22-939

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Z.Q., BY HIS PARENT, G.J., G.J., INDIVIDUALLY AND ON BEHALF OF Z.Q., J.H., BY HIS PARENT, Y.H., Y.H., INDIVIDUALLY AND ON BEHALF OF J.H., J.A., BY HIS PARENT, D.S., D.S., INDIVIDUALLY AND ON BEHALF OF J.A., M.S., BY HIS PARENT, R.H., R.H., INDIVIDUALLY AND ON BEHALF OF M.S., D.V., BY HIS GUARDIAN, V.L., V.L., INDIVIDUALLY AND ON BEHALF OF D.V., J.W., BY HIS PARENT, A.W., A.W., INDIVIDUALLY AND ON BEHALF OF J.W., D.M., BY HIS PARENT, E.L., E.L., INDIVIDUALLY AND ON BEHALF OF D.M., C.B., BY HIS PARENT, C.B.2, C.B.2, INDIVIDUALLY AND ON BEHALF OF C.B., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

PLAINTIFFS-APPELLANTS,

(Caption continued on inside cover)

On Appeal from the United States District Court
for the Southern District of New York, No. 20-cv-9866
Before the Honorable Andrew L. Carter

BRIEF OF THE NEW YORK CITY BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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June 22, 2022

—AGAINST—

NEW YORK CITY DEPARTMENT OF EDUCATION, NEW YORK CITY BOARD OF EDUCATION, RICHARD CARRANZA, IN HIS OFFICIAL CAPACITY AS CHANCELLOR OF THE NEW YORK CITY SCHOOL DISTRICT, NEW YORK STATE EDUCATION DEPARTMENT, NEW YORK STATE BOARD OF REGENTS, BETTY A. ROSA, IN HER OFFICIAL CAPACITY AS INTERIM COMMISSIONER OF EDUCATION AND PRESIDENT OF THE UNIVERSITY OF THE STATE OF NEW YORK,

DEFENDANTS-APPELLEES.

CORPORATE DISCLOSURE STATEMENT

The Association of the Bar of the City of New York (a/k/a the New York City Bar Association) certifies that it is a voluntary bar association with no parent corporation or subsidiaries, and no corporation or publicly held entity owns 10 percent or more of its stock. The New York City Bar Association has one affiliate, the Association of the Bar of the City of New York Fund, Inc.

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INTERESTS OF AMICUS CURIAE[1]

The Association of the Bar of the City of New York (the "City Bar"), through its Education and the Law Committee, submits this brief *amicus curiae* in support of Plaintiffs-Appellants in this case. The City Bar is a professional organization of over 23,000 attorneys and law students who practice in the New York City metropolitan area, as well as across the United States and internationally. The City Bar seeks to promote legal reform and improve the administration of justice through its more than 150 standing and special committees. The City Bar's Education and the Law Committee addresses legal and policy issues that are of particular concern in the area of education, including the interests of students with disabilities whose claims are at the heart of this litigation.

[1] Appellants and Appellees both consented in writing to the filing of this amicus curiae brief. No party's counsel authored this brief in whole or in part, and no person other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

This Court and the Supreme Court have long recognized important exceptions to the requirement that potential plaintiffs must exhaust administrative remedies prior to filing a federal lawsuit alleging failure to comply with the Individuals with Disabilities Education Act, 20 U.S.C. §1401 *et seq.* In this case, students with disabilities and their parents ("Plaintiffs") have alleged pervasive, consistent, and persistent failures of New York City public schools to provide students with disabilities with a free appropriate public education ("FAPE"). Claims of such general, system-wide noncompliance with federal law are not subject to exhaustion.

Untold thousands of students with disabilities were left behind during the pandemic in our City, where they lost the special education and related services that they were promised. These students already were among the most vulnerable populations when the pandemic hit, and the education system's responses often made matters worse. By the accounting of the New York City Department of Education itself, for months of the 2019-2020 academic year, barely half of the students who should have been receiving support pursuant to an individualized education program actually were. The affected students need to catch up–and they are legally entitled to catch up–through compensatory education. See P. ex rel. Mr. and Mrs. P. v. Newington Bd. of Educ., 546 F.3d 111, 123 (2d Cir. 2008)

(compensatory education is a remedy for denial of FAPE). But the City and the State will not reach these students, and they will not fulfill their statutory duties, without an effective, citywide plan and process for delivering compensatory education.

The Plaintiffs' Class Action Complaint alleges the City and State (collectively, "Defendants") have failed to provide a legally adequate plan or process for providing such compensatory education. The Plaintiffs allege the Defendants have failed to identify students who are entitled to compensatory education services, to specify the services needed, and to deliver such services to those students. The Plaintiffs further allege that these failures violate the City's and the State's duties under the Individuals with Disabilities Education Act ("IDEA") and other laws. But the District Court did not reach the merits of those statutory claims. Instead, the District Court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(1), holding that the Plaintiffs were required to exhaust administrative remedies before filing suit.

The doctrine of exhaustion has no place here. In the IDEA context, exhaustion "is 'not an inflexible rule.'" Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199 (2d Cir. 2002) (citation omitted). For decades, the Second Circuit has "excused exhaustion of administrative remedies in cases that included allegations of systemic violations." J.S. ex rel. N.S. v. Attica Cent. Schs.,

386 F.3d 107, 113 (2d Cir. 2004) (collecting cases). Forcing the Plaintiffs' claims *en masse* through an administrative hearing system that can neither adjudicate the merits of the claims nor order the systemic relief sought would be an exercise in futility. Taylor v. Vermont Dep't of Educ., 313 F.3d 768, 789 (2d Cir. 2002) (finding "exhaustion is not necessary under the IDEA where it would be futile to resort to the due process procedures or where 'it is improbable that adequate relief can be obtained by pursuing administrative remedies (e.g., the hearing officer lacks the authority to grant the relief sought)'" (citation omitted)); see also Mrs. W. v. Tirozzi, 832 F.2d 748, 756-57 (2d Cir. 1987) (reviewing legislative history to conclude exhaustion is not required when hearing officer lacks needed authority (citations omitted)); accord M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 305 (S.D.N.Y. 2014) (excusing exhaustion when administrative officers "have no power to alter the City's policies or general practices and cannot issue prospective relief").[2] To require aggrieved families to pursue administrative proceedings, one by one, then litigate, one by one, and attempt to obtain reform on an individual basis, cannot serve the interests of affected students, their parents, the

[2] A broader review of the scope of the authority of an independent hearing officer describes relief that is almost exclusively specific to a particular student. See Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2011). One arguable exception, involving an order that school district employees receive training, was found beyond the hearing officer's authority by a state appellate court. Id. at 28-29.

public schools, or the state, and would effectively undermine the goals of the IDEA.

Part I of this brief describes for the Court the urgency of the plight of the Plaintiffs and the dire need for system-wide reform to provide adequate educational support services and compensatory services to make up for failures during the pandemic. This context illustrates the importance of the Plaintiffs' claims. Part II turns to the requirement of exhaustion and explains why the Plaintiffs, whose allegations fall within a category of claims long recognized by this Court as exempt from exhaustion, should not be forced to exhaust administrative remedies before pursuing systemic reform in federal court.

I. STUDENTS WITH DISABILITIES, ALREADY DISADVANTAGED PRIOR TO THE PANDEMIC, HAVE BEEN LEFT FURTHER BEHIND BY NEW YORK CITY

The urgency of providing adequate educational support to children with disabilities has grown sharply over the course of the global COVID-19 pandemic. While the New York City Department of Education ("DOE"), by its own account, did not provide a free appropriate public education ("FAPE") to far too many students with disabilities even before the pandemic,[3] the harm was compounded by

[3] OFFICE OF SPECIAL EDUCATION, NEW YORK STATE DEPARTMENT OF EDUCATION, New York City Department of Education Compliance Assurance Plan (May 2019), https://emsc32.nysed.gov/compcontracts/nysed-rfi-21-003-iho-nyc/nycdoe-compliance-assurance-plan-may-2019.pdf, at 2 (noting that the DOE "has been identified as not meeting the requirements of IDEA for 13 consecutive years due to

the shift to remote schooling. As a result, the claims at issue in the instant lawsuit are that much more important.

Further, students with disabilities, especially those who are Black, those who are of Latin descent, and/or those who live in low-income or low-wealth families, have suffered disproportionately. While only 13 percent of students with disabilities in New York City in 2019 were white, 31 percent were Black and 48 percent were of Latin descent.[4] These children are vastly overrepresented in the population of students who have individualized education programs ("IEPs").[5] By failing to provide required special education and related services to students with

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performance and/or compliance outcomes for the subgroup of students with disabilities and was recently notified of its 2018–19 school year identification as a district that needs intervention in implementing these requirements" (citation omitted)).

[4] Cheri Fancsali, *Special Education in New York City: Understanding the Landscape,* RSCH. ALL. FOR NEW YORK CITY PUB. SCHS. (Aug. 2019), https://steinhardt.nyu.edu/sites/default/files/2021-03/Special_Education_in_New_York_City_final.pdf.

[5] The great majority of students enrolled in New York City's public schools are economically disadvantaged and are members of racial or ethnic minority groups. NEW YORK CITY DEP'T OF EDUC., DOE Data at a Glance, https://www.schools.nyc.gov/about-us/reports/doe-data-at-a-glance (describing characteristics of the student body) (last visited June 12, 2022). More specifically, of the 192,370 students who had an IEP in the 2020-2021 academic year, 50,649 were Black and 95,365 were Hispanic, according to the DOE. NEW YORK CITY DEP'T OF EDUC., School Age Special Education Data Report (Nov. 1, 2021), p. 19, https://infohub.nyced.org/docs/default-source/default-document-library/annual-special-education-data-report-sy21.pdf.

disabilities in violation of the IDEA, the school system has allowed racial and socio-economic inequities to grow.

The claims in the instant lawsuit seek to compel the Defendants to honor their statutory commitment to these vulnerable students. The IDEA provides federal funding to States on the condition that they comply with its terms, including the requirement that states have "in effect policies and procedures to ensure" that the state makes available a "free appropriate public education . . . to all children with disabilities residing in the State between the ages of 3 and 21, inclusive. . ." 20 U.S.C. §1412(a).

Despite that requirement, masses of New York City's students with special needs have not received all of the services they were entitled to during the pandemic, nor have they received compensatory education to make up for what they missed. In fall 2020, according to a DOE report released in February 2021, only 54 percent of students with disabilities were receiving all the support called for by their IEPs,[6] which, for example, may mandate certain class sizes or physical

[6] NEW YORK CITY DEP'T OF EDUC., Special Education Data Report - February 2021 (Feb. 11, 2021),https://data.cityofnewyork.us/api/views/6thv-9wgt/files/58af5272-e32a-4077-9d05-71fab7215290?download=true&filename=Special_Education_Data_Report_-_February_2021.xlsx. The share of students with disabilities who did not receive their full IEPs declined to 24 percent as of January 2021, meaning one in four students did not receive full support. Id. Such fluctuations highlight the need for compensatory services.

or occupational therapy. Many students with disabilities were not provided access to devices or an internet connection.[7] This is not a case-by-case issue. Rather, as evidenced by the sheer number of students not receiving their full program services, this is a systemic problem. The problem existed prior to COVID-19 and the pandemic significantly exacerbated it.[8]

The City's attempts to provide support to students with disabilities by offering an afterschool and weekend program proved ineffective, leaving those students to fall further behind.[9] The City's approach had a random and arbitrary quality, for both families in need and special education teachers. There was little chance that students who had a given educational need would appear in the right locations alongside teachers who had the appropriate skills and materials. Delays in the rollout of the program forced students to spend an extra two months without

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[7] See Reema Amin, *NYC schools failed to provide students with adequate remote learning access: lawsuit*, CHALKBEAT (Jan. 6, 2022), https://ny.chalkbeat.org/2022/1/6/22870943/nyc-schools-remote-learning-lawsuit.

[8] OFFICE OF THE NEW YORK STATE COMPTROLLER, Disruption to Special Education Services: Closing the Gap on Learning Loss from COVID-19 (Sept. 2021), https://www.osc.state.ny.us/files/reports/pdf/special-education-report.pdf.

[9] Alex Zimmerman & Yoav Gonen, *NYC created a massive after-school program to help all students with disabilities catch up after COVID disruptions. Most never showed up*, CHALKBEAT (Apr. 7, 2022), https://ny.chalkbeat.org/2022/4/7/23013866/nyc-special-education-recovery-services-after-school#:~:text=NYC%20created%20a%20massive%20after,Most%20never%20showed%20up.&text=This%20is%20part%20of%20an,education%20challenges%20in%20city%20schools.

required services, and in addition, transportation to and from the program was not guaranteed, nor were educators to facilitate it.[10] Types of services, as well as their quality, availability, and the amount of time they were offered, varied from school to school.[11] Further, the DOE's guidance in 2020 allowed classes containing both special education and mainstream students — known as integrated co-teaching classrooms ("ICTs") — to have only one teacher when being conducted virtually, thereby disregarding the needs of many students with disabilities.[12] These failings make the need to assist students through education programming and compensatory programming that much greater.

II. ADMINISTRATIVE EXHAUSTION IS NOT A PREREQUISITE TO CHALLENGES TO SYSTEMIC FAILURES UNDER THE IDEA

In this context of widespread failures of the educational system in New York City to deliver FAPEs during the pandemic and to deliver compensatory education

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[10] Yoav Gonen & Alex Zimmerman, *NYC delays its massive academic recovery program for students with disabilities*, CHALKBEAT (Nov. 9, 2021), https://ny.chalkbeat.org/2021/11/9/22772928/nyc-special-education-after-school-services-delay-academic-recovery-plan.

[11] See Zimmerman & Gonen, *supra* note 9.

[12] Michael Elsen-Rooney, *NYC Education Dept.'s remote learning plan for some special education students flouts state law: advocates*, DAILY NEWS (Sept. 10, 2020), https://www.nydailynews.com/new-york/education/ny-remote-learning-students-with-disabilities-20200910-seqwrwngu5dirfodsir2wioatu-story.html.

for those failures, the Plaintiffs filed their Class Action Complaint. They requested a viable citywide plan and process for securing compensatory education for thousands of disabled students. However, the District Court concluded that the Plaintiffs had to turn to the very administrative system that they challenged, forcing them to pursue system-wide relief through individual hearings overseen by administrative officers who not only lack the necessary expertise but also are not authorized to provide the requested relief. That demand was erroneous and inconsistent with Second Circuit precedent.

A. IDEA Claims That Do Not Involve Particular Students' Educational Needs Are Not Subject to Exhaustion

In a typical IDEA dispute involving objections to a particular student's IEP, federal courts ordinarily require that parents and students first seek relief through individualized due process hearings in local or State educational agencies. See 20 U.S.C. §1415(f) (describing such hearings). A typical claim alleges that an IEP is inadequate to provide an appropriate education for that child—for example, because the school did not offer suitable study materials to a student with a visual impairment. See Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 480, 483 (2d Cir. 2002) (requiring exhaustion); see also 20 U.S.C. §1415(l) (addressing exhaustion as applied to non-IDEA claims). In these cases, "[t]he exhaustion doctrine prevents courts from undermining the administrative process and permits an agency to bring its expertise to bear on a problem as well as

to correct its own mistakes." Heldman on Behalf of T.H. v. Sobol, 962 F.2d 148, 159 (2d Cir. 1992); see also C.K. v. Bd. of Educ. of Westhampton Beach Sch. Dist., 185 F. Supp. 3d 317, 328 (E.D.N.Y. 2016) (involving allegations "tied to the events, conditions, or consequences of an individual student's IEP").

This is not one of those "textbook" IDEA cases, as this Court put it in J.S. ex rel. N.S. v. Attica Cent. Sch., 386 F.3d 107, 115 (2d Cir. 2004). As discussed in Part II.C. below, this case involves "allegations of systemic violations" to which exhaustion does not and should not apply. Id. at 113. It is settled doctrine in this Circuit that such systemic claims, which cannot be remedied effectively through individual agency due process hearings, should not be subjected to exhaustion. The next Part explains the logic underlying this sensible conclusion.

B. The District Court Erred in Dismissing the Case for Failure to Exhaust Administrative Remedies When the Administrative Body Lacked the Power to Remedy Systemic Failures to Comply with the IDEA

Claims of systemic violations of the IDEA fall into one of three categories recognized for decades by the Second Circuit as exempt from the exhaustion requirement. Exhaustion does not apply if "(1) it would be futile to use the due process procedures; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; [or] (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies." Mrs. W. v. Tirozzi, 832 F.2d 748, 756 (2d Cir. 1987) (quoting H.R. Rep. No. 296, 99th Cong.,

1st Sess. 7 (1985)); see also Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 530 n.41 (2d Cir. 2020) (recognizing limits to exhaustion demands and quoting Mrs. W.), cert. denied, 141 S. Ct. 1075 (2021). The facts and claims alleged in the Plaintiffs' complaint might well fall into any or all of the three categories, but for the sake of simplicity and consistent with settled precedent, the argument here focuses on futility. Both this Court and the United States Supreme Court have "consistently recognized a futility exception to exhaustion requirements." Carr v. Saul, 141 S. Ct. 1352, 1361 (2021).

This Court has found that it would be futile to pursue administrative remedies to address instances of systemic failure to comply with the IDEA. Substantively, placing artificial hurdles in the way of pursuing an effective remedy for systemic noncompliance unfairly penalizes students with disabilities whom the Act aims to protect. It also imposes that penalty without advancing the traditional purposes of exhaustion under the IDEA: drawing on the expertise of the agency officials who would field the claims, developing a factual record for evaluation of those claims, and offering those officials the first opportunity to correct problems in a particular student's IEP. See Taylor, 313 F.3d at 790; accord Carr, 141 S. Ct. at 1361 ("It makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested") (citations omitted). The agency

hearing officers lack the authority[13] to act on claims about districtwide or statewide failures to plan and implement procedures for finding disabled students and delivering education services. Administrative proceedings are designed for individual, "textbook" cases, not systemic claims.[14]

Thus, the question for the District Court in this case was whether the Plaintiffs alleged systemic violations of the IDEA.[15] This is not a semantic inquiry. As this Court explained in J.S., allegations of "wrongdoing that is inherent in the program itself and not directed at any individual child" implicate

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[13] See Zirkel, supra note 2.

[14] Of course, a plaintiff may not sidestep exhaustion demands by merely including the word "systemic" or "wide-spread" in a complaint. See Hope v. Cortines, 872 F. Supp. 14, 17 (E.D.N.Y. 1995) (addressing exhaustion for non-IDEA claims and plaintiff's conclusory allegations about IDEA violations), aff'd, 69 F.3d 687 (2d Cir. 1995). But the instant case is not about mere labelling. The substance of the Plaintiffs' claims targets system-wide violations of the IDEA. Whatever the precise line between a systemic claim and a complaint about one, particular student's IEP, these claims lie well within this Court's protection from exhaustion demands.

[15] The exhaustion inquiry does not involve the merits of the Plaintiffs' statutory claims. See Ventura de Paulino, 959 F.3d at 531. Of course, a defendant may separately argue that it has not violated the IDEA, to the extent that such argument is not forfeited or waived. But a defendant may not complicate exhaustion doctrine by "conflat[ing] the merits inquiry of whether the Parents have stated a claim upon which relief can be granted with the arguable threshold inquiry of whether the Parents needed to exhaust their administrative remedies." Id. In this case, the District Court solely relied on exhaustion, and the City Defendants argued for dismissal solely based on exhaustion and Federal Rule of Civil Procedure 12(b)(1). The State Defendants added arguments for dismissal based on Rule 12(b)(6), but the District Court did not analyze the Rule 12(b)(6) motion separately.

system-wide concerns and thus are not subject to the exhaustion requirement. 386 F.3d at 110. That conclusion is not altered when plaintiffs add detail about their own experiences with the system. The complaint in J.S. included detailed descriptions of the ways that the defendant school district failed to provide a FAPE to specific students, but also "allege[d] twenty-seven separate ways in which the School District ha[d] failed to comply with its obligations." Id. at 111-112; accord B.C. v. Mount Vernon Sch. Dist., 837 F.3d 152, 157 n.3 (2d Cir. 2016) (finding that plaintiffs' claims fell within the "'futility' exception because they challenge a 'district-wide policy'" (citation omitted)). Put slightly differently, although the school district failed to provide the students with a FAPE, the alleged cause of the failure and the core of the students' complaint was systemic failure at the district level. This Court held that the plaintiffs were entitled to bypass the administrative system.

The J.S. opinion described types of allegations that qualify as "systemic" rather than "textbook" by analyzing how the Second Circuit had made this assessment in other cases. 386 F.3d at 113-115 (discussing Heldman v. Sobol, 962 F.2d 148 (2d Cir. 1992); Mrs. W.; J.G. v. Bd. of Educ. of the Rochester City Sch. Dist., 830 F.2d 444 (2d Cir. 1987); and Jose P. v. Ambach, 669 F.2d 865 (2d Cir. 1982)). In Heldman, a father of a student with learning disabilities challenged the manner in which hearing officers are selected in New York. In Mrs. W., the

plaintiffs asserted that the agency did not formulate or implement adequate complaint resolution procedures. In J.S., this Court found that the "allegations were of wrongdoing inherent in the program, which included failure to evaluate and place students, failure to develop individualized education programs, and failure to inform parents of their rights." J.S., 386 F.3d at 114-15, citing J.G., 830 F.2d at 446-47. And in Jose P., plaintiffs sought structural reform of the New York State and City educational systems to allow more timely evaluation and placement of children with special needs.[16] In each case, the systematic failures to comply with IDEA resulted in denial of a FAPE to students with disabilities, but the alleged failures had the same "common element":

> [T]he plaintiffs' problems could not have been remedied by administrative bodies [1] because the *framework and procedures* for assessing and placing students in appropriate educational programs were at issue, *or* [2] because the *nature and volume* of complaints were incapable of correction by the administrative hearing process.

J.S., 386 F.3d at 114 (emphasis added). The Court found in J.S. that the "complaint does not challenge the content of Individualized Education Programs,

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[16] In Jose P., 669 F.2d 865, the Court did not require exhaustion both because the defendant lacked the capacity to respond effectively through administrative proceedings to all the claims that students with disabilities might make, and because such individualized remedies "could well be… inappropriate" given the complexity of the failures to comply with the IDEA. Id. at 869. Indeed, this Court recognized that the trial court judge correctly declined to impose the exhaustion requirement because the "court *could not be sure* that resort to state administrative remedies would not be 'futile'" – meaning that certainty of futility is not necessary to preclude dismissal on the pleadings. Id. (emphasis added).

but rather the School District's total failure to prepare and implement Individualized Education Programs." Id. at 115. The Court also listed, among several other lapses, the school district's "alleged failure to provide appropriate training to school staff"; "failure to perform timely evaluations and reevaluations of disabled children" and "provide parents with required procedural safeguards regarding identification, evaluation, and accommodation of otherwise disabled children"; and "failure to perform legally required responsibilities in a timely manner, including providing and implementing transition plans, transitional support services, assistive technology services." Id.

Similarly, in J.L. on behalf of J.P. v. New York City Dep't of Educ., 324 F. Supp. 3d 455, 464 (S.D.N.Y. 2018), the plaintiffs described "policies and procedures [that] created layers of bureaucracy that made it difficult for parents of disabled children to obtain services." In that case, the plaintiffs focused on what the court characterized as "disjointed bureaucracy" and "organizational dysfunction" that required students with disabilities and their parents to coordinate with multiple agencies in order to ensure that the students would receive support, including nursing, transportation, and porter services. Id. at 464-65. The court held that such claims were not subject to an exhaustion requirement. In similar circumstances, courts in this Circuit have reached the same conclusion. See, e.g., Kalliope R. ex rel. Irene D. v. New York State Dep't of Educ., 827 F. Supp. 2d

130, 139-140 (E.D.N.Y. 2010) (exhaustion not required); S.W. by J.W. v. Warren, 528 F. Supp. 2d 282, 292-96 (S.D.N.Y. 2007) (explaining rule and reaching same conclusion regarding systemic claims).

It is difficult, if not impossible, to reconcile the District Court's broad and inflexible version of the exhaustion doctrine in the instant case with any of the foregoing holdings. In every IDEA case, one could say that the statute includes a commitment to individualized education programs for each student with a disability. But that fact rightly did not prevent the systemic claims discussed above from proceeding in federal court. In every IDEA case, agency hearings at least theoretically hold out the promise of some relief to individual students, in the form of a different educational placement or compensatory education. But again, the mere existence of individualized relief cannot justify imposition of the exhaustion requirement when plaintiffs seek system-wide relief. Otherwise, all of the above cases would have to be overruled. The better approach, consistent with long-standing Second Circuit precedent, is to continue drawing practical, if at times difficult, distinctions between textbook claims and systemic claims, in accord with the purposes of the exhaustion doctrine as well as the authority and capacity of administrative hearings.

C. The Plaintiffs' IDEA Claims Relate to Citywide Plans and Procedures, Not Individual Grievances

The Plaintiffs' allegations of systemic failures to comply with the IDEA in this case are not meaningfully different from the allegations in Second Circuit cases, several described above, in which the plaintiffs were permitted to move forward without administrative exhaustion. Compl. ¶¶58-65 (systemic noncompliance with IEPs), ¶¶66-71 (failure to provide needed technology), ¶¶72-75 (failure to support English Language Learners), and ¶¶76-80 (failure to provide needed in-person instruction). The relevant claims involve the frameworks and procedures for special education in New York City, and further, they implicate the limited ability of the ordinary administrative process to handle the nature and volume of complaints generated by inadequate citywide plans and processes. See J.S., 386 F.3d at 114.

The Plaintiffs in Z.Q. allege that the DOE and State Board of Education failed – during the period of remote learning and in its aftermath – to provide services and programming to support children with disabilities, to provide compensatory programming to make up for learning loss, and, crucially, to develop a workable plan and process to ascertain which students need compensatory education services and, among those who do, of what sort. Compl. ¶¶4-7. These claims relate to the systemic failure by the DOE to comply with the requirements of the IDEA, through failing to operate a system to ensure that the students who

suffered the most during the school shutdown and period of remote learning receive a FAPE. Accordingly, the Plaintiffs seek "the creation and implementation of a specific process and plan to remedy the denials of Plaintiffs' and Class members' rights, which will promptly afford these students the education to which they are legally entitled—before they fall any further behind." Compl. ¶13.

The Plaintiffs give examples of the DOE's failure to provide remote learning devices to more than 60,000 students, Compl. ¶¶66-71; the DOE's failure to provide remote service to English Language Learners, Compl. ¶¶72-75; and the DOE's failure to provide in-person learning when necessary, Compl. ¶¶76-80. Each of these failures presents an issue relating to the frameworks and procedures implemented by the City's education system and cannot adequately be remedied by filing impartial hearing requests, student by student–perhaps tens of thousands of them.

Like the allegations made in J.S., the allegations in the Complaint here include numerous references to the failures of the City and State to implement an adequate system and to develop plans to effectuate such a system. For example, the Plaintiffs assert that the DOE adopted a policy requiring teachers to create "Special Education Remote Learning Plans" without first holding required IEP meetings with parents, as required by federal regulations, 34 C.F.R. §§ 300.322, 300.501(b). Compl. ¶61. At a bare minimum, a systemic violation occurred which

could potentially entitle every single New York public school student with an IEP to relief.

Furthermore, the administrative system in New York City lacks the capacity to process thousands of additional claims arising from citywide failures.[17] The Plaintiffs allege that the school district failed to implement a system by which children with special needs would receive education during the period of remote learning, then compounded that lapse by failing to develop a system by which children with special needs could receive compensatory services to make up for learning loss. Just as in Jose P., the procedures through which parents could demand a remedy "are totally inadequate to handle the thousands of individuals in the classes." 669 F.2d at 868.[18]

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[17] A review on behalf of the State Education Department of the DOE's independent hearing process for handling complaints by parents of students with disabilities observed that the "high number of due process complaints filed in New York City – the majority of which are resolved in favor of parents. . . raises valid questions of the school district's ability to offer free appropriate public education to its students with disabilities." Deusdedi Merced, Report: External Review of the New York City Impartial Hearing Office, SPECIAL EDUCATION SOLUTIONS LLC (Feb. 22, 2019), p. 19, https://www.regents.nysed.gov/common/regents/files/120p12d3.pdf. The report noted that the duration of cases of complaints involving New York City schools was increasing even prior to the pandemic. Id. fig. 9.

[18] When the District Court in the instant case considered J.S., it determined that neither the framework or procedures for assessing and placing students in appropriate education programs were at issue, nor were the nature and volume of complaints incapable of correction by the administrative hearing process. However, those two conclusions of fact are precisely what the Complaint disputes - making disposition on the pleadings utterly inappropriate. The District Court continuously relies on the fact that Plaintiffs did not attempt to go through the

The children in the instant case have already suffered through a learning environment rendered unstable to an unprecedented degree by the pandemic and the Defendants' inadequate responses to it. The adverse impact on their education will only increase the longer resolution takes.[19] Requiring exhaustion in this case not only would fly in the face of decades of Circuit precedent but would also punish the very students whom the IDEA was written to protect – a uniquely vulnerable cohort. A judicial remedy holds far more promise of achieving systemic solutions. By allowing Plaintiffs to proceed with the merits of their claim, this Court would ensure that Defendants respond to the allegations of systemic failure, in the interest of ensuring that students receive educational support and services that the law promises.

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administrative route, but that is not and should not be a factor in determining whether exhaustion is required.

[19] This Court has found that administrative proceedings may be futile when the nature of the injury is exacerbated and the efficacy of the relief sought is undermined by the passage of time. In Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195 (2002), this Court reviewed a decision to order the defendant to pay for the private education of a student with disabilities at a private school pending the resolution of parents' claim that an alternative placement would violate the "stay put" provision in Section 1415(j) of the IDEA. This Court approved because otherwise the plaintiffs would suffer from an unstable learning environment. Id. at 199. Thus, the court took into account the costs of delayed relief associated with administrative proceedings, and such costs may arise in cases involving other guarantees of the IDEA.

CONCLUSION

For the reasons set forth above, the City Bar respectfully requests that this Court reverse the judgment of the District Court.

Dated: June 22, 2022

Respectfully submitted,

NEW YORK CITY BAR ASSOCIATION

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 5,183 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Mac, ver. 16.62, in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Gilana Keller
GILANA KELLER

Dated: June 22, 2022

Certificate of Service

I hereby certify that on June 22, 2022, I electronically filed the foregoing brief *amicus curiae* with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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