

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NT;

EB by and through his mother and next friend, VP;

LB1 by and through his mother and next friend, BB;

HG by and through his mother and next friend, LO;

KSG by and through his mother and next friend, VG;

AJ by and through his guardian and next friend, IF;

IP by and through his mother and next friend, DP;

SM by and through his father and next friend, KM;

JW by and through his mother and next friend, YC;

DR by and through his mother and next friend, NR;

on behalf of themselves and all others similarly
situated,

Plaintiffs,

- against -

NEW YORK CITY BOARD OF EDUCATION;
NEW YORK CITY DEPARTMENT OF
EDUCATION; and JOEL KLEIN, in his official
capacity as Chancellor of the New York City School
District,

Defendants.

Civ. No.: CV 02 5118 (CJS)

**THIRD AMENDED CLASS ACTION
COMPLAINT FOR INJUNCTIVE,
DECLARATORY AND OTHER
RELIEF**

I. PRELIMINARY STATEMENT

1. This is a civil rights class action brought pursuant to 42 U.S.C. § 1983, the 14th Amendment to the U.S. Constitution, the Individuals With Disabilities Education Act

("the IDEA"), 20 U.S.C. § 1400, *et. seq.*, Section 504 of the Rehabilitation Act of 1973 ("Section 504") 29 U.S.C. § 794 and the Americans with Disabilities Act of 1990, 42 ("ADA") U.S.C. § 12132, *et seq.* by children with disabilities who seek declaratory and injunctive relief based on their illegal exclusion from the public schools and denial of the educational services to which they are entitled under law.

2. Exclusion as used in this Complaint is defined as any practice that results in the exclusion of a disabled child from school without due process of law and may be labeled by Defendants and their agents as exclusions, discharges, suspensions, expulsions or transfers.

3. Plaintiffs allege that the Defendants and their agents and employees instituted a policy, practice and custom pursuant to which plaintiffs, all of whom are children with disabilities under the age of 21, are illegally excluded from school and denied educational services to which they are entitled under federal and state law. Plaintiffs have missed days, weeks and months of educational services due to the Defendants' conduct.

4. Although the circumstances underlying the plaintiffs' exclusions and their disabilities are not identical, all plaintiffs' share three key facts which are at the heart of this case: (a) they were excluded from school or their educational program on at least one occasion; (b) this exclusion was not conducted legally and with sufficient procedural protections due under federal and state law and (c) they were denied educational services after the exclusion(s) to which they were entitled under federal and state law.

II. JURISDICTION

5. This Court has jurisdiction under 28 U.S.C. § 1331, in that claims are asserted under the laws of the United States; under 28 U.S.C. § 1343(a), in that claims are asserted

under laws providing for the protection of civil rights; under 42 U.S.C. § 1983, in that Defendants violated Plaintiffs' rights under color of state law; under the IDEA, 20 U.S.C. § 1400 *et seq.*, as amended by Pub. L. No. 105-17 at § 615(I)(3)(A) (1997), in that this action presents claims under the IDEA; under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, in that this action presents claims under Section 504; and under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, *et seq.*, in that this action presents claims under the ADA. This Court has jurisdiction over Plaintiffs' pendent state law claims pursuant to 28 U.S.C. § 1367. Plaintiffs also seek declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202.

6. Venue is proper under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this district.

7. If successful, the Plaintiffs are entitled to costs and attorneys fees under 42 U.S.C. § 1988 and 20 U.S.C. § 1400, *et seq.*

III. PARTIES

Plaintiffs

8. Plaintiff NT is an 18-year-old girl with disabilities who lives in New York City and has attended the New York City public schools.

9. Plaintiff EB is a 6-year-old boy with a disability who resides in New York City and attends a New York City public school. He brings this action through his mother and next friend, VB.

10. Plaintiff LB1 is a 17-year-old student with a disability. LB1 lives in New York City and attends New York City school. He brings this action through his mother and next friend, BB.

11. Plaintiff HG is a 17-year-old student with a disability who lives in New York City. He brings this action through his mother and next friend, LO.

12. Plaintiff KSG is a 14-year-old student with traumatic brain injury (TBI) and Attention Deficit Disorder ("ADHD"). He resides in New York City and attends New York City schools. KSG brings this action through his mother and next friend, VG.

13. Plaintiff AJ is a 10-year-old boy with a disability who resides in New York City and attends a New York City public school. He brings this action by his legal guardian and next friend, IF.

14. Plaintiff SM is 16-year-old boy with a disability who resides in New York and has attended New York City public schools. He currently attends a residential school in New York State, pursuant to an Individualized Education Program ("IEP") developed by a New York City school district. He brings this action by his father and next friend, KM.

15. Plaintiff IP is a 16-year-old student with a disability who resides in New York City and attends a New York City public school. He brings this action through his mother and next friend, DP

16. Plaintiff JW is an 11-year-old boy with ADHD who lives in New York City and attends a New York City public school. He brings this action by his mother and next friend, YC.

17. Plaintiff DR is a 1st grade student with a significant disability and behavioral issues. He lives in New York City and attends New York City school. He brings this action through his mother and next friend, NR.

Defendants

18. Defendant The NEW YORK CITY BOARD OF EDUCATION ("the Board of Education" or "the Board" or the "BOE") was the Local Educational Agency ("LEA")

under the IDEA charged with ensuring that children are provided with a free, appropriate public education in New York City under federal and state law. It was the official body charged with the responsibility for developing policies with respect to the administration and operation of the public schools in the City of New York. N.Y. Educ. Law §§ 2590, 2590-g (McKinney 1980). The Board was, and its successor is, the recipient of federal financial assistance under the IDEA.

19. Defendant The NEW YORK CITY DEPARTMENT OF EDUCATION (“Department” or the “DOE”) is the newly formed government office or LEA charged with ensuring that children are provided with a free, appropriate public education in New York City. It is also the official body charged with the responsibility for developing policies with respect to the administration and operation of the public schools in the City of New York. N.Y. Educ. Law §§ 2590, 2590-g (McKinney 1980). The DOE is the recipient of federal financial assistance under the IDEA.

20. Defendant JOEL KLEIN is the Chancellor of the New York City School District (“the Chancellor”) and as such is entrusted with the specific powers and duties set forth in N.Y. Educ. Law § 2590-h (McKinney 1930), including the power and duty to control and operate all special education programs and services conducted in New York City Schools and programs. He is sued here in his representative, and not his individual, capacity.

IV. CLASS ACTION ALLEGATIONS

21. Plaintiffs’ claims for relief are brought on their own behalf and on behalf of all those similarly situated pursuant to Federal Rules of Civil Procedure 23(a) and 23(b). Defendants have acted and refused to act on grounds generally applicable to the named

and class plaintiffs, making appropriate declaratory and injunctive relief as to the class as a whole.

22. The class represented by the named plaintiffs is comprised of all students with disabilities aged 3-21, who have been, are being and will be excluded from school in violation of federal and state law and denied educational services to which they are entitled under law after the exclusion.

23. The class is so numerous that joinder of all members is impracticable. Upon information and belief, there are thousands of children with disabilities who are members of the class.

24. In addition, upon information and belief, joinder is impracticable because all of the members of the class are disabled children, and many members of the class are low-income persons, may not speak English, and likely would have great difficulty in pursuing their rights individually.

25. There are questions of law and fact in common among the named plaintiffs and the members of the class they seek to represent and those questions predominate over all other questions affecting individual class members. All of the plaintiffs have the same federal and state statutory rights to receive regular and special education services and procedural protections. All of the plaintiffs and their parents have procedural and substantive rights under the federal law. Additionally, all plaintiffs have the same federal constitutionally protected right not to be arbitrarily denied their rights to educational services and the same rights to due process under federal and state law.

26. The claims of the named plaintiffs are similar to those of the class they seek to represent, in that they, as with the other members of the class, arise from the same

conduct – the illegal exclusion from school and denial of class members’ rights to educational services—that gives rise to the class members’ claims

27. The named plaintiffs will adequately represent and protect the interests of the class. They have no interests in conflict with the other members of the class; plaintiffs and class members seek to ensure that they will not be subject to illegal exclusions and denial of educational services to which they are entitled. Therefore, the relief sought by named plaintiffs will benefit all members of the class.

28. By illegally excluding class members from school and denying them educational services and due process to which they are entitled, Defendants have acted on grounds generally applicable to members of the class. As a result, declaratory and injunctive relief with respect to the entire class is appropriate.

29. A class action is the appropriate method for a fair and efficient adjudication of this controversy.

30. Counsel for the named plaintiffs are experienced in federal class action litigation and will vigorously pursue this action in the interest of the class.

V. FURTHER ALLEGATIONS

A. THE RIGHT TO EDUCATIONAL SERVICES IN NEW YORK STATE

31. New York State Education Law provides that any person over five and under 21 years of age, who lives in New York City and has not received a regular high school diploma, is entitled to attend a public school. N.Y. Educ. Law § 3202(1).

32. New York State Education Law also mandates full-time instruction for students until the age of 16, and allows certain jurisdictions to extend the age of required school attendance. N.Y. Educ. Law § 3202. New York City has opted to extend the

compulsory school age to 17; New York City Chancellor's Regulation A-101 provides that all students who turn 17 after July 1st are required to attend school for the following school year under the compulsory education law.

33. The New York State Commissioner's Regulations define "full-time instruction" to mean at least 5 ½ hours of instruction per day. 8 N.Y.C.R.R. § 175.5.

34. Academic standards for high school graduation were substantially revised by relatively new State and City policies and, upon information and belief, are now significantly more stringent than in previous years. Students are now required to earn a Regents' diploma by earning a certain number of high school units or credits and passing exit exams.

35. The New York State Commissioner's Regulations require that each school district offer all students grades 9 through 12 the opportunity to meet the requirements to take courses to prepare for a Regents diploma. 8 N.Y.C.R.R. § 100.2(e).

36. New York State law spells out a number of services to be provided to students if they are struggling academically, truant, or having behavior problems.

37. Students in grades 7 through 12 are supposed to receive Guidance Services, which should entail an annual review of their educational progress and career plans by school counselors (individually or in small groups), instruction about careers, and counseling. Guidance services can also be used to assist students who exhibit any attendance, academic, behavioral or adjustment problems and to encourage parental involvement. 8 N.Y.C.R.R. § 100.2(j).

38. Students who are truant or struggling academically are also eligible to receive Educationally Related Support Services ("ERSS"). Children with disabilities are

specifically eligible for ERSS services, which may include counseling, speech and language improvement services, small group instruction, modified curricula, individualized tutoring and other such strategies that have demonstrated success. N.Y. Educ. Law § 3602(32); 8 N.Y.C.R.R. § 100.2(v).

39. All high school students are entitled to receive Academic Intervention Services (“AIS”). AIS are intended to assist students who are at risk of not achieving the State learning standards in English language arts, mathematics, social studies and/or science, or who are at risk of not gaining the knowledge and skills needed to meet or exceed designated performance levels on State assessments. 8 N.Y.C.R.R. § 101.1(g).

40. In New York State, students are entitled to alternative instruction during periods of suspension. New York Education Law Section 3214(5).

41. Under the NYC Chancellor’s Regulations, all students who are suspended are entitled to homework, class work and the right to take standardized exams and make-up tests.

B. PROTECTIONS FROM EXCLUSION, EXPULSION AND DISCHARGE UNDER THE U.S. CONSTITUTION, STATE & LOCAL LAW

U.S. Constitution

42. The Due Process Clause of the 14th Amendment to the Constitution of the United States prohibits public schools from excluding students from school without due process.

State Law on Suspension, Transfer and Dropping from Enrollment

43. Section 3412 of the New York Education Law sets forth specific due process protections that must be provided to students and parents before students are removed from a classroom or suspended from school.

44. Section 3214 provides for different levels of due process for children who are removed from class, suspended for five days or less or suspended for more than five days. On its face Section 3214 does not expressly permit expulsions (or permanent exclusions) from school.

45. Among other things, children who are suspended for five days or more, are entitled to written notice, an opportunity for a hearing, the right to cross-examine witnesses, the right to receive a list of free or low cost legal service providers and the right to an appeal.

46. Section 3214 directs Defendants to develop a Code of Conduct that, among other things, sets out the conduct for which students can be subject to disciplinary proceedings. Defendants have adopted Citywide Standards of Disciplinary and Intervention Measures (the Discipline Code) and New York City Chancellor's Regulation A-443, which contain the procedures and standards for student suspensions and expulsions. Some of these provisions were enacted to comply with the terms of a settlement of another federal case named BOE v. Board of Education, 80 Civ. 2829 (S.D.N.Y. 1982), which was brought on behalf of a class of non-disabled high school students who were being suspended and expelled without due process and denied educational services.

47. In New York State, a student cannot be suspended from school unless he is disruptive or violent as defined by Section 3214 of the New York Education Law.

48. Truancy, poor grades, age or low academic performance are not grounds for expulsion, removal or suspension under the New York State Education Law or the Chancellor's policies except for very limited circumstances set forth in New York Education Law § 3202.

49. Section 3202(1)(a) provides that schools are permitted to drop from enrollment a student over compulsory school age (between the ages of 18-21) if the student has been absent for 20 consecutive school days. However, before a student can be dropped from a register, certain procedures must be followed, such as notice of the right to stay in school until the age of 21 and opportunity for a conference. N.Y. Educ. Law § 3202.

50. New York State Education Law section 3214 also protects students without disabilities from being involuntarily transferred. Before a principal may initiate an involuntary school transfer, a parent must be provided written notice and an opportunity for a hearing. N.Y. Educ. Law § 3214(5). A transfer cannot be effectuated until the hearing decision is rendered. This law does not include children with disabilities, presumably because they have protections from involuntary transfer under the pendency provisions of the IDEA.

51. The New York State Law and regulations governing special education also prohibit students with disabilities from being involuntarily transferred without notice, an opportunity for due process proceedings (a hearing, appeal and court) and the right to remain in the child's current school until the resolution of the proceedings.

52. The New York State Department of Education has also adopted a policy that prohibits the involuntary transfer of students with disabilities who are suspended.

C. FEDERAL DISABILITIES LAWS

IDEA

53. In addition to entitlements and process due under the New York State Laws and regulations, children with disabilities and their parents have significant entitlements and protections under the IDEA.

54. In enacting the IDEA, Congress specifically addressed in its findings the need to correct the historical exclusion of children with disabilities from public education: “Before...the enactment of the Education for All Disabled Children Act of 1975...more than one half of the children with disabilities in the United States did not receive appropriate educational services that would enable such children to have full equality of opportunity.” 20 U.S.C. § 1400(2)(B). Congress also found that “1,000,000 of the children with disabilities in the United States were excluded entirely from the public school system and did not go through the educational process with their peers.” 20 U.S.C. § 1400(2)(C).

55. Congress recognized that without federal pressure school districts frequently did not serve disabled children properly, but instead excluded them from school, warehoused them in self-contained special education classes, or left them in regular classes with no services to ensure that they could learn. Honig v. Doe, 484 U.S. 305, 308 (1988).

56. “Disabilities,” as defined by the IDEA, include various cognitive, emotional, behavioral and physical impairments, such as learning disabilities and emotional disturbances. See 34 C.F.R. § 300.7(a)(9).

57. The IDEA requires that states and local education agencies ensure that each child with a disability is provided FAPE. FAPE consists of special education and related services designed to meet the child’s unique needs, and provided in conformity with certain procedural safeguards specified by the Act.

58. The IDEA contains extensive procedural and substantive requirements for parents and students with disabilities. Parents are supposed to receive notices of all of the IDEA’s procedural due process requirements.

59. A school district cannot stop providing educational services to a child or change a child’s placement without notice and an opportunity to object to the cessation of services by utilizing a system of administrative due process, which can include a hearing or mediation.

60. In the event a parent seeks due process, their child has a right to stay put or remain in the current educational placement.

61. In enacting the re-authorized IDEA in 1997, Congress also emphasized the importance of preventing suspensions and expulsions of children with disabilities as a disciplinary measure: “[R]esearch, demonstration, and practice over the past 20 years in special education and related disciplines have demonstrated that an effective educational system now and in the future must...create school-based disciplinary strategies that will be used to reduce or eliminate the need to use suspension and expulsion as disciplinary options for children with disabilities.” 20 U.S.C. § 1451(a)(6)(H).

62. Even children who are suspended or expelled cannot be denied FAPE for more than ten days in any school year.

63. Students with disabilities have the right to be identified and evaluated if the school personnel know or should reasonably suspect that the child has a disability, based on their behavior and/or performance, or expression of concern of a parent or school staff member.

Section 504 & the ADA

64. Section 504 of the Rehabilitation Act of 1973 (Section 504) protects students with disabilities from discrimination by school districts that receive federal funds.

65. Students with disabilities and their parents are entitled to notice of their rights under Section 504 as well as a notice before a district stops services or changes a child's placement or school.

66. Section 504 protects a child from being disciplined for behavior that is a manifestation of a disability and protects students with disabilities from discrimination even if a school district has not identified the student as disabled.

67. Students with disabilities are entitled to FAPE under Section 504.

68. The AD also protects children with disabilities from discrimination based on their disabilities.

D. NEW YORK STATE SPECIAL EDUCATION LAW

69. New York State Education Law Section 4400 *et. seq.*, and the regulations promulgated thereunder at 8 NYCRR 200 and 200.1 also govern delivery of special education services in New York State.

70. The law and regulations implement provisions of the IDEA and, in certain areas, provide expanded protections for disabled students.

VI. THE VIOLATIONS ALLEGED HEREIN ARE SYSTEMIC

71. Congress enacted the IDEA to ensure that students with disabilities have meaningful access to public education. States who participate in the IDEA receive substantial federal funds in exchange for their agreement to provide a free appropriate public education to all disabled children in the state, and to comply with the IDEA's procedural and substantive mandates.

72. Although the plaintiffs have different disabilities and the circumstances underlying their exclusion are not identical, they are all being subject to the same illegal practices, to wit they are being excluded from school without due process and deprived of their legally mandated educational services for days, weeks and months and, upon information and belief, years at a time.

73. Defendants, their agents and employees should not benefit from the different labels they place on the exclusion of children, which has resulted in widespread violation of the law. Regardless of whether a child's exclusion is labeled a suspension, expulsion, discharge or transfer or a parent is merely asked to keep a child at home, the plaintiffs are suffering from the same type of exclusion and denial of educational services.

74. The exclusion without due process amount to suspensions, expulsions and transfers without any process or in the absence of legally sufficient process and may include but is not limited to failure to provide notice of due process and other federal substantive rights under the IDEA and Section 504, failure to provide accurate notice, failure to afford an opportunity for a hearing, untimely process or excluding students for reasons that are not legally authorized or of which they had no prior notice.

75. The denial of educational services comes in the form of complete denial -- children are completely out of school -- or they are kept in “alternative” centers that do not provide special education services or minimally adequate regular instruction.

76. Upon information and belief, most, if not all, of these centers and schools do not meet the minimum requirements for educational services under law and do not provide special education services. Children are often denied instruction, do not get relevant class work, are not afforded the ability to learn the regular curriculum or earn credits toward their high school diplomas. After spending weeks or months in these centers, the students fall completely behind in their schoolwork and behavior worsens. For children who were already at-risk of educational failure, these settings are often the next step toward dropping out of school.

77. Upon information and belief, the Defendants have failed to adopt appropriate policies and procedures to ensure that the individual schools and district or regional administrators are not excluding the plaintiffs from school and denying them legally mandated educational services.

78. Upon information and belief, Defendants have failed to ensure that school administrators and teachers are properly trained in the relevant laws and due process requirements that protect children from illegal exclusions and denials of educational services.

79. Upon information and belief, Defendants have failed to supervise teachers, administrators and other school system staff to ensure that they are not excluding plaintiffs from school and denying them educational services in violation of law.

80. Upon information and belief, Defendants have failed to ensure that children are provided legally adequate instruction and special education services after they are suspended from school.

81. Upon information and belief, Defendants have also failed to institute a system for tracking these students and the underlying processes, making it easy for schools and districts to violate children's rights.

82. Upon information and belief, Defendants have not developed a system to ensure that school administrators and teachers are held accountable for complying with federal, state and local laws and policies that protect the rights of class members from being excluded from school and denied substantive and procedural protections of the law.

83. Upon information and belief, Defendants have adopted a policy and practice of transferring children with disabilities from one school to another, without affording them the opportunity for notice, a hearing and an opportunity to stay in a particular school until the resolution of the administrative proceedings.

84. Since the many of the plaintiffs' exclusions are not being formally called "suspensions or expulsions" which would normally be tracked, it is difficult to identify the exact number of children who are being subject to the Defendants' illegal conduct.

85. Upon information and belief, each year there are approximately 165,000 children with identified disabilities receiving special education services in New York City and thus, there are thousands of children who have standing to challenge the conduct complained of herein as they are all at risk of illegal exclusion and denial of educational services.

86. The statistics reported by the DOE to the New York State Education Department for under their IDEA reporting obligations (the PD-5 Reports) show that thousands of disabled children are not finishing school. They are being classified either as “drop-outs” or “discharges”/ "moved – known to be continuing” in the DOE reports to the New York State Education Department.

87. In the 2000-2001 school year, for example, the DOE reported 15,174 children ages 14-21 were exiting the special education system. This report alleges that 3,714 students were “discharged”/ "moved- known to be continuing,” 5,365 students dropped out and 988 “reached maximum age.” Only 67 disabled students earned a Regents’ diploma, 1,496 earned local diplomas and 150 earned high school equivalency diplomas.

88. For the 2001-2002 school year, 14,135 children exited the system – upon information and belief, approximately 10,000 of those children either “dropped out” or were discharged. Upon information and belief, class members are being counted as “drop outs or discharges” when they were, in fact, illegally excluded from school.

89. The DOE published statistics called “Student Mobility Reports,” for the years 2000-2001, 1999-2000 and 1998-1999. Those documents reflect that for high school programs alone, during each year, approximately 55,000 students were “discharged” per year from the high schools. Upon information and belief, some of these students were disabled and were improperly discharged.

90. Upon information and belief, these discharge figures underestimate the number of children who were discharged, as they do not represent a complete breakdown of the type of students discharged from schools. Moreover, some students, like HG, NT and EB are informally discharged without being marked as discharged by their schools.

91. Upon information and belief, others are being labeled as formal suspensions, but are still removed in violation of law and denied educational services to which they are entitled.

92. In addition to the class members and additional children alleged herein, many other parents have contacted plaintiffs' counsel concerning their children's illegal exclusion and denial of educational services.

93. Defendants' actions, lack of action and the conduct of their agents amounts to systemic legal violations.

94. Defendants have been on notice of many of these many violations for several years. They have chosen to turn a blind eye to the practices of district administrators and principals and have neglected their duty to ensure that the appropriate administrators are aware of their legal obligations to class members.

95. Counsel for plaintiffs released a report in November 2002 indicating that thousands of children were being discharged from New York City public schools and raised questions concerning the discharge of students with disabilities. Defendants' or their counsel never responded to this report.

96. Counsel for plaintiffs have brought the problems of individual children to the attention of Defendants' counsel. In most cases, counsel has not intervened in a timely fashion to prevent irreparable harm.

VII. THE EXPERIENCE AND FACTS CONCERNING THE NAMED PLAINTIFFS

97. NT, has been diagnosed with bipolar disorder, and she has experienced behavioral and academic difficulties for years. In October 2001, after being illegally

discharged from Lower Manhattan Outreach, and missing at least four months of school, NT was finally enrolled in Borough Academy ("BA"). Upon information and belief, NT did not receive any special education services while at BA.

98. In January 2002, NT was hospitalized for her bi-polar disorder. Upon her discharge from the hospital, NT's grandmother attempted to reenroll NT in BA. However, NT's grandmother was informed that NT was not permitted to reenroll and that she would need to wait till the Fall to re-register. At no time did the school inform NT or her guardian of her rights regarding appropriate educational placements. In fact, NT's mother was encouraged to sign her out of school. No services were offered to NT and she missed the entire Spring semester of school.

99. In September 2002, NT and her mother were told by BA that due to NT's behavior she was not allowed to return to school because BA did not have the resources to address her needs. At no time during or prior to the 2001-2002 school year did any of the Defendants or their employees or agents refer NT for an evaluation under the IDEA or Section 504 or provide her with the services and protections due to her under federal and state law.

100. On September 11, 2002, Counsel wrote a letter to the Chancellor's attorney informing him of the situation and requesting immediate placement. Two weeks later, NT was still out of school, and she filed this action. After filing this action, NT was evaluated by the Committee on Special Education ("CSE") and reinstated to a fifth school. NT started having difficulties there due to her medication and had to be re-admitted into the hospital in November 2002.

101. On January 9, 2003, AFC informed the Defendant's counsel that NT had requested home instruction upon leaving the hospital on November 11, 2002, but had not received instructional services. Even after Defendants were notified through their counsel, NT did not get home instruction for several weeks.

102. In violation of law, NT did not receive adequate due process prior to her exclusions from school: she was excluded for a reason not authorized by law, NT and her parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to exclusion, were not offered the opportunity for a hearing and not afforded the other substantive and procedural protections to which they were entitled under federal and state law. After the schools excluded her illegally on a number of occasions, she was denied educational services for months in violation of federal and state law.

EB

103. In the Spring of 2001, EB, a 6-year-old boy, is classified as emotionally disturbed. In September 2002, EB was suspended from school. His mother was never provided notice or informed of her rights regarding the suspension. While suspended, EB did not receive any instructional services at all. When EB returned to school, he was placed inappropriately in a self-contained class.

104. In violation of law, EB did not receive adequate due process prior to his exclusion from school: EB and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to exclusion, were not offered the opportunity for a suspension hearing. After the school excluded him, he was denied educational services for one month in violation of federal and state law.

LB1

105. LB1, a 17-year-old student, has an IEP that classifies him as Learning Disabled and recommends General Education with support services. In September 2002, LB1 was discharged from high school and has been out of school since that time. Upon being discharged, school officials told LB1 that he could no longer attend his high school because he was too old and did not have enough credits. LB1's mother was never informed of his rights regarding his discharge from school. LB1 has missed 8 months of his school services this year. In April 2003, AFC filed an Impartial Hearing under the IDEA and Section 504 ("Impartial Hearing") on behalf of LB and his parent. An Impartial Hearing is a mechanism by which parents and children with disabilities may try to raise their complaints about service provision under the IDEA and Section 504.

106. In violation of law, LB1 did not receive adequate due process prior to his exclusion from school: LB1 was excluded for a reason not authorized by law, he and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to exclusion and were not offered the opportunity for a hearing. After the school excluded him illegally, he was denied educational services for several months in violation of federal and state law.

HG

107. HG, 17-year-old student, is classified as learning disabled. In the Spring of 2002, HG was told he had to transfer from John Jay High School to another school. HG's parents were never informed of his rights regarding the transfer. In the Fall of 2002, HG's mother, LO, attempted to enroll him in the Accorn School. Upon his arrival at Accorn, he was told he was not permitted to enroll. As a result, he was out of school for

over 8 months. In March 2003, AFC filed an Impartial Hearing on behalf of HG and his mother. Although the Impartial Hearing Officer (“IHO”) issued a decision in HG's favor, HG is still out of school and the IHO’s order requiring that HG be placed on home instruction for the remainder of the school year has not been enforced.

108. In violation of law, HG did not receive adequate due process prior to his exclusion from school: HG was excluded for a reason not authorized by law, he and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to exclusion and were not offered the opportunity for a hearing. After the school excluded him illegally, he was denied educational services for several months in violation of federal and state law.

KSG

109. KSG, a 14-year-old boy, is learning disabled, has ADHD and has a TBI. Over the past year, KSG was repeatedly suspended, illegally transferred, and warehoused in inappropriate suspension centers without services. Upon information and belief, his parents were not notified by the Department of KSG's rights regarding transfers and suspensions. KSG has missed more than fifty days of appropriate instruction and in May 2003 was still in an alternative center that was not providing appropriate educational services. AFC filed an Impartial Hearing on behalf of KSG and his mother and are waiting for a decision. In the meantime, KSG is in a private school setting for the Summer.

110. In violation of law, KSG did not receive adequate due process prior to his exclusion from school: KSG and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to exclusions, were not

provided sufficient process for the suspension and were not provided adequate notice or opportunity for a hearing prior to his transfer. After the school excluded him illegally on a number of occasions, he was denied educational services for more than two months in violation of federal and state law.

AJ

111. AJ, 10-year-old boy, is Autistic. From September until November 2002, AJ sat in a room in P178, with only his paraprofessional because the school and Superintendent of District 23 refused to implement AJ's IEP. He was excluded from all of his classes. AJ's guardians were never informed of his rights regarding this exclusion. In September 2002, AFC filed an Impartial Hearing on behalf of AJ and his guardian. Although the IHO ordered that AJ be restored to his class with his IEP services, the District and the school did not comply with that order. In October 2002, the IHO issued a second order directing AJ to be placed in his class. Finally, two days after the Second Amended Complaint was filed naming AJ as a Plaintiff, Defendants reinstated AJ. He had missed more than two months of instruction.

112. In violation of law, AJ did not receive adequate due process prior to his exclusion from school: AJ was excluded for a reason not authorized by law, he and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to exclusion and were not offered the opportunity for a hearing. After the school excluded him illegally, he was denied educational services for several months in violation of federal and state law.

SM

113. SM, a 16-year-old student, has a learning disability. Although SM took medication for his ADHD, he was decertified from special education in 1999 and offered no services after that time. SM had been subject to numerous suspensions and behavioral referrals throughout his school career. His father was never provided with adequate notice of his rights. In November 2001, SM was assaulted on two different occasions at school. SM's father requested a safety transfer, but he was out of school for several weeks before a new school was provided. In January 2001, AFC filed an Impartial Hearing on behalf of SM and his father. As a result, SM is currently attending a residential school.

114. In violation of law, SM did not receive adequate due process prior to his exclusion from school: SM was excluded for a reason not authorized by law, he and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to exclusion and were not offered the opportunity for a hearing. After the school excluded him, he was denied educational services in violation of federal and state law.

IP

115. IP, 16-year-old student, received Special Education Teacher Support Services ("SETSS") for his learning disabilities. In March 2003, after being accused of a suspendable offense, IP was referred to two alternative placements, neither of which provided any instruction. As of April 2003, IP has not received a decision or disposition on his suspension. At some point, he or his mother was verbally informed that IP had been transferred to another school. In April 2003, AFC contacted the Defendants'

counsel concerning this child. IP was still being denied educational services until this complaint was filed.

116. In violation of law, IP did not receive adequate due process prior to his exclusion from school: IP and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to exclusion and were not provided adequate and timely process. After the school excluded him illegally, he was denied educational services for several weeks in violation of federal and state law.

JW

117. JW, 11-year-old boy, has ADHD and has a Section 504 plan to receive medication in school. In February 2002, JW was removed from his regular class due to behavior and placed into a dean's intervention room at the school for approximately one month. He received no direct instruction there and was segregated from his peers. During this time, his parents never received notice of the suspension or removal, of a hearing or of a conference or manifestation determination review. After AFC contacted the principal, the school took JW out of suspension but he was not permitted to return to his regular class; instead, he was sent to a class of lower functioning students. In March 2002, AFC filed a request for an Impartial Hearing. Following the hearing, a decision was issued in favor of the parent and the district was ordered to transfer JW to another school with an appropriate class. Despite the order, the Defendants did not transfer JW until September 2002, after AFC and the Defendants' office of legal services contacted the district numerous times during the summer.

118. In violation of law, JW did not receive adequate due process prior to his exclusion from school: JW and his parent/guardian were not provided notice of their

substantive and procedural rights under federal and state law prior to exclusion and were not provided a hearing prior to his exclusion. After the school excluded him illegally, he was denied educational services for more than one month in violation of federal and state law.

DR

119. DR, 1st grade student, is disabled. He spent much of the 2002-2003 school year out of his class, in the in-house suspension room and time-out rooms. His mother never received any notice or information about DR's rights regarding these exclusions. In March 2003, the school called the hospital and DR was admitted for psychiatric observation. In April 2003, he was discharged from the hospital and eventually enrolled in a Day Treatment Program. He missed a few days of school, however, because of a lack of appropriate bussing.

120. In violation of law, DR did not receive adequate due process prior to his exclusion from school: DR and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to his exclusions and were not provided a hearing prior to his exclusions. After the school excluded him illegally on a number of occasions, he was denied educational services for weeks at a time in violation of federal and state law.

VIII. FACTS CONCERNING ADDITIONAL MEMBERS OF THE CLASS

121. Many children with disabilities in New York City are being denied access to legally mandated education and denied due process before being excluded from school due to Defendants' conduct. The students with disabilities who appear as named plaintiffs and those whose stories are set forth herein demonstrate that there are systemic

policies and practices in New York City that violate federal and state law and that are resulting in irreparable harm to vulnerable disabled children.

122. Some children are being excluded and labeled as “suspended,” others are labeled as “discharged” or “transferred,” and some are being labeled as merely having accepted a change in placement for their students. Some of these exclusions are done formally, while others are informal.

123. Regardless of the label placed on the specific action by the Defendants, all class members are being subject to the same type of conduct: illegal exclusion from school and denial of adequate due process and educational services to which they are entitled. Examples of potential class members follow.

LB2

124. LB2 is a 9-year-old child with a disability. He has an IEP classifying him as “emotionally disturbed” which recommends a special class. He was suspended from IS 188 in District 21 for an incident that occurred on April 4, 2003. The district sent notice to the wrong address and, as a result, no hearing was made available for ten days, until April 14, 2003. LB2 was not permitted to attend school after the date of the incident and did not receive any educational services. On April 21, 2003, AFC contacted Defendants’ counsel concerning LB2’s situation and were informed that he could return to school on April 28, 2003, the first day after the spring vacation.

125. In violation of law, LB did not receive adequate due process prior to his exclusion from school: LB and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to his exclusion and were not provided a hearing prior to his exclusion. After the school excluded him

illegally, he was denied educational services for weeks in violation of federal and state law.

AC

126. AC is a 16-year-old student with a disability. He has an IEP classifying him as learning disabled. In the Spring of 2001, AC was improperly discharged from John Adams High School. No arrangements were made to ensure that he was re-enrolled in another program and he missed more than two months of school. No IEP meeting was held, and no change of placement or other notices were provided to his mother. AC's mother never received another assignment to a different school for AC. On October 16, 2002, AFC filed an impartial hearing for AC. The first date offered for the hearing was November 7, 2002. In the interim, AFC secured a seat for AC in an approved private school and the student is attending there now.

127. In violation of law, AC did not receive adequate due process prior to his exclusion from school: AC was excluded for a reason not authorized by law, he and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to exclusion and were not offered the opportunity for a hearing. After the school excluded him illegally, he was denied educational services for several months in violation of federal and state law.

JC

128. JC is a 15-year-old student with a disability who has been receiving special education services in self-contained special classes since kindergarten. JC was suspended from Christopher Columbus High School in the Bronx in October 2003, but he was not removed from school until January or February 2003. In between his suspension

and his removal he passed 5 out of 7 classes. In February 2003, he was given a one-year suspension for the October incident by the Bronx High School Superintendent and ordered to attend Wildcat Academy. However, Wildcat does not have special education services. On February 26, 2003 AFC informed Defendants' counsel and filed an impartial hearing. After the hearing, the parent was offered a placement in the Lehman alternative suspension center. However, upon information and belief, there are no special education services there, children don't receive work from their schools and there is no real instruction occurring. Through AFC's assistance the child is now recommended for a private school, which the parent accepted in early April. The student missed at least 6 weeks of school. JC has started attending the private school. Upon information and belief, no bussing has been made available.

129. In violation of law, JC did not receive adequate due process prior to his exclusion from school: JC and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to exclusions, was not provided sufficient process for the suspension and was not provided adequate notice or opportunity for a hearing prior to his transfer to a setting which was inappropriate. After the school excluded him illegally, he was denied educational services in violation of federal and state law.

TD

130. TD is a 17-year-old student with a disability who received special education services for several years. For the 2000-2001, 2001-2002 and part of the 2003 school year he attended the Bronx Leadership Academy. He had an IEP calling for a special class. However, since the school did not have a special class, TD received no

services. He had behavioral issues and was kept out of class for weeks at a time, sitting in a dean's office or separate room. TD was suspended in the fall of 2002 and he missed several weeks of school because the Bronx High School Superintendent did not have an alternative suspension program with special education services. His mother, AD, filed an impartial hearing in the fall. TD was initially placed in a private day school through a settlement with the District, but got expelled. Subsequently, the hearing was resolved for a recommendation for a residential placement and interim home instruction. TD missed another month of school after the settlement, because the order memorializing the settlement was not enforced.

131. In violation of law, TD did not receive adequate due process prior to his exclusions from school: TC was excluded for reasons not authorized by law, he and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to exclusion and were not offered the opportunity for a hearing and not provided legally sufficient notice prior to his last suspension. After the school excluded him illegally on a number of occasions, he was denied educational services for several weeks in violation of federal and state law.

MG

132. MG is a 13-year-old student with a disability, who started his third year in 5th grade in a school in District 1 in September 2002. In November 2002, he was suspended from PS 34 for an indefinite period of time. He and his mother, LG, did not receive appropriate due process prior to his removal and he did not receive appropriate educational services during the period of removal. After the suspension, MG was placed in the alternative suspension center where he did not receive appropriate educational

services for more than five months. On March 25, 2003, he was suspended from the alternative center and missed one week of school.

133. In violation of law, MG did not receive adequate due process prior to his exclusions from school: EB and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to the exclusions and were not offered the opportunity for hearings. After the school excluded him illegally on a number of occasions, he was denied educational services for more than five months in violation of federal and state law.

SG

134. SG is a 16-year-old student with a disability. He has severe ADHD and may have TBI. SG's mother and teacher made multiple requests for evaluations for special education. Upon information and belief, SG was not evaluated until October 2002. On or about May 2002, SG was suspended from Brandeis High School and received a one-year suspension. He was assigned to Lower Manhattan Outreach, an alternative suspension center. In April 2002, he was suspended without due process from Lower Manhattan Outreach and assigned to West Manhattan Outreach, where he attended for the remainder of the school year. SG spent the first two months of the 2002-2003 school year out of school, without any services. In the Fall of 2002, neither suspension site nor Brandeis High School would allow him to reenroll. On October 15, 2002, SG's mother filed for an expedited Impartial Hearing and requested expedited evaluations. Evaluations were not started until October 24, 2002, after the timelines for the expedited evaluations had already run. On or about October 30, 2002, the Department offered SG the opportunity to enroll in a new high school.

135. In violation of law, SG did not receive adequate due process prior to his exclusion from school: SG and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to exclusions and were not provided adequate and timely process. After Defendants excluded him illegally, he was denied educational services for several months in violation of federal and state law.

RJ

136. RJ is a 15-year-old 9th grader with ADHD who was attending a high school in Queens. He was suspended a number of times for his refusal to remove a headband, which he used to hide an inoperable lesion of blood vessels on his temple. Those suspensions were not conducted with appropriate due process. After yet another incident prompted by his headgear on March 6, 2003, he was told not to come back to school. However, his mother, ROJ, did not get a written notice until March 14, 2003. Pursuant to this notice, RJ was assigned to Queens Outreach, which does not provide adequate instruction or special education services. Upon information and belief, his mother, ROJ, believed RJ had been decertified from special education in 1999, because he was not getting services. She had requested counseling all of last year and nothing was offered. When AFC contacted the District concerning the suspension, on April 10, 2003, his advocate was informed that the student still had an IEP. After missing school for almost one month, RJ was granted a transfer to an alternate high school. A request has been made for a Section 504 accommodation plan that would allow RJ to use a clothing article in the school to cover the lesion.

137. In violation of law, RJ did not receive adequate due process prior to his exclusions from school: RJ was excluded for reasons not authorized by law, he and his

parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to exclusion and were not afforded legally sufficient due process. After the school excluded him illegally, he was denied educational services for approximately one month in violation of federal and state law.

JL

138. JL is a kindergarten student with a disability who goes to school in District 6. In November 2003, he was removed from his school and involuntarily transferred without due process. On his parent's behalf, AFC filed for an impartial hearing on December 2, 2002 and notified the Defendants' counsel. On or about December 16, 2003 JL was permitted to go back to his school. He missed approximately 25 days of school.

139. In violation of law, JL did not receive adequate due process prior to his exclusions from school: JL was excluded for reasons not authorized by law, he and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to exclusion and were not afforded a hearing. After he was excluded, he was denied educational services for almost one month in violation of federal and state law.

SL

140. SL is an 8-year-old student with a disability who was suspended from PS 273 on December 13, 2002. The written policy in District 19 is that students with disabilities do not receive alternative education services during their period of suspension if their parents exercise their right to adjourn a suspension hearing to seek legal counsel. On February 10, 2003, AFC wrote a letter to the suspension hearing officer in District 9 requesting that SL be reinstated to his school. On or before February 7, 2003, AFC

notified Defendants' counsel that SL was not being enrolled in school. Soon thereafter, SL was permitted to reenroll in school.

141. In violation of law, SL did not receive adequate due process prior to his exclusions from school: SL and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to exclusion and were not afforded legally sufficient process. After he was excluded, he was denied educational services for more than one month in violation of federal and state law.

JM1

142. JM1 is an 8-year-old child with a severe speech delay and emotional problems. JM1 had been attending Northside day treatment school in District 4 until October 2003, when his mother was told he had to leave school. After being forced to leave, JM1 did not receive any educational services until mid-November, when home instruction was put in place. However, the home instruction was not adequate and he was not receiving his speech services for five months. AFC informed Defendants' counsel about JM1 on February 26, 2003 and filed an impartial hearing on March 8, 2003. The hearing date was not set until more than one month later, on April 8, 2003. JM1 was eventually given an interim placement at a school, but was not reinstated in a day treatment program. JM1 was out of school for five months.

143. In violation of law, JM1 did not receive adequate due process prior to his exclusion from school: JM1 was excluded for a reason not authorized by law, he and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to exclusion and were not offered the opportunity for a

hearing. After the school excluded him illegally, he was denied educational services for several months in violation of federal and state law.

JM2

144. JM2 is a 12-year-old student with a learning disability who has an IEP that classifies him as learning disabled and notes that he has behavioral issues. During the 2001-2002 and 2002-2003 school years, JM2 was suspended and removed from school without being provided any educational services for days at a time. Despite the fact that JM2's mother informed the district that he should be reinstated, he was transferred to a different site. When AFC, on behalf of his parent, objected to a transfer as being a violation of his rights, the District determined that it would, instead, consider an extended suspension and perhaps place JM2 in a one-year expulsion center called a Second Opportunity School (SOS). Upon information and belief, there are no special education services at SOS that would meet his needs. On October 15, 2002, AFC filed a request for an expedited Impartial Hearing, requesting, among other things, that JM2 be reinstated in school. The hearing was not scheduled until November 6, 2002. JM2 was not reinstated during this time. On or about October 28, 2002, JM2's mother placed him temporarily at IS 61, since he was still out of school. On or about October 30, 2002, AFC received a decision letter dated October 11, 2002, from the suspension hearing, which upheld the suspension and placed JM2 on an extended suspension for one year with placement at a SOS. The District held a meeting to determine whether JM2's behavior was a manifestation of his disability on October 28th, without written notice to JM2's mother or AFC. On or about October 31, 2002, JM2's mother was informed through the

Defendants' counsel that the disposition placing him in a SOS school was not accurate. JM2 was offered the opportunity to go to another school.

145. In violation of law, JM2 did not receive adequate due process prior to his exclusion from school: JM2 and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to exclusions, were not provided sufficient process for the suspension and were not provided adequate notice or opportunity for a hearing prior to his transfer. After the school excluded him illegally on a number of occasions, he was denied educational services for more than one month in violation of federal and state law.

LM

146. LM is a 15-year-old student with a disability who is supposed to receive special education services. LM had done so well in his junior high school segregated special education program that he was placed back in regular classes in a regular high school. He had very poor behavior in the fall of 2002 and eventually went on medication in January 2003. In February 2002, LM was removed from his high school without due process and sent to an alternative site that did not have special education services. The site was for suspended students, even though LM was not suspended. On behalf of his mother, MM, on February 5, 2003, AFC wrote to Defendants and asked for him to be reinstated. On or about March 8, 2003, Defendants allowed LM to return to the high school building, but LM was only allowed to take English and Math and was barred from lunch and other academic subjects. On March 14, 2003, AFC informed Defendants' counsel of the fact that LM was out of school. On March 17, 2003, AFC informed Defendants' counsel about LM as well as the general lack of instruction and special

education services at the Bronx Lehman suspension center. A request for an expedited Impartial Hearing was filed on March 14, 2003. The hearing was scheduled for March 27, 2003 and as of the hearing date, LM was still out of most of his classes and had missed more than one month of school. The order of the hearing officer was sent to LM's mother through her counsel, AFC on April 24, 2003. On or about April 22, LM was arrested and placed in secure detention, where he is not receiving special education services and accommodations to which he is entitled.

147. In violation of law, LM did not receive adequate due process prior to his exclusion from school: LM and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to his exclusions, were not provided sufficient process for a suspension and were not provided adequate notice or opportunity for a hearing prior to an exclusion. After the school excluded him illegally on a number of occasions, he was denied educational services for more than one month in violation of federal and state law.

RM

148. RM is an 18-year-old student with a disability who has received special education services since second grade. RM has an average to high average IQ, yet his reading and math levels are at approximately 4th and 5th grade levels. RM has earned at least 20 high school credits. In Spring 2002, the CSE recommended that RM return to a special class in a regular high school. On September 6, 2002, when RM and his mother went to the new school to enroll, he was told that he was not enrolled there and was instructed to contact the CSE. RM's records reflect that he was discharged on September 6, 2002. RM and his mother were not able to obtain a new school placement and he sat

out of school for two months. On November 7, 2003, AFC filed for an expedited Impartial Hearing to get RM reenrolled, among other things. Eventually, on January 21, 2003, the hearing was resolved through a partial settlement.

149. In violation of law, RM did not receive adequate due process prior to his exclusion from school: RM was excluded for a reason not authorized by law, he and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to exclusion and were not offered the opportunity for a hearing. After the school excluded him illegally, he was denied educational services for several months in violation of federal and state law.

BN

150. BN is a student at IS 126. During the 2001-2002 school year, BN was attending a school-based mental health program run by LIJ at his school. When this program ended in the Spring, his mother enrolled him in an outside counseling program. During the week of April 15, 2002, there was an incident in school where, allegedly, BN got angry and pulled things off a bulletin board. On Friday, April 19, 2002, his mother received a letter asking her to attend a guidance meeting at the district with the Director of Pupil Personnel on Monday, April 22, 2002. At this hearing, the Director of Pupil Personnel told BN's mother that she recommended that his mother obtain a psychiatric evaluation for BN. BN's mother agreed and began taking steps to make an appointment for such an evaluation. The Director said that BN should have an "in-house" suspension and that the suspension could not be at BN's current school, pending results of the outside psychiatric evaluation. On April 24, 2002 a dean at the school told his mother that BN was no longer enrolled at his school and she should contact the district to find

out what to do next. Apparently he had been moved to an alternative site called Project Return. On Friday, April 26, AFC faxed and mailed a letter to the District pointing out the various violations in this situation, and also asserted the child's IDEA rights. On Monday, April 29, 2002, BN's mother went to school with a letter from AFC and BN was re-enrolled at IS 126. On Wednesday, May 1, 2002, BN brought home another letter saying that BN would again be transferred to Project Return. The school shared the content of the letter with BN telling him that he is no longer enrolled at the school and is not wanted, greatly upsetting him. BN's mother filed a request for an Impartial Hearing on May 10, 2002, requesting that BN be reenrolled. On May 13, 2002, the school finally readmitted BN. Overall, BN missed approximately three weeks of school without any instruction due to defendants' illegal actions.

151. In violation of law, BN did not receive adequate due process prior to his exclusion from school: BN was excluded for a reason not authorized by law, he and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to exclusion and were not offered the opportunity for a hearing. After the school excluded him illegally, he was denied educational services for several weeks in violation of federal and state law.

JS

152. JS is a 20-year -old-student with a disability who was discharged from JFK High School in September 2001. He only needed two Regents' exams to graduate. He missed one and one half years of school and he had never been evaluated or classified as disabled by Defendants. On July 24, 2002, AFC filed an impartial hearing. On August 23, 2002, AFC wrote to Defendant's counsel on JS's behalf. Even after contacting

Defendant's council, JS still was not re-enrolled in school. On August 27, 2002, AFC wrote to counsel again, but no resolution was forthcoming. The hearing was originally scheduled for August 21, 2002, with adjourned dates of October 7, 2002 and October 9, 2002. The IHO rendered his decision on November 21, 2003, holding in favor of JS under Section 504. AFC received the decision on November 26, 2002. On January 22, 2003, the District created an IEP and classified JS as Learning Disabled. Even after the hearing, JS was not reinstated into school.

153. In violation of law, JS did not receive adequate due process prior to his exclusion from school: JS was excluded for a reason not authorized by law, he and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to exclusion and were not offered the opportunity for a hearing. After the school excluded him illegally, he was denied educational services for more than fourteen months in violation of federal and state law.

LS

154. LS is a 14-year-old special education student. He was discharged from his special education class in a District 75 school in the Spring of 2002 despite the fact that he had an IEP for a 12-month program. He missed more than 5 months of school until his mother, GS, filed an impartial hearing on October 24, 2002, requesting, among other things, that he be reinstated to school. The District offered to place him in an approved private school and he accepted. After he was accepted to the school in early December 2002, he was then excluded from school for approximately two more months because of problems with his behavior and access to the bus.

155. In violation of law, LS did not receive adequate due process prior to his exclusion from school: LS was excluded for reasons not authorized by law, he and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to exclusions and were not offered the opportunity for hearings. After he was illegally excluded, he was denied educational services for more than five months in violation of federal and state law.

WZ

156. WZ is an 18-year-old student with a disability who lives in Brooklyn. In or around November 2002, WZ's mother, JZ, was told by school staff that he was no longer allowed to attend Canarsie High School and had to enroll in a GED program. JZ and WZ signed transfer forms, believing they had no choice. JZ attempted to enroll WZ in a GED program, but there was no space. In or around January 2002, she returned to the school requesting that he be re-enrolled. Instead, WZ was only allowed to enroll in a GED program at the school, which operated for two hours in the morning. On or about October 1, 2002, AFC filed an impartial hearing on his behalf requesting that he be evaluated for a suspected disability and placed in a program to meet his needs. On or about October 23rd, the Department's representatives at the Committee on Special Education agreed to evaluate him on an expedited basis. WZ was offered a school placement in mid-November 2002. After WZ was evaluated by the CSE he was classified as learning disabled with speech and language delays and an IEP was created for him. His hearing was settled and he is now in a private school for learning disabled students at District expense.

157. In violation of law, WZ did not receive adequate due process prior to his exclusion from school: WZ was excluded for a reason not authorized by law, he and his parent/guardian were not provided notice of their substantive and procedural rights under federal and state law prior to exclusion and were not offered the opportunity for a hearing. After the school excluded him illegally, he was denied educational services for more than four months in violation of federal and state law.

IX. EXHAUSTION IS NOT REQUIRED

158. Class members are being irreparably harmed, in that they are being denied access to school and not receiving educational services to which they are entitled.

159. Plaintiffs are not mandated to exhaust administrative remedies for the following reasons.

a. The allegations set forth in this complaint are systemic. As such, they cannot be effectively remedied through administrative hearings, which focus on one child a time and cannot result in class wide relief. Moreover, the relief sought here cannot be obtained through administrative channels.

b. Children are being illegally excluded from school and, as such, are not required to pursue administrative remedies before seeking to be restored to their pendency placements.

c. Children are being excluded or transferred informally and not provided adequate or timely notice of their rights to protections and administrative remedies. As such, since they are not receiving notice, they should not be held to the exhaustion requirement.

d. Even class members who attempt to use the administrative proceedings are still suffering irreparable harm, since the administrative system is not adequate to address their claims.

e. The administrative hearing process is not proceeding quickly enough to ensure that children are not suffering irreparable harm by continuing to be excluded for weeks or months.

f. The Defendants due process hearings rarely, if ever, meet federal and state timelines. Once a hearing is filed, a parent may not get a hearing date for 3 or 4 weeks. Once a hearing is held, the hearing officers generally require that they be provided 30 days to issue a written decision. Once a decision is rendered, there is a 30-day appeals process before the Defendants are required to enforce the order, unless pendency is an issue.

g. IHOs do not have jurisdiction to enforce their orders, and thus even parties who prevail may not receive relief. Moreover the system for assigning IHOs does not comport with state requirements.

h. On questions of law, hearing officers do not have unique or specialized expertise. Accordingly, exhaustion of administrative remedies is not required in this case.

160. Nor is exhaustion required for the state law claims; class members allege illegal policies, practices and systemic violations and the remedies sought here would not be available through another state administrative process. Moreover, class members are not generally being provided adequate notice of their rights. And, as set forth above, the

state system is not fast enough to ensure that children would not be excluded from school and irreparably harmed.

X. CAUSES OF ACTION

By and For the First Cause of Action – IDEA

161. Plaintiffs reallege and incorporate by reference the allegations in paragraphs 1-160 as if fully set forth herein.

162. Defendants have violated and continue to violate plaintiffs' rights under the IDEA by, inter alia:

- a. Excluding eligible class members from school and denying them a free and appropriate public education, in violation of 20 U.S.C. § 1400 *et seq.*;
- b. Removing children from school for more than ten days;
- c. Failing to identify, locate and evaluate all class members who are in need of special education services prior to or during the period of exclusion.
- d. Failing to ensure that school and district administrators and teachers adhere to the requisite procedural safeguards for disabled children and their parents and guardians, including prior written notice of proposed charges, the right to disagree in adequate administrative proceedings and the right to pendency during those proceedings.

163. As a result of Defendants' conduct, plaintiffs have been injured and continue to suffer injury.

By and For the Second Cause of Action – Section 504 of the Rehabilitation Act

164. Plaintiffs reallege and incorporate by reference the allegations in paragraphs 1-163 as if fully set forth herein.

165. Defendants receive federal financial assistance for their educational programs.

166. Class members are qualified individual with disabilities under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

167. By the foregoing facts alleged herein, Defendants have and are continuing to violate the rights of the named plaintiffs and class members under the Section 504 of the Rehabilitation Act of 1973 and the regulations promulgated thereunder.

By and For the Third Cause of Action – Due Process

168. Plaintiffs reallege and incorporate by reference the allegations in paragraphs 1-167 as if fully set forth herein.

169. By the foregoing facts alleged herein, Defendants have violated the rights of the named plaintiffs and class members under the Due Process Clause of the 14th Amendment to the Constitution of the United States.

By and For the Fourth Cause of Action – Equal Protection

170. Plaintiffs reallege and incorporate by reference the allegations in paragraphs 1-169 as if fully set forth herein.

171. The Fourteenth Amendment to the United States Constitution prohibits state actors from singling out persons for unequal treatment as compared to others similarly situated if the unequal treatment is based on impermissible considerations such as the intent to inhibit or punish the exercise of federally-protected rights or the malicious bad faith intent to injure.

172. By the foregoing facts alleged herein, Defendants have violated the rights of the named plaintiffs and class members under the Equal Protection Clause of the 14th Amendment to the Constitution of the United States.

By and For the Fifth Cause of Action – Americans with Disabilities Act

173. Plaintiffs reallege and incorporate by reference the allegations in paragraphs 1-172 as if fully set forth herein.

174. All plaintiffs have impairments that substantially limit one or more major life activities, including talking, communicating, learning, and interacting with others as well as a record of such an impairment.

175. All plaintiffs are qualified to receive a free appropriate public education in defendants' schools.

176. By reason of the policy, practice, or custom described above, all defendants have failed and will continue to fail to reasonably accommodate the disabilities of each and every plaintiff and members of the plaintiff class, failed to provide them with an appropriate education, and have therefore discriminated against them on the basis of their disability in violation of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, *et seq.*

177. As a direct and proximate result of the misconduct, each and every plaintiff and members of the plaintiff class suffered and continue to suffer psychological pain, suffering and mental anguish, and the deprivation of their right to a free appropriate public education, which will continue unless defendants are enjoined from their unlawful conduct.

By and For the Sixth Cause of Action – New York State Education Law

178. Plaintiffs reallege and incorporate by reference the allegations in paragraphs 1-177 as if fully set forth herein.

179. By the foregoing facts alleged herein, Defendants have violated the rights of the named plaintiffs and class members under the New York State Education Law and the regulations promulgated thereunder.

By and For the Seventh Cause of Action – 42 U.S.C. § 1983

180. Plaintiffs reallege and incorporate by reference the allegations in paragraphs 1-179 as if fully set forth herein.

181. By implementing, promulgating, and continuing to enforce and/or effectuate a policy, practice and custom pursuant to which the named plaintiffs and other members of the plaintiff class are illegally excluded from school and denied educational services to which they are entitled under federal and state law, defendants have deprived and will continue to deprive each and every plaintiff and members of the plaintiff class of rights, remedies, privileges, and immunities guaranteed to every citizen of the United States, in violation of 42 U.S.C. § 1983, including, but not limited to, rights guaranteed by the IDEA, 20 U.S.C. § 1400 *et. seq.*, the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; conspired among themselves to do so (taking numerous overt steps in furtherance thereof); and failed to prevent one another from doing so.

182. By implementing, promulgating, and continuing to enforce and/or effectuate a policy, practice and custom of refusing to comply with orders of their own Impartial Hearing Officer ordering them to return children to school, defendants have

deprived and will continue to deprive those plaintiffs and members of the plaintiff class of rights, remedies, privileges, and immunities guaranteed to every citizen of the United States, in violation of 42 U.S.C. § 1983, including, but not limited to, rights guaranteed by the IDEA, 20 U.S.C. § 1400 *et. seq.*, the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; conspired among themselves to do so (taking numerous overt steps in furtherance thereof); and failed to prevent one another from doing so.

183. By failing to adopt adequate policies and procedures to prevent plaintiffs from being illegally denied from school and deprived of educational services defendants have deprived and will continue to deprive those plaintiffs and members of the plaintiff class of rights, remedies, privileges, and immunities guaranteed to every citizen of the United States, in violation of 42 U.S.C. § 1983, including, but not limited to, rights guaranteed by the IDEA, 20 U.S.C. § 1400 *et. seq.*, the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; conspired among themselves to do so (taking numerous overt steps in furtherance thereof); and failed to prevent one another from doing so.

184. By failing to supervise and train their employees and agents concerning due process and the laws and policies designed to prevent illegal exclusion from school and denial of educational services, defendants have deprived and will continue to deprive those plaintiffs and members of the plaintiff class of rights, remedies, privileges, and immunities guaranteed to every citizen of the United States, in violation of 42 U.S.C. § 1983, including, but not limited to, rights guaranteed by the IDEA, 20 U.S.C. § 1400 *et. seq.*, the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, *et seq.*, and Section

504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; conspired among themselves to do so (taking numerous overt steps in furtherance thereof); and failed to prevent one another from doing so.

185. Defendants acted under pretense and color of state law and in their individual and official capacities and within the scope of their respective employments as City, SED, and/or Department employees and/or officers. Said acts by defendants were beyond the scope of their jurisdiction, without authority of law, and in abuse of their powers, and said defendants acted willfully, knowingly, recklessly, and with the specific intent to deprive plaintiffs of their constitutional rights secured by 42 U.S.C. § 1983, and by the IDEA, the ADA, and the Rehabilitation Act.

186. As a direct and proximate result of the misconduct, each and every plaintiff and members of the plaintiff class suffered and continue to suffer psychological pain, suffering and mental anguish, and the deprivation of their right to a free appropriate public education, which will continue unless defendants are enjoined from their unlawful conduct.

187. The acts of the individual defendants were reckless, willful, wanton, malicious, and/or intentional, thus entitling plaintiffs to an award of punitive damages on all claims.

188. By facts alleged herein concerning Defendants actions, Defendants have violated 42 U.S.C. § 1983 by depriving plaintiffs, under color of state law, of their rights, privileges and immunities under federal statutory and constitutional law.

By and For the Eighth Cause of Action – Declaratory Relief

189. Plaintiffs reallege and incorporate by reference the allegations in paragraphs 1-188 as if fully set forth herein.

190. In light of the foregoing, Plaintiffs seek a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202, stating that the Defendants’ conduct as alleged above is illegal and violates the rights of class members.

XI. RELIEF

191. WHEREFORE, plaintiffs request that this Court:

- a. Assume jurisdiction of this case;
- b. Enter a preliminary injunction requiring that the District immediately enroll named plaintiffs in school and enforce orders of Impartial Hearing Officers;
- c. Certify a class consisting of all students with disabilities who have been excluded from school in violation of law and denied due process, procedural protections and educational services to which they are entitled under law.
- d. Issue a declaratory judgment that Defendants have violated plaintiffs’ rights as set forth above;
- e. Issue an injunction restraining the Defendants from illegally excluding class members from school and denying them FAPE under federal and state law.
- f. Issue an injunction restraining the Defendants from failing to comply with federal and state law and Chancellor’s Regulations with respect to class members;
- g. Issue an injunction or judgment directing the Defendants to immediately identify those class plaintiffs who have been illegally excluded, suspended, expelled or disciplined who are under the age of 21 who have not received a Regents or Local

diploma; outreach by letter in appropriate languages, which will be drafted and approved by Plaintiffs counsel, and offering class members the opportunity to re-enroll in the school from which they were removed or excluded or another appropriate program of their choice, obtain FAPE and services guaranteed to them by law and compensatory services; such letter will also contain a notice for class members to contact plaintiffs' counsel.

h. Issue an injunction or judgment directing the Defendants to immediately identify those individuals with disabilities who had been illegally excluded, suspended, expelled or disciplined in the past 3 years but who are now over the age of 21 who have not received a Regents or Local diploma and offering them the opportunity for compensatory educational services by letter in appropriate languages, which will be drafted and approved by Plaintiffs offer the opportunity to re-enroll in their school or other program, obtain FAPE and services guaranteed to them by law and compensatory services; such letter will also contain a notice for class members to contact plaintiffs' counsel.

i. Such compensatory services under (f) and (g) should include the development of a fund that can be accessed by class members to pay for educational services to make up for loss of educational services for class members who have experienced significant exclusions, without the necessity of hiring an attorney.

j. With respect to class members not already excluded, discharged, suspended or expelled, enter a permanent injunction requiring Defendants to establish and maintain, on an ongoing basis, a system sufficient to ensure that class members' rights are protected and that they are not excluded from school for more than 10 days in any school year.

- k. With respect to all class members, enter a judgment
- i. Requiring Defendants to design, to submit to plaintiffs and the court for approval and to implement an effective plan to ensure that class members will be afforded the substantive and procedural protections to which they are entitled under federal, state and local law and not excluded from school violation of their rights. Such plan should contain a new system by which defendants will track exclusions, suspensions, expulsions, discharges and other exclusions and ensure accountability in the local community school districts, high school superintendent's offices and District 75 for complying with federal, state and local mandated procedures;
 - ii. Requiring Defendants to develop a plan to ensure that all personnel in the schools, Districts and Department's Central Offices are trained on the mandates of due process, the IDEA, Section 504, State and local law and policies which relate to the claims in question.
 - iii. Requiring Defendants ensure that all written and other notices and procedures and policies comply with federal, state and local law and are designed to ensure that the class members rights are protected.
 - iv. Requiring Defendants to establish and maintain policies and procedures and a system designed to ensure that class members are

properly identified, evaluated and provided with all mandated services and procedural protection and not excluded from school. Such system should include a procedure whereby parents are consulted and advised as to their rights.

- v. Requiring Defendants to establish a system for children whom the district knows, or should know, to have a disability, to ensure that a child is not excluded, removed, suspended, discharged or expelled from any class or school based on behavior before an adequate determination is made as to whether a disability is present (and until any administrative appeals and judicial review are completed); is transferred to an alternative school or class or otherwise disciplined only in a manner consistent with applicable law; and is afforded all other procedural and substantive rights with respect to special education.
- vi. Requiring Defendants to retain an independent expert monitor to oversee, develop and implement the plans and systems and track compliance;
- vii. Requiring Defendants to submit to counsel for plaintiffs and the court regular periodic reports on the implementation of the plans, data about children who are excluded, suspended, expelled, discharged or disciplined, and the development of procedures and policies;

- viii. Requiring Defendants to disseminate notices to parents of all students expelled, discharged, suspended or otherwise excluded informing them of this action and providing them with plaintiff counsel's contact information.
- ix. Appointing a special master or independent monitor to oversee and monitor defendants' implementation of the requirements of this order;
- x. Retaining jurisdiction of this action for all purposes, including entry of such additional orders as may be necessary or proper;
- l. Award to plaintiffs their costs and attorneys fees; and
- m. Grant such other and further relief as may be appropriate.

Dated: July 15, 2003
New York, New York

Respectfully submitted,

Elisa F. Hyman (EFH4709)
Ranee J. Waldman (RW4736)
Attorneys for Plaintiffs
Advocates for Children of New York
151 W. 30th Street, 5th Floor
New York, New York 10001
(212) 947-9779

