. 12(b)(6). Their central arguments were (1) the deficiencies identified in the DESE reports were not a sufficient basis for the ADA claim and (2) the ADA claim was not properly brought because (a) S.S. had failed to first exhaust administrative remedies and/or (b) the private right of action established under the ADA was not applicable to the plaintiffs' claim. Additionally, Defendants argued the claims against the individual defendants should be dismissed because individuals are not subject to suit under the ADA. At that time, Defendants did not raise any concerns about the standing of PPAL.

After the plaintiffs opposed the motion, but before the court issued its ruling, the plaintiffs sought leave to file an amended complaint including DLC as an additional plaintiff; adding allegations about a second student and member of the proposed class, N.D.; adding factual allegations related to events occurring after the suit was filed; and adjusting the definition of the proposed class. (Dkt. No. 48.) The Amended Complaint also removed allegations related to violations allegedly identified in DESE reports. (Dkt. No. 49-2). Defendants opposed the motion on various grounds. However, rather than challenging the standing of DLC at that time, Defendants explicitly "reserved the right" to challenge standing at a later stage. (Dkt. No. 50.)

[3] Plaintiffs also sought an order permitting the case to be litigated as a class action, declaratory judgment that the defendants had violated Title II with respect to the proposed class, and an award of attorneys' fees and costs.

This court allowed the filing of the Amended Complaint. (Dkt. No. 53.) Plaintiffs subsequently filed a sur-reply to the motion to dismiss, but neither party asked to otherwise supplement the briefing on the motion to dismiss following the filing of the Amended Complaint. After holding a hearing on the matter, the court denied the motion to dismiss, except as to the claims asserted against individual defendants. Consistent with the arguments made by Defendants, the court focused its analysis on the legal sufficiency of the specific claims made by S.S., including legal questions regarding the limits the Individuals with Disabilities in Education Act ("IDEA") imposes on efforts to bring an ADA claim related to the provision of educational services in a public school setting. The IDEA requires states to provide "[a] free appropriate public education [("FAPE")] to all children with disabilities" and also requires that, "[t]o the maximum extent appropriate" children with disabilities receive FAPE in the least restrictive environment ("LRE").[4] 20 U.S.C. § 1412(a). The IDEA also includes language specifically stating the rights it provides do not supersede rights that might otherwise be available pursuant to other statutes. 20 U.S.C. § 1415(l). However, before a litigant can file suit under another statute in order to seek a remedy available under the IDEA, they must first exhaust the IDEA administrative process. *Id.*

Central to the parties' arguments was whether Plaintiffs' ADA claims were simply disguised IDEA claims. Defendants argued this was the case and, therefore, IDEA exhaustion was not only required, but proper exhaustion necessarily included an appeal of the administrative ruling finding no IDEA violation. Plaintiffs countered they sought relief for conduct that violated only the ADA and since they were not alleging any violation of the IDEA, administrative exhaustion did not require them to appeal the administrative ruling applying the IDEA. Though the statutory language

[4] In order to meet the LRE requirement, children with disabilities must be educated together with children without disabilities unless "the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5).

is easily recited, its application in this case was not self-evident. Relying on the First Circuit's decision in *Frazier v. Fairhaven School Committee*, 276 F.3d 52 (1st Cir. 2002), this court concluded that since exhaustion is required "though a party might seek relief that 'is not available in the administrative venue,'" Plaintiffs were required to exhaust the IDEA administrative procedures, even if the specific relief sought could not be provided through that process. *S.S. v. City of Springfield ("S.S. I")*, 146 F. Supp. 3d 414, 418 (D. Mass. 2015). This court went on to conclude that S.S. had fulfilled the exhaustion requirement by proceeding through a hearing before the Massachusetts Board of Special Education Appeals ("BSEA") and was not required to also bring an IDEA claim appealing the BSEA's decision in order to proceed with the ADA claim.

Following this court's ruling denying Defendants' motion to dismiss as to the Springfield defendants, Plaintiffs filed a motion for certification of the proposed class. In deciding that motion, this court once again considered the question of exhaustion in light of the First Circuit's decision in *Frazier* and determined that because the claims of the putative class members "concern[ed] the delivery of services to students whose educational programs are governed by [individualized education programs ("IEPs")]," [5] the exhaustion requirement applied to each member of the putative class. *Springfield (S.S. II)*, 318 F.R.D. 210, 222 (D. Mass. 2016). As Plaintiffs conceded that putative class members, other than S.S., had not exhausted the remedies available under the IDEA, the court found exhaustion was one basis for denying the motion to certify the class. *Id.* at 223-24. Following the court's denial of the motion for class certification, Defendants filed the instant Motion for Judgment on the Pleadings. Defendants seek entry of judgment against PPAL and DLC, on the grounds that they lack standing to participate in this action.

[5] Under the IDEA, "as a condition for receiving federal funds, states must provide all disabled children with a FAPE" and IEPs are "[t]he primary vehicle for delivery of a FAPE." *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 518 F.3d, 18, 23 (1st Cir. 2008); *see also* 20 U.S.C. §§ 1401(8), 1412(a)(1)(A, 1414(d)(1)(A).

Since the motion was filed, S.S. has been voluntarily dismissed from this case, leaving PPAL and DLC as the only plaintiffs. In the course of arguing that Plaintiffs lack standing, Defendants raised concerns about IDEA exhaustion. As the court had not previously considered how the IDEA exhaustion requirement applied to PPAL and DLC, the court requested the parties submit supplemental briefing as to whether IDEA exhaustion is required before the ADA claim advanced by PPAL and DLC can be brought.

III. STANDING

"Article III of the Constitution confines the judicial power of federal courts to deciding actual 'Cases' or 'Controversies.'" *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013). As a result, "any person invoking the power of a federal court must demonstrate standing to do so." *Id.* "[B]ecause standing is a prerequisite to a federal court's subject matter jurisdiction, the absence of standing may be raised at any stage of a case." *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 730 (1st Cir. 2016); *see also Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98, 101 (1st Cir. 2014) ("[W]hether a plaintiff has Article III standing implicates a federal court's subject-matter jurisdiction and, thus, must be resolved no matter how tardily the question is raised."). As there has already been a motion to dismiss, Defendants have labeled their filing as a motion for judgment on the pleadings and invoke Federal Rule of Civil Procedure 12(c), rather than 12(b)(1).

Generally, "'[a] motion for judgment on the pleadings [under Rule 12(c)] is treated much like a Rule 12(b)(6) motion to dismiss,' with the court viewing 'the facts contained in the pleadings in the light most favorable to the nonmovant and draw[ing] all reasonable inferences therefrom.'" *In re Loestrin 24 Fe Antitrust Litig.*, 814 F.3d 538, 549 (1st Cir. 2016) (alterations in original) (quoting *Pérez-Acevedo v. Rivero-Cubano,* 520 F.3d 26, 29 (1st Cir. 2008)). At the pleading stage, the same "plausibility standard applicable under Rule 12(b)(6)" applies to standing determinations. *Hochendoner*, 823 F.3d at

730. As a result, "the plaintiff bears the burden of establishing sufficient factual matter to plausibly demonstrate . . . standing to bring the action." *Id.* Because "[t]he standing inquiry is both plaintiff-specific and claim-specific," PPAL and DLC must demonstrate they each have standing in their own right in order to continue as plaintiffs in this case. *Pagán v. Calderón*, 448 F.3d 16, 26 (1st Cir. 2006).[6]

"The doctrine of standing is of both constitutional and prudential dimension." *Mangual v. Rotger-Sabat*, 317 F.3d 45, 56 (1st Cir. 2003). In order to establish standing, "a plaintiff must show that '(1) he or she has suffered some actual or threatened injury as a result of the challenged conduct; (2) the injury can be fairly traced to that conduct; and (3) the injury likely will be redressed by a favorable decision from the court.'" *Id.* (quoting *N.H. Right to Life PAC. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996)). While these requirements generally prevent a litigant from bringing a claim based on harms experienced by others, under the doctrine of associational standing "an organization may sue to redress its members' injuries, even without a showing of injury to the association itself."

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[6] Plaintiffs have argued the opposite, that they need only show that one named plaintiff has standing for the court to have subject matter jurisdiction over the entire case. However, while "[i]t is a settled principle that when one of several co-parties (all of whom make similar arguments) has standing, an appellate court need not verify the independent standing of the others," a district court cannot ignore a standing challenge when considering a case in the first instance. *Compare Houlton Citizens' Coal. v. Town of Houlton*, 175 F.3d 178, 183 (1st Cir. 1999)(ending standing analysis after concluding one appellant had standing to challenge lower court order); *Horne v. Flores*, 557 U.S. 433 (2009) (stating the Court need only assure itself that at least one petitioner had standing when hearing an appeal that "implicate[d] the [lower court] orders in their entirety"); *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007) (noting the Court need only find one petitioner has standing to consider appeal of a lower court order denying a petition for review of a federal administrative order); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977) (recognizing standing of individual plaintiff sufficient basis for court's jurisdiction over appeal of lower court order without requiring court to resolve prudential questions related to associational standing of association plaintiff) *with Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (stating plaintiff "bears the burden of showing that he has standing for each type of relief sought) and *Pagan*, 448 F. 3d at 326 ("The standing inquiry is both plaintiff-specific and claim-specific."). Applied at this stage, the approach advocated by Plaintiffs would permit a district court to simply ignore the issue of standing in any case where at least one plaintiff clearly has standing. This result would clearly violate Article III.

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United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc., 517 U.S. 544, 552 (1996). Organizations seeking to establish standing "must clearly allege facts demonstrating standing; [the court] then construe[s] those facts and reasonable inferences drawn from them in plaintiffs' favor." *Animal Welfare Inst. v. Martin*, 623 F.3d 19, 25 (1st Cir. 2010).

"[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977). Though the first two of these elements are required by Article III, the third element is prudential only – a court-constructed limit on the exercise of jurisdiction to prevent actions that would "fail[] to resolve the claims of the individuals ultimately interested." *Brown Group*, 517 U.S. at 558. DLC additionally argues that Congress has abrogated the third element as to claims brought by protection and advocacy organizations, including DLC, created under the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. § 10801 *et seq.*, ("PAIMI Act").

Turning to the first two elements, the court considers whether the Amended Complaint adequately establishes that PPAL and DLC have at least one constituent with individual standing to sue and whether efforts to support the educational needs of students attending the Springfield Day School are germane to the each organization's core purposes.[7] *Animal Welfare*, 623 F.3d at 25. As the plaintiffs, PPAL and DLC have the burden of showing at least one constituent (1) "suffered some actual or threatened injury" that (2) "can fairly be traced" to the failure of SPS to provide the school-based behavioral services ("SBBS") PPAL and DLC seek, and (3) that "injury likely will be redressed

[7] For purposes of the standing inquiry, this court considers the "defined and discrete constituency" of each organization to occupy the same position as formal members. *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 326 (D. Mass. 2013) (citing *NAACP v. Harris*, 567 F. Supp. 637, 640 (D. Mass. 1983)).

by a favorable decision from the court." *Mangual*, 317 F.3d at 56 (quoting *N.H. Right to Life PAC. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996). The Amended Complaint identifies two individual students who were allegedly harmed by being placed at the Springfield Public Day School: S.S. and N.D., both of whom were constituents of PPAL and DLC at the time the Amended Complaint was filed. The court finds the allegations in the Amended Complaint sufficiently assert that each of these students suffered an actual injury as a result of attending the Public Day School, they would have attended neighborhood schools had SBBS been available, and their educational needs would have been better met at neighborhood schools offering SBBS. Additionally, the involvement of both PPAL and DLC in this litigation, and its attempt to secure access to better educational services for a set of constituents, is consistent with the core purposes each organization serves.

This brings the court to the third requirement for associational standing, that the "individual members' participation is not necessary to either the claim asserted or the relief requested." *Animal Welfare*, 623 F.3d at 25. As noted above, unlike the first two requirements, this third requirement does not arise from Article III of the Constitution. Instead, the courts created this requirement to address "matters of administrative convenience and efficiency." *Brown Group*, 517 U.S. at 556. Again referencing this court's decision to deny class certification, Defendants argue this third prong weighs against PPAL and DLC establishing associational standing because the relevant harms, if any, suffered by their constituents require individualized remedies. Defendants also point to the court's earlier ruling finding exhaustion was required and assert relief is unavailable for any constituent who has not exhausted. In response, Plaintiffs argue the relief they request can be granted without the participation of individual constituents and, therefore, this third prong is satisfied. Additionally, Plaintiffs argue that Congress abrogated application of this third prong to the DLC through statutes which authorize DLC to seek legal remedies for its constituents.

This court's denial of the motion for class certification followed a probing review of submissions from both parties that went well beyond the amended complaint. That review led the court to determine class certification was not appropriate because Plaintiffs had not demonstrated the members of the proposed class had suffered the same injury and a common remedy would apply to the whole class. The court also declined to certify the class because of its concerns regarding the application of the IDEA exhaustion requirement. While these conclusions raise substantive questions about the viability of the claims brought by PPAL and DLC, they do not, and should not, have a direct bearing on the threshold issue of standing. For this reason, the court assesses the third element of associational standing in the context of the allegations made in the Amended Complaint. As presented there, PPAL and DLC seek prospective relief to address an alleged problem that has caused the same harm to a group of their constituents and, therefore, does not require the participation of individual students. Viewed in this way, the court cannot conclude that the prudential concerns underlying the third element provide a basis for finding that PPAL and DLC lack associational standing.

IV. EXHAUSTION

The court has addressed the IDEA exhaustion requirement in each of its previous decisions in this case, first its application to the individual claims of S.S. and then the relevance of the requirement when claims were asserted for the prospective class. Defendants' motion raised the question of how the IDEA exhaustion requirement applies to PPAL and DLC in the context of their standing argument. As discussed above, the court disagrees with Defendants' arguments that the general absence of exhaustion by constituents of PPAL and DLC prevents PPAL and DLC from having standing. However, as discussed in the court's prior opinions, IDEA exhaustion, when required, is a necessary prerequisite to bringing a claim pursuant to the ADA. As S.S., the only

constituent PPAL and DLC has ever identified as having exhausted IDEA remedies, is no longer a party to this case or a constituent of PPAL and DLC, the court finds it appropriate to consider whether the IDEA exhaustion requirement warrants entry of judgment on the pleadings. *See e.g. U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 446 (1993) ("[A] court may consider an issue 'antecedent to ... and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief.") (quoting *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)). The court, therefore, invited the parties to file supplemental briefs addressing the application of the IDEA exhaustion requirement, independent of the standing analysis.

Under the IDEA, parties must exhaust the available administrative remedies before filing a civil action under another law if the parties are "seeking relief that is also available under [IDEA]." 20 U.S.C. § 1415(*l*). The First Circuit has ruled the exhaustion requirement is not absolute and, therefore, it is not determinative of a court's subject matter jurisdiction to hear a case, but rather is a condition precedent to entering federal court. *Frazier*, 276 F.3d at 59. As a result, where IDEA exhaustion is required, a plaintiff who has not exhausted cannot proceed with an ADA claim. See *id.*

When determining whether exhaustion is required in a particular case, courts have struggled to articulate a balanced analytic approach that does not undercut the exhaustion requirement and does not improperly burden litigants asserting claims under other statutes. In the ruling on class certification this court, extrapolating from the First Circuit's ruling in *Frazier*, concluded that exhaustion is required in this case because the benefits that accrue from exhaustion, notably the development of an administrative record by a state agency with specialized knowledge, would assist the court's consideration of the claim brought under the ADA, even though, as in *Frazier,* the exact remedy sought was not available through the IDEA administrative process. *S.S. II*, 318 F.R.D. at 221-22. The court considered whether an exception to the exhaustion requirement could apply in an action seeking relief for a class. *Id.* at 221. The court found no basis for an exception applicable

simply because a case is framed as a class action. *Id.* Additionally, the court found that the underlying purposes of the exhaustion requirement, which are to ensure that prior to litigation educational agencies have an opportunity to address problems with the formulation or implementation of a student's IEP and educational professionals create an evidentiary record, are relevant in this case. *Id.* at 221-22.

After this court reached the conclusion that IDEA exhaustion is required in this particular case, the Supreme Court provided additional guidance as to how courts should decide whether IDEA exhaustion is required before a claim may be litigated under the ADA. *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017). Specifically, the Supreme Court has confirmed that IDEA exhaustion is only required if the suit asserted under another statute "seek[s] relief for the denial of a FAPE, because that is the only 'relief' the IDEA makes 'available.'" *Id.* at 752. In order to determine whether a suit seeks relief for the denial of a FAPE, the Supreme Court advises courts to "consider substance not surface," and ask two hypothetical questions: "could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school . . . [a]nd second, could an *adult* at the school . . . have pressed essentially the same grievance." *Id.* at 755, 56 (emphasis in original). If the answers to these hypotheticals are no, then, the Supreme Court advises, "the complaint probably does concern a FAPE" and exhaustion is required.[8] *Id.* at 756.

[8] Left unresolved by the *Fry* ruling is the question of whether exhaustion is required when a student complains of a violation of FAPE but seeks a remedy that cannot be provided by the IDEA administrative process, such as an award of monetary damages. In the absence of clarification of this point from the Supreme Court, this court continues to follow the approach taken by the First Circuit in *Frazier*, which is to require exhaustion, even if monetary damages are sought, because the ultimate determination as to the appropriateness of monetary damages will be informed by the administrative record assembled during the exhaustion of IDEA procedural remedies. Regardless, Plaintiffs here are not claiming the alleged ADA violations deprived any of their constituents of a FAPE, nor are they seeking money damages.

Plaintiffs assert their case is an "equal access" case, rather than one seeking FAPE, yet when these two hypotheticals are asked of the ADA claim in this case, the answer to both is clearly no.[9] The court can think of no other public facility where the ADA would require provision of the range of services Plaintiffs seek, nor can the court imagine a situation in which a school would be required to provide such services to an adult at the school. Applying these hypothetical questions to this case clarifies that the IDEA exhaustion requirement applies here and that a plaintiff who cannot demonstrate IDEA exhaustion of its claim cannot state a valid claim for relief under the ADA.

PPAL and DLC argue an exception to the exhaustion requirement should be made for them because (1) IDEA administrative remedies are available only to students' families and local educational authorities, not entities like PPAL and DLC, (2) any such exhaustion would be futile

[9] Plaintiffs cite two cases decided since *Fry* in which courts found exhaustion was not required and argue for a similar outcome here. Not only are these cases from other circuits and their analysis not binding on this court, but both of those cases are distinguishable from this case in important respects. In *J.S., III by & through J.S. Jr. v. Houston Cty. Bd. of Educ.*, the parents of a student who was removed by a paraprofessional from his classroom to an isolated area in violation of his IEP and subjected to verbal and physical abuse by that same individual sued the school district, without first exhausting under IDEA. 877 F.3d 979 (11th Cir. 2017). The Eleventh Circuit noted that the case did not "fit neatly into *Fry's* hypotheticals" and found exhaustion was not required because the plaintiff had presented sufficient evidence that the student had been removed from his classroom for discriminatory reasons that had "no purpose related to his education." *Id.* at 986. In this case, Plaintiffs have not challenged that students were placed at the Public Day School pursuant to IEPs which met the requirements of IDEA, meaning they provided FAPE in the LRE. Thus, the reason any student was placed at the Public Day School was directly related to the student's education. Additionally, since neighborhood schools necessarily are less restrictive environments than the separate Public Day School, the placement of a student at the Public Day School only complied with the IDEA if it was first determined that a student could not receive FAPE in the neighborhood school, even "with the use of supplementary aids and services." 20 U.S.C. § 1412(l). These facts also distinguish this case from the other case cited by Plaintiffs, *Abraham P. v. Los Angeles Unified Sch. Dist.*, No. CV 17-3105-GW (FFMx), 2017 WL 4839071 (C.D. Cal. Oct. 5, 2017). In *Abraham P.*, a disabled student was subjected to physical abuse that was allowed to continue even after the student's parents complained and the abuse interfered with the student's ability to access his educational program. *Id.* at *4. In finding plaintiff did not seek redress for failure to provide FAPE and, therefore, was not required to exhaust, the court observed that the amended complaint indicated the student was doing well and did not need additional education services, demonstrating that his suit was about damages for past discrimination rather than a remedy for a denial of FAPE. In this case, the remedy sought by Plaintiff is the provision of an array of new services necessary to allow students to receive FAPE in their neighborhood schools.

because the relief sought is not available through the IDEA administrative process, and (3), in the case of DLC, any exhaustion requirement is abrogated for Protection and Advocacy groups seeking systemic remedies. These arguments are not persuasive because each is premised on the assumption that PPAL and DLC are, in fact, seeking systemic relief for a failure to provide services unrelated to the provision FAPE to a particular group of students. The court sees the situation differently.

In the context of this case, whether the ADA requires something more than the IDEA cannot be determined without consideration of what the IDEA requires. The IDEA sets up a detailed system for ensuring that disabled students receive individualized educational services and the exhaustion requirement ensures that courts asked to make determinations about whether a student has received FAPE in the LRE have the benefit of an administrative record assembled by educational experts. At the motion to dismiss stage, this court narrowly determined dismissal was not appropriate because a gap exists between the requirements of the IDEA and those of the ADA. The court observed that in the context of S.S., such a gap could exist only if the ADA required some support, as a reasonable accommodation, that would have enabled S.S. to attend a neighborhood school and receive FAPE, but that was not required under the IDEA. *S.S. I*, 146 F. Supp.3d at 424. While the court expressed some doubt as to whether such a gap could be ultimately be shown, the Amended Complaint had adequately pleaded facts from which the court could infer there were services which could be required by the ADA, but not the IDEA, that would enable S.S. to attend a neighborhood school. The administrative record from S.S.'s BSEA appeal would clearly be relevant to making such a determination.

Though S.S. is no longer a party to this litigation, the needs served by the exhaustion requirement are still relevant. As set out in the Amended Complaint, the relief sought by PPAL and DLC is closely related to questions about the provision of FAPE to their constituents. As a result,

IDEA exhaustion is required. In the absence of such exhaustion, PPAL and DLC are unable to state a claim for relief under the ADA.[10]

V. CONCLUSION

For the reasons discussed above, the court finds PPAL and DLC have associational standing, but grants Defendants' Motion for Judgment on the Pleadings based on the absence of IDEA exhaustion.

It is So Ordered.

_/s/ Mark G. Mastroianni_____
MARK G. MASTROIANNI
United States District Judge

[10] Quite possibly the court would reach a different conclusion if, for example, PPAL and DLC alleged SPS was preventing them from assisting specific families seeking to determine whether their children were receiving appropriate services or that there was a pattern or practice that was preventing a large group of students from receiving FAPE in the LRE. *See Michigan Prot. & Advocacy Serv., Inc. v. Flint Cmty. Sch.*, 146 F. Supp. 3d 897 (E.D. Mich. 2015) (ruling IDEA exhaustion requirement inapplicable to claims brought by a protection and advocacy organization after not receiving timely responses to requests for educational records for certain students, submitted with parental consent forms); *New Jersey Prot. & Advocacy, Inc. v. New Jersey Dep't of Educ.*, 563 F. Supp. 2d 474 (D.N.J. 2008) (ruling IDEA exhaustion not required because the claims made by statewide advocacy organizations did not seek "individual remedies necessary to make themselves or their constituents whole."). PPAL and DLC, however, have not made such claims.

Addendum C

1412(a)(5)(A) of this title and paragraph (1)(A) if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(e) Educational placements

Each local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

(f) Alternative means of meeting participation

When conducting IEP team[2] meetings and placement meetings pursuant to this section, section 1415(e) of this title, and section 1415(f)(1)(B) of this title, and carrying out administrative matters under section 1415 of this title (such as scheduling, exchange of witness lists, and status conferences), the parent of a child with a disability and a local educational agency may agree to use alternative means of meeting participation, such as video conferences and conference calls.

(Pub. L. 91–230, title VI, § 614, as added Pub. L. 108–446, title I, § 101, Dec. 3, 2004, 118 Stat. 2702.)

PRIOR PROVISIONS

A prior section 1414, Pub. L. 91–230, title VI, § 614, as added Pub. L. 105–17, title I, § 101, June 4, 1997, 111 Stat. 81, related to evaluations, eligibility determinations, individualized education programs, and educational placements, prior to the general amendment of subchapters I to IV of this chapter by Pub. L. 108–446.

Another prior section 1414, Pub. L. 91–230, title VI, § 614, Apr. 13, 1970, 84 Stat. 181; Pub. L. 94–142, § 5(a), Nov. 29, 1975, 89 Stat. 784; Pub. L. 98–199, § 3(b), Dec. 2, 1983, 97 Stat. 1358; Pub. L. 100–630, title I, § 102(d), Nov. 7, 1988, 102 Stat. 3293; Pub. L. 101–476, title IX, § 901(b)(59)–(70), Oct. 30, 1990, 104 Stat. 1144, 1145; Pub. L. 102–119, §§ 6, 25(b), Oct. 7, 1991, 105 Stat. 591, 607, related to requisite features of an application, approval of application by State educational agency, consolidated applications of local educational agencies, and provision of special education and related services directly to children with disabilities in areas not served by local educational agency, prior to the general amendment of subchapters I to IV of this chapter by Pub. L. 105–17.

A prior section 1414a, Pub. L. 91–230, title VI, § 614A, as added Pub. L. 103–382, title III, § 312, Oct. 20, 1994, 108 Stat. 3934, which related to treatment of State agencies that received funds for fiscal year 1994 under subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 (as in existence on the day preceding Oct. 20, 1994), was omitted in the general amendment of subchapters I to IV of this chapter by Pub. L. 105–17.

§ 1415. Procedural safeguards

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

(b) Types of procedures

The procedures required by this section shall include the following:

(1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

(2)(A) Procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents, which surrogate shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child. In the case of—

(i) a child who is a ward of the State, such surrogate may alternatively be appointed by the judge overseeing the child's care provided that the surrogate meets the requirements of this paragraph; and

(ii) an unaccompanied homeless youth as defined in section 11434a(6) of title 42, the local educational agency shall appoint a surrogate in accordance with this paragraph.

(B) The State shall make reasonable efforts to ensure the assignment of a surrogate not more than 30 days after there is a determination by the agency that the child needs a surrogate.

(3) Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency—

(A) proposes to initiate or change; or

(B) refuses to initiate or change,

the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

(4) Procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so.

(5) An opportunity for mediation, in accordance with subsection (e).

(6) An opportunity for any party to present a complaint—

(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and

(B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this subchapter, in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph.

(7)(A) Procedures that require either party, or the attorney representing a party, to provide due process complaint notice in accordance with subsection (c)(2) (which shall remain confidential)—

[2] So in original. Probably should be capitalized.

(i) to the other party, in the complaint filed under paragraph (6), and forward a copy of such notice to the State educational agency; and

(ii) that shall include—

(I) the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;

(II) in the case of a homeless child or youth (within the meaning of section 11434a(2) of title 42), available contact information for the child and the name of the school the child is attending;

(III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(IV) a proposed resolution of the problem to the extent known and available to the party at the time.

(B) A requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements of subparagraph (A)(ii).

(8) Procedures that require the State educational agency to develop a model form to assist parents in filing a complaint and due process complaint notice in accordance with paragraphs (6) and (7), respectively.

(c) Notification requirements

(1) Content of prior written notice

The notice required by subsection (b)(3) shall include—

(A) a description of the action proposed or refused by the agency;

(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(D) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;

(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and

(F) a description of the factors that are relevant to the agency's proposal or refusal.

(2) Due process complaint notice

(A) Complaint

The due process complaint notice required under subsection (b)(7)(A) shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements of subsection (b)(7)(A).

(B) Response to complaint

(i) Local educational agency response

(I) In general

If the local educational agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint notice, such local educational agency shall, within 10 days of receiving the complaint, send to the parent a response that shall include—

(aa) an explanation of why the agency proposed or refused to take the action raised in the complaint;

(bb) a description of other options that the IEP Team considered and the reasons why those options were rejected;

(cc) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

(dd) a description of the factors that are relevant to the agency's proposal or refusal.

(II) Sufficiency

A response filed by a local educational agency pursuant to subclause (I) shall not be construed to preclude such local educational agency from asserting that the parent's due process complaint notice was insufficient where appropriate.

(ii) Other party response

Except as provided in clause (i), the noncomplaining party shall, within 10 days of receiving the complaint, send to the complaint a response that specifically addresses the issues raised in the complaint.

(C) Timing

The party providing a hearing officer notification under subparagraph (A) shall provide the notification within 15 days of receiving the complaint.

(D) Determination

Within 5 days of receipt of the notification provided under subparagraph (C), the hearing officer shall make a determination on the face of the notice of whether the notification meets the requirements of subsection (b)(7)(A), and shall immediately notify the parties in writing of such determination.

(E) Amended complaint notice

(i) In general

A party may amend its due process complaint notice only if—

(I) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subsection (f)(1)(B); or

(II) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.

(ii) Applicable timeline

The applicable timeline for a due process hearing under this subchapter shall recom-

mence at the time the party files an amended notice, including the timeline under subsection (f)(1)(B).

(d) Procedural safeguards notice

(1) In general

(A) Copy to parents

A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only 1 time a year, except that a copy also shall be given to the parents—

(i) upon initial referral or parental request for evaluation;

(ii) upon the first occurrence of the filing of a complaint under subsection (b)(6); and

(iii) upon request by a parent.

(B) Internet website

A local educational agency may place a current copy of the procedural safeguards notice on its Internet website if such website exists.

(2) Contents

The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents (unless it clearly is not feasible to do so) and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to—

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) the opportunity to present and resolve complaints, including—

(i) the time period in which to make a complaint;

(ii) the opportunity for the agency to resolve the complaint; and

(iii) the availability of mediation;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(J) State-level appeals (if applicable in that State);

(K) civil actions, including the time period in which to file such actions; and

(L) attorneys' fees.

(e) Mediation

(1) In general

Any State educational agency or local educational agency that receives assistance under this subchapter shall ensure that procedures are established and implemented to allow parties to disputes involving any matter, including matters arising prior to the filing of a complaint pursuant to subsection (b)(6), to resolve such disputes through a mediation process.

(2) Requirements

Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process—

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this subchapter; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) OPPORTUNITY TO MEET WITH A DISINTERESTED PARTY.—A local educational agency or a State agency may establish procedures to offer to parents and schools that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with—

(i) a parent training and information center or community parent resource center in the State established under section 1471 or 1472 of this title; or

(ii) an appropriate alternative dispute resolution entity,

to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) LIST OF QUALIFIED MEDIATORS.—The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) COSTS.—The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) SCHEDULING AND LOCATION.—Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) WRITTEN AGREEMENT.—In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution and that—

(i) states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;

(ii) is signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(iii) is enforceable in any State court of competent jurisdiction or in a district court of the United States.

(G) MEDIATION DISCUSSIONS.—Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.

(f) Impartial due process hearing

(1) In general

(A) Hearing

Whenever a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(B) Resolution session

(i) Preliminary meeting

Prior to the opportunity for an impartial due process hearing under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint—

(I) within 15 days of receiving notice of the parents' complaint;

(II) which shall include a representative of the agency who has decision-making authority on behalf of such agency;

(III) which may not include an attorney of the local educational agency unless the parent is accompanied by an attorney; and

(IV) where the parents of the child discuss their complaint, and the facts that form the basis of the complaint, and the local educational agency is provided the opportunity to resolve the complaint,

unless the parents and the local educational agency agree in writing to waive such meeting, or agree to use the mediation process described in subsection (e).

(ii) Hearing

If the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this subchapter shall commence.

(iii) Written settlement agreement

In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i), the parties shall execute a legally binding agreement that is—

(I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(II) enforceable in any State court of competent jurisdiction or in a district court of the United States.

(iv) Review period

If the parties execute an agreement pursuant to clause (iii), a party may void such agreement within 3 business days of the agreement's execution.

(2) Disclosure of evaluations and recommendations

(A) In general

Not less than 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date, and recommendations based on the offering party's evaluations, that the party intends to use at the hearing.

(B) Failure to disclose

A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) Limitations on hearing

(A) Person conducting hearing

A hearing officer conducting a hearing pursuant to paragraph (1)(A) shall, at a minimum—

(i) not be—

(I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or

(II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) possess knowledge of, and the ability to understand, the provisions of this chapter, Federal and State regulations pertaining to this chapter, and legal interpretations of this chapter by Federal and State courts;

(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(B) Subject matter of hearing

The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.

(C) Timeline for requesting hearing

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

(D) Exceptions to the timeline

The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to—

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

(E) Decision of hearing officer

(i) In general

Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

(iii) Rule of construction

Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

(F) Rule of construction

Nothing in this paragraph shall be construed to affect the right of a parent to file a complaint with the State educational agency.

(g) Appeal

(1) In general

If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency.

(2) Impartial review and independent decision

The State educational agency shall conduct an impartial review of the findings and decision appealed under paragraph (1). The officer conducting such review shall make an independent decision upon completion of such review.

(h) Safeguards

Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded—

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions, which findings and decisions—

(A) shall be made available to the public consistent with the requirements of section 1417(b) of this title (relating to the confidentiality of data, information, and records); and

(B) shall be transmitted to the advisory panel established pursuant to section 1412(a)(21) of this title.

(i) Administrative procedures

(1) In general

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2).

(B) Decision made at appeal

A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2).

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

(B) Limitation

The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this subchapter, in such time as the State law allows.

(C) Additional requirements

In any action brought under this paragraph, the court—

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees

(i) In general

In any action or proceeding brought under this section, the court in its discre-

tion, may award reasonable attorneys' fees as part of the costs—

(I) to a prevailing party who is the parent of a child with a disability;

(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(ii) Rule of construction

Nothing in this subparagraph shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

(C) Determination of amount of attorneys' fees

Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services

(i) In general

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if—

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) IEP Team meetings

Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e).

(iii) Opportunity to resolve complaints

A meeting conducted pursuant to subsection (f)(1)(B)(i) shall not be considered—

(I) a meeting convened as a result of an administrative hearing or judicial action; or

(II) an administrative hearing or judicial action for purposes of this paragraph.

(E) Exception to prohibition on attorneys' fees and related costs

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees

Except as provided in subparagraph (G), whenever the court finds that—

(i) the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint described in subsection (b)(7)(A),

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees

The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j) Maintenance of current educational placement

Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

(k) Placement in alternative educational setting

(1) Authority of school personnel

(A) Case-by-case determination

School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.

(B) Authority

School personnel under this subsection may remove a child with a disability who

violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).

(C) Additional authority

If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 1412(a)(1) of this title although it may be provided in an interim alternative educational setting.

(D) Services

A child with a disability who is removed from the child's current placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or subparagraph (C) shall—

(i) continue to receive educational services, as provided in section 1412(a)(1) of this title, so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(E) Manifestation determination

(i) In general

Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

(ii) Manifestation

If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

(F) Determination that behavior was a manifestation

If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall—

(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in subparagraph (C) or (G);

(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

(G) Special circumstances

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child—

(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

(iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

(H) Notification

Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards accorded under this section.

(2) Determination of setting

The interim alternative educational setting in subparagraphs (C) and (G) of paragraph (1) shall be determined by the IEP Team.

(3) Appeal

(A) In general

The parent of a child with a disability who disagrees with any decision regarding place-

ment, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.

(B) Authority of hearing officer

(i) In general

A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A).

(ii) Change of placement order

In making the determination under clause (i), the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may—

(I) return a child with a disability to the placement from which the child was removed; or

(II) order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

(4) Placement during appeals

When an appeal under paragraph (3) has been requested by either the parent or the local educational agency—

(A) the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(C), whichever occurs first, unless the parent and the State or local educational agency agree otherwise; and

(B) the State or local educational agency shall arrange for an expedited hearing, which shall occur within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing.

(5) Protections for children not yet eligible for special education and related services

(A) In general

A child who has not been determined to be eligible for special education and related services under this subchapter and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for in this subchapter if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) Basis of knowledge

A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred—

(i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(ii) the parent of the child has requested an evaluation of the child pursuant to section 1414(a)(1)(B) of this title; or

(iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

(C) Exception

A local educational agency shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation of the child pursuant to section 1414 of this title or has refused services under this subchapter or the child has been evaluated and it was determined that the child was not a child with a disability under this subchapter.

(D) Conditions that apply if no basis of knowledge

(i) In general

If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B) or (C)) prior to taking disciplinary measures against the child, the child may be subjected to disciplinary measures applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).

(ii) Limitations

If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under this subsection, the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with this subchapter, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

(6) Referral to and action by law enforcement and judicial authorities

(A) Rule of construction

Nothing in this subchapter shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(B) Transmittal of records

An agency reporting a crime committed by a child with a disability shall ensure that

copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

(7) Definitions

In this subsection:

(A) Controlled substance

The term "controlled substance" means a drug or other substance identified under schedule I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(B) Illegal drug

The term "illegal drug" means a controlled substance but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act [21 U.S.C. 801 et seq.] or under any other provision of Federal law.

(C) Weapon

The term "weapon" has the meaning given the term "dangerous weapon" under section 930(g)(2) of title 18.

(D) Serious bodily injury

The term "serious bodily injury" has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18.

(*l*) Rule of construction

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

(m) Transfer of parental rights at age of majority

(1) In general

A State that receives amounts from a grant under this subchapter may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law)—

(A) the agency shall provide any notice required by this section to both the individual and the parents;

(B) all other rights accorded to parents under this subchapter transfer to the child;

(C) the agency shall notify the individual and the parents of the transfer of rights; and

(D) all rights accorded to parents under this subchapter transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

(2) Special rule

If, under State law, a child with a disability who has reached the age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this subchapter.

(n) Electronic mail

A parent of a child with a disability may elect to receive notices required under this section by an electronic mail (e-mail) communication, if the agency makes such option available.

***(o)* Separate complaint**

Nothing in this section shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

(Pub. L. 91–230, title VI, § 615, as added Pub. L. 108–446, title I, § 101, Dec. 3, 2004, 118 Stat. 2715.)

REFERENCES IN TEXT

Section 327 of the District of Columbia Appropriations Act, 2005, referred to in subsec. (i)(3)(B)(ii), is section 327 of Pub. L. 108–335, title III, Oct. 18, 2004, 118 Stat. 1344, which is not classified to the Code.

The Federal Rules of Civil Procedure, referred to in subsec. (i)(3)(D)(i)(I), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

The Controlled Substances Act, referred to in subsec. (k)(7)(B), is title II of Pub. L. 91–513, Oct. 27, 1970, 84 Stat. 1242, as amended, which is classified principally to subchapter I (§ 801 et seq.) of chapter 13 of Title 21, Food and Drugs. For complete classification of this Act to the Code, see Short Title note set out under section 801 of Title 21 and Tables.

The Americans with Disabilities Act of 1990, referred to in subsec. (*l*), is Pub. L. 101–336, July 26, 1990, 104 Stat. 327, as amended, which is classified principally to chapter 126 (§ 12101 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 12101 of Title 42 and Tables.

The Rehabilitation Act of 1973, referred to in subsec. (*l*), is Pub. L. 93–112, Sept. 26, 1973, 87 Stat. 355, as amended. Title V of the Act is classified generally to subchapter V (§ 790 et seq.) of chapter 16 of Title 29, Labor. For complete classification of this Act to the Code, see Short Title note set out under section 701 of Title 29 and Tables.

PRIOR PROVISIONS

A prior section 1415, Pub. L. 91–230, title VI, § 615, as added Pub. L. 105–17, title I, § 101, June 4, 1997, 111 Stat. 88; amended Pub. L. 106–25, § 6(a), Apr. 29, 1999, 113 Stat. 49, related to procedural safeguards, prior to the general amendment of subchapters I to IV of this chapter by Pub. L. 108–446.

Another prior section 1415, Pub. L. 91–230, title VI, § 615, as added Pub. L. 94–142, § 5(a), Nov. 29, 1975, 89 Stat. 788; amended Pub. L. 99–372, §§ 2, 3, Aug. 5, 1986, 100 Stat. 796, 797; Pub. L. 100–630, title I, § 102(e), Nov. 7, 1988, 102 Stat. 3294; Pub. L. 101–476, title IX, § 901(b)(71)–(75), Oct. 30, 1990, 104 Stat. 1145; Pub. L. 102–119, § 25(b), Oct. 7, 1991, 105 Stat. 607; Pub. L. 103–382, title III, § 314(a)(1), Oct. 20, 1994, 108 Stat. 3936, related to procedural safeguards, prior to the general amendment of subchapters I to IV of this chapter by Pub. L. 105–17.

Addendum D

From: ECFnotice@mad.uscourts.gov
Sent: Friday, February 16, 2018 12:02 PM
To: CourtCopy@mad.uscourts.gov
Subject: Activity in Case 3:14-cv-30116-MGM S.S. et al v. City of Springfield et al Order

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United States District Court

District of Massachusetts

Notice of Electronic Filing

The following transaction was entered on 2/16/2018 at 12:02 PM EST and filed on 2/16/2018
Case Name: S.S. et al v. City of Springfield et al
Case Number: 3:14-cv-30116-MGM
Filer:
Document Number: 243(No document attached)

Docket Text:
Judge Mark G. Mastroianni: ELECTRONIC ORDER entered. The parties' briefing on Defendants' [203] Motion for Judgment on the Pleadings discuss the relevance of the IDEA exhaustion requirement within the standing analysis, but do not address the independent application of the IDEA exhaustion requirement to claims brought by PPAL and DLC. Having previously discussed the relevance of IDEA exhaustion to the individual and proposed class plaintiffs, the court believes a complete analysis of the pending Motion for Judgment on the Pleadings should include consideration of the application of the IDEA exhaustion requirement to PPAL and DLC. See *U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 446 (1993) ("[A] court may consider an issue 'antecedent to... and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief.") (citing *Arcadia v. Ohio Power Co.*, 498 U.S. 73,77 (1990)). The parties are, therefore, directed to submit supplemental briefs to the court addressing the relevance of the IDEA exhaustion requirement, on its own rather than as a consideration related to standing, to a determination of whether judgment on the pleadings is appropriate at this stage of the litigation. As the scope of the IDEA exhaustion requirement is a familiar issue in this litigation, the parties' briefs shall not exceed ten (10) pages and are due no later than Monday, March 5, 2018. (Bartlett, Timothy)

3:14-cv-30116-MGM Notice has been electronically mailed to:

Robert E. McDonnell robert.mcdonnell@morganlewis.com

Edward M. Pikula attyemp@aol.com, epikula@springfieldcityhall.com

Mary J. Kennedy mkennedy@bulkley.com, ddelaney@bulkley.com

Melinda M. Phelps mphelps@bulkley.com, dleeming@bulkley.com

Sandra J. Staub sstaub@cpr-ma.org

Karen L. Goodwin karen.goodwin@usdoj.gov, CaseView.ECF@usdoj.gov, sheila.hebda@usdoj.gov, usama.ecf@usdoj.gov

Lisa C. deSousa ldesousa@springfieldcityhall.com, lisacdesousa@gmail.com, mlandry@springfieldcityhall.com

Michael D. Blanchard michael.blanchard@morganlewis.com

Mary Ellen MacDonald mmacdonald@bulkley.com, kthompson@bulkley.com

Ira A. Burnim irabster@gmail.com

Jeff Goldman jeff.goldman@morganlewis.com

Elizabeth M. Bresnahan elizabeth.bresnahan@morganlewis.com, patricia.beeman@morganlewis.com

Stephen L. Holstrom sholstrom@bulkley.com

Matthew T. Bohenek matthew.bohenek@morganlewis.com, BOCalendarDepartment@morganlewis.com, christopher.wasil@morganlewis.com, nicole.burhoe@morganlewis.com

Deborah A Dorfman ddorfman@cpr-ma.org, Plong@cpr-ma.org

Samuel R. Miller smiller@cpr-ma.org

Jennifer Mathis jenniferm@bazelon.org

Anne Langford anne.langford@usdoj.gov

Michelle L. Leung michelle.leung@usdoj.gov, john.saylor@usdoj.gov, morgan.namian@usdoj.gov

Alison Barkoff Abarkoff@cpr-ma.org

3:14-cv-30116-MGM Notice will not be electronically mailed to:

Alison Barkoff
Center for Public Representation

1825 K Street, N.W. Suite 600
Washington, DC 20006