No. 24-

IN THE

Supreme Court of the United States

ONANEY POLANCO, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF A.D.,

Petitioner,

v.

DAVID BANKS, IN HIS OFFICIAL CAPACITY AS CHANCELLOR OF THE NEW YORK CITY DEPARTMENT OF EDUCATION, AND NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case raises a question of exceptional importance for some of our most vulnerable citizens-disabled children and their parents. Here, the Parent filed a due process complaint alleging that the New York City Department of Education failed to provide a free appropriate public education to her child. The child was wheelchair-bound and was assigned to an inaccessible school. The Courts below held that Parent waived the issue of handicapped accessibility by not specifically listing it in her due process complaint, despite the location's closure during COVID, and despite the fact that Parent raised the issue of lack of trained staff to perform wheelchair transfers.

The questions presented are:

1. Whether the courts below properly applied State Law in the spirit of cooperative federalism which places the burden on the Department of Education to prove they provided a free appropriate public education.
2. Whether a Parent must forfeit her claim that a school district failed to provide a free appropriate public education for her child by objecting to the location but not specifically listing accessibility in her due process complaint.
3. Whether equities require remand.

PARTIES TO THE PROCEEDING

Petitioners Onaney Polanco, Individually and as Parent and Natural Guardian of A.D., were appellants in the court of appeals and petitioners in the district court.

Respondent Meisha Porter, in her Official Capacity as Chancellor of the New York City Department of Education, then later substituted by David Banks, and the New York City Department of Education ("DOE"), were the appellees in the court of appeals and defendants in the district court.

CORPORATE DISCLOSURE STATEMENT

Petitioners Onaney Polanco, Individually and a Parent and Natural Guardian of A.D., have no parent corporations, and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

The following related proceedings are directly related to this petition:

Onaney Polanco, Individually and as Parent and Natural Guardian of A.D. v. David Banks, in his Official Capacity as Chancellor of the New York City Department of Education, New York City Department of Education, No. 23-373, United States Court of Appeals for the Second Circuit, judgment denying Appellants' Petition for Rehearing, or in the alternative, Rehearing En Banc entered July 19, 2024. (ECF 105).

Onaney Polanco, Individually and as Parent and Natural Guardian of A.D. v. Meisha Porter, in her

Official Capacity as Chancellor of the New York City Department of Education, New York City Department of Education, No. 1:21-cv-10176 (JGK), United States District Court for the Southern District of New York, Summary Order denying Plaintiffs' Motion for Summary Judgment and granting Defendants' Motion for Summary Judgment entered on February 2, 2023. (ECF 2).

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PETITION FOR A WRIT OF CERTIORARI

Onaney Polanco, Individually and as Parent and Natural Guardian of A.D., respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is not published. (A, 1a-7a). The court's denial of rehearing en banc is not published. (A, 27a-28a). The opinion of the United States District Court for the Southern District of New York is not published but available at 2023 U.S. Dist. LEXIS 56989 and 2023 WL 2751340. (A, 8a-26a).

The findings of the Second Circuit, in relevant part, state: "Polanco claims that the placement school did not provide A.D. with a FAPE because the school building was inaccessible beyond its first-floor entrances. Unless the other party consents, a party requesting a due process hearing is typically precluded from raising issues regarding the IEP that she did not include in her due process complaint. 20 U.S.C. §1415(f)(3)(B); *see R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 187 (2d Cir. 2012) ('That [due process] complaint must list all of the alleged deficiencies in the IEP.') Polanco failed to raise the placement school's inaccessibility in her due process complaint. Instead, she raised it for the first time during the hearing, depriving the DOE of the opportunity to develop the record to reflect whether the placement school could accommodate A.D. or

whether changes to the selected school placement were necessary. *See R.E.*, 694 F.3d at 187 n.4. We therefore agree with the District Court that Polanco forfeited this claim." (A, 6a)

JURISDICTION

On February 28, 2024, the U.S. District Court for the Southern District of New York issued a judgment denying summary judgment to Plaintiffs and granting summary judgment to Defendants. On March 14, 2023, Plaintiffs filed their notice of appeal. The Second Circuit denied Plaintiffs' appeal after oral argument. It entered its Opinion and Judgment on May 10, 2024. Plaintiffs filed a Petition for Rehearing/Rehearing En Banc on May 24, 2024 which was denied on July 19, 2024. This Court has jurisdiction under 28 U.S.C. §1254(1).

FULL TEXT COPIES OF ALL CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THIS CASE

Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, et seq.

(a) Short title. This title [20 USCS §§ 1400 et seq.] may be cited as the "Individuals with Disabilities Education Act".

(b) [Omitted]

(c) Findings. Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(2) Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142) [enacted Nov. 29, 1975], the educational needs of millions of children with disabilities were not being fully met because—

> (A) the children did not receive appropriate educational services;
>
> (B) the children were excluded entirely from the public school system and from being educated with their peers;
>
> (C) undiagnosed disabilities prevented the children from having a successful educational experience; or
>
> (D) a lack of adequate resources within the public school system forced families to find services outside the public school system.

(3) Since the enactment and implementation of the Education for All Handicapped Children

Act of 1975 [enacted Nov. 29, 1975], this title [20 USCS §§ 1400 et seq.] has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.

(4) However, the implementation of this title [20 USCS §§ 1400 et seq.] has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

(5) Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—

> (A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to—
>
> > (i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and
> >
> > (ii) be prepared to lead productive and independent adult lives, to the maximum extent possible;

(B) strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home;

(C) coordinating this title [20 USCS §§ 1400 et seq.] with other local, educational service agency, State, and Federal school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965, in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent;

(D) providing appropriate special education and related services, and aids and supports in the regular classroom, to such children, whenever appropriate;

(E) supporting high-quality, intensive preservice preparation and professional development for all personnel who work with children with disabilities in order to ensure that such personnel have the skills and knowledge necessary to improve the academic achievement and functional performance of children with disabilities, including the use of

scientifically based instructional practices, to the maximum extent possible;

(F) providing incentives for whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports, and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children;

(G) focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results; and

(H) supporting the development and use of technology, including assistive technology devices and assistive technology services, to maximize accessibility for children with disabilities.

(6) While States, local educational agencies, and educational service agencies are primarily responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.

(7) A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an equal educational opportunity for all individuals.

(8) Parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways.

(9) Teachers, schools, local educational agencies, and States should be relieved of irrelevant and unnecessary paperwork burdens that do not lead to improved educational outcomes.

(10)

(A) The Federal Government must be responsive to the growing needs of an increasingly diverse society.

(B) America's ethnic profile is rapidly changing. In 2000, 1 of every 3 persons in the United States was a member of a minority group or was limited English proficient.

(C) Minority children comprise an increasing percentage of public school students.

(D) With such changing demographics, recruitment efforts for special education personnel should focus on increasing the participation of minorities in the teaching

profession in order to provide appropriate role models with sufficient knowledge to address the special education needs of these students.

(11)

(A) The limited English proficient population is the fastest growing in our Nation, and the growth is occurring in many parts of our Nation.

(B) Studies have documented apparent discrepancies in the levels of referral and placement of limited English proficient children in special education.

(C) Such discrepancies pose a special challenge for special education in the referral of, assessment of, and provision of services for, our Nation's students from non-English language backgrounds.

(12)

(A) Greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.

(B) More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population.

(C) African-American children are identified as having intellectual disabilities and emotional disturbance at rates greater than their White counterparts.

(D) In the 1998–1999 school year, African-American children represented just 14.8 percent of the population aged 6 through 21, but comprised 20.2 percent of all children with disabilities.

(E) Studies have found that schools with predominantly White students and teachers have placed disproportionately high numbers of their minority students into special education.

(13)

(A) As the number of minority students in special education increases, the number of minority teachers and related services personnel produced in colleges and universities continues to decrease.

(B) The opportunity for full participation by minority individuals, minority organizations, and Historically Black Colleges and Universities in awards for grants and contracts, boards of organizations receiving assistance under this title [20 USCS §§ 1400 et seq.], peer review panels, and training of professionals in the area of special

education is essential to obtain greater success in the education of minority children with disabilities.

(14) As the graduation rates for children with disabilities continue to climb, providing effective transition services to promote successful postschool employment or education is an important measure of accountability for children with disabilities.

(d) Purposes. The purposes of this title [20 USCS §§ 1400 et seq.] are—

(1)

(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

20 U.S.C. § 1415(j)

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

Constitution of the United States of America, Article III, Sec. 2

Article III

Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1292(a)(1)

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

Fed. R. App. P. 35(b)

(b) PETITION FOR HEARING OR REHEARING EN BANC. A party may petition for a hearing or rehearing en banc.

(1) The petition must begin with a statement that either: (A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or (B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

Fed. R. App. P. 40(4)

(4) Action by the Court. If a petition for panel rehearing is granted, the court may do any of the following: (A) make a final disposition of the case without reargument; (B) restore the case to the calendar for reargument or resubmission; or (C) issue any other appropriate order.

34 C.F.R. § 300.324(4)

(4)*Agreement*.(i) In making changes to a child's IEP after the annual IEP Team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP Team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP.(ii) If

changes are made to the child's IEP in accordance with paragraph (a)(4)(i) of this section, the public agency must ensure that the child's IEP Team is informed of those changes.(5)*Consolidation of IEP Team meetings*. To the extent possible, the public agency must encourage the consolidation of reevaluation meetings for the child and other IEP 19 Team meetings for the child.(6)*Amendments*. Changes to the IEP may be made either by the entire IEP Team at an IEP Team meeting, or as provided in paragraph (a)(4) of this section, by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent must be provided with a revised copy of the IEP with the amendments incorporated.

NYS Educ. Law §4401(1)

The board of education or trustees of the school district or the state agency responsible for providing education to students with disabilities shall have the burden of proof, including the burden of persuasion and burden of production, in any such impartial hearing, except that a parent or person in parental relation seeking tuition reimbursement for a unilateral parental placement shall have the burden of persuasion and burden of production on the appropriateness of such placement.

STATEMENT OF THE CASE

A. Statement of Facts Resulting in the Petition

Petitioner is a child with a disability, A.D., and his parent, Onaney Polanco. Respondent is the New York

Department of Education. This Petition for a Writ of Certiorari involves a Memorandum Opinion and Order of the United States District Court for the Southern District of New York, Filed February 27, 2023. (Appendix B). That decision was affirmed by Summary Order of the Second Circuit United States Court of Appeals on May 10, 2024 (Appendix A). An Order denying rehearing/rehearing en banc was entered on July 19, 2024. (Appendix C)

B. Concise Summary of the Argument

Plaintiff A.D. suffers from a traumatic brain injury and Pelizaeus-Merbacher disease, which is a rare disorder that progressively degenerates the central nervous system and results in deteriorating coordination, motor abilities, and cognitive function. A.D. was nine years old at the beginning of the 2020-2021 school year and was non-ambulatory, requiring the use of a wheelchair as well as two-person transfers into and out of his wheelchair. He was also fully dependent on a g-tube for feeding, minimally verbal, and vision impaired. Due to his disabilities, he is impaired in cognition, language, memory, attention, reasoning, and abstract thinking. (ECF 31 at 9-10).

On June 23, 2020, only seven days before the July 1, 2020 beginning of the 2020-2021 extended school year, an Individualized Education Program ("IEP") was issued for A.D. Plaintiffs filed their Ten Day Notice on June 26, 2020 and their Due Process Complaint on June 26, 2020. (ECF 32 at 161) A school location letter was sent on June 27, 2020, a Saturday which was only two business days prior to the

beginning of A.D.'s extended school year. (ECF 31 at 13).

Independent Hearing Officer Virginia Tillyard was appointed under case number 196382, and a Pendency Order was requested. The Pendency Order was entered on January 6, 2021, six months after the filing of the Due Process Complaint. A Findings of Fact and Decision ("FOFD") was entered on May 22, 2020. (ECF 31 at 10). IHO Tillyard found that the District's proposed placement was inappropriate. The school location was only wheelchair accessible at the entrance, not throughout the school, and A.D. would not be able to access any classrooms or resource rooms above the first floor. (ECF 31 at 10). The IHO found that, under the *Burlington/Carter* three-prong test, the District failed to offer A.D. a free appropriate public education ("FAPE"), that his placement at iBrain was appropriate, and that equities favored payment from the DOE directly to iBrain for both retrospective and prospective tuition and related services at iBrain for the 2020-2021 extended school year. (ECF 31 at 10).

The DOE appealed the case to the State Review Office and Officer Carol Hague was appointed under case number 21-143. (ECF 31 at 11). SRO Hague entered her decision on July 30, 2021. She overturned the IHO's FOFD, finding that, because Plaintiffs' Due Process Complaint did not specifically raise the concern of wheelchair accessibility, that claim was precluded and the DOE offered A.D. a FAPE. She did not continue to prongs II and III of the *Burlington/Carter* analysis. (ECF 31 at 11).

Parent filed a federal suit in the Southern District of New York requesting review of the administrative record. The District Court agreed with the SRO that the issue of wheelchair accessibility should have been specifically mentioned in Plaintiffs' Due Process Complaint to provide notice to Defendants of the issue, which they could then attempt to remedy. Based on this finding, the Court declined analysis and findings regarding procedural due process deficiencies within the case. (ECF 31 at 11).

The Second Circuit affirmed the District Court's decision and denied the Petitioners' request for rehearing/rehearing en banc.

The Southern District of New York should have considered that parent was excluded from the school due to COVID closures. At no time during the administrative and judicial process could the child have disenrolled from private school and attended public school. That the student was able to attend private school during this time does not lessen the Defendants' responsibility to provide a FAPE. While Parent adamantly argued that A.D.'s condition was too delicate for untrained staff to perform wheelchair transfers, at no point did the Defendants notify parent that they were likely untrained because the school was inaccessible to children in wheelchairs. Instead, they claimed FAPE was available because they planned to train their staff, presumably in the two business days between the mailing of the school location letter and the first day of the extended school year. The Parent did not know that the school was inaccessible until the Defendants' own witness testified. The Defendants had the audacity to suggest that it was Parents' duty to check whether the

placement could accommodate A.D.'s wheelchair, and that she should have contacted the school because of, and despite the fact, that it was closed. (ECF 52 at 14). Defendants ignore that they had constructive knowledge, if not actual knowledge, that the location was inappropriate. Where the Defendants bear the burden of proof that they provided a FAPE, the parent should not be put in the position to investigate even the most mundane administrative decision.

Furthermore, it was the Defendants, not the Plaintiffs, who were responsible for a significant delay in providing this information. Despite both IDEA and state procedural requirements which demand that a due process hearing be held within 45 days of the expiration of a 30-day resolution period, the due process hearing in this case, and, thus, Defendants' witness testimony, did not occur for months, and the IHO did not provide an order for over three hundred days from the filing of the Due Process Complaint.

Further, the IDEA encourages parental involvement and requires school districts to include parents in educational planning but does not require parental involvement. The parent's involvement revolves around the IEP process and nowhere is the parent required to double check the administrative work of the school district.

The Defendants also should have considered that the procedural due process deficiencies under both state and federal law were severe enough to constitute substantive denial of FAPE. At no time while the due process hearing pended was A.D. able to access a free appropriate public education.

C. Basis for Federal Jurisdiction in the Lower Court

Appellate jurisdiction was proper in the Second Circuit United States Court of Appeals under 28 U.S.C. §1291, 28 U.S.C. §1292(a)(1). The case arises under IDEA. 20 U.S.C. §1401, *et seq*.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO ADDRESS A QUESTION OF EXCEPTIONAL IMPORTANCE

A. Whether cooperative federalism requires federal courts to enforce state regulation placing the burden of proof on the School District to show they provided a FAPE?

B. Should specificity in a Due Process Complaint be required on an issue of basic accessibility?

II. REVIEW IS WARRANTED TO ADDRESS AN INCORRECT DECISION BELOW

A. The Courts Below Erred by Failing to Grant Equitable Relief.

B. This Court's Intervention is Necessary to Reverse the Trend of Federal Courts Violating the Rights of Disabled Students as Codified in Binding State Law.

ARGUMENT

I. COOPERATIVE FEDERALISM AND THE DISTRICT'S BURDEN OF PROOF

The Second Circuit's decision contravenes cooperative federalism as contemplated by the IDEA. In exchange for federal funds, school districts must provide a FAPE to qualified children. 20 U.S.C. § 1412(a) and 20 U.S.C. § 1413(a). Parents who feel their child is denied a FAPE are entitled to due process to challenge the school district. The IDEA establishes general principles for due process hearings but allows States to decide how to implement them. The IDEA serves as a floor, not a ceiling. It guarantees the minimum a State must do to benefit parents and their children but invites the State to do even better for those parties.

Given the historical atrocities that children with disabilities faced, the IDEA specifically noted that disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is essential to our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities. 20 U.S.C. § 1400(c)(l). Whether because of funding issues or social stigmas around disability, States failed at special-education. "Certainly the failure to provide a right to education to handicapped children cannot be allowed to continue ... Congress must take a more active role ... to guarantee that children are provided equal educational opportunity." S. REP. 94-168, 9.

The State has historically controlled the education of children--particularly children with disabilities. As failures to educate special-education children became apparent, Congress implemented the Education for All Handicapped Children Act, which became the IDEA. While federal oversight was necessary, the State itself was the primary driver of education. Though federal courts are given jurisdiction to decide complaints, they must still implement the State rules as critical and necessary. The IDEA requires each State to make its own guidelines to meet the Act's purposes--it allows States to go above and beyond those basic requirements. States are only eligible to receive IDEA funds if they show they have those basic procedures in place. 20 U.S.C. § 1412(a).

For policies that go beyond the basics, each State must identify in writing to local educational agencies any rules, regulations, or policies that are not required by the IDEA and federal regulations. 20 U.S.C. § 1407(a)(2). States like New York have recognized that parents and children are at a disadvantage when drafting and filing a due process complaint and have put extensive protections into place. New York State publishes charts of these rules, which show the State requirement, citation, and how the requirement differs from the federal requirement. In March 2023, this chart encompassed 32 pages reflecting the extra rights given by New York Educational Law and New York Codes, Rules, and Regulations.[1]

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[1] Required by Federal Law/Regulation/Policy March 2023. Last accessed October 18, 2023, at https://www.nysed.gov/sites/default/files/programs/special-education/nys-law-regulations-policy-not-required-by-federal-law-regulation-policy. pdf.

New York has taken an aggressive approach to ensure that the rights of children with disabilities and parents of such children are protected. Parents may prosecute claims on behalf of their children and have separate rights under the IDEA that they may prosecute individually. *Winkelman ex rel. Winkelman*, 550 U.S. 516 (1994). These added protections are meaningless should a parent challenging an administrative order in district court have their argument rejected in favor of the lesser protections of the IDEA. "Cooperative federalism" requires the federal court system to ensure that State Regulations are followed and that administrative decisions are given due weight.

"Congress has made clear that the Act itself represents an exercise in 'cooperative federalism.' Respecting the States' right to decide this procedural matter here, where education is at issue, where expertise matters, and where costs are shared, is consistent with that cooperative approach." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 67 (2005) (Breyer, J., dissenting) (internal citation omitted). *See also Wisconsin Dep't of Health & Fam. Servs. v. Blumer*, 534 U.S. 4 73, 495 (2002) (when interpreting statutes "designed to advance cooperative federalism" the Court has "not been reluctant to leave a range of permissible choices to the State"). Cooperative federalism requires respect for the State's right to set the rules and its right to determine how those rules apply here.

New York is among a few states that have recognized that pitting the parent of a disabled child against a team of educational experts is an unfair fight. Parents who wish to challenge a school district

often do not have the resources, education, finances, or confidence to fight the multiple people that a school district can employ to support their position. School districts often have in-house counsel or other representation familiar with the IDEA whereas only parents with significant financial resources can obtain counsel and experts to rival those representing the DOE. Furthermore, the IDEA does not provide for any pre-trial discovery so the parent has no right to interview teachers, service providers, paraprofessionals, or others involved in the child's education. The district, in contrast, has unlimited access to all information about the child's education.

In addition to an imbalance in access to information, families of children with disabilities have dramatically higher rates of poverty and are less educated than the population as a whole.[2] In order to develop an IEP, the school district should already have collected the relevant data, including evaluations and teacher input. It is then presented at a CSE meeting to the parent in a light most favorable to the district's recommendations. If the district already has the burden to make their case to the parent, it puts no additional burden on the district to make their case to a hearing officer. It is, however, a significant burden on the parent to attack the district's IEP to a hearing officer.

The "IDEA does not rely on parents to come forward to ask for help". *Weyrick v. New Albany-Floyd Co. Consol. Sch. Corp.*, 2004 U.S. Dist. LEXIS 26435 at *6 (S.D. Ind. 2004). Instead, a school district must

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[2] Parish, Rose et al. "Material Hardship in U.S. Families Raising Children with Disabilities" (Council for Exceptional Children, Vol. 75, No. 1, pp. 71-92 (2008)).

identify a child eligible for special education services, perform evaluations on the child, and develop the IEP. This duty does not change whether the child comes from a wealthy, well-educated, and loving home or whether the child bounces between foster placements. Their ability to challenge the quality of the education, however, does rely on whether their parent or guardian has the ability, knowledge, and resources to ask for help. Placing the burden of proof and production on the parent only creates a wider discrepancy between kids who have hit the parental lottery and those who lack an advocate either able or willing to advocate for them.

While not all jurisdictions and not even this Court have agreed with New York that the burden of proof and production being placed on the district is the right policy, New York has codified that standard and it is a requirement of cooperative federalism that all courts of review apply that law.

To help balance the disparity in expertise and access to information between the district and parent, school districts in New York have the burden of both persuasion and production in IDEA due process hearings. The only exception is when a parent is seeking tuition reimbursement for a unilateral placement, in which case the parent has the burden to show the placement is appropriate. NYS Educ. Law §4404(1). The SRO erred by not requiring the Defendant DOE to meet the burden of proof, essentially excusing them from a very fundamental requirement--to provide an accessible school--by placing blame on the parent for not recognizing the district's failure during COVID closures. The District Court and Second Circuit furthered this error by

affirming, and by failing to enforce the requirements of cooperative federalism.

II. DUE PROCESS COMPLAINT REQUIREMENTS

The District here assigned the child to a school which was not wheelchair accessible. However, Plaintiffs filed a Due Process Complaint based on the IEP prior to receipt of the school location letter. The District only mailed the school location letter two business days before the start of the school year. Parent did not have any knowledge, either actual or constructive, that the school was not wheelchair accessible until the hearing held by the IHO on the Due Process Complaint. However, Parent did question whether the staff at the school location were properly trained to perform two-person wheelchair transfers.

The SRO found "that the lack of wheelchair accessibility at the Placement School was not mentioned in plaintiff's DPC before the IHO, and therefore 'the issue of wheelchair accessibility was not properly raised within the due process complaint notice, and as such was beyond the scope of the impartial hearing" (ECF 31 at 27). At the Due Process hearing, Plaintiffs' counsel asked the District's witness what is essentially a form question to lay foundation--whether the school was accessible. The witness said that the school was only accessible at the main entrance. The District had the opportunity on re-direct to further explore the issue. Upon review, the District Court found that the lack of notice in the Due Process Complaint combined with the single question asked during hearing allowed parents to " 'sandbag the school district' with problems that could have been addressed during the 30-day resolution period". (ECF

31 at 27). Yet this was the first instance where Plaintiffs had any knowledge of the accessibility issue. Because the school location was closed by the Defendants due to COVID, Plaintiffs were not able to tour the school.

In addition, there was no 30-day resolution period. The district mailed a letter to Plaintiffs with only two business days prior to the start of the school year. Had Parent disenrolled A.D. from private school and showed up for the first day of in-person school, A.D. would not have been able to access his education. It is the Defendants that have sandbagged the Plaintiffs. Defendants had multiple years of dealings with these Plaintiffs. They held full IEP meetings for A.D. which included information from medical forms and evaluations. They fought with parent over whether the staff at the school location was able to provide two-person wheelchair transfers. At no point did they ever come forward with the fact that the school was not accessible. Only the District has access to a comprehensive list of school locations and levels of accessibility.

The intent of the requirement to provide notice in a Due Process Complaint is to let the school district know what services, minutes, benchmarks, goals, class size or therapies the parent thinks aren't appropriate for the child. The Defendants have the responsibility to address concerns regarding educational policy and need specific notice of what those concerns are before the Defendants can reconsider or double down. The notice requirement should not extend to the basic needs of the child when the DOE is well-aware of those needs. There is no reason for a parent, knowing that the school has all

the information about the student and all the information about its own schools, to even think that the "educational experts" would make such a thoughtless mistake.

The legislative and judicial history of the IDEA does not go so far as to give the parent the ultimate responsibility over the child's education. In a pivotal case from 1988, this Court found that "Congress felt a need to emphasize the 'necessity of parental participation' when enacting the IDEA, in part because in the past, parents were not consulted concerning their child's education. See generally *Honig v. Doe*, 484 U.S. 305, 309-312 (1988)"[3]. In fact, one of the first rights that parents got under the IDEA was to veto the placement of their child in a special education class. 34 C.F.R. 300.500(b)(1)(iii)(A)-(B) (2004). At every point in its history, the IDEA gives the school district the right and responsibility to educate the child. In particular, the 2004 amendments added further protections for parental involvement on both substantive and procedural grounds. There is no indication in the IDEA that Congress intended for parents to be involved to the extent of reviewing the internal procedures of the school district for error.

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[3] Daggett, Lynn M. and Perry A. Zirkel, LeeAnn L. Gurysh. "ARTICLE: FOR WHOM THE SCHOOL BELL TOLLS BUT NOT THE STATUTE OF LIMITATIONS: MINORS AND THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT", 38 U. Mich. J.L. Reform 717, Fn 52.

III. EQUITABLE RELIEF

Regardless of whether parent "waived" her right to litigate the accessibility issue, the Court below erred by not providing her with equitable relief. The IDEA requires Defendants to provide a due process hearing within 45 days from the expiration of the 30-day resolution period. 20 U.S.C. §1415; 34 C.F.R. §300.515(a). This timeline is also codified in New York law. 8 NYCRR §200.5(j)(3) and (5). The parent did not know the school location until she had already unilaterally enrolled A.D. in private school. From the time she filed her due process complaint, it was six months before she received a Pendency Order and ten months until she received a decision on the merits. When parent enrolled her child in private school, she took a financial risk that she would be on the hook for the student's tuition if the IEP was found to be appropriate. However, both federal and state law told her that she would only be on the hook for no more than two and half months. A few months of tuition, transportation, and related services at a private school in New York City for a non-ambulatory and non-verbal student can cost more than the median yearly household income.[4]

In good faith, a parent takes this risk thinking any losses will be mitigated because they will quickly receive a ruling. When a decision takes nearly an entire year, the procedural violation becomes substantive and the circumstances for the parent are potentially dire. While "it is important that a school district comply with the IDEA's procedural

[4] "Average Salary in New York, NY" Gusto Payroll. Gusto.com/resources/research/salary/ny/new-york. Last accessed 10/10/2024.

requirements, rather than being a goal in itself, such compliance primarily is significant because of the requirements' impact on students' and parents' substantive rights". *C.P. v. New Jersey Dep't of Educ.*, 2022 U.S. Dist. LEXIS 158147 (D.N.J. 2022), citing *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 565 (3rd Cir. 2010). Had the same decision been reached by the IHO within the required timeframe and the decision timely appealed, parent could have taken her child to the district school, learned that it was inaccessible, and all parties would've had the chance to address the school location issue. Instead, parent incurred significant debt to the private school as she waited for due process. Parent detrimentally relied on the Defendants to comply with federal and state law: "the failure to offer the parents and their children a timely hearing for months after the expiration of the 45-day period [] crosses the line from process to substance". *Evans v. Board of Education of the Rhinebeck Central School District*, 930 F. Supp. 83, 93 (S.D.N.Y 1996).

If, on any of the 320 days from filing the due process complaint to receiving the decision, Parent had become wary of the process and decided to take A.D. to public school, he would not, and could not, have received a FAPE. In the child-centric focus of the IDEA, "each day a child is denied a free appropriate education by such procedural dereliction of a school system, he or she is harmed yet again". *Cox v. Brown*, 498 F. Supp. 823, 828-29 (D.D.C. 1980). Just because the parent did not take A.D. to the school location designated to implement his IEP, it does not follow that he received a FAPE. This Court should not find that, because a parent or third party has softened the blow of Defendants' unlawful delay by financing his

education, that fact "does not invalidate Plaintiff's statement that Plaintiff could not access Plaintiff's education as required under the law". *C.Q v. River Spring Charter Schs.,* 2019 U.S. Dist. LEXIS 206817 (C.D. Cal., 2019).

Furthermore, Parent was accused of "sandbagging" the school district. (ECF 31 at 27). "Sandbagging" is "remaining silent about [a litigant's] objection and belatedly raising the error only if the case does not conclude in his favor". *Puckett v. United States*, 556 U.S. 129, 134 (2009) (internal citations omitted). This was not the case. Only during the Defendants' witness's testimony did Plaintiffs learn of the inaccessibility of the school. The only parties to know that fact prior to that testimony were the Defendants. The fact that Plaintiffs' single question regarding accessibility, which elicited this fact, was not further developed, was not sandbagging. The school district has the burden of proof and production to show that they provided a FAPE. Instead, they assigned a school location only days prior to the start of the school year, and days after the Plaintiffs filed their Due Process Complaint, had months of knowing that the Plaintiffs felt the district staff was unable to perform the two-person wheelchair transfers that A.D., a medically delicate child with a g-tube, needed, and then produced a witness that undermined their case.

The district knew the child was dependent on a wheelchair throughout the IEP process and they knew of Parent's concern that the district's staff could not provide wheelchair transfers. They finalized the IEP days before the start of A.D.'s extended school year, received Plaintiffs' Due Process Complaint with her

concerns about wheelchair transfers, and then, a few days later, assigned a school location to a school which was closed for COVID. They took away the Plaintiffs' time and opportunity to visit the school prior to the school year. They then had nearly a year prior to the FOFD to investigate Plaintiffs' concerns that their staff was unable to do the wheelchair transfers which would have revealed the lack of accessibility at that school, but, in bad faith, defended their case by saying that, if A.D. had attended the school, they would have trained the staff. Whether A.D. was assigned to the inaccessible school due to complete disregard for his needs or due to a clerical error, Defendants failed in both their burdens of proof and production and did not provide a FAPE. This Court should reverse on the equities.

IV. TREND OF VIOLATING STATE LAW

Defendants have had a history of haphazardly implementing the New York State laws and regulations relating to the IDEA. One class action case, *L.V., et al. v. New York City Department of Education, et al.*, 03-Civ.-9917 (RJH), documents over twenty years of administrative chaos at the New York City Department of Education. When final orders were in place, the Defendants have refused to implement them under an erroneous "obligation to 'protect the public fisc.'" (ECF 237-5, Shore Decl. ¶9; Ex E. to Shore Decl.). The Court also rejected "Defendants' invitation to rewrite the Act, especially because both Congress and the Department of Education declined to suspend the IDEA's core mandates during the pandemic" (ECF 258 at 13-14).

The Defendants owed A.D. a FAPE in July of 2020 when he began his extended school year. COVID

closures did not suspend their core mandates to provide an accessible school location, but did prevent the Plaintiffs from visiting the school. Defendants did not investigate Plaintiffs' concern about the wheelchair transfers. Had they done so, they may have discovered that the staff was not trained because the school was not accessible. Defendants failed to match a wheelchair dependent student to an accessible school. As shown in *L.V.*, the Defendants have years of failing to abide by state law and regulations, valid orders, and the requirements of the IDEA. It is inequitable to allow their list of failures to be disregarded and their burden of proof and production to be waived because the Plaintiffs gave the benefit of the doubt to the District that they would provide A.D. a FAPE. This Court should not allow the Defendants to continue their trend of violating state law without consequences.

CONCLUSION

The petition for a writ of certiorari should be granted to resolve a question of exceptional importance to maintain the rights of special education children in New York to a free, appropriate, public education under the Individuals with Disabilities Education Act. Cooperative federalism requires that this Court overturn the Second Circuit's decision which affirms the Southern District of New York's finding that a disabled child was not denied a FAPE, despite being assigned to a school which he could not access, because the parent did not know the school was inaccessible due to COVID closures. Under New York law, the school district bears the burden of proof and production to show that a FAPE was provided. Only once the district's witness, nearly a year after the

due process complaint was filed, testified that the school was inaccessible were Plaintiffs aware of the district's failure. It is inequitable to allow A.D. to be denied a FAPE because his parent was unaware that the school district could make such an incompetent mistake.

Respectfully submitted,

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October 17, 2024

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MAY 10, 2024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT.CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of May, two thousand twenty-four.

No. 23-373-cv

Appendix A

ONANEY POLANCO, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF A.D.,

Plaintiff-Appellant,

v.

DAVID BANKS, IN HIS OFFICIAL CAPACITY AS CHANCELLOR OF THE NEW YORK CITY DEPARTMENT OF EDUCATION, NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendants-Appellees.[*]

May 10, 2024, Decided

PRESENT: JON O. NEWMAN,
JOSÉ A. CABRANES,
RAYMOND J. LOHIER, JR.,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York. (John G. Koeltl, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

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* The Clerk of Court is directed to amend the caption as set forth above. Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Chancellor of the New York City Department of Education David Banks is automatically substituted for former Chancellor Meisha Porter.

Appendix A

Plaintiff-Appellant Onaney Polanco, on behalf of her minor son A.D., appeals from a judgment of the United States District Court for the Southern District of New York (Koeltl, *J.*) granting summary judgment in favor of Defendants-Appellees on Polanco's claims arising under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1482. We assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

This case is before us after three levels of review. First, on May 22, 2021, an Impartial Hearing Officer (IHO) concluded that A.D., who uses a wheelchair, was denied a free appropriate public education (FAPE) because the placement school was allegedly inaccessible to him beyond its first-floor entrances. Then, on July 30, 2021, the State Review Officer (SRO) reversed the decision of the IHO, holding instead that Polanco forfeited the issue of accessibility at the placement school and that the DOE had not otherwise denied A.D. a FAPE. Finally, on February 28, 2023, the District Court granted Defendants-Appellees' motion for summary judgment, upholding the SRO's decision. Polanco now asserts that the District Court's decision was erroneous.

Mindful that courts lack the "specialized knowledge and educational expertise" of state administrators, we conduct a "circumscribed *de novo* review of a district court's grant of summary judgment in the IDEA context," seeking only to "independently verify that the administrative record supports the district court's

determination." *S.W. v. N.Y.C. Dep't of Educ.*, 725 F.3d 131, 138 (2d Cir. 2013).

Polanco first argues that because the administrative proceedings were not timely conducted, A.D. was denied a FAPE. As relevant here, New York's regulations require an IHO to render a decision "not later than 45 days from the day after" the expiration period of the resolution process, 8 N.Y.C.R.R. § 200.5(j)(5), which is generally 30 days after a complaint has been filed, *see* 20 U.S.C. § 1415(f)(1)(B)(ii).

Here, even though the IHO issued a final decision nearly a year after Polanco filed her due process complaint, A.D. was not denied a FAPE. Under 20 U.S.C. § 1415(f)(3)(E)(ii), parents are entitled to reimbursement for procedural violations only if the violations "impeded the child's right to a free appropriate public education," "significantly impeded the parents' opportunity to participate in the decisionmaking process," or "caused a deprivation of educational benefits." In other words, where the Individualized Education Program (IEP) itself was adequate, "any delay" in resolving a parent's challenge to it "cannot have prejudiced [her child's] education." *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 381-82 (2d Cir. 2003); *see also J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 69-70 (2d Cir. 2000). Because we agree with the District Court that the IEP was adequate, the delay did not deny A.D. a FAPE.

Polanco also asserts several substantive violations. First, she argues that the classroom intended for A.D.

would not have implemented an appropriate functional grouping of students. Generally, the sufficiency of a placement offered by the DOE is determined based on the IEP itself. *See R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 186-88 (2d Cir. 2012). Thus, "[i]n determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and therefore reasonably known to the parties at the time of the placement decision." *Id.* at 187. "Speculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement." *Id.* at 195.

Polanco's claim is unavailing because it is speculative. Instead of demonstrating how the proposed class grouping could prospectively have denied A.D. a FAPE, Polanco merely speculated that the placement would have improperly grouped A.D. had he attended the placement school. As discussed, however, speculation "is not an appropriate basis for unilateral placement." *Id.* By contrast, the SRO, in assessing the adequacy of the plan, cited testimony that the school *could* provide an appropriate grouping for A.D. *See Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 133-34 (2d Cir. 1998).

Polanco next asserts that A.D. was denied a FAPE because he was improperly classified as having "multiple disabilities" instead of a "traumatic brain injury." Appellant's Br. 16. We agree with the District Court, however, that a "student's disability classification is generally immaterial in determining whether a FAPE was provided if the IEP otherwise sufficiently met the needs of the disabled student." *Polanco v. Porter*, No.

21-CV-10176 (JGK), 2023 U.S. Dist. LEXIS 32444, 2023 WL 2242764, at *6 (S.D.N.Y. Feb. 27, 2023). Indeed, as the SRO held, "the IDEA's strong preference for identifying the student's specific needs and addressing those needs generally outweighs relying on a particular disability diagnosis." App'x 77.

Polanco also alleges that A.D. was denied a FAPE because the assigned school nurse was not trained in G-tube feeding and the staff at the placement school could not conduct two-person transfers. As the District Court and SRO explained, however, the IEP provided for training in both of those functions. Thus, Polanco's assertion that such training would be insufficient is again speculative. *See R.E.*, 694 F.3d at 195.

Finally, Polanco claims that the placement school did not provide A.D. with a FAPE because the school building was inaccessible beyond its first-floor entrances. Unless the other party consents, a party requesting a due process hearing is typically precluded from raising issues regarding the IEP that she did not include in her due process complaint. 20 U.S.C. § 1415(f)(3)(B); *see R.E.*, 694 F.3d at 187 ("That [due process] complaint must list all of the alleged deficiencies in the IEP."). Polanco failed to raise the placement school's inaccessibility in her due process complaint. Instead, she raised it for the first time during the hearing, depriving the DOE of the opportunity to develop the record to reflect whether the placement school could accommodate A.D. or whether changes to the selected school placement were necessary. *See R.E.*, 694 F.3d at 187 n.4. We therefore agree with the District Court that Polanco forfeited this claim.

We have considered Polanco's remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgment of the District Court is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

/s/ Catherine O'Hagan Wolfe

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED FEBRUARY 27, 2023

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

21-cv-10176 (JGK)

ONANEY POLANCO,

Plaintiff,

- against –

MEISHA PORTER, *et al.*,

Defendants.

February 27, 2023, Decided
February 27, 2023, Filed

MEMORANDUM OPINION AND ORDER

JOHN G. KOELTL, District Judge:

The plaintiff, Onaney Polanco, brings this suit on behalf of her minor son, A.D., alleging that the defendants, Meisha Porter and the New York City Department of Education ("DOE"), violated the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* The plaintiff is appealing an order of the State Review Office ("SRO") that declined to award the plaintiff a tuition

reimbursement for her unilateral placement of A.D. at the International Institute of the Brain ("iBRAIN") for the 2020-2021 school year. The SRO's decision reversed the decision of an Impartial Hearing Officer ("IHO") which had granted reimbursement to the plaintiff. The parties have cross-moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. For the following reasons, the plaintiff's motion for summary judgment is **denied**, and the defendants' motion for summary judgment is **granted**.

I.

The following facts are based on the parties' Local Civil Rule 56.1 statements and the administrative record in this case and are undisputed unless otherwise noted. *See* Plaintiff's Rule 56.1 Statement, ECF No. 24 ("Pl.'s 56.1"); Defendants' Rule 56.1 Counterstatement, ECF No. 32 ("Defs.' 56.1"); Certified Record, ECF No. 20 ("Record").

The plaintiff, Polanco, is the parent of A.D., her minor son. Pl.'s 56.1 ¶¶ 1-2. At the beginning of the 2020-2021 school year, A.D. was nine years old. *Id.* ¶ 2. A.D. has been diagnosed with Pelizaeus-Merzbacher disease, a "brain-based disorder." *Id.* ¶ 3. Because of his disability, A.D. is "non-ambulatory, minimally verbal, has minor vision impairment," "is fully dependent on a G-tube for feeding," "uses a wheelchair," and "requires two person transfers for all mobility." *Id.* ¶ 4. A.D. "suffers severe impairments in the areas of cognition, language, memory, attention, reasoning, and abstract thinking." *Id.* ¶ 5. Because A.D.

is a disabled student and a resident of New York City, the DOE is "obligated to provide him with a Free Appropriate Public Education ('FAPE')" for "every school year." *Id.* ¶ 8.

On May 26, 2020, the Committee on Special Education ("CSE") convened to develop an Individualized Education Plan ("IEP") for A.D. for the 2020-2021 school year. Id. ¶ 9. The plaintiff attended this meeting. Defs.' 56.1 ¶ 10.

On June 23, 2020, the CSE sent the plaintiff a finalized IEP. Pl.'s 56.1 ¶ 11. The IEP created by the CSE recommended for A.D.: "a twelve-month school year; a special classroom with a staffing ratio of 6:1+1; a specialized school (District 75); a full-time 1:1 paraprofessional for ambulation, feeding, and safety; a 1:1 transportation paraprofessional; assistive technology ('AT') devices and services; related services of occupational therapy ('OT'), physical therapy ('PT'), and speech/language therapy ('SLT') five times a week in 60-minute sessions . . . per week; daily school nurse services for G-tube feeding and group Parent Counseling and Training ('PCAT') once a month for 60 minutes; two-person lift training and G-tube training; special transportation with a 1:1 paraprofessional, limited travel time, air conditioning, a life bus, and a wheelchair." *Id.* ¶ 12. The IEP also classified A.D. as a student with "Multiple Disabilities." *Id.* ¶ 6. The IEP also clarified specifically that A.D. uses a wheelchair. *Id.* ¶ 13.

On June 26, 2020, the plaintiff's "Parent Advocate" sent a ten day notice to the CSE informing the CSE that the plaintiff intended to enroll A.D. at iBRAIN for the

2020-2021 school year. R. at 1147.[1] One day later, on June 27, 2020, the CSE sent a School Location Letter ("SLL") to the plaintiff, providing that A.D. be placed at The Locke School of Arts and Engineering in Manhattan ("Placement School"). R. at 935; *see also* Pl.'s 56.1 ¶¶ 11, 14.[2]

On July 1, 2020, the plaintiff enrolled A.D. at iBRAIN, a private, "highly specialized education program for students with brain injuries and brain-based disorders." Pl.'s 56.1 ¶ 18. A.D. has attended iBRAIN since July 2018. *Id.* ¶ 19. At iBRAIN, A.D. received: "education in a 6:1:1 special class; related services of OT, PT, and SLT in 60-minute sessions, five times each per week; music therapy in individual sessions twice a week for 60-minutes (2x60), and one group session for 60 minutes per week (1x60); PCAT once per month in 60-minute sessions; a 1:1 paraprofessional and 1:1 nurse; assistive technology devices and services; and adaptive seating." *Id.* ¶ 20.

On July 6, 2020, the plaintiff filed a Due Process Complaint ("DPC") asserting that the DOE failed to offer A.D. a FAPE for the 2020-2021 school year, and requesting

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1. [1]The plaintiff claims in her 56.1 statement that the ten day notice was sent on July 26, 2020, and the defendants do not dispute this. Defs.' 56.1 ¶ 17. However, the administrative record includes the notice dated June 26, 2020. R. at 1147. The defendants' Rule 56.1 Statement also makes it clear that the letter was sent on June 26, 2020. *See* Defs.' 56.1 ¶¶ 40-41.

2. The plaintiff claims in her 56.1 statement that the School Location Letter was sent on June 26, 2020, and the defendants do not dispute this. *Id.* ¶ 11. However, the administrative record includes the letter, and shows that the letter is dated June 27, 2020. R. at 935.

that the DOE fund A.D.'s placement at iBRAIN, "including tuition, related services, and transportation," for the 2020-2021 school year. *Id.* ¶ 23. On January 27, 2021, a hearing commenced on the matter, which concluded on March 19, 2021, "after nine total days of proceedings." *Id.* ¶ 24.

On May 22, 2021, IHO Tillyard issued a Findings of Fact and Decision ("FOFD"), finding that: "(1) the [d]efendants failed to offer A.D. a FAPE for the 2020-2021 school year, (2) the unilateral placement of iBRAIN was appropriate, and (3) equitable considerations weighed in favor of the Parents." *Id.* ¶ 25. The IHO found that the Placement School "could not meet [A.D.'s] needs as set out by the May 2020 IEP," *id.* ¶ 26, because the IEP "indicates that [A.D.] uses a wheelchair and needs an accessible school building," but "the record shows that the Placement [School] building was only wheelchair accessible at the entrances," *id.* ¶ 16. The TKO also concluded that the plaintiff "had met her burden in proving that iBRAIN was an appropriate [private] placement," and that "on balance, equitable considerations support [the plaintiff's] claim for payment of [A.D.'s] expenses for the 2020-2021 school year." *Id.* ¶¶ 27-28. The IHO therefore ordered the defendants to pay the costs of A.D.'s attendance at iBRAIN.

On June 1, 2021, the defendants submitted a "Request for Review" of the IHO's decision to State Review Officer ("SRO") Carol H. Hague. *Id.* ¶¶ 32-33. On July 30, 2021, SRO Hague reversed the IHO's decision and found that the DOE offered A.D. a FAPE for the 2020-2021 school year. *Id.* ¶ 33. The SRO found that the lack of wheelchair

accessibility at the Placement School was not mentioned plaintiff's DPC before the IHO, and therefore "the issue of wheelchair accessibility was not properly raised within the due process complaint notice, and as such was beyond the scope of the impartial hearing." R. at 17. The SRO noted that "the subject of wheelchair accessibility was first addressed during the impartial hearing as part of the parent's attorney's cross-examination of the district witness," based on "one question." *Id.* The SRO concluded that "finding a denial of FAPE based on" "the one-question line of inquiry by parent's counsel during a nine day impartial hearing . . . is nothing short of the proverbial 'sandbag' courts counsel against." *Id.* Because the SRO found that A.D. was offered a FAPE, the SRO declined to consider whether the plaintiff had met her burden to demonstrate that iBRAIN was an appropriate placement and that equitable considerations were in the plaintiff's favor. Pl.'s 56.1 ¶ 35.

The plaintiff has moved for summary judgment seeking review of the SRO's reversal of the IHO's FOFD. The plaintiff seeks to uphold the IHO's decision that the defendants pay the costs of A.D.'s attendance at iBRAIN, or in the alternative, a remand to the IHO for further administrative proceedings. The defendants have cross-moved for summary judgment, seeking to uphold the SRO's decision that A.D. was provided a FAPE for the 2020-2021 school year.

Appendix B

II.

"Under the IDEA, states receiving federal funds are required to provide all children with disabilities a free appropriate public education." *Gagliardo v. Arlington Cent. Sch. Dist.,* 489 F.3d 105, 107 (2d Cir. 2007); *see also* 20 U.S.C. § 1412(a)(1)(A).[3] A FAPE must provide "special education and related services tailored to meet the unique needs of a particular child, and be reasonably calculated to enable the child to receive educational benefits." *Walczak v. Florida Union Free Sch. Dist.,* 142 F.3d 119, 122 (2d Cir. 1998). Because the IDEA expresses a "strong preference for children with disabilities to be educated, to the maximum extent appropriate, together with their non-disabled peers, special education and related services must be provided in the least restrictive setting consistent with a child's needs." *Id.; see also Grim v. Rhinebeck Cent. Sch. Dist.,* 346 F.3d 377, 379, 74 Fed. Appx. 137 (2d Cir. 2003).

These services are administered through a written IEP, which must be updated at least annually. *Walczak,* 142 F.3d at 122; *see also* 20 U.S.C. § 1414(d). In New York, the responsibility for developing an appropriate IEP for a child is assigned to a local CSE. *Walczak,* 142 F.3d at 123.

Parents in New York who wish to challenge their child's IEP as insufficient under the IDEA may request

3. Unless otherwise noted, this Memorandum Opinion and Order omits all internal alterations, citations, footnotes, and quotation marks in quoted text.

an impartial due process hearing before an IHO appointed by the local board of education. *Id.* at 122-23 (citing 20 U.S.C. § 1415(f) and N.Y. Educ. Law § 4404(1)). A party may appeal the decision of the IHO to an SRO, and the SRO's decision may be challenged in either state or federal court. *Id.* (citing 20 U.S.C. § 1415(g), 1415(i) (2) (A) and N.Y. Educ. Law 4404 (2)); *see also Jennifer D. v. N.Y.C. Dep't of Educ.,* 550 F. Supp. 2d 420, 424 (S.D.N.Y. 2008).

Under the IDEA, a district court independently reviews the administrative record, along with any additional evidence presented by the parties, and must determine by a preponderance of the evidence whether the IDEA's provisions have been met.[4] *Grim,* 346 F.3d at 380; *see also Mrs. B v. Milford Bd. of Educ.,* 103 F.3d 1114, 1120 (2d Cir. 1997). This independent review, however, is "by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). The

4. Courts have noted that "summary judgment appears to be the most pragmatic procedural mechanism in the Federal Rules for resolving IDEA actions," but that "[t]he inquiry . . . is not directed to discerning whether there are disputed issues of fact, but rather, whether the administrative record, together with any additional evidence, establishes that there has been compliance with IDEA's processes and that the child's educational needs have been appropriately addressed." *Wall v. Mattituck-Cutchogue Sch. Dist.,* 945 F. Supp. 501, 508 (E.D.N.Y. 1996); *see also Antonaccio v. Bd. of Educ. of Arlington Cent. Sch. Dist.,* 281 F. Supp. 2d 710, 714 (S.D.N.Y. 2003).

Court of Appeals for the Second Circuit has explained that "federal courts reviewing administrative decisions must give 'due weight' to these proceedings, mindful that the judiciary generally 'lack[s] the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy.'" *Gagliardo,* 489 F.3d at 113 (quoting *Rowley,* 458 U.S. at 206, 208); *see also Cerra v. Pawling Cent. Sch. Dist.,* 427 F.3d 186, 192 (2d Cir. 2005).

Deference to the decision in the administrative record is particularly appropriate when the administrative officers' review has been thorough and careful, and when the Court's decision is based solely on the administrative record. *See Walczak,* 142 F.3d at 129; *Frank G. v. Bd. of Educ.,* 459 F.3d 356, 367 (2d Cir. 2006). Where the findings of the IHO and SRO conflict, the findings of the IHO "may be afforded diminished weight." *A.C. ex rel. M.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist.,* 553 F.3d 165, 171 (2d Cir. 2009). Accordingly, the Court "defer[s] to the final decision of the state authorities, even where the reviewing authority disagrees with the hearing officer." *Id.* at 171.

III.

Parents dissatisfied with a district's recommended school placement for their child may unilaterally place their child in a private school and seek tuition reimbursement from the district. *See* 20 U.S.C. § 1412(a)(10)(C). However, parents who choose to place their children in a private school "during the pendency of review proceedings, without the consent of state or local school officials, do

so at their own financial risk." *Florence Cnty. Sch. Dist. Four v. Carter,* 510 U.S. 7, 15, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993). The Burlington/Carter test governs whether a district is required to pay for the private program selected by the parent. *See T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.,* 752 F.3d 145, 152 (2d Cir. 2014); *see also Sch. Comm. of Burlington v. Dep't of Educ. of Mass.,* 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985). Parents are entitled to reimbursement if: (1) the school district's proposed placement violated the IDEA, (2) the parents' alternative private placement was appropriate, and (3) equitable considerations favor reimbursement. *T.M.,* 752 F.3d at 152. The DOE bears the burden on the first prong of the test to establish that the student's IEP provided a FAPE. *See M.W. ex rel. S.W. v. N.Y.C. Dep't of Educ.,* 725 F.3d 131, 135 (2d Cir. 2013). If the DOE fails to meet this burden, the parents then bear the burden to establish that the alternative private placement was appropriate and that the equities favor the parents. *Id.*

In the initial administrative proceeding, the IHO concluded that the Placement School did not provide A.D. with a FAPE because the building was allegedly inaccessible beyond its first floor entrances, and found in favor of the plaintiff on the appropriateness of placing A.D. at iBRAIN and on the balance of equities. R. at 39. On appeal, the SRO reversed the decision of the IHO, finding that the issue of accessibility had been waived because the plaintiff had not raised it in her DPC. Based on the administrative record, the SRO found that the DOE had not denied A.D. a FAPE for the 2020-2021 school year, and therefore did not find it necessary to reach the

second and third prongs of the Burlington/Carter test. R. at 16-17, 19. Because the SRO concluded that the IEP was proper and that A.D. was offered a FADE, the plaintiff bears the burden "of demonstrating that the [SRO] erred." *M.H. v. N.Y.C. Dep't of Educ.,* 685 F.3d 217, 225 n.3 (2d Cir. 2012). Generally, "courts must defer to the reasoned conclusions of the SRO as the final state administrative determination." *Id.* at 246.

The plaintiff argues that the SRO's reversal of the IHO is not entitled to deference because the SRO ignored "key evidence, such as the lack of accessibility of the [Placement School], fail[ed] to address obvious weaknesses and gaps, and ma[de] impermissible credibility assessments about the factual findings on class grouping, disability classification, and medical concerns about training." Pl.'s Memo., ECF No. 26, at 8. While it is true that inadequately reasoned SRO decisions may not merit deference, *see Scott ex rel. C.S. v. N.Y.C. Dep't of Educ.,* 6 F. Supp. 3d 424, 441 (S.D.N.Y. 2014), the SRO's decision was not inadequately reasoned. An SRO decision may not merit deference if the SRO "(1) failed to carefully consider significant evidence; (2) failed to address obvious weaknesses and gaps in the evidence; (3) mischaracterized the testimony of . . . critical witnesses; and (4) made an impermissible credibility assessment." *Id.*

In this case, the SRO considered the issue of the Placement School's accessibility but found that the plaintiff had waived the issue because it was not raised in the DPC. Ordinarily, the IDEA provides for a "statutory 30-day resolution period once a due process complaint

is filed" during which the DOE may remedy any alleged deficiencies in the IEP without penalty. *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 187-88 (2d Cir. 2012); *see also* 20 U.S.C. § 1415(f)(1)(B). "If, at the end of the resolution period, the parents feel their concerns have not been adequately addressed and the amended IEP still fails to provide a FAPE, they can continue with the due process proceeding and seek reimbursement." *R.E.,* 694 F.3d at 188. The DPC must include "all of the alleged deficiencies in the IEP . . . in order for the resolution period to function." *Id.* at 187 n.4. "Substantive amendments to the parents' claims are not permitted" where they were not first raised in the DPC because this would allow parents to "sandbag the school district" with problems that could have been addressed during the 30-day resolution period. *Id.*

In this case, the DPC "does not make any allegations or references to the assigned public school being inaccessible for students with wheelchairs." R. at 16. Instead, as the SRO found, the issue of wheelchair accessibility "was first addressed during the impartial hearing as part of the parent's attorney's cross-examination of the district witness," and involved only a short answer to a single question posed to the witness. R. at 17. The witness was asked: "[W]ith respect to the structure . . . could you tell us whether or not that building is handicap[] accessible?" to which the witness responded: "To my knowledge, it is not an accessible building besides the entrances." *Id.* The "party requesting [a] due process hearing shall not be allowed to raise issues at [the] hearing that were not raised in [the] due process complaint unless [the] other

party agrees." *B.P. v. N.Y.C. Dep't of Educ.,* 634 F. App'x 845, 849 (2d Cir. 2015) (citing 20 U.S.C. § 1415(f)(3)(B)). "The scope of the inquiry of the IHO, and therefore the SRO and this Court, is limited to matters either raised in the [p]laintiffs' impartial hearing request or agreed to by [the] [d]efendant." *B.P. v. N.Y.C. Dep't of Educ.,* 841 F. Supp. 2d 605, 611 (E.D.N.Y. 2012). The SRO was therefore correct in concluding that the IHO, by considering the plaintiff's arguments about the Placement School's wheelchair inaccessibility, went beyond the scope of the impartial hearing. Although the plaintiff's attorney raised the issue of accessibility during its cross-examination of the district's witness, the one-line inquiry into the accessibility of the Placement School, without providing the witness the opportunity to elaborate further on the Placement School's accessibility, raises the obvious concern of "sandbag[ging]" that the 30-day resolution period, and the requirement to raise deficiencies in the DPC, is designed to avoid. *R.E.,* 694 F.3d at 187 n.4.

The plaintiff argues that the issue of wheelchair inaccessibility was not waived because it was raised in the DPC. However, the plaintiff only points to general statements in the DPC that the district failed to implement the IEP by "not offering a seat to [A.D.] in a classroom that could implement the IEP," and that the district provided "a placement that does not provide the mandated program." R. at 16. These statements, which did not specifically address the issue of the Placement School's alleged wheelchair inaccessibility, could not have put the school district on reasonable notice of that accessibility issue and did not give the school district an opportunity to cure that

defect with the placement. Accordingly, the plaintiff did not raise properly the issue of wheelchair accessibility in the DPC and therefore has waived that issue.[5] Moreover, "challenges to a school district's proposed placement school must be evaluated prospectively" and "cannot be based on mere speculation." *M.O. v. N.Y.C. Dep't of Educ.*, 793 F.3d 236, 244 (2d Cir. 2015). The SRO found that the plaintiff's general statements raised only "general challenges and, accordingly, did not raise any prospective, non-speculative challenges" to the proposed placement. R. at 17. Because the plaintiff's statements do not highlight any specific reasons why the Placement School could not have implemented the IEP, but instead only speculates as to the its inability to do so, the SRO concluded correctly that the plaintiff's statements did not raise properly any prospective challenges to the proposed placement.

Because the issue of wheelchair accessibility was limited to a single question on cross examination, the school district was never provided the opportunity to develop why the Placement School was appropriate to implement the IEP for A.D., to make changes in the selected school placement, or indeed to change the selected school entirely. What facilities were available at the Placement School was never developed nor did the record reflect whether A.D.'s classes were limited to the first floor or what accommodations were contemplated for a student who plainly used a wheelchair and whose IEP

5. The plaintiff also did not raise the issue of 1:1 nursing services in the DPC. Thus, for the same reasons that the plaintiff has waived her accessibility challenge, the plaintiff has also waived the issue of nursing services.

provided for a wheelchair.[6] The 30-day resolution period is intended specifically to allow the school district to cure any defects identified with its proposed placement. Allowing the plaintiff to circumvent this process by not raising the challenge in the DPC amounts to "sandbag[ging]" the school district with an issue that it otherwise may have been able to cure if the issue had been raised earlier. *R.E.*, 694 F.3d at 187 n.4.

The plaintiff also argues that A.D. was denied a FAPE because A.D. should have been classified as having a "traumatic brain injury" instead of being classified as having "multiple disabilities." However, well-reasoned decisions in other circuits have clarified that a student's disability classification is generally immaterial in determining whether a FAPE was provided if the IEP otherwise sufficiently met the needs of the disabled student. *See, e.g., Fort Osage R-1 Sch. Dist. v. Sims ex rel. B.S.*, 641 F.3d 996, 1004 (8th Cir. 2011) ("[T]he particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs."); *Heather S. v. Wisconsin,* 125 F.3d 1045, 1055 (7th Cir. 1997) ("[W]hether [the student] was described as cognitively disabled, other health impaired, or learning disabled is all beside the point . . . The IDEA charges the school with developing an appropriate education, not with coming up

6. Indeed, the district's placement witness, who "had 3 years of experience as IEP Co-ordinator at the [Placement School]" and who the IHO specifically found to be knowledgeable and credible, testified during the hearing that "[the Placement School] would be able to provide those services [required in the IEP]." R. at 30-32.

with a proper label with which to describe [the student's] multiple disabilities."). For the same reasons, the SRO found this argument unavailing because "the IDEA's strong preference for identifying the student's specific needs and addressing those needs generally outweighs relying on a particular disability diagnosis." R. at 20.

The plaintiff raised several other issues before the SRO that the SRO determined were inadequate challenges to the proposed placement. First, the plaintiff argues that the Placement School did not group A.D. with other students with similar needs who were similarly disabled. However, the plaintiff's challenge to A.D.'s class grouping fails because it does not present a prospective challenge to the IEP but is instead merely speculative. *M.O.,* 793 F.3d at 244. The plaintiff only speculates as to whether the proposed class grouping would interfere with A.D.'s ability to receive a proper education at the Placement School. Because the plaintiff did not show how the proposed class grouping could prospectively have denied A.D. a FAPE, the SRO was correct to conclude that this challenge was insufficient. *See Walczak,* 142 F.3d at 134 (finding that an IEP was not deficient even though it grouped a student "in a class with children whose intellectual, social, and behavioral needs were incompatible with her own" because it did not affect the student's ability to "continue making academic progress").

Along the same lines, the SRO concluded that the plaintiff's other arguments were insufficient because the plaintiff raised issues that only speculated as to the Placement School's inability to implement the IEP. For

example, the plaintiff argued that A.D. was denied a FAPE because the assigned school nurse was not trained in G-tube feeding and because the staff at the Placement School could not conduct two-person transfers. However, the IEP specifically provides that staff at the Placement School should be trained to conduct two-person transfers and that nurses should be trained for G-tube feeding. *See* R. at 871. Because the IEP provided specifically that the staff at the Placement School would be trained to address these issues, any further challenge that such training would be insufficient only speculates, impermissibly, as to the Placement School's ability to implement the IEP. *See R.E.,* 694 F.3d at 195 ("Speculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement.").

The plaintiff, on this motion for summary judgment, also raises for the first time a procedural challenge that the administrative proceedings were not conducted in a timely fashion, which the plaintiff argues "amounts to a denial of [a] FAPE, and entitles [the plaintiff] to pendency payments from the close of the statutory 45-day period until a hearing is finally [held]." Pl.'s Memo. at 14. New York's regulations implementing the IDEA require an IHO to render a decision "not later than 45 days from the day after" various periods for mediation. N.Y. Comp. Codes R. & Regs. tit. 8, § 200.5(j)(5) (2021). In this case, the IHO issued a final decision over ten months after the plaintiff filed the DPC. And where extensions of time have been granted, "the decision must be rendered and mailed no later than 14 days from the date the impartial hearing officer closes the record." *Id.* The defendants respond that the plaintiff has waived her procedural challenge because

the plaintiff did not raise this issue in the administrative proceedings before either the IHO or the SRO. *See Garro v. Conn.,* 23 F.3d 734, 737 (2d Cir. 1994) ("Before seeking judicial review in the federal courts, persons claiming to be aggrieved by procedural violations of the IDEA must first exhaust their administrative remedies."). In any event, the plaintiff's procedural challenge is meritless because "[a] child's right to a FAPE is not prejudiced by delay where a court finds that the challenged IEP was adequate." *M.O. v. N.Y.C. Dep't of Educ.,* 996 F. Supp. 2d 269, 272 (S.D.N.Y. 2014); *see also Grim,* 346 F.3d at 382 ("Because the [IEPs] were both appropriate and available, any delay in resolving the parents' challenges to them cannot have prejudiced [the student's] education."). In this case, the school district offered A.D. an adequate IEP, and therefore any delay did not deny A.D. a FAPE. *See Grim,* 346 F.3d at 381-82.

The SRO's reversal of the IHO's initial determination that the plaintiff was denied a FAPE was therefore well-reasoned and correct, and entitled to deference as the "final decision of the state authorities." *See M.H.,* 685 F.3d at 241. The plaintiff has not shown that A.D. was denied a FAPE for the 2020-2021 school year. Because A.D. has not been denied a FAPE, it is unnecessary to reach the latter prongs of the analysis: whether the alternative private placement was appropriate, and whether equitable considerations favor reimbursement. Accordingly, the defendants' motion for summary judgment is **granted**, and the plaintiff's motion for summary judgment is **denied**.[7]

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7. The plaintiff, in her moving papers, requests "[i]n the alternative" that this case be remanded to the IHO "for further

Appendix B

CONCLUSION

The Court has considered all the arguments of the parties. To the extent not specifically addressed above, the arguments are either moot or without merit. For the foregoing reasons, the plaintiff's motion for summary judgment is **denied**, and the defendants' motion for summary judgment is **granted**. The Clerk is directed to close all pending motions and to close this case.

SO ORDERED.

Dated: New York, New York
February 27, 2023

/s/ John G. Koeltl
John G. Koeltl
United States District Judge

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hearings and presentation of evidentiary evidence." Pl.'s Memo. at 20. However, at oral argument, the plaintiff conceded that remand would no longer be appropriate. In any event, remand is ordinarily appropriate only when a district court "needs further clarification or does not have sufficient guidance from the administrative agencies." *T.L. v. N.Y.C. Dep't of Educ.*, 938 F. Supp. 2d 417, 436 (E.D.N.Y. 2013). In this case, it is not clear what purpose remand would serve because there is no need for further clarification or guidance from either the IHO or the SRO.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JULY 19, 2024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of July, two thousand twenty-four.

Docket No: 23-373

ONANEY POLANCO, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF A.D.,

Plaintiff-Appellant,

v.

DAVID BANKS, IN HIS OFFICIAL CAPACITY AS CHANCELLOR OF THE NEW YORK CITY DEPARTMENT OF EDUCATION, NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendants-Appellees.

ORDER

Appellant, Onaney Polanco, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc.*

Appendix C

The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

/s/ Catherine O'Hagan Wolfe