UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES H. AND ISRAEL F., on behalf of themselves and all others similarly situated, *Plaintiffs*, v. THE DISTRICT OF COLUMBIA, *et al.*, *Defendants*.	Civil Action No. 1:21-cv-00997 (CJN)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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Term Used	**Description**
DCPS	District of Columbia Public Schools
FAPE	Free Appropriate Public Education
HOD	Hearing Officer Determination
IDEA	Individuals with Disabilities Education Act
IEP	Individualized Education Program
IYP	Inspiring Youth Program
OSSE	Office of State Superintendent of Education

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INTRODUCTION

Plaintiffs bring this case on behalf of themselves and others similarly situated to challenge the systemic failure of defendants District of Columbia Public Schools (DCPS), the District of Columbia Office of the State Superintendent of Education (OSSE), and the District of Columbia ("the District") to provide or otherwise ensure the provision of federally mandated special education and related services to students detained in the District of Columbia's Central Detention Facility and the Correctional Treatment Facility (collectively, "the DC Jail complex"). Plaintiffs also bring this action on behalf of themselves and other similarly situated to challenge defendants' discriminatory treatment of them with regard to the failure to provide a free appropriate public education (FAPE) in violation of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq.*, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), the Americans with Disabilities Act, 42 U.S.C. § 12132, federal and local implementing regulations, and the District of Columbia Human Rights Act, D.C. Code § 2-1401.

Named plaintiffs are two high school students with disabilities and special education needs. Both named plaintiffs have Individualized Education Programs (IEPs) detailing the specialized instruction and related services they are mandated to receive under the IDEA. Both named plaintiffs are also detained in the DC Jail complex. They are enrolled in the DC Jail complex's on-site school, the Inspiring Youth Program (IYP), which is run by DCPS and monitored by OSSE. Neither they nor the approximately 38 other IYP students with disabilities and special education needs have received their necessary special education and related services since March 2020.

At the beginning of the COVID-19 pandemic, defendant DCPS made a deliberate decision to abandon its federally mandated duty to provide FAPE to IYP students at the DC Jail complex. On March 13, 2020, DCPS halted in-person class instruction and related services for all of its students in response to the pandemic and committed to a distance learning model to begin on

March 24, 2020. For students learning at their homes, DCPS resumed classes and related services via direct instruction provided through two-way videoconferencing. However, for IYP students detained in the DC Jail complex, DCPS chose not to resume class instruction or counseling sessions in any form whatsoever. Instead, DCPS adopted a policy and practice of providing IYP students with printed or tablet computer-delivered work packets with no direct instruction for special education, general education, or related services, leaving these students to teach and counsel themselves. The work packets cannot provide these students with the specialized instruction and support that they need and do not replace their classes or counseling sessions. These students are still languishing without class instruction and related services over one year later.

The IDEA, Section 504 of the Rehabilitation Act, federal implementing regulations, and District of Columbia law require that defendants provide or otherwise ensure the provision of FAPE to students identified as disabled up until the end of the semester in which the student turns 22. 20 U.S.C. § 1400; 34 C.F.R. § 300; 29 U.S.C. § 794(a); 34 C.F.R. § 104; 5-E D.C.M.R. § 3000.1. In order to provide FAPE, defendants must provide or otherwise ensure the provision of special education and related services in conformity with each student's IEP. 20 U.S.C. § 1401(9)(D). An IEP details, among other things, the amount of specialized instruction and related services that each student needs. Defendants have failed to provide or ensure the provision of specialized instruction and related services in conformity with IYP students' IEPs by deliberately deciding not to provide direct instruction or the mandated related services.

On January 11, 2021, an administrative hearing established that DCPS failed to meet its IDEA obligations with respect to named plaintiff Charles H., because "[t]he record is clear that [Charles] has not received specialized instruction or related services since the inception of COVID-19 restrictions." Hearing Officer Determination (HOD), *Charles H. v. DCPS and OSSE*, Case No.

2020-0184 ("*Charles H. v. DCPS*"), Pl. Ex. 1, p. 20. The hearing officer also found that OSSE had failed to meet its obligation to ensure that DCPS complied with the IDEA at IYP "by failing to exert its authority to monitor and supervise DCPS' compliance with IDEA within [IYP], and by failing to intervene upon notice of an alleged failure of DCPS to provide appropriate special education services within [IYP]." *Id.*, p. 24. These conclusions were in part based on a finding that "[w]ork packets, delivered every other week, with no scheduled interaction with any teacher, do not constitute specialized instruction or virtual instruction." *Id.*, p. 20. Despite the HOD, the situation remains largely unchanged for Charles and all IYP students.[1] Defendants continue to systemically deprive plaintiffs of FAPE in violation of federal and local law by, as a policy and practice, failing to provide or otherwise ensure the provision of direct instruction for special education and/or related services to these students in conformity with their IEPs.

Plaintiffs hereby move for certification of a hybrid class under (1) Rule 23(b)(2), as to the claims for class-wide injunctive and declaratory relief, and (2) under Rule 23(b)(3) as to the corresponding requests for compensatory education. As explained below, plaintiffs satisfy the requirements of Rule 23(a), 23(b)(2), 23(b)(3), and 23(g)(1). Plaintiffs satisfy Rule 23(a)'s numerosity, commonality, typicality, and adequacy requirements. Furthermore, certification of plaintiffs' claims for class-wide injunctive and declaratory relief under Rule 23(b)(2) would be consistent with Supreme Court precedent and this Circuit's jurisprudence and is appropriate and necessary to provide uniform relief to remedy defendants' systemic violation. Certification of plaintiffs' claims for compensatory education under Rule 23(b)(3) is desirable because common

[1] In his due process complaint, Charles brought systemic claims on behalf of all similarly situated students. *See* Complaint, *Charles H. v. DCPS and OSSE*, Case No. 2020-0184, Pl. Ex. 2, pp. 3-4. The hearing officer concluded that he did not have jurisdiction over his Rehabilitation Act claim or his claims of systemic violations of the IDEA and the Rehabilitation Act. *See* Prehearing Order, *Charles H. v. DCPS and OSSE*, Case No. 2020-0184, Pl. Ex. 3, pp. 4-5.

issues predominate and a class action is the superior and efficient method for adjudicating this case. Plaintiffs satisfy Rule 23(g)(1) as plaintiffs' counsel has the requisite experience in handling complex federal class actions and knowledge of the applicable law, as well as the resources to represent this class. Therefore, the Court should grant certification as a hybrid class action.

ARGUMENT

CLASS DEFINITION

The named plaintiffs seek to represent the following class:

> All persons who (1) were, as of or after March 24, 2020, are, or will be in the future entitled to receive special education and/or related services pursuant to an IEP issued under the IDEA and its federal and local implementing regulations, (2) were, as of or after March 24, 2020, are, or will be in the future, detained in the DC Jail complex, and (3) did not, do not, or will not, receive direct instruction and/or related services in conformity with the specialized instruction and/or related services mandated by their IEPs while in the DC Jail complex.

I. PLAINTIFFS MEET THE RULE 23(a) PREREQUISITES FOR A CLASS ACTION

An action may be brought on behalf of a class when each of the four prerequisites of Rule 23(a) is met and when one or more of the additional requirements of Rule 23(b) is satisfied. Fed. R. Civ. P. 23(a)-(b). Rule 23(a) sets forth the following four-part test:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Plaintiffs satisfy each part of this test: the putative class is sufficiently numerous, there are common questions of law and fact, the named plaintiffs' claims are typical, and the named plaintiffs will fairly and adequately protect the class's interests.

A. PLAINTIFFS MEET THE NUMEROSITY PREREQUISITE

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Demonstrating impracticability of joinder 'does not

mandate that joinder of all parties be impossible—only that the difficulty or inconvenience of joining all members of the class make use of the class action appropriate.'" *D.L. v. D.C.*, 302 F.R.D. 1, 11 (D.D.C. 2013) (quotation omitted), *aff'd*, 860 F.3d 713 (D.C. Cir. 2017).

1. <u>The Class Size Satisfies Numerosity</u>

Courts look to class size, among other factors, to determine whether the Rule 23(a)(1) prerequisite has been met and joinder is impracticable. Generally, courts recognize that "[t]here is no specific threshold that must be surpassed" to demonstrate impracticability. *Taylor v. D.C. Water & Sewer Authority*, 241 F.R.D. 33, 37 (D.D.C. 2007) (citing *General Telephone Company of the Northwest v. EEOC*, 446 U.S. 318, 330 (1980)). Nevertheless, "[i]n this district, courts have found that numerosity is satisfied when a proposed class has at least forty members." *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 196 (D.D.C. 2013). Courts in this jurisdiction have also held that a plaintiff may satisfy the requirement by supplying estimates, rather than a precise number, of putative class members. *See, e.g., Pigford v. Glickman*, 182 F.R.D. 341, 347-48 (D.D.C. 1998). Though "[m]ere conjuncture, without more, is insufficient to establish numerosity," *id.* at 347, a plaintiff need only provide "a reasonable basis for the estimate provided." *Lightfoot v. D.C.*, 246 F.R.D. 326, 335 (D.D.C. 2007) (citing *Bynum v. D.C.*, 214 F.R.D. 27, 32-33) (D.D.C. 2003)).

Plaintiffs estimate that the plaintiff class is comprised of at least 40 individuals. While the number fluctuates slightly, there are typically an average of approximately 40 individuals enrolled in IYP each year. *See* Testimony of Amy Lopez, Deputy Director, Department of Corrections, *Charles H. v. DCPS*, Pl. Ex. 4, Tr. 50:23-50:26. There are approximately 36 students currently enrolled in IYP. *See* OSSE 2020-21 School Year Annual Enrollment Audit Supplemental Tables, downloaded on March 30, 2021, Pl. Ex. 5, p. 4; *see also* DCPS IYP School Profile, downloaded on March 23, 2021, Pl. Ex. 6 (showing 44 students enrolled for the 2019-2020 school year). In

addition, plaintiffs conservatively estimate that there have been approximately four IYP students who were in the Department of Corrections' custody since March 24, 2020 but who have since been transferred or released. *See* Declaration of Rachel Russo ("Russo Decl."), Pl. Ex. 7, para. 5 (noting that the School Justice Project, which represents plaintiffs here, typically represents a quarter of the IYP student population and one of their clients has been released since March 24, 2020). The putative class includes all IYP students: all students enrolled in IYP have disabilities that qualify them for special education and related services under the IDEA. *See* Russo Decl., Pl. Ex. 7, para. 6. All of the students at IYP have IEPs that require specialized instruction and/or related services. *Id.*, para. 3. None of these students received or are receiving direct instruction and/or related services in conformity with the mandates of their IEPs. *See* Class Action Complaint for Declaratory, Injunctive, and Other Relief, ECF No. 4, paras. 75-76.

Plaintiffs provide a reasonable basis for the estimate that there are approximately four former and 36 current IYP students for a total of 40 individuals who comprise the plaintiff class as of now. *See Lightfoot*, 246 F.R.D. at 335. However, as described below, the putative class includes future class members, which increase its size. A class of this size is sufficient to satisfy numerosity because joinder of these individuals is impracticable. *Accord Bynum*, 214 F.R.D. at 32.

2. Joinder is Impracticable Given the Inclusion of Future Claimants, the Transitory Nature of Class Members, and the Challenges that Individuals Who Are Detained Encounter in Seeking Relief

Plaintiffs also satisfy the non-numerical considerations that courts analyze to determine if the Rule 23(a)(1) prerequisite has been met. In deciding numerosity, the D.C. Circuit has held that "classes including future claimants generally meet the numerosity requirement due to the 'impracticality of counting such class members, much less joining them.'" *J.D. v. Azar*, 925 F.3d 1291, 1322 (D.C. Cir. 2019) (quoting 1 Rubenstein, Newberg on Class Actions § 3:15); *see also*

D.L., 302 F.R.D. at 11 (finding the numerosity prerequisite satisfied where, *inter alia*, "the class seeks prospective relief for future class members, whose identities are currently unknown and who are therefore impossible to join"), *aff'd*, 860 F.3d 713 (D.C. Cir. 2017); *Blackman v. D.C.*, 677 F. Supp. 2d 169, 171 (D.D.C. 2010) (noting the certification of two IDEA subclasses in the litigation's underlying cases that included future harmed children). Plaintiffs here are seeking relief that will also inure to the benefit of future, currently unknowable, class members. The putative class includes those persons who:

> will be in the future entitled to receive special education and/or related services[,] . . . will be in the future, detained in the DC Jail complex, and . . . will not[] receive direct instruction and/or related services in conformity with the specialized instruction and/or related services mandated by their IEPs . . . .

(ECF No. 4, para. 19).

The inherently transitory nature of the putative class members who are detained also makes their joinder in a suit other than a class action impractical. This Circuit and other courts have relied upon the inherently transitory nature of detention facilities to certify classes like plaintiffs' class. *See, e.g., J.D.*, 925 F.3d at 1323 (affirming the certification of a class consisting of all pregnant unaccompanied minors who are or will be in Office of Refugee Resettlement custody); *Wilburn v. Nelson*, 329 F.R.D. 190, 195 (N.D. Ind. 2018) (finding numerosity satisfied and "joinder of all members is plainly impracticable" in a class action brought on behalf of juveniles in solitary confinement at a correctional facility); *A.T. by and through Tillman v. Harder*, 298 F. Supp. 3d 391, 407 (N.D.N.Y. 2018) ("[P]laintiffs' proposed class includes all future juveniles who will be detained at the Broome County Jail, precisely the sort of revolving population that often makes joinder of individual members impracticable."); *V.W. by and through Williams v. Conway*, 236 F.Supp.3d 554, 574 (N.D.N.Y. 2017) ("[P]laintiffs' class and subclass include all future juvenile

pre-trial detainees at the Justice Center, the sort of revolving population that makes joinder of individual members a difficult proposition.").

The DC Jail complex's population is transitory as it includes those who are detained awaiting trial and those incarcerated after conviction awaiting placement in Federal Bureau of Prisons facilities. *See* Department of Corrections Inspection Report, October 2020, Pl. Ex. 8, p. 13 ("[R]esidents are generally housed for short periods of time, because it is a pre-trial detention facility with a transient population."); *see also* Russo Decl., Pl. Ex. 7, paras. 5, 15. Each individual's detention length varies and there is no way to know how long each member of the putative class will be detained at the DC Jail complex. *See* Department of Corrections Inspection Report, Pl. Ex. 8, pp. 13, 22 (discussing that differing ranges of average stays). In addition, the putative class regularly adds new members as individuals are detained or transferred into the DC Jail complex and enrolled in IYP. *See* Russo Decl., Pl. Ex. 7, para. 5 (noting that the School Justice Project added three new IYP students as clients since the beginning of the pandemic). The inherently transitory nature of IYP students, and different lengths of time which they are detained, means that joinder of these individuals in one suit is impossible.

In addition, the fact that these individuals are detained impedes their ability to maintain individual suits. *See V.W.*, 236 F. Supp. 3d at 574 (finding numerosity satisfied in part based on the acknowledgment that "the ability of any one individual member of the class . . . to maintain an individual suit will necessarily be limited by the simple reality that they are being detained as part of the criminal justice process"); *Redmond v. Bigelow*, No. 13-393, 2014 WL 2765469, at *3 (D. Utah June 18, 2014) (noting that individual members of a putative class of prisoners would face myriad practical difficulties in maintaining individual suits).

Lastly, most members of the plaintiff class lack the financial resources to bring these claims individually. *See* DCPS IYP School Profile, Pl. Ex. 6 (noting that 95% of IYP students are

economically disadvantaged). Courts have found the lack of financial resources of class members and the resulting inability, or difficulty, of instituting individual suits relevant for the numerosity inquiry. *See D.L.*, 302 F.R.D. at 11 (explaining that for a class of "the District's youngest and most vulnerable pupils, many of whom are indigent and unable to obtain legal services," the class action lawsuit is an example of the "[e]conomic reality . . . that petitioner's suit [must] proceed as a class action or not at all" (internal citations and quotations omitted)), *aff'd*, 860 F.3d 713 (D.C. Cir. 2017).

Accordingly, the number of current class members, the nature of the relief requested, the explicit inclusion of future class members, the inherently transitory nature of class members, and their lack of financial resources, demonstrate that plaintiffs have met the numerosity prerequisite.

B. QUESTIONS OF LAW AND FACT ARE COMMON TO THE CLASS

The next of Rule 23(a)'s prerequisites—commonality—is also satisfied. Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). As the Supreme Court clarified in *Wal-Mart Stores, Inc. v. Dukes*, the crux of the commonality prerequisite is the "capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." 564 U.S. 338, 350 (2011) (internal citation omitted). Therefore, "a class must present a common contention that is 'capable of class[-]wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *D.L. v. D.C.*, 312 F.R.D. 1, 3-4 (D.D.C. 2015) (quoting *Wal-Mart*, 564 U.S. at 350), *aff'd*, 860 F.3d 713 (D.C. Cir. 2017).

The Supreme Court noted in *Wal-Mart* that an alleged unlawful policy or practice can provide the "glue" necessary for this common contention. 564 U.S. at 352-353. The D.C. Circuit also has acknowledged that commonality is satisfied where there is "a uniform policy or practice that affects all class members." *D.L. v. D.C.*, 713 F.3d 120, 128 (D.C. Cir. 2013); *see also D.L. v.*

D.C., 860 F.3d 713, 724 (D.C. Cir. 2017) (upholding the certification of three subclasses of preschool-aged children with disabilities; each subclass was "defined by reference to a 'uniform policy or practice' governing a specific stage of the special education process" (internal citations omitted)).

Here, defendant DCPS eliminated direct instruction and related services for IYP students and developed a policy and practice to replace both with the provision of paper-based or tablet-delivered work packets. Defendant DCPS has conceded that this is a policy and practice. *See* Testimony of Tarisai Lumumba-Umoja, DCPS Special Education Coordinator, *Charles H. v. DCPS*, Pl. Ex. 9, Tr. 62:22-63:14 (testifying that when DCPS shifted to distance learning in March 2020, "we . . . developed a plan that included . . . work via paper and pen . . . ."), Testimony of Dr. Tanya Roane, former IYP Principal, *Charles H. v. DCPS*, Pl. Ex. 10, Tr. 93:16-96:17 (testifying that although she knew by July or early August that IYP would not use the virtual platform that was cited in the Student Handbook provided to IYP students, she "just didn't go back and revise[] the handbook"). Plaintiffs also demonstrate the existence of such a policy and practice through named plaintiffs' declarations and a declaration from Rachel Russo, a Supervising Attorney at the School Justice Project. *See* Declaration of Charles H. ("Charles H Decl."), Pl. Ex. 11, paras. 8-13, 23; Declaration of Israel F. ("Israel F. Decl."), Pl. Ex. 12, paras. 13-15, 25; Russo Decl., Pl. Ex. 7, paras. 10-13.

Furthermore, defendant DCPS has admitted that this uniform policy or practice injures each class member in the same way. DCPS's failure to provide direct instruction and related services has resulted in a universal failure to implement the IEPs of IYP students and therefore failure to provide FAPE. *See* DCPS Closing Statement, *Charles H. v. DCPS*, Pl. Ex. 13, p. 5 (admitting that "[u]nder the current circumstances in the facility the staff members are not able to provide the supports and services outlined in student IEPs").

OSSE and the District have an obligation to ensure that DCPS provides FAPE to all eligible students and to provide FAPE directly if necessary. OSSE and the District failed to ensure that IYP students at the DC Jail complex are provided with FAPE. *See* HOD, Pl. Ex. 1, p. 24. Therefore, the common question in this litigation is whether defendants in fact fail to provide or otherwise ensure the provision FAPE to IYP students when it does not provide or otherwise ensure that these students receive direct instruction and/or related services in conformity with their IEPs. As required for the commonality prerequisite, this common question "presents a true or false question that is dispositive of its respective claim." *D.L.*, 302 F.R.D. at 13.

There are also other related common questions. Plaintiffs bring related claims under the Rehabilitation Act, the Americans with Disabilities Act, and the District of Columbia Human Rights Act, all of which hinge on the underlying IDEA violations. The common questions there relate to whether defendants' common failure to provide direct instruction and related services, and therefore FAPE, amount to discrimination in violation of federal and District law.

Another district court found the commonality requirement satisfied in an almost identical factual circumstance, in which special education students were being provided educational assignments in lieu of direct instruction. *See V.W.*, 236 F. Supp. 3d at 575-76 (commonality satisfied when defendants only sporadically delivered assigned work instead of direct instruction to those in solitary confinement because this amounted to a "systemic deprivation of individualized special education services in violation of the IDEA"). Other district courts have found commonality where a policy or practice, such as the imposition of solitary confinement, results in special education students being denied access to educational opportunities. *See, e.g.*, *A.T.*, 298 F. Supp. 3d at 408 (commonality satisfied when special education students were placed in solitary confinement and only sporadically received their necessary educational instruction and related services). Commonality is satisfied here because DCPS's policy and practice, and OSSE and the

District's corresponding failures, amounts to a systemic deprivation of individualized special education and related services, a denial of FAPE, as well as discriminatory treatment.

Plaintiffs further satisfy Rule 23(a)(2)'s commonality prerequisite because the question presented by the putative class is "susceptible to common proof." *D.L.*, 860 F.3d at 724. Plaintiffs set forth this common proof in the plaintiffs' Motion for a Preliminary Injunction, which is being simultaneously filed. This proof includes the fact that defendant DCPS has a policy and practice of failing to provide direct instruction and related services to IYP students; that each IYP student has an IEP that requires specialized instruction and/or related services and that specialized instruction cannot occur without direct instruction; and that the putative class is suffering common irreparable harm. In support, plaintiffs are submitting documents and testimony of representatives of the defendants, the declarations of the plaintiffs, a declaration of a witness who has represented numerous students at IYP with respect to their special education needs, and expert declarations.

Finally, plaintiffs satisfy commonality because a single injunction can remedy the harm in the present case, similar to the manner in which a single injunction was able to remedy the harm for each subclass in *D.L.*, 860 F.3d at 713. For example, in *D.L.*, for the subclass organized around the District's failure to provide timely eligibility determinations, the D.C. Circuit upheld the district court's requirement that the District meet its statutory deadline 95 percent of the time and improve its performance by 10 percent in the first year and 5 percent each year thereafter until it met that 95 percent requirement. *Id.* at 724. Here, too, this Court can remedy the harm by requiring defendants to provide and otherwise ensure the provision of direct instruction and related services in conformity with students' IEPs.

Since plaintiffs' claims regarding defendants' violation of Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and the DC Human Rights Act stem from defendants' failure to provide FAPE to plaintiffs in conformity with their IEPs and are based on the same facts,

harms, and evidence, these claims are also suitable for adjudication under Rule 23(a). *See* ECF 4, paras. 5-8.

* * *

As plaintiffs are subject to a uniform policy or practice and suffer common harms that are susceptible to common proof and curable by a single injunction, the commonality prerequisite of Rule 23(a)(2) is satisfied.

C. THE CLAIMS OF THE CLASS REPRESENTATIVES ARE TYPICAL OF THE CLAIMS OF THE CLASS

Plaintiffs also satisfy the third prerequisite of Rule 23 in that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The purpose of this requirement is to "ensure[] that the claims of the representative and absent class members are sufficiently similar so that the representatives' acts are also acts on behalf of, and safeguard the interests of, the class." *Littlewolf v. Hodel*, 681 F. Supp. 929, 935 (D.D.C. 1988), *aff'd sub nom.*, *Littlewolf v. Lujan*, 877 F.2d 1058 (D.C. Cir. 1989).

The typicality prerequisite "is ordinarily met if the claims or defenses of the representatives and the members of the class stem from a single event or a unitary course of conduct, or if they are based on the same legal or remedial theory." *J.D.*, 925 F.3d at 1291 (internal quotations and citation omitted); *see also Richardson*, 991 F. Supp. 2d at 196 ("[C]ourts have found the typicality requirement satisfied when class representatives suffered injuries in the same general fashion as absent class members." (internal quotation marks and citation omitted)). Named plaintiffs' claims need only be typical, not identical. *See D.L.*, 302 F.R.D. at 14. Therefore, "[c]ourts have held that typicality is not destroyed merely by factual variations." *Wagner v. Taylor*, 836 F.2d 578, 591 (D.C. Cir. 1987) (internal quotations omitted).

In the instant case, the claims of the class representatives are typical of the claims of class members. Each named plaintiff has a disability that qualifies him for special education and/or related services under the IDEA, as do all members of the putative class. *See* ECF No. 4, para. 48; Charles H. Decl., Pl. Ex. 11, para. 5; Israel F. Decl., Pl. Ex. 12, para. 5. Each named plaintiff has an IEP that mandates the amount of specialized instruction and/or related services needed for him to access the curriculum, as do all members of the putative class. *See* ECF No. 4, paras. 14-15; Charles H. Decl., Pl. Ex. 11, para. 6; Israel F. Decl., Pl. Ex. 12, para. 6. Neither of the named plaintiffs has received specialized instruction and related services in conformity to the mandates of his IEP while detained in the DC Jail complex during the COVID-19 pandemic, just as none of the putative class has received this. *See* ECF No. 4, paras. 57-60; Charles H. Decl., Pl. Ex. 11, para. 8; Israel F. Decl., Pl. Ex. 12, paras. 25-26. Each of the named plaintiffs has been injured by being denied FAPE, which is identical to the injury suffered by all putative class members. *See* ECF No. 4, paras. 180-183; Charles H. Decl., Pl. Ex. 11, paras. 25-26; Israel F. Decl., Pl. Ex. 12, paras. 24-26.

Named plaintiffs' injuries arise from the same course of conduct affecting the entire putative class: since the beginning of the COVID-19 pandemic, defendant DCPS has not provided direct instruction for its classes or provided access to FAPE. *See* ECF No. 4, paras. 72-76; Charles H. Decl., Pl. Ex. 11, paras. 8-10; Israel F. Decl., Pl. Ex. 12, paras. 12-15. Instead, DCPS has adopted a policy and practice of providing the named plaintiffs, and all putative class members, printed or tablet computer-delivered work packets and generic videos, effectively requiring that they teach themselves all of their subjects. *See* ECF No. 4, paras. 57-59, 79-83; Charles H. Decl., Pl. Ex. 11, paras. 8-21; Israel F. Decl., Pl. Ex. 12, paras. 14-17, 19, 21-24. In addition, DCPS has halted regular related services as part of this policy and practice in violation of the obligation to provide FAPE. *See* ECF No. 4, paras. 62-76; Charles H. Decl., Pl. Ex. 11, paras. 23-25; Israel F.

Decl., Pl. Ex. 12, paras. 25-26. Similarly, as the hearing officer found, OSSE and the District have an obligation to ensure that DCPS provides FAPE to all eligible students and to provide FAPE directly if necessary. OSSE and the District failed to ensure that IYP students at the DC Jail complex are provided with FAPE. *See* HOD, Pl. Ex. 1, p. 24.

Therefore, named plaintiffs' claims are based on the same legal theory as that of the putative class: Defendants' failure to provide or otherwise ensure the provision of direct instruction and related services in conformity with IYP students' IEPs is a failure to provide or otherwise ensure the provision of FAPE in violation of the IDEA, its federal implementing regulations, the Rehabilitation Act, their federal implementing regulations, and District of Columbia law. *See* ECF No. 4, paras. 186-222.

Finally, named plaintiffs and the putative class members request and are entitled to the same type of relief—declaratory, injunctive, and compensatory relief—on the same legal theories. *See* ECF No. 4, paras. 11-12, 186-222, pp. 52-54.

As explained above, since plaintiffs' claims regarding defendants' violation of Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and the District of Columbia Human Rights Act stem from defendants' failure to provide FAPE to plaintiffs in conformity with their IEPs and are based on the same facts, harms, and evidence, named plaintiffs' claims are typical and thus also suitable for adjudication under Rule 23(a). *See* ECF No. 4, paras. 48-106, 178-185.

Accordingly, plaintiffs have met the typicality prerequisite.

D. THE PLAINTIFFS WILL FAIRLY AND ADEQUATELY PROTECT THE INTERESTS OF THE CLASS

The final Rule 23(a) prerequisite—that plaintiffs will fairly and adequately protect the interests of the class—is satisfied in this case. Fed. R. Civ. P. 23(a)(4). In order to satisfy this

prerequisite, "1) the named representative must not have antagonistic or conflicting interests with the unnamed members of the class, and 2) the representative must appear able to vigorously prosecute the interests of the class through qualified counsel." *Twelve John Does v. D.C.*, 117 F.3d 571, 575 (D.C. Cir. 1997) (internal quotations and citation omitted). The first of these two criteria exists to prevent any "conflicts of interest" that would prove "fundamental to the suit and . . . go to the heart of the litigation." *Keepseagle v. Vilsack*, 102 F. Supp. 3d 205, 216 (D.D.C. 2015) (internal quotations and citation omitted). "Speculative or hypothetical" conflicts will not defeat the adequacy requirement. *National Veterans Legal Services Program v. United States*, 235 F. Supp. 3d 32, 41 (D.D.C. 2017). Meanwhile, the second criterion ensures class counsel's "competency." *Id.* at 43.

Named plaintiffs have no interests that are antagonistic nor interests that conflict with those of the putative class. Rather, named plaintiffs' interests are coextensive. Named plaintiffs challenge the same unlawful conduct that affects the putative class and they have suffered the same harm as that of the putative class. *See* pp. 9-15 above. Named plaintiffs seek forms of declaratory, injunctive, and compensatory relief that will benefit all putative class members. They seek no damages or individual relief for themselves alone. Each understands the obligations of a named plaintiff in a class action and is ready to carry out those obligations. *See* Charles H. Decl., Pl. Ex. 11, para. 27; Israel F. Decl., Pl. Ex. 12, para. 30. *Accord Garnett v. Zeilinger*, 301 F. Supp. 3d 199, 211 (D.D.C. 2018) (finding that named plaintiffs were adequate representatives when they "attested that their lawyers informed them of the responsibilities of a class representative and that they are willing to protect the class's interests, and their declarations demonstrate an awareness of the facts of this case").

In addition, named plaintiffs will vigorously prosecute the interests of the class through qualified counsel. As set forth below, plaintiffs' counsel from Terris, Pravlik & Millian, LLP,

School Justice Project, and the Washington Lawyers' Committee for Civil Rights and Urban Affairs ("the Washington Lawyers' Committee") are well-qualified and experienced in litigating complex civil matters, including class actions brought pursuant to the IDEA and the Rehabilitation Act.

Kathleen L. Millian, Zenia Sanchez Fuentes, and Stephanie A. Madison are the attorneys of record from Terris, Pravlik, & Millian, LLP. Ms. Millian is lead counsel. She graduated from Stanford Law School in 1985 and was a judicial clerk to the Honorable James K. Singleton of the Alaska Court of Appeals from 1985 to 1986. Since 1987, Ms. Millian has practiced complex federal litigation in the civil rights and environmental fields with Terris, Pravlik & Millian, LLP, where she became a partner in 1992. Ms. Millian has significant experience representing plaintiffs in class actions. She currently represents the plaintiff classes in the District of Columbia District Court in the following cases: *Salazar, et al. v. D.C., et al.*, Civil Action No. 93-452 (TSC) (plaintiff class of DC Medicaid beneficiaries whose claims of numerous violations of federal and local law were settled in a consent injunctive order after trial; *Salazar* is currently in the monitoring phase), *D.L.*, *et al. v. D.C., et al.*, Civil Action No. 05-1437 (RCL) (plaintiff class of preschool-aged children whose claims for injunctive and declaratory relief for violations of the IDEA, the Rehabilitation Act, and District law were upheld after appeal; *D.L.* is currently in the monitoring phase), *Maldonado v. D.C.*, Civil Action No. 10-1511 (RJL) (putative plaintiff class of DC Medicaid beneficiaries who allege violations of due process in the provision of Medicaid pharmacy services), and *Ivy Brown v. D.C.*, Civil Action No. 10-2250 (ESH) (plaintiff class of DC Medicaid beneficiaries who allege violations of the Americans with Disabilities Act and the Rehabilitation Act in the unnecessary segregation of residents in nursing facilities in violation of the *Olmstead* mandate). *See* Declaration of Kathleen L. Millian ("Millian Decl."), Pl. Ex. 14, paras. 3-9.

Ms. Sanchez Fuentes graduated from George Washington University Law School in 2005. Since 2005, Ms. Sanchez Fuentes has practiced complex litigation in the federal courts in the fields of civil rights and environmental law with Terris, Pravlik & Millian, LLP, where she became a partner in 2013. Before this Court, Ms. Sanchez Fuentes currently represents the plaintiff class, along with Ms. Millian, in *Salazar, et al. v. D.C., et al.*, Civil Action No. 93-452 (TSC). *See* Declaration of Zenia Sanchez Fuentes ("Sanchez Fuentes Decl."), Pl. Ex. 15, paras. 3-6.

Ms. Madison graduated from the Georgetown University Law Center in 2014. From 2014 to 2015, she worked as a litigation fellow at the American Civil Liberties Union's National Prison Project, where she was part of the litigation team representing class action plaintiffs challenging the constitutionality of jail, prison, and immigration detention center conditions. Since 2015, she has been engaged in civil rights litigation in the District of Columbia District Court with Terris, Pravlik, & Millian, LLP. In this Court, Ms. Madison represents the putative plaintiff class, along with Ms. Millian, in *Maldonado v. D.C.*, Civil Action No. 10-1511 (RJL). In addition, Ms. Madison has worked on *D.L., et al. v. D.C.*, *et al.*, Civil Action No. 05-1437 (RCL) and *Salazar, et al. v. D.C., et al.*, Civil Action No. 93-452 (TSC). *See* Declaration of Stephanie A. Madison ("Madison Decl."), Pl. Ex. 16, paras. 3-8.

Sarah Comeau and Ifetayo Belle are the attorneys of record from the School Justice Project. Ms. Comeau graduated from American University Washington College of Law in 2011. From 2011 until 2012, Ms. Comeau worked as a post-graduate legal fellow in the Juvenile Services Program at the Public Defender Service for the District of Columbia. In 2013, Ms. Comeau co-founded School Justice Project, which has served since its founding over 100 young people between the ages of 17 and 22 years old with disabilities that qualify them for special education and related services under the IDEA. A large percentage of School Justice Project's clients have spent time within the DC Jail complex and have attended IYP. In the District of Columbia District

Court, Ms. Comeau represented the plaintiff in *Easter v. D.C.*, Civil Action No. 14-1754 (EGS), which challenged, pursuant to the IDEA and the Rehabilitation Act, the District's failure to provide special education and related services to those committed to the District's juvenile justice agency and placed in several government-run secure facilities. That case held that systemic claims under the IDEA were permissible. *See Easter v. D.C.*, 128 F. Supp. 3d 173, 178 (D.D.C. 2015). Ms. Comeau also represented the plaintiff in *Brown v. D.C.*, Civil Action No. 17-348 (RDM), who challenged the District's failure to provide special education or related services to him while detained in a Federal Bureau of Prisons facility in violation of the IDEA and the Rehabilitation Act. Ms. Comeau also has represented named plaintiff Israel F. in his due process case before OSSE's Office of Dispute Resolution to vindicate his rights under the IDEA, the Rehabilitation Act, and District of Columbia regulations, as he exhausted his administrative remedies before filing this suit. *See* Declaration of Sarah Comeau ("Comeau Decl."), Pl. Ex. 17, paras. 4-8.

Ms. Belle graduated from Northeastern Law School in 2010. Since 2010, Ms. Belle has represented or worked with hundreds of students and families to advance their educational rights at various non-profit organizations that have a focus on education law. From 2013 to 2018, Ms. Belle worked at Advocates for Children of New York where she represented approximately 80 students with disabilities in various special education proceedings, including in IDEA due process hearings against the New York City Department of Education. In 2019, Ms. Belle joined School Justice Project, where she is a Senior Staff Attorney. Ms. Belle represents court-involved young people from 17 to 22 years old who have special education needs, including in IDEA due process hearings against DCPS and OSSE. Ms. Belle represented named plaintiffs Charles H. and Israel F. in their due process cases before OSSE's Office of Dispute Resolution to vindicate their rights under the IDEA, the Rehabilitation Act, and District of Columbia regulations. *See* Comeau Decl., Pl. Ex. 17, paras. 9-10.

Jonathan M. Smith, Kaitlin Banner, and Margaret Hart are the attorneys of record from the Washington Lawyers' Committee. Mr. Smith graduated from the Antioch School of Law in 1984. From 1989 to 2002, he was first a staff attorney and then the Executive Director of the D.C. Prisoners' Legal Services Project. From 1998 to 2002, he was the Executive Director of the Public Justice Center in Baltimore, Maryland, and from 2002 to 2010, he was the Executive Director of the Legal Aid Society of the District of Columbia. From 2010 to 2015, he was the Chief of the Special Litigation Section of the Civil Rights Division of the United States Department of Justice. That Section was responsible for pattern or practice investigations of civil rights violations by law enforcement, correctional, juvenile justice, and mental health and developmental disability agencies. In 2015, Mr. Smith was Associate Dean of Experiential and Clinical Programs at the University of the District of Columbia David A. Clarke School of Law. In 2016, Mr. Smith was appointed Executive Director of the Washington Lawyers' Committee. In the District of Columbia District Court, Mr. Smith has represented the plaintiff classes in numerous prison cases including: *Inmates of D.C. Jail v. Jackson*, Civil Action No. 75-1668 (WBB); *Inmates of the Modular Facility v. D.C.*, Civil Action No. 96-7094, 1996 WL 734195 (D.C. Cir. Nov. 25, 1996); *Franklin v. D.C.*, Civil Action No. 94-0511 (JHG); *Inmates of Three Lorton Facilities v. D.C.*, Civil Action No. 92-108 (JLG). *See* Declaration of Jonathan Smith ("Smith Decl."), Pl. Ex. 18, paras. 5-6.

Ms. Banner graduated from the George Washington Law School in 2008 and obtained her L.L.M. from the David A. Clarke School of Law at the University of the District of Columbia in 2012. As a Clinical Instructor at the Took Crowell Institute for At-Risk Youth at the University of the District of Columbia, Ms. Banner represented numerous individuals in IDEA due process hearings before OSSE's Office of Dispute Resolution. From 2012 to 2018, Ms. Banner was an attorney, then Deputy Program Director and Acting Director of Advancement Project's Opportunity to Learn Program. There, Ms. Banner worked alongside communities on reducing

the overuse and disparate use of zero-tolerance school discipline policies and stopping the criminalization of young people of color by employing creative legal tactics and policy reform. In 2018, Ms. Banner joined the Washington Lawyers' Committee as Deputy Legal Director, where she works on matters pertaining to civil rights, education, and disability rights. In this Court, Ms. Banner currently represents the plaintiff class in *Costa et. al v. Bazron et. al*, Civil Action No. 19-3185 (RDM) (putative class action alleging constitutional and statutory violations by defendants at the District's public psychiatric facility, Saint Elizabeths Hospital, including responses to the COVID-19 pandemic) and *Black Lives Matter et al. v. Trump et al.*, Civil Action No. 20-1469 (DLF) (putative class action alleging indiscriminate use of force against civil rights protestors at Lafayette Square). Ms. Banner also represents the plaintiff in *Wheeler v. American University et. al*, D.D.C. No. 20-2735 (alleging discrimination in violation of, *inter alia*, the Rehabilitation Act). Ms. Banner is an Adjunct Professor for Georgetown University Law School's Juvenile Justice Clinic. *See* Smith Decl., Pl. Ex. 18, para. 7.

Ms. Hart graduated from Temple University Beasley School of Law in 2010. From 2012 to 2015, Ms. Hart worked as an associate for Lewis Johs Avallone Aviles, LLP, and represented approximately one hundred students with disabilities in IDEA cases against the New York City Department of Education, including due process hearings and appeals to the New York State Education Department Office of State Review. From 2015 to 2019, Ms. Hart was a staff attorney at Disability Rights DC at University Legal Services, the federally-mandated protection and advocacy organization for individuals with disabilities in the District of Columbia. While at Disability Rights DC, part of Ms. Hart's work was dedicated to representing students with disabilities in claims arising under the IDEA at OSSE's Office of Dispute Resolution. In 2019, Ms. Hart joined the Washington Lawyers' Committee, where she works on matters pertaining to civil rights, education, and disability rights. In this Court, Ms. Hart currently represents the

putative plaintiff class, along with Ms. Banner, in *Costa et. al v. Bazron et. al*, Civil Action No. 19-3185 (RDM). Ms. Hart also represents the plaintiff in *Wheeler v. American University et. al*, D.D.C. No. 20-2735 (alleging discrimination in violation of, *inter alia*, the Rehabilitation Act). *See* Smith Decl., Pl. Ex. 18, para. 8.

As shown above and in the attached declarations (Pl. Exs. 14-18), these attorneys are capable of prosecuting this action on behalf of the putative class vigorously and efficiently and are ready to dedicate the necessary resources to do so. Therefore, Rule 23(a)'s adequacy of representation prerequisite is satisfied.

II. PLAINTIFFS SEEK HYBRID CERTIFICATION OF THEIR CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF UNDER RULE 23(b)(2) AND THEIR CLAIMS FOR COMPENSATORY RELIEF UNDER RULE 23(b)(3)

In order to maintain this case as a class action, plaintiffs must also satisfy the additional requirements of at least one of the subsections of Rule 23(b). Fed. R. Civ. P. 23(b). In this case, plaintiffs seek a hybrid certification of their class-wide declaratory and injunctive claims under Rule 23(b)(2) and their claims for compensatory education under Rule 23(b)(3).[2]

The D.C. Circuit has endorsed hybrid certification for classes with declaratory, injunctive, and damages claims. *See Eubanks v. Billington*, 110 F.3d 87, 96 (D.C. Cir. 1997) ("[T]he court may adopt a hybrid approach, certifying a (b)(2) class as to the claims for declaratory or injunctive relief, and a (b)(3) class as to the claims for monetary relief . . . ."); *see also Bynum v. D.C.*, 214 F.R.D. 27, 41 (D.D.C. 2003) (certifying a (b)(2) class with respect to the plaintiffs' claims for

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[2] For plaintiffs moving for declaratory, injunctive, and individualized relief, some courts have chosen to certify separate classes rather than separate claims. *See Coleman through Bunn v. D.C.*, 306 F.R.D. 68, 84 (D.D.C. 2015) (certifying a hybrid class action comprised of separate classes for declaratory relief and damages); *D.S. ex rel. S.S. v. New York City Dep't of Educ.*, 255 F.R.D. 59, 73 (E.D.N.Y. 2008) (creation of a compensatory education subclass). That is not necessary here since the two classes would be identical. Regardless, in the alternative, plaintiffs move for certification of a Rule 23(b)(2) class and a Rule 23(b)(3) class with both using the definition (*see* p. 4) and for all the reasons described herein (*see* pp. 4-22).

injunctive and declaratory relief, and a (b)(3) class with respect to their claims for damages). Plaintiffs here seek injunctive relief with respect to the provision of FAPE at IYP and with respect to compensatory education. Compensatory education awards constitute "discretionary, prospective, injunctive relief" that is equitable in nature—they are not damages. *See Reid ex rel. Reid v. D.C.*, 401 F.3d 516, 523 (D.C.C. 2005). However, plaintiffs' request for compensatory education is comparable to damages in that plaintiffs request the court to award individualized compensatory education to the plaintiff class to address the denial of FAPE. *See* ECF No. 4, p. 54; *see also A.R. v. Connecticut State Bd. of Educ.*, No. 16-01197, 2020 WL 2092650, at *12 (D. Conn. May 1, 2020) (certifying a hybrid class for plaintiffs alleging systemic violations of the IDEA wherein class members' claims for class-wide injunctive and declaratory relief were certified under Rule 23(b)(2) and class members' claims for individualized compensatory education relief were certified under Rule 23(b)(3)). Therefore, hybrid certification is appropriate and should be granted.

A. PLAINTIFFS' CLAIMS FOR CLASS-WIDE DECLARATORY AND INJUNCTIVE RELIEF SHOULD BE CERTIFIED UNDER RULE 23(b)(2)

Plaintiffs satisfy Rule 23(b)(2) which states that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." As the language of this rule makes clear, plaintiffs must show that 1) the defendant has "acted, refused to act, or failed to perform a legal duty on grounds generally applicable to all class members," and 2) "final relief of an injunctive nature or a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, must be appropriate." *D.L.*, 302 F.R.D. at 16 (citing 2 Rubenstein, Newberg on Class Actions § 4:26 (5th ed. 2013)). Both factors are met here.

As to the first factor, the central focus of this case is defendants' systemic failure to provide FAPE to IYP students since the beginning of the COVID-19 pandemic. *See* ECF No. 4, paras. 41, 55-106, 189, 194-196, 202, 221. Defendant DCPS's policy and practice of providing only work packets and abandoning direct instruction in conformity with the students' IEPs is equally applicable to each member of the putative class. *Id.*, paras. 55-106. In addition, DCPS halted regular related services as part of this policy and practice. *See id.*; Charles H. Decl., Pl. Ex. 11, paras. 23-25; Israel F. Decl., Pl. Ex. 12, paras. 25-26. As to the second factor, because defendant DCPS's policy and practice is generally applicable to the putative class, final injunctive and declaratory relief for the entire class is appropriate. As set forth in the relief section of plaintiffs' Complaint, and in plaintiffs' Motion for a Preliminary Injunction, plaintiffs are seeking a declaratory judgment that DCPS's practices and procedures violate the rights of the named plaintiffs and the plaintiff class under the IDEA, the Rehabilitation Act, the Americans with Disabilities Act, federal implementing regulations, and District of Columbia law. *See* ECF No. 4, pp. 52-54. Plaintiffs also seek an injunction ordering the District to comply with the requirements of the IDEA, the Rehabilitation Act, the Americans with Disabilities Act, federal implementing regulations, and District of Columbia law. Stated in *Wal-Mart* terms, certification of a (b)(2) class in this case is appropriate because defendants' conduct is "such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart*, 564 U.S. at 360 (internal quotations and citation omitted). There is no delegation of discretion like in *Wal-Mart*. *See id.* at 343 (noting that the only feature common to all promotion decisions was the policy of delegating those discretionary decisions to individual store managers). Instead, defendant DCPS has a policy and practice that applies equally to all IYP students: because of the lack of direct instruction, no IYP student is receiving the specialized instruction or related services mandated by their IEPs.

Courts have repeatedly certified claims under Rule 23(b)(2) that sought injunctive and declaratory relief based on systemic violations of the IDEA and Rehabilitation Act. *See, e.g.*, *D.L.*, 302 F.R.D. at 16, *aff'd*, 860 F.3d 713 (D.C. Cir. 2017). In *D.L.*, the court certified four subclasses, each around a common question: "whether the District fulfilled its statutory duty to have effective policies and procedures to identify disabled children; . . . whether the District fulfilled its obligation to timely evaluate identified children; . . . whether the District performed its duty to provide timely eligibility determinations; and . . . whether the District provided smooth and effective transitions between Part C and Part B services as required by the IDEA." *Id.* at 13. In upholding the certification, the D.C. Circuit noted that defining each subclass around a "uniform policy or practice" ensured the subclasses were "cast around common harm[s], susceptible to common proof, and curable by a single injunction." *D.L.*, 860 F.3d at 724 (internal citations and quotations omitted). "Stated differently, each subclass alleges a uniform practice or failure that harmed every subclass member in the same way." *D.L.*, 302 F.R.D. at 13, *aff'd*, 860 F.3d 713 (D.C. Cir. 2017). Here, the entire class is comparable to each *D.L.* subclass: it is defined by a single unlawful uniform policy and practice that harmed each class member in the same way.

A district court certified a subclass under Rule 23(b)(2) in a similar factual circumstance for claims under the IDEA and Rehabilitation Act. In *V.W.*, plaintiffs were special education students detained in a jail who were not being provided with direct instruction when placed in solitary confinement but rather were sporadically provided with paper-based work packets. *V.W.* 236 F. Supp. 3d at 577. The district court certified a class under Rule 23(b)(2), because "the members of the class and the subclass would benefit from the same remedy—an order enjoining defendants from application of the policies and practices resulting in the deprivations at issue." *Id.* As in this case, defendants' conduct here is generally applicable to the putative class and plaintiffs are seeking appropriate injunctive and declaratory relief for the class as a whole.

Plaintiffs have met the requirements under Rule 23(b)(2). Indeed, Rule 23(b)(2) was intended for civil rights cases such as the present case. *See D.L.*, 860 F.3d at 726 ("Rule 23(b)(2) exists so that parties and courts, especially in civil rights cases like this, can avoid piecemeal litigation when common claims arise from systemic harms that demand injunctive relief."); *In re District of Columbia*, 792 F.3d 96, 102 (D.C. Cir. 2015) ("Rule 23(b)(2) was intended for civil rights cases."). Therefore, plaintiffs' claims for injunctive and declaratory relief should be certified pursuant to Rule 23(b)(2).

B. PLAINTIFFS' CLAIMS FOR COMPENSATORY EDUCATION SHOULD BE CERTIFIED UNDER RULE 23(b)(3)

Plaintiffs satisfy Rule 23(b)(3) for their compensatory education claims. Rule 23(b)(3) certification is satisfied when (1) "the questions of law or fact common to class members predominate over any questions affecting only individual members[,]" and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Coleman through Bunn v. D.C.*, 306 F.R.D. 68, 84-85 (D.D.C. 2015) (internal quotation marks omitted) (quoting Fed. R. Civ. P. 23(b)(3)).

Unlike a (b)(2) class, a (b)(3) class may be certified where a class suit, though not mandatory, is "convenient and desirable." *See Amchem Products. v. Windsor*, 521 U.S. 591, 615 (1997) (internal quotations and citation omitted). The purpose of the predominance and superiority criteria are to cover cases "in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Id.*

Plaintiffs meet the requirements under Rule 23(b)(3) as explained below.

1. COMMON ISSUES PREDOMINATE

Common issues predominate if "the issues in the class action that are subject to generalized proof, thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof." *Johnson v. D.C.*, 248 F.R.D. 46, 56 (D.D.C. 2008) (internal quotation marks omitted). The plaintiffs "must, at minimum, establish widespread injury to the class." *Kottaras v. Whole Foods Market*, 281 F.R.D. 16, 23 (D.D.C. 2012) (internal quotation marks and citation omitted). "[T]his means that [the] [p]laintiff must proffer a method that will use common evidence to show that a substantial majority of the members of the proposed class were injured by—or, put another way, that there was widespread injury to the class from—[the] [d]efendant's unlawful conduct." *Id.*

Here, the predominance requirement is satisfied because questions of law or fact common to the putative class predominate over any questions affecting only individual class members. The putative class members' compensatory education claims depend on the resolution of common questions of law and fact including:

(1) whether defendants are required under the IDEA, Rehabilitation Act, or the corresponding regulations to provide or otherwise ensure the provision of FAPE to class members until the age of 22;

(2) whether defendants' failure to provide direct instruction is a failure to implement class members' IEPs and denies FAPE to class members and therefore violates the IDEA, the Rehabilitation Act, or the corresponding regulations;

(3) whether defendants' failure to provide related services is a failure to implement class members' IEPs and denies FAPE to class members;

(4) whether defendants' common conduct amounts to discrimination in violation of the Rehabilitation Act, the Americans with Disabilities Act, and District law; and

(5) whether defendants' violation of the IDEA obliges it to provide compensatory education to class members.

These questions, which determine the scope of defendants' liability, can be resolved on a class-wide basis through generalized proof and do not depend on class members' individual circumstances.

Common evidence is likely to resolve the liability question because the failure to provide direct instruction and related services is a policy and practice applicable to all IYP students and therefore this proof will not vary among the putative class members. *See* pp. 14-15 above (describing the evidence plaintiffs submit with this motion to demonstrate this policy and practice and its applicability to all IYP students). In support of their Motion for Preliminary Injunction, plaintiffs will submit additional evidence of this policy and practice including testimony by DCPS employees regarding its policies and practices and the declaration of Correctional Special Education expert Dr. Joseph Calvin Brojomohun-Gagnon. Dr. Brojomohun-Gagnon will also provide his opinions regarding the necessity of direct instruction to implement the mandates of plaintiffs' IEPs and the corresponding harm to the plaintiffs from the lack of direct instruction and related services. Plaintiffs will use this evidence—which is applicable to all putative class members—to show that defendants' policy and practice led to a class-wide denial of FAPE and also violations of federal and local anti-discrimination laws.

The precise amount of compensatory education due to each class member would be an individualized determination. However, that does not prevent certification because the common issues predominate over the individualized issues. *See McCarthy v. Kleindienst*, 741 F.2d 1406, 1415 (D.C. Cir. 1984) ("[T]he mere fact that damage awards will ultimately require individualized fact determinations is insufficient by itself to preclude class certification."); *see also* 2 Newberg on Class Actions § 4:54 (5th ed. 2020) ("[C]ourts in every circuit have uniformly held that the

23(b)(3) predominance requirement is satisfied despite the need to make individualized damage determinations."). Here, predominance is satisfied because the underlying questions of liability and the putative class members' entitlement to compensatory education can be resolved through the presentation of common proof, and do not depend on individualized evidence. Even if individualized fact determinations are necessary to award compensatory education, the common question of liability predominate. *See Johnson*, 248 F.R.D. at 56.

Accordingly, issues common to the putative class predominate over any issues affecting only individual class members and plaintiffs meet the predominance requirement of Rule 23(b)(3).

2. A CLASS ACTION IS THE SUPERIOR METHOD FOR ADJUDICATING PLAINTIFFS' COMPENSATORY CLAIM

Rule 23(b)(3) sets out four criteria for a court to consider in evaluating superiority to other available methods for fairly and efficiently adjudicating a controversy:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Here, each factor weighs in favor of adjudicating plaintiffs' compensatory education claims as a class action.

First, the interests of the putative class members would be best served by a single class action, and there are no overriding interests in controlling the prosecution in separate actions. *See* Fed. R. Civ. P. 23(b)(3)(A). The approximately 40 class members in this case are students with disabilities detained in the DC Jail complex who would assuredly find it difficult to pursue their claims individually considering the myriad practical difficulties of detention. *See* pp. 6-8 above. In addition, the majority of these students come from economically disadvantaged backgrounds and likely lack the financial resources necessary for this pursuit. *See* pp. 8-9 above. In such

circumstances, "[m]ultiple lawsuits would be costly and inefficient, and the exclusion of class members who cannot afford separate representation would be neither fair nor an adjudication of their claims." *Coleman*, 306 F.R.D. at 88 (citation omitted). In the absence of a class action, then, class members are unlikely to vindicate their rights through prosecution of these claims at all.

Second, there is no other litigation currently pending in this Court regarding this subject matter, which would be complicated or affected by this case. *See* Fed. R. Civ. P. 23(b)(3)(B). That said, there are other administrative proceedings addressing the failures at issue in this case. However, like Charles' administrative proceeding, none of those other administrative proceedings can provide the systemic relief sought here. *See* HOD, Pl. Ex. 1, p. 3. Instead, it is efficient to adjudicate all common issues together in a class action.

Third, this Court is a desirable venue for concentrating the litigation of these class members' compensatory education claims. *See* Fed. R. Civ. P. 23(b)(3)(C). The putative class members have been, are, or will be detained in the DC Jail complex, all events in question occurred in the District, and defendants are located here, as are many of the likely witnesses. *See Coleman*, 306 F.R.D. at 88 (finding that the "desirability of concentrating the litigation in a particular forum counsels in favor of a class action, because the relevant actions necessarily occurred in the District and the defendant is located here"). Therefore, this Court is the appropriate and desirable place for litigating the putative class members' compensatory education claims.

Fourth, and finally, it is unlikely that this class action will be difficult or unmanageable, *see* Fed. R. Civ. P. 23(b)(3)(D), given the extent to which putative class members raise common issues. *See Coleman*, 306 F.R.D. at 88 (finding that there was no "risk that the classes will be particularly unmanageable, given the extent to which class members raise common issues"). If difficulties do arise in managing this class, the Court may turn to case-managing devices, such as appointment of a special master, to handle any individual elements of class members' claims. *Cf.*

In re Johnson, 760 F.3d 66, 74 (D.C. Cir. 2014) (upholding the district court's certification of a Rule (b)(3) class action when the district court, in anticipation of the eventual need for individualized Teamsters hearings, created a mechanism to send those questions to separate hearings outside the class proceedings). In plaintiffs' forthcoming Motion for a Preliminary Injunction, plaintiffs request that this court order defendants to convene IEP team meetings for plaintiffs to determine all special education and related services missed during the COVID-19 pandemic. This mechanism or others like it would limit any involvement by the Court in the individual elements of the relief.

For these reasons, certification of the putative class members' compensatory education claims is superior to other available methods for fairly and efficiently adjudicating the controversy. A class action would "achieve economies of time, effort, and expense" for all parties to this litigation. *See Amchem Prods.*, 521 U.S. at 615.

Because both predominance and superiority requirements are satisfied, certification under Rule 23(b)(3) is appropriate.

3. PLAINTIFFS' CLASS WILL RECEIVE NOTICE OF THE PENDENCY OF THE CLASS ACTION AND OF THEIR OPT-OUT RIGHTS

Upon certification of plaintiffs' claims for compensatory education under Rule 23(b)(3), plaintiffs would provide class members with individual notice and an opportunity to opt out of the claims for compensatory education. *See* Fed. R. Civ. P. 23(c)(2)(b). Plaintiffs' counsel has the ability and resources to do so. *See* Millian Decl., Pl. Ex. 14.

The rule provides that "[i]ndividual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 173 (1974). With the cooperation of defendants, plaintiffs will obtain the names and addresses of class members.

Notice to members of the class must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Further, the notice must reasonably convey the required information, and must afford a reasonable time for those interested to make their appearance. *Id.*

The notice would clearly and concisely state in plain, easily understood language: (i) the nature of this class action; (ii) the definition of the class certified; (iii) the class claims, issues, and expected defenses; (iv) the binding effect of class judgment on members under Rule 23(c)(3); (v) that a class member may enter an appearance through an attorney if the member so desires; (vi) that the court will exclude from the class any member who requests exclusion; and (vii) the time and manner for requesting exclusion.

Plaintiffs' counsel would publish and distribute the notices through mail, over the internet, and through means suggested by the Department of Corrections to comport with its security concerns. *See Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 484 (1988) (upholding the use of first-class mail as "reasonably calculated . . . to apprise interested parties" of the proceedings affecting their individual rights). The notice and opt out rights will ensure that the procedural protections of Rule 23(b)(3) are afforded to each class member.

III. CLASS COUNSEL MEETS THE CRITERIA OF RULE 23(g)(1)

Plaintiffs satisfy the criteria of Rule 23(g)(1), which governs appointment of class counsel. Rule 23(g)(1)(A)(i) – (iv) provides that, when appointing class counsel, the court must consider the following factors: (i) "the work counsel has done in identifying or investigating potential claims in the action"; (ii) "counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action"; (iii) "counsel's knowledge of the applicable law"; and (iv) "the resources that counsel will commit to representing the class[.]"

Plaintiffs' counsel satisfy all the Rule 23(g)(1)(A) factors in this case. First, plaintiffs' counsel has spent significant time identifying and investigating the claims and potential claims in the case. Before this suit was filed, plaintiffs' counsel expended many hours of work over the course of eight months identifying and investigating potential claims in the action. *See* Millian Decl., Pl. Ex. 14, para. 11. During this investigation, counsel sent a letter to defendants DCPS and OSSE detailing the potential claims and asking that they be resolved without litigation. *Id.*, para 12. Furthermore, counsel exhausted Charles H.'s administrative remedies and is in the process of exhausting Israel F.'s administrative remedy.

Second, as set forth above (pp. 16-22), the team of plaintiffs' counsel is experienced in handling class actions and other complex civil litigation and in litigating claims under the IDEA and the Rehabilitation Act as applied to the educational rights of students detained in the District. Ms. Millian, Ms. Sanchez Fuentes, and Ms. Madison are attorneys with Terris, Pravlik & Millian, LLP, where they specialize in complex federal litigation and class actions. *See* Millian Decl., Pl. Ex. 14, paras. 5-6; Sanchez Fuentes Decl., Pl. Ex. 15, paras. 4-5; Madison Decl., Pl. Ex. 16, para. 6. Ms. Millian has over 30 years of experience handling complex litigation in the federal district and appellate courts and is currently lead counsel in *Salazar* and *Maldonado*. *See* Millian Decl., Pl. Ex. 14, paras. 5-9. Ms. Comeau and Ms. Belle are attorneys with the School Justice Project, where they specialize in IDEA due process hearings and representing students within the DC Jail complex to ensure they can access FAPE. *See* Comeau Decl., Pl. Ex. 17, paras. 4-10. Mr. Smith, Ms. Banner, and Ms. Hart are attorneys with the Washington Lawyers' Committee, where they specialize in complex federal litigation and class actions. *See* Smith Decl., Pl. Ex. 18, paras. 5-8.

Third, plaintiffs' counsel has knowledge of the applicable law. Plaintiffs' counsel at Terris, Pravlik & Millian, LLP demonstrates this knowledge by their successful handling of the *D.L.* class action over a period of 16 years. *See* Millian Decl., Pl. Ex. 14, para. 8; Madison Decl., Pl. Ex. 16,

para. 8. Plaintiffs' counsel at School Justice Project demonstrates this knowledge by their experience in their successful handling of federal litigation brought pursuant to the IDEA and Rehabilitation Act and numerous IDEA due process cases, particularly in the detention context. *See* Comeau Decl., Pl. Ex. 17, paras. 5-9. Plaintiffs' counsel at the Washington Lawyers' Committee demonstrates this knowledge by their numerous IDEA due process cases and federal litigation brought pursuant to the Rehabilitation Act. *See* Smith Decl., Pl. Ex. 18, paras. 9-10.

Finally, plaintiffs' counsel will commit the resources necessary to represent the class throughout litigation. Plaintiffs' counsel has committed the full range of resources necessary to litigate other complex class actions requiring substantial time and resources and will do the same on behalf of this class. *See* Millian Decl., Pl. Ex. 14, paras. 10-11.

As demonstrated above, plaintiffs' counsel has the requisite experience in handling complex federal class actions, knowledge of the applicable law, and resources to represent this class. Accordingly, plaintiffs' class counsel has satisfied the criteria of Rule 23(g)(1).

CONCLUSION

For the foregoing reasons, plaintiffs have met the prerequisites in Rule 23(a) and the criteria for Rules 23(b)(2), 23(b)(3), and 23(g)(1). Accordingly, the Court should certify this action as a hybrid Rule 23(b)(2) and (b)(3) class action. A proposed order is attached.

Respectfully submitted,

/s/ Stephanie A. Madison

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April 12, 2021

Counsel for Plaintiffs

LIST OF EXHIBITS

Number	Description
1	Hearing Officer Determination, *Charles H. v. DCPS and OSSE* ("*Charles H. v. DCPS*"), Case No. 2020-0184
2	Complaint, *Charles H. v. DCPS*
3	Prehearing Order, *Charles H. v. DCPS*
4	Testimony of Amy Lopez, Deputy Director, Department of Corrections, *Charles H. v. DCPS*
5	OSSE 2020-21 School Year Annual Enrollment Audit Supplemental Tables, downloaded on March 30, 2021
6	DCPS IYP School Profile, downloaded on March 23, 2021
7	Declaration of Rachel Russo
8	Department of Corrections Inspection Report, October 2020
9	Testimony of Tarisai Lumumba-Umoja, DCPS Special Education Coordinator, *Charles H. v. DCPS*
10	Testimony of Dr. Tanya Roane, former IYP Principal, *Charles H. v. DCPS*
11	Declaration of Charles H.
12	Declaration of Israel F.
13	DCPS Closing Statement, *Charles H. v. DCPS*
14	Declaration of Kathleen L. Millian
15	Declaration of Zenia Sanchez Fuentes
16	Declaration of Stephanie A. Madison
17	Declaration of Sarah Comeau
18	Declaration of Jonathan Smith