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Education Delayed Is Education Denied*

63 N.Y.L. SCH. L. REV. 95 (2018–2019)

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* Former U.S. Secretary of Education Arne Duncan coined the phrase “educational opportunity delayed is education denied” during his remarks at the National Urban League Centennial Conference in 2010. *See Secretary Arne Duncan’s Remarks at the National Urban League Centennial Conference*, U.S. DEP’T EDUC. (July 27, 2010), <https://www.ed.gov/news/speeches/secretary-arne-duncans-remarks-national-urban-league-centennial-conference>.

EDUCATION DELAYED IS EDUCATION DENIED

I. INTRODUCTION

Delays characterize nearly every aspect of the special education program in New York City (NYC). The NYC Department of Education (DOE) is plagued by unreliable service databases,¹ an ongoing shortage of qualified evaluators and providers,² and serial reforms that disrupt services.³ These delays have devastating consequences for NYC's special education students.⁴ For instance, in 2016, the four-year graduation rate of students with disabilities was only forty-one percent.⁵ Students with special needs are also more likely to be arrested and suspended from school than general education students.⁶

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1. See TINA KIM, N.Y.C. OFFICE OF THE COMPT., AUDIT REPORT ON THE DEPARTMENT OF EDUCATION'S SPECIAL EDUCATION STUDENT INFORMATION SYSTEM 1 (July 22, 2013), https://comptroller.nyc.gov/wp-content/uploads/documents/7A12_114.pdf (concluding that the DOE's Special Education Student Information System (SESIS) was not meeting its goal of providing users with an efficient and reliable system to handle the administration of the Special Education Program); see also Elizabeth A. Harris, *Letitia James, New York Public Advocate, Sues New York City Education Dept. Over Schools' Disability Services*, N.Y. TIMES (Feb. 2, 2016), <https://www.nytimes.com/2016/02/03/nyregion/letitia-james-sues-new-york-city-education-dept-over-schools-disability-services.html> (reporting that a lawsuit filed against the DOE accused it of denying special education students required services due to its faulty computer system).
 2. See Kate Taylor, *Thousands of New York City Students Deprived of Education Services, Report Says*, N.Y. TIMES (Mar. 1, 2016), <http://www.nytimes.com/2016/03/02/nyregion/thousands-of-new-york-city-students-deprived-of-special-education-services-report-says.html> (noting that thirty percent of students who requested an initial evaluation to determine their need for special education services waited longer than the sixty-day requirement under state law); see also THOMAS P. DINAPOLI & KENNETH B. BLEIWAS, OFFICE OF THE STATE COMPT., WAITING FOR SPECIAL EDUCATION 8 (2008), <http://www.osc.state.ny.us/osdc/rpt3-2009.pdf> (stating that the DOE "faced a 'severe shortage' of speech therapists, counselors, and physical and occupational therapists").
 3. See BETSY GOTBAUM, OFFICE OF THE N.Y.C. PUB. ADVOC., OVERWORKED, UNDERUTILIZED: HOW THE DEPARTMENT OF EDUCATION'S REORGANIZATIONS OF SPECIAL EDUCATION TURNED SCHOOL PSYCHOLOGISTS FROM MENTAL HEALTH PROFESSIONALS INTO PAPER PUSHERS 6–9 (2008), <https://www.uft.org/files/attachments/public-advocate-report-overworked-underutilized.pdf> (discussing how multiple overhauls of the special education system resulted in delays of services and evaluations).
 4. See, e.g., D.D. v. N.Y.C. Bd. of Educ., No. CV-03-2489 (DGT), 2004 U.S. Dist. LEXIS 5189, at *74–76 (E.D.N.Y. Mar. 30, 2004) (finding that a denial of mandated special education services constituted "irreparable harm" that could not be remedied by monetary damages), *vacated*, 465 F.3d 503 (2d Cir. 2006).
 5. Alex Zimmerman & Monica Disare, *New York City's Graduation Rate Continues Climb, but a Larger Share of English Learners Are Dropping Out*, CHALKBEAT (Feb. 10, 2017), <https://www.chalkbeat.org/posts/ny/2017/02/10/new-york-citys-graduation-rate-continues-climb-but-a-larger-share-of-english-learners-are-dropping-out>.
 6. See *Are Students with Disabilities Suspended at a Higher Rate Than Other Students?*, N.Y.C. INDEP. BUDGET OFF. (Apr. 18, 2016), <http://ibo.nyc.ny.us/cgi-park2/2016/04/are-students-with-disabilities-suspended-at-a-higher-rate-than-other-students> (finding that students with disabilities made up nearly a third of the suspended student population for the 2012–2013 school year, while only comprising about eighteen percent of the general student population); see also SAMANTHA POWNALL, N.Y. CIVIL LIB. UNION, A, B, C, D, STPP: HOW SCHOOL DISCIPLINE FEEDS THE SCHOOL-TO-PRISON PIPELINE 1 (2013), https://www.nyclu.org/sites/default/files/publications/nyclu_STPP_1021_FINAL.pdf.

Approximately seventeen percent of the total student population are children with disabilities;⁷ hundreds if not thousands of these children each year do not receive the services they are entitled to under federal and state laws.⁸ The only check on the implementation of the special education program is litigation: an administrative impartial due process hearing and subsequent appeals⁹ which are fraught with delays, leaving children who need immediate help without timely recourse.¹⁰ Even when parents receive orders for appropriate services from an impartial hearing officer (IHO), the DOE often fails to provide students with these ordered services.¹¹ Parents' attorneys must either file another hearing request or vigorously advocate to enforce orders.¹² Low-income families who are unable to find representation to obtain the services their children need are disproportionately impacted by the DOE's failure to

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7. *NYC Public Schools: Special Education District Data Profile 2016-17*, N.Y. ST. EDUC. DEP'T, <https://data.nysed.gov/specialed/?year=2017&instid=7889678368#EnrollmentandClassificationRate> (last visited Jan. 2, 2019).
 8. See N.Y.C. DEP'T OF EDUC., LOCAL LAW 27 OF 2015 ANNUAL REPORT ON SPECIAL EDUCATION: SCHOOL YEAR 2016-2017 24 (2017), <https://www.sinergiany.org/sites/default/files/2018-CityCouncilReportSY17.pdf> (reporting that 7,383, or four percent of students in grades K-12 during the 2016-2017 school year did not receive recommended special education services); see also Kevin Mahnken, *NYC's Special Education Crisis, Where 1 in 4 Families Doesn't Receive Guaranteed Services and Students Are Forced to Wait 60 Days (or More) for IEP Meetings*, THE 74 (Feb. 13, 2018), <https://www.the74million.org/article/nycs-special-education-crisis-where-1-in-4-families-dont-receive-guaranteed-services-and-students-are-forced-to-wait-60-days-or-more-for-iep-meetings>; see generally GILBERT K. McMAHON, THE McMAHON ADVOC. GRP., NYS SPECIAL EDUCATION IMPARTIAL HEARING OUTCOMES, <http://www.specialedlawadvocacy.com/NYS%20Special%20Education%20Impartial%20Hearing%20Outcomes.pdf> (last visited Jan. 4, 2019) (analyzing empirical data about due process impartial hearing disputes between parents and school districts). While more current data is needed for a complete picture, practitioners report that this data substantially understates the total number of cases resolved at hearings in New York. See *id.* Further, these figures do not account for students the DOE is obligated to locate, evaluate, and educate under the "Child Find" provision of the IDEA. See 20 U.S.C. § 1412(a)(3)(A) (2017) ("All children with disabilities residing in the State . . . who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.").
 9. See N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5 (2018).
 10. See McMAHON, *supra* note 8, at 6.
 11. A lawsuit brought by Advocates for Children resulted in the DOE implementing more orders. See Order and Final Judgment, *LV v. N.Y.C. Dep't of Educ.*, No. 03 Civ. 9917 (RJH) (S.D.N.Y. Apr. 10, 2008). However, reports from 2011 indicated continued delays. See, e.g., NAVIGANT, INDEPENDENT AUDITOR'S POST CORRECTIVE ACTION FOURTH QUARTERLY REPORT 4 (2011), https://www.advocatesforchildren.org/sites/default/files/on_page/Independent_Auditors_Fourth_Quarterly_Report_After_the_DOEs_Corrective_Action_Plan_32011.pdf?pt=1.
 12. See OFFICE OF SPECIAL EDUC., N.Y. STATE EDUC. DEP'T, QUESTIONS AND ANSWERS ON IMPARTIAL DUE PROCESS HEARINGS FOR STUDENTS WITH DISABILITIES 19 (2018), <http://www.p12.nysed.gov/specialed/dueprocess/documents/impartial-hearing-guidance-jan-2018.pdf> (stating that parents can file a complaint with the New York State Education Department or go to court if a school district does not implement the IHO's decision).

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timely provide services or comply with hearing officer orders.¹³ According to data obtained from the 2016–2017 school year, “the poorest kids get cheated most often.”¹⁴

While Mayor Bill de Blasio’s administration has been settling certain special education cases more efficiently,¹⁵ many of NYC’s most vulnerable children who need immediate interventions continue to suffer.¹⁶ Through the story of Daniel Smith, a five-year-old boy with a speech delay and emotional disturbance,¹⁷ this article considers how the DOE implements the Individuals with Disabilities Education Act (IDEA) through its recent special education reforms and impartial due process hearings.¹⁸ This article also provides suggestions to mitigate the time spent and cost borne by families fighting for their children’s federally mandated services.

II. THE IDEA AND DUE PROCESS

Under the IDEA, states that receive funding from Congress are required “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.”¹⁹ The cornerstone of the free appropriate public education (FAPE) provision is a student’s individualized education program (IEP), a written plan that must accurately reflect the results of evaluations to identify the student’s needs; establish annual goals and short-term instructional objectives related to those needs; and provide for the use of appropriate special education and related services in

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13. See Ben Chapman, *NYC Denies Nearly 9,000 Kids with Disabilities the Services They Need*, N.Y. DAILY NEWS (Sept. 4, 2017), <http://www.nydailynews.com/new-york/education/nyc-denies-9-000-kids-disabilities-services-article-1.3467241>; see also Elisa Hyman, Dean Hill Rivkin & Stephen A. Rosenbaum, *How the IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER SOC. POL’Y & L. 107 (2011).
 14. Chapman, *supra* note 13. In District 9 in the Bronx, 856 students did not receive mandated services, compared to only sixty-seven students in Manhattan’s comparably wealthier District 1. *Id.*
 15. Alex Zimmerman, *The City Is Paying for More Students with Disabilities to Attend Private School; Advocates Say Problems Persist*, CHALKBEAT (July 8, 2016), <http://www.chalkbeat.org/posts/ny/2016/07/08/the-city-is-paying-for-more-students-with-disabilities-to-attend-private-school-advocates-say-problems-persist> (noting the increase in tuition reimbursements and decrease in lengthy hearings over the course of de Blasio’s administration).
 16. See Chapman, *supra* note 13.
 17. Daniel Smith’s experience, and others described in this article, are based on cases handled by the author and other attorneys in New York City from 2014 to 2018.
 18. See 20 U.S.C. §§ 1400–82 (2017). Although it was renamed the Individuals with Disabilities Education Improvement Act, or IDEIA, it continues to be commonly referred to as the IDEA. See Rebecca Renner, *The Similarities & Differences Between IDEA and IDEIA*, CLASSROOM, <https://www.theclassroom.com/similarities-differences-between-idea-idea-8397136.html> (last visited Jan. 11, 2019).
 19. § 1400(d)(1)(A).

order for the student to progress.²⁰ The IDEA requires school districts to collaborate with parents to formulate the IEP.²¹

In New York, parents are vital members of the Committee on Special Education (CSE),²² a team of educators and providers tasked with developing the student's IEP and reviewing it on at least an annual basis.²³ The goal of the annual review is "to determine if the annual goals for the student are being achieved" and to revise the IEP if necessary.²⁴ The CSE must ensure families²⁵ participate in the decision-making process in determining their children's needs for special education.²⁶ At the same time, Congress recognized that school districts have a "natural advantage in information and expertise," which can leave parents in the dark.²⁷ Thus, the IDEA provides parents with procedural safeguards to challenge the decisions of the CSE.²⁸

A due process hearing, or special education hearing, is the trial-like process by which parents and school districts dispute appropriate services for a student before an IHO.²⁹ After a parent files a hearing request, the DOE has ten days to respond to the issues raised.³⁰ An IHO must be appointed immediately after the hearing request, or complaint, is filed.³¹ While state regulations establish timelines for commencing and concluding these hearings, IHOs routinely grant extensions to accommodate the

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20. § 1414(d); *see* *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000–01 (2017) (holding that the IDEA requires a "merely more than *de minimis*" standard for student progress). This standard means that the "educational program must be appropriately ambitious in light of [the student's] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives." *Id.* at 1000; *see also* *Honig v. Doe*, 484 U.S. 305, 311 (1988) (detailing the IEP).
 21. *See* § 1414(b)(2)(A), (d)(1)(B)(i), (d)(3)(A)(ii), (d)(3)(D), (d)(4)(A)(ii)(III), and (e); *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 530 (2007) ("The IEP proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's educational program.").
 22. N.Y. STATE EDUC. DEP'T, PART B: PROCEDURAL SAFEGUARDS NOTICE (2013), <http://www.p12.nysed.gov/specialed/formsnotices/psgn/PSGN-July2013.pdf>.
 23. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(f) (2018).
 24. *Id.*
 25. "Parents" and "families" are used interchangeably in this article to connote the caregiver responsible for directing educational decisions for their child.
 26. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(d).
 27. *Schaffer v. Weast*, 546 U.S. 49, 60 (2005) (internal quotation and citation omitted).
 28. *See* 20 U.S.C. § 1415(a) (2017); *see also* *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 197 (2d Cir. 2002). Parents have the option of going through mediation with the CSE, or resolving the dispute at a "resolution session" before going to a due process hearing. § 1415(e)–(f).
 29. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5. An IHO is like a judge. *Id.* § 200.1(x). Both parents and the school district make opening and closing statements, call witnesses, present evidence, and brief legal questions. *Id.* § 200.5(j)(3)–(4).
 30. *Id.* § 200.5(i)(5).
 31. *Id.* § 200.5(j)(3)(ii).

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hearing officer's, parties', and witnesses' schedules, and to complete the record.³² When such extensions are granted, a decision must be rendered within fourteen days after the record closes.³³

New York has one of the highest number of special education cases that go through the hearing process.³⁴ On average, approximately 2,000 to 4,000 cases are filed per year, and around 500 of those are actually adjudicated.³⁵ With approximately eighty-five IHOs authorized to hear DOE cases,³⁶ it can take months to complete just one hearing—sometimes as long as three years.³⁷

III. EDUCATION REFORMS AND HEARING DELAYS

A. Education Reforms

Before the IDEA was passed in 1975, students with disabilities across the country were “simply warehoused in special classes or were neglectfully shepherded through the system until they were old enough to drop out.”³⁸ Even decades after the IDEA was enacted, NYC students with disabilities continued to be segregated from their non-disabled peers, having to travel to schools that provided the necessary services that their zoned schools lacked.³⁹ Other students languished in the DOE's evaluation

32. *Id.* § 200.5(j)(2), (j)(3)(i)–(iii). The New York State Regulations provide each party “up to one day to present its case unless the [IHO] determines that additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision. Additional hearing days, if required, shall be scheduled on consecutive days wherever practicable.” *Id.* § 200.5(j)(3)(xiii).

33. *Id.* § 200.5(j)(5).

34. *IDEA Dispute Resolution Data Summary for: New York 2004–05 to 2016–17*, CADRE 2 (Nov. 28, 2018), <https://www.cadeworks.org/sites/default/files/resources/2016-17%20DR%20Data%20Summary%20-%20New%20York.pdf>; see also Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL'Y STUD. 3, 4–5 (2010).

35. Response from N.Y. State Educ. Dep't to Steven L. Goldstein's FOIL (Freedom of Information Law) request for “a listing of all the IHOs currently on the rotational list . . . certified to preside over impartial hearings” in New York City (Feb. 4, 2016) (on file with the author); see also McMAHON, *supra* note 8, at 9. New York is a “two-tier” system, where the losing party must appeal to the State Review Officer (SRO) before exhausting administrative remedies and proceeding in federal court. Zirkel & Gina, *supra* note 34, at 3, 5. However, exhaustion is not required when following the administrative process “would be futile or inadequate.” *Honig v. Doe*, 484 U.S. 305, 326–27 (1988); see also *M.G. v. N.Y.C. Dep't of Educ.*, 15 F. Supp. 3d 296, 305–06 (S.D.N.Y. 2014).

36. Goldstein FOIL request, *supra* note 35.

37. McMAHON, *supra* note 8, at 6–7. More current data is needed for a complete picture. Practitioners in New York City report that decisions are very rarely issued within these timeframes because many hearings require extensions due to the sheer number of cases and the lack of availability of hearing officers. See ADVOC. FOR CHILD. OF N.Y., SPECIAL EDUCATION IMPARTIAL HEARINGS 16 (2015), https://www.advocatesforchildren.org/sites/default/files/library/impartial_hearings.pdf?pt=1 (noting that the deadline for an IHO to issue a decision “is not always met”).

38. *Honig*, 484 U.S. at 309 (internal quotation and citation omitted).

39. See Patrick Wall, *Special Education Overhaul Leaves Students Less Isolated but Schools Struggle to Keep Up*, CHALKBEAT (Aug. 11, 2014), <http://www.chalkbeat.org/posts/ny/2014/08/11/special-education-overhaul-leaves-students-less-isolated-but-schools-struggle-to-keep-up> (discussing how special-needs

and placement processes, in violation of the IDEA's requirements.⁴⁰ A report published by the New York State Comptroller in 2008, entitled *Waiting for Special Education*, revealed that during the 2006–2007 school year, a monthly average of 4,500 students remained in the evaluation process for more than thirty school days.⁴¹ More than half of all students recommended for new placements waited longer than sixty school days to receive their services because the DOE failed to inform their parents of the placements.⁴²

Attempting to minimize delays and integrate students, the DOE embarked on a series of reforms. In 2009, the DOE reorganized its administration, hiring, for the first time, a Deputy Chancellor of Special Education.⁴³ The Deputy Chancellor was tasked with ensuring that students with disabilities received appropriate services, in the least restrictive environment, in all schools.⁴⁴ As a result, individual schools were required to budget for and provide special education services to all students.⁴⁵

students used to have to be bused to distant schools to receive needed services); PERRY & ASSOCS., GETTING IT RIGHT: SCHOOL LEVEL IMPLEMENTATION OF NEW YORK CITY DEPARTMENT OF EDUCATION SPECIAL EDUCATION REFORM 32 (2013), http://www.pertyandassociatesinc.com/NYC-SpecEd-12-3-13_FINAL.pdf (proposing that students with disabilities be able to attend their zoned school or a school of their choosing to receive needed services); Philissa Cramer, *City Announces Broad Outlines of a Special Education Overhaul*, CHALKBEAT (Feb. 1, 2010), <http://www.chalkbeat.org/posts/ny/2010/02/01/city-announces-broad-outlines-of-a-special-education-overhaul> (“For too long, educating students with disabilities has meant separating them from their general education peers.”); *Litigation: Jose P.*, ADVOC. CHILD. N.Y., http://www.advocatesforchildren.org/litigation/class_actions/jose_p_vs_mills (last visited Jan. 4, 2019) (providing a list of court orders stemming from a class action suit against the DOE in 1979).

40. DiNAPOLI & BLEIWAS, *supra* note 2, at 1; see 20 U.S.C. § 1414(a), (d) (2017).

41. DiNAPOLI & BLEIWAS, *supra* note 2, at 1.

42. *Id.* The DOE's data system (SEGIS) replaced the previous system, the Child Assistance Program (CAP) in 2010, and has been monumentally challenging to implement: Teachers, providers, and DOE administrators have all reported that it has been difficult to track whether students are timely evaluated or are receiving the services in their IEPs. See KIM, *supra* note 1; Brady Dale, *This \$69M Special Ed Software Has Become NYC's Own HealthCare.gov-like Disaster*, OBSERVER (Jan. 17, 2017), <http://observer.com/2017/01/sepis-special-education-public-advocate-department-of-education>.

43. Philissa Cramer, *City's Top Special Education Deputy Retiring as Reforms Roll Out*, CHALKBEAT (Apr. 16, 2012), <https://www.chalkbeat.org/posts/ny/2012/04/16/citys-top-special-education-deputy-retiring-as-reforms-roll-out>. As of this article's publication, the newly-appointed New York City Schools Chancellor, Richard Carranza, announced an overhaul of the DOE and removed the Deputy Chancellor of Special Education position. See *Chancellor Carranza Announces Streamlined Support and Leadership Structure for New York City Schools*, N.Y.C. DEP'T EDUC., <https://www.schools.nyc.gov/about-us/news/announcements/contentdetails/2018/06/27/chancellor-carranza-announces-streamlined-support-and-leadership-structure-for-new-york-city-schools> (last updated Aug. 20, 2018).

44. See Memorandum from Garth Harries, Senior Coord. for Special Educ., to Joe Klein, N.Y.C. Dep't of Educ. Chancellor (July 2, 2009), <https://www.uft.org/files/attachments/spec-ed-recom.pdf>; Cramer, *supra* note 39; Cramer, *supra* note 43.

45. This is different from prior reforms, where the district rather than the individual school was required to budget for these services. See Michael Winerip, *Keeping Students' Mental Healthcare out of the E.R.*, N.Y. TIMES (Apr. 8, 2012), http://www.nytimes.com/2012/04/09/nyregion/trying-to-keep-students-mental-health-care-out-of-the-er.html?pagewanted=2&_r=0&ref=michaelwinerip.

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However, after the reform was implemented, school principals were unable to reorganize their classrooms to serve all students with special needs.⁴⁶

Many school principals were forced to inform families that their children with special needs could not enroll because the school did not have the classes or services these children required.⁴⁷ Worse, some schools simply failed to inform parents that they did not offer the services their children needed and returned to the practice of “warehousing” children.⁴⁸ Some students were declassified, or removed from special education programming, altogether.⁴⁹ These practices harm children and violate federal and state laws, which require IEPs to be developed based on the student’s unique needs—not the school’s.⁵⁰ Today, many families continue to face similar situations as schools negotiate the funding and staffing needs of their neighborhood students.⁵¹ Although the special education reforms nominally brought NYC into compliance with the IDEA, it did so without staffing, funding, or programming to provide students with disabilities with a FAPE.⁵²

Take, for instance, Daniel Smith, a pre-school student with a speech delay and emotional disturbance whose special education services were summarily removed in his kindergarten year. From 2009–2011, Daniel attended an 8:1:2⁵³ pre-school classroom where he also received speech therapy and counseling. In May 2011, during Daniel’s last year at the pre-school, the CSE, including the parent, Ms. Smith, met to create Daniel’s IEP for the upcoming kindergarten year. Since Daniel’s current school did not offer a kindergarten program, Daniel would have to attend a

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46. See LETITIA JAMES, OFFICE OF THE N.Y.C. PUB. ADVOC., *NEW YORK CITY SCHOOLS ARE FAILING TO PROVIDE MANDATED SUPPORTS TO CHILDREN WITH DISABILITIES* 6 (2017); Cramer, *supra* note 39; Wall, *supra* note 39; see also ARISE COAL., *SPECIAL EDUCATION REFORM FACT SHEET* (2012), http://www.arisecoalition.org/uploads/1/3/4/8/13489995/special_ed_reform.pdf.
 47. See Meredith Kolodner, *Special Needs Students Shut out of NYC Schools, Despite DOE “Reforms,”* ALTERNET (Feb. 24, 2012), <https://perma.cc/HU3F-RWCH>; Wall, *supra* note 39.
 48. See Cramer, *supra* note 39; Kolodner, *supra* note 47; Cf. Nora Gordon, *Who Is in Special Education and Who Has Access to Related Services? New Evidence from the National Survey of Children’s Health*, BROOKINGS INST. (Apr. 5, 2018), <https://www.brookings.edu/research/who-is-in-special-education-and-who-has-access-to-related-services-new-evidence-from-the-national-survey-of-childrens-health> (noting how even though “the goal of special education is to provide supportive services and adaptations to allow all students to access the curriculum, many view it as a way of warehousing children” on a national level).
 49. See Wall, *supra* note 39.
 50. See *id.*; 20 U.S.C. § 1414(c)(1)(A) (2017); 34 C.F.R. § 300.533 (2017); N.Y. COMP. CODES R. & REGS. tit. 8, §§ 200.5(C)(2)(i), 200.4(b)(4), (b)(5)(i) (2018).
 51. See Chapman, *supra* note 13; Hyman, Rivkin & Rosenbaum, *supra* note 13.
 52. See JAMES, *supra* note 46. Despite these challenges there are some CSEs that can and do provide their students with a FAPE. See Chapman, *supra* note 13. Yet, therein lies the problem: More than forty years have passed since the IDEA was enacted, but depending on the mayor, the district, or the grade level, services and policies can vary wildly, excluding thousands of children who need immediate help. See *id.*; see also DiNAPOLI & BLEIWAS, *supra* note 2.
 53. 8:1:2 means eight students per one teacher per two teaching aides.

brand new school in September.⁵⁴ The CSE recommended a 12:1:1 program with a paraprofessional aide (“para”)⁵⁵ and counseling. The DOE also informed Ms. Smith that Daniel no longer needed speech therapy and removed it from his IEP. Ms. Smith agreed with the 12:1:1 program with a para and counseling. However, Ms. Smith disagreed with the decision to eliminate speech therapy from Daniel’s IEP because she observed her son continue struggling to speak.

When Ms. Smith received the final IEP two weeks later, it did not include the 12:1:1 classroom. Instead, Daniel would be placed in a general education classroom because Daniel’s zoned school did not offer a 12:1:1 class. Ms. Smith was shocked by this change, and worried because she knew Daniel would struggle in a new and large classroom.

Terrified, Ms. Smith asked Daniel’s pre-school teachers for help. They referred her to an attorney who represented her pro bono and helped her file a hearing request. Shortly thereafter, the DOE mailed Ms. Smith a draft of a new IEP reflecting the 12:1:1 recommendation from the CSE meeting in May. The DOE assured Ms. Smith that her zoned school would offer a kindergarten classroom with the appropriate services by September 2011, so Ms. Smith withdrew the hearing request. However, when Ms. Smith brought Daniel to his first day of school in September, the class did not exist. Ms. Smith filed another hearing request.

B. Education Delayed Is Education Denied

1. Pendency

State and federal regulations require that “during the pendency of any [impartial hearing], . . . unless the local board of education and the parents otherwise agree, the student shall remain in the then-current placement of such student.”⁵⁶ The “then-current” placement is “the placement at the time of the previously implemented IEP.”⁵⁷ The pendency, or “stay put” provision prohibits the school district from changing a student’s placement during an impartial hearing.⁵⁸ This provision is “an automatic

54. When schools like Daniel’s do not offer a kindergarten program, the DOE has the burden to find an appropriate kindergarten program at another school. *See* ADVOCES FOR CHILD. OF N.Y., TURNING 5: A GUIDE TO THE TRANSITION FROM PRESCHOOL SPECIAL EDUCATION TO KINDERGARTEN 19 (2018), https://www.advocatesforchildren.org/sites/default/files/library/turning_5_guide.pdf?pt=1. In cases where the appropriate program does not exist, the IDEA requires the DOE to create one that meets Daniel’s needs. *See* ADVOCES FOR CHILD. OF N.Y., AFC’S GUIDE TO SPECIAL EDUCATION 26 (2016), https://www.advocatesforchildren.org/sites/default/files/library/special_ed_guide.pdf?pt=1.

55. A paraprofessional aide is an assistant assigned to a particular student. *Paraprofessionals and Substitute Paraprofessionals*, N.Y.C DEP’T EDUC., <https://www.schools.nyc.gov/careers/other-jobs-in-schools/paraprofessionals-and-substitute-paraprofessionals> (last visited Jan. 7, 2019).

56. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(m)(1) (2018).

57. *Mackey v. Bd. of Educ.*, 386 F.3d 158, 163 (2d Cir. 2004) (quoting *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990)).

58. 34 C.F.R. § 300.518(a) (2017).

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preliminary injunction,” creating an “absolute rule in favor of the status quo.”⁵⁹ It is the closest thing to a temporary restraining order in this administrative system.⁶⁰ The goal of pendency is to minimize disruption to the child’s education and ensure that he continues to receive the services he needs during the course of the litigation.⁶¹

When the parent and school district agree on the student’s then-current placement, pendency should be automatic. According to the U.S. Department of Education, “[w]here the child’s current educational placement is not in dispute, a school district should implement the stay put provision automatically since it is not necessary to await an appearance before, and decision by, an IHO.”⁶²

However, in practice, pendency in NYC is not automatic; it requires its own hearing and IHO order—before the IHO conducts an impartial hearing on the merits⁶³—which creates additional uncertainty and anxiety for parents. Parents’ attorneys report that the DOE routinely requires a pendency order from an IHO in order to continue providing services to students, even when the DOE agrees with the parent on the student’s pendency placement.⁶⁴ As a result, parents like Ms. Smith, who want their children to continue receiving appropriate services for the duration of an impartial hearing, must move to enforce pendency when they file their impartial hearing requests. Although uncontested pendency motions can be resolved in as little as one day,⁶⁵ parents must still wait for an IHO to be available to hear the motion and draft the pendency order, adding to an already lengthy and contentious litigation.⁶⁶

This was precisely the case for Ms. Smith, whose pendency motion was not heard until two weeks after the request for a pendency hearing was filed. During that time,

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59. *Zvi D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982) (“[The stay put] provision is, in effect, an automatic preliminary injunction. The statute substitutes an absolute rule in favor of the status quo . . .”).
 60. *Cf.* N.Y. C.P.L.R. § 6313 (McKinney 2018) (requiring a showing of immediate and irreparable harm for a court to impose a temporary restraining order on an opposing party). Likewise, in special education hearings, irreparable harm may occur when a child is removed from an appropriate placement during litigation. *See D.D. v. N.Y.C. Bd. of Educ.*, No. CV-03-2489 (DGT), 2004 U.S. Dist. LEXIS 5189, at *74–76 (E.D.N.Y. Mar. 30, 2004) (finding that irreparable harm was imminent due to the deprivation of mandated services), *vacated*, 465 F.3d 503 (2d Cir. 2006).
 61. *M.G. v. N.Y.C. Dep’t of Educ.*, 982 F. Supp. 2d 240, 247 (S.D.N.Y. 2013) (“Importantly, though, the purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability, including a stable learning environment during what may be a lengthy administrative and judicial review.”) (internal quotations and citation omitted).
 62. Letter from Melody Musgrove, Dir., Office of Special Educ. Programs, U.S. Dep’t of Educ., to Steven L. Goldstein, Att’y at Law (Oct. 18, 2012), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/12-002172r-ny-goldstein-pendency-10-18-12.pdf>.
 63. A pendency order is a brief decision on only the issue of pendency, following a pendency hearing. It orders the DOE to keep the student in her then-current placement. *See* 34 C.F.R. § 300.518; N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(m) (2018); *M.G.*, 982 F. Supp. 2d at 246–47; *Zvi D.*, 694 F.2d at 906.
 64. *See* Magda Labonté, *What Is Pendency?*, LAW OFF. REGINA SKYLER & ASSOCIATES (Apr. 19, 2018), <https://www.skylerlaw.com/blog/2018/4/19/what-is-pendency>.
 65. *See* McMAHON, *supra* note 8, at 6–7.
 66. *See id.*

Daniel received no services and had nowhere to attend school: A general education classroom at his zoned school, with over twenty-four students, would have been wholly inappropriate, and the recommended 12:1:1 kindergarten classroom did not exist. Moreover, Daniel missed a third week of instruction because Ms. Smith did not receive the pendency order until one week after the pendency hearing, which took only one day. In total, Daniel spent three weeks at home without instruction or services.

An appropriate pendency placement for Daniel would have been an 8:1:2 classroom with speech and counseling services pursuant to Daniel's last implemented IEP. At the pendency hearing, the DOE did not contest the 8:1:2 classroom or the counseling and speech therapies per Daniel's prior pre-school IEP. The IHO ordered the DOE to provide these services and expeditiously place Daniel in an 8:1:2 classroom for the duration of the underlying impartial hearing.

Instead, the DOE provided Ms. Smith with Related Service Authorizations (RSAs), which are essentially vouchers with a list of services providers, like counselors and speech therapists.⁶⁷ Ms. Smith had to call nearly forty providers—without any assistance from the DOE—before she was able to locate one counselor and one speech therapist. The DOE was ordered to provide Daniel with the counselor and the speech therapist, not provide the parent with a list of providers. Finally, the DOE failed to provide the 8:1:2 pendency placement as ordered by the IHO.

As a result of the DOE's failure to place Daniel in the 8:1:2 setting, Ms. Smith, who worked full-time, was forced to either ask her mother to look after Daniel at home, or find a daycare that would accept him and accommodate his therapists. Ms. Smith chose the daycare because, she reasoned, even if it were a class of sixteen students, Daniel would continue to socialize and receive instruction. However, as the impartial hearing dragged on for weeks and then months, Ms. Smith noticed that Daniel's emotional and communication skills regressed. Instead of expressing himself verbally as he had learned to at his pre-school, he experienced tantrums, cried, and threw furniture. Ms. Smith often had to leave work in the middle of the day to bring Daniel home, which nearly cost Ms. Smith her job.

Pendency can mitigate the damage resulting from hearing delays and inappropriate IEPs because it requires that students continue to receive special education services during the course of litigation.⁶⁸ It is especially helpful for children who face declassification mid-year, or if the DOE attempts to remove a particular service that a student still needs.⁶⁹ However, the pendency provision was not drafted in contemplation of months- or years-long hearings. When hearings take months to

67. *Related Services*, N.Y.C. DEP'T EDUC., <https://www.schools.nyc.gov/special-education/supports-and-services/related-services> (last visited Jan. 7, 2019).

68. *See M.G.*, 982 F. Supp. 2d at 247.

69. *See id.*; *see also* ADVOCS. FOR CHILD. OF N.Y., AFC'S GUIDE TO SPECIAL EDUCATION, *supra* note 54, at 23. Pendency is especially effective in tuition reimbursement cases where a student is already in a private school and will likely continue in that placement for years to come. *See Forest Grove Sch. Dist. v. T. A.*, 557 U.S. 230 (2009) (holding that the IDEA authorizes tuition reimbursement for private school special education services if the school district does not offer an appropriate public program); *see also* Zimmerman, *supra* note 15.

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complete, students remain in classes they may have outgrown, undermining pendency's purpose and forcing families to decide on a setting that is the lesser of two evils. As the United States Court of Appeals for the First Circuit held:

The IDEA charges school districts with making reasonable efforts both to work with parents and to satisfy the needs of special education students. That entails the responsibility to find a path that runs between the rock and the hard place. Knee-jerk compliance with a stay-put provision does not negate that responsibility.⁷⁰

The DOE's routine failure to find that path, from providing appropriate instruction to implementing an IHO's order, denies children vital services at critical moments in their educational and social development.

2. *Independent Educational Evaluations*

In addition to fighting for Daniel's 12:1:1 class, Ms. Smith also requested an independent speech evaluation. An independent educational evaluation (IEE) is a publicly funded, independent assessment conducted by a professional not employed by the DOE.⁷¹ An IEE can be in any area the child needs, such as in speech or psychology; writing a letter to the DOE, or to the student's school, is all that is needed to trigger the IEE regulation.⁷²

In Daniel's case, the DOE had determined at the May 2011 CSE meeting that he no longer needed speech therapy. Ms. Smith disagreed because Daniel continued to have expressive language delays. Following the CSE meeting, Ms. Smith wrote to the DOE and requested an independent speech therapy evaluation, but the DOE never responded to Ms. Smith's letter.

Under federal and state regulations, if a parent requests an IEE because she disagrees with the school district's evaluation, the district must, without unnecessary delay, either request a hearing to show that its evaluation is appropriate, or ensure that an IEE is provided at public expense.⁷³ The purpose of these regulations is to ensure that parents have access to experts "who can evaluate all the materials that the school must make available, and who can give an independent opinion."⁷⁴ Thus, parents "are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the

70. *Me. Sch. Admin. Dist. No. 35 v. Mr. R.*, 321 F.3d 9, 19–20 (1st Cir. 2003); *see also Burr v. Ambach*, 863 F.2d 1071, 1076 (2d Cir. 1988) (describing the pendency provision as protection against an even worse placement during the pendency of review proceedings), *vacated*, *Sobol v. Burr*, 492 U.S. 902 (1989).

71. 34 C.F.R. § 300.502(a)–(b) (2017); N.Y. COMP. CODES R. & REGS. tit. 8, §§ 200.1(z), 200.5(g) (2018).

72. *See Wayne Steedman, Independent Educational Evaluations: What? Why? How? Who Pays?*, WRIGHTSLAW (Nov. 11, 2016), <https://www.wrightslaw.com/info/test.tee.steedman.htm>.

73. 34 C.F.R. § 300.502(b); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(g). The regulations allow for an exception to this second option for instances where the school district demonstrates, in an impartial hearing, that the independent evaluation obtained by the parent did not meet the district's criteria. § 300.502(b)(3); § 200.5(g)(v).

74. *Schaffer v. Weast*, 546 U.S. 49, 60–61 (2005).

opposition.”⁷⁵ Often, however, as was the case with Ms. Smith, the DOE fails to acknowledge the parent’s request for the IEE, despite being required by the IDEA to respond to such requests.⁷⁶ In these cases, the only way for a parent to obtain the IEE is to request a hearing and ask the IHO to order one, which needlessly prolongs the hearing and placement processes.⁷⁷

3. *The Hearing Officer’s Final Decision and Order for Daniel Smith*

In Daniel’s case, the impartial hearing took two months to complete and an additional two months for a final decision. Ms. Smith did not receive the order until February 2012, eight months after the DOE indicated Daniel would be placed in a general education classroom, and five months after it failed to provide the 12:1:1 kindergarten classroom. The IHO ordered compensatory instruction⁷⁸ and placement in a 12:1:1 kindergarten classroom in an approved non-public school with counseling, speech therapy, and a 1:1 para. The IHO also found that the DOE’s failure to respond to Ms. Smith’s letter requesting the independent speech evaluation entitled her to the IEE.⁷⁹ Particularly in clear-cut cases like Daniel’s, the DOE could save the parent, hearing system, and DOE valuable time and resources if it had responded to the parent’s letter as required and agreed to the IEE up front.

IV. CONCLUSION: LOOKING AHEAD

A. *Accurate Data Is Vital for Accountability*

As an initial matter, the DOE must implement databases that accurately track each aspect of the identification, evaluation, and placement processes under the IDEA.⁸⁰ The current data system is inadequate at best.⁸¹ Without accurate data, it is difficult for educators and advocates to provide students with appropriate services

75. *Id.* at 61.

76. Practitioners and parents report that it is the DOE’s practice to not respond to parents’ requests for IEEs, despite the requirement to do so under its own policies and federal and state regulations. As a result, IEEs are a component of many hearing requests. *See* N.Y.C. DEP’T OF EDUC., SPECIAL EDUCATION STANDARD OPERATING PROCEDURES MANUAL 33 (2018), <https://www.nyccharterschools.org/sites/default/files/resources/03062009SOPM.pdf>.

77. *See* McMAHON, *supra* note 8.

78. “[C]ompensatory awards should aim to place disabled children in the same position they would have occupied but for the school district’s violations of IDEA.” *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

79. IHOs also have the authority to order an IEE during a hearing to further develop the record regarding the student’s needs. In this situation, the IEE is automatically at public expense. 34 C.F.R. § 300.502(d) (2017); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(g)(2) (2018).

80. *See* N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4.

81. *See* KIM, *supra* note 1; Chapman, *supra* note 13; Dale, *supra* note 42.

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and to hold the country's largest school system accountable.⁸² The state must conduct more audits like *Waiting for Special Education*.⁸³ New York City is long overdue for an incisive look at its special education system and how to help its most vulnerable students progress.

B. The DOE Must Implement Clear and Consistent Policies to Comply with the IDEA

Providers and administrators are often unaware of their obligations under the law and must be trained to implement the IDEA's mandate.⁸⁴ For instance, in Daniel's case, the DOE failed to comply with the IHO's pendency order when it issued RSAs instead of providing Daniel with the ordered speech therapy and counseling services. The DOE had no system to ensure Daniel actually received the ordered services, which again denied him a FAPE.⁸⁵

Non-English speaking families are at even more of a disadvantage. Advocates and practitioners report that when students' service providers go on vacation or take leave, some schools simply send home a letter, in English, enclosing forms to sign up for RSAs.⁸⁶ Unaware of the information contained therein, parents do not obtain the RSAs and their children are denied mandated services from their IEPs, unless or until parents go to hearing to obtain an order.⁸⁷ Although the DOE is required to communicate with parents in their native language,⁸⁸ practitioners report that many non-English speaking parents receive communications from the DOE in only English.⁸⁹

82. According to the DOE, there are more than 1.1 million students in the NYC school system, making it the largest school district in the United States. *DOE at a Glance*, N.Y.C. DEP'T EDUC., <https://www.schools.nyc.gov/about-us/reports/doe-data-at-a-glance> (last visited Jan. 7, 2019).

83. DiNAPOLI & BLEIWAS, *supra* note 2. In June 2012, the State Comptroller, Thomas P. DiNapoli, who published the 2008 report on special education evaluation delays, *Waiting for Special Education*, announced a new special education audit initiative. The audit "found numerous cases of waste, abuse and in some cases criminal conduct" by multiple individual service providers. *DiNapoli: Special Education Pre-K Provider Claimed Nearly \$1 Million in Ineligible Expenses*, OFF. N.Y. ST. COMPTROLLER (Oct. 26, 2016), <http://www.osc.state.ny.us/press/releases/oct16/102616.htm>.

84. See Cramer, *supra* note 39; Wall, *supra* note 39.

85. Indeed, RSAs often "go unused at an alarming rate," particularly in the city's poorest districts. See JAMES, *supra* note 46, at 11–13 (reporting that families in the poorest districts in the city failed to utilize RSAs at rates of up to ninety-one percent based on internal DOE data from the 2015–2016 school year).

86. See Letter from Kelly McAnny, Co-Dir., Disab. Justice Program, N.Y. Lawyers for the Pub. Interest, and Rigel S. Massaro, Staff Att'y, Immigrant Students' Rights Project, *Advocs. for Child. of N.Y.*, to Office of Civil Rights, U.S. Dep't of Educ. (June 20, 2012), <https://www.nylpi.org/images/FE/chain234siteType8/site203/client/EVC%20OCR%20Complaint.pdf>.

87. See *id.*

88. 20 U.S.C. §§ 1414(b)(1), 1415(b)(3)–(4), (c)(1) (2017); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(b)(6)(i)(d)(xii) (2018); see *Language Access Policy*, N.Y.C. DEP'T EDUC., <https://www.schools.nyc.gov/school-life/policies-for-all/language-access-policy> (last visited Jan. 8, 2019); *Translation and Interpretation*, N.Y.C. DEP'T EDUC., <https://infohub.nyced.org/resources/communications/translation-and-interpretation> (last visited Jan. 8, 2019).

89. See McAnny & Massaro Letter, *supra* note 86.

Similarly, with IEEs, the DOE has only two options when responding to a parent's request: Either initiate a due process hearing or fund the IEE.⁹⁰ Yet, the DOE typically does neither.⁹¹ Instead, the parent has no choice but to file a hearing request for an IHO to order the DOE to comply with the statute it is already required to follow. CSEs and school administrators must be trained to develop policies that ensure compliance with the IDEA's IEE provision. This will decrease the number of hearings and the months children waste in inappropriate settings.

C. *The DOE Should Expeditiously Resolve Cases*

In addition to delays with IEEs and implementing IHO orders, advocates report that DOE representatives sometimes attempt to prolong hearings in order to moot the placement issues that brought parents to hearing in the first place.⁹² While some students may receive compensatory services for instruction lost in an inappropriate setting, there is no making up for lost time. Finding and scheduling a service provider presents yet another time-consuming hurdle to mandated services, especially under the DOE's current practice of issuing RSAs.⁹³ Parents' success at impartial hearings ultimately changes their children's lives, but not without substantial financial, emotional, and educational costs, particularly for low-income families: Daniel regressed over the course of his protracted hearing, and his mother nearly lost her job because she frequently had to pick him up from daycare.

The de Blasio administration has largely followed through with its promise to settle tuition reimbursement cases more efficiently, which has helped many families.⁹⁴ The administration should apply this more efficient settlement approach to its litigation strategy as well. While delay tactics play a part in certain types of litigation, special education hearings should not be one of them. These children require immediate relief.⁹⁵

D. *Congress Intended for Parents to Be Equal Participants*

Congress emphasized the importance of parents' equal participation in the development of their children's IEPs.⁹⁶ The IDEA requires school districts to provide

90. 34 C.F.R. § 300.502(a)–(b) (2017); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(g)(1). The law places the burden on the DOE, not the parent, to justify its decision. § 300.502(a)–(b); § 200.5(g)(1).

91. Hyman, Rivkin & Rosenbaum, *supra* note 13, at 126–28.

92. *See id.*; *see also* DiNAPOLI & BLEIWAS, *supra* note 2.

93. *See Related Services*, *supra* note 67; McAnny & Massaro Letter, *supra* note 86.

94. *See Zimmerman*, *supra* note 15.

95. This is especially true for families who cannot afford to pay for private services. *See* Hyman, Rivkin & Rosenbaum, *supra* note 13, at 126–28; N.Y.C. INDEP. BUDGET OFFICE, BEYOND A MEAL STATUS: A NEW MEASURE FOR QUANTIFYING POVERTY IN NEW YORK CITY SCHOOLS (2015), <http://www.ibo.nyc.ny.us/iboreports/beyond-meal-status-a-new-measure-for-quantifying-poverty-levels-in-the-city-schools-october-2015.pdf>.

96. Parental participation is emphasized throughout the IDEA. *See* 20 U.S.C. § 1414(b)(2)(A), (d)(1)(B)(i), (d)(3)(A)(ii), (d)(3)(D), (d)(4)(A)(ii)(III), and (e) (2017).

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parents with prior written notice before proposing any change in placement or new services.⁹⁷ The district must also, at specified times, provide parents with a “procedural safeguards notice” that explains their rights.⁹⁸ However, parents often report that they are not provided with these documents; if and when they are, the documents are rarely explained or translated into their native language, which prevents parents from meaningfully participating in their children’s education.⁹⁹ When the DOE fails to properly inform parents of their rights or their children’s progress, their children can languish in inappropriate placements for months or years.¹⁰⁰

Many non-profit agencies publish valuable, parent-friendly information regarding the special education process in NYC.¹⁰¹ The DOE should likewise ensure, as required, that parents know their rights.¹⁰² While Ms. Smith was able to find an attorney to represent her, many families, particularly those without means, are unaware of their rights or of agencies that can help them navigate this complicated process.¹⁰³

E. A FAPE Is Not a Favor or a Fight, but a Right

In general, when parents are able to bring their cases to a hearing, they win.¹⁰⁴ However, Congress did not intend for families to endure a trial in order to receive a

97. See 34 C.F.R. § 300.503 (2017); see also N.Y. STATE EDUC. DEP’T, *supra* note 22.

98. N.Y. STATE EDUC. DEP’T, *supra* note 22.

99. See Hyman, Rivkin & Rosenbaum, *supra* note 13, at 132–33 (noting that enforcement of these protections is “limited,” and that even when the documents are provided to parents they are often not “issued . . . in easy-to-read language accessible to parents who have not attended college”).

100. For instance, during the aforementioned 2010–2012 reform, some schools that lacked appropriate settings failed to inform parents that their children were attending classrooms with ratios completely out of compliance with their IEPs. See Wall, *supra* note 39 (noting that reforms led to overcrowding, which resulted in lack of adequate services, sometimes without the parents’ knowledge).

101. See, e.g., *Guides and Resources*, ADVOC. CHILD. N.Y., http://www.advocatesforchildren.org/get_help/guides_and_resources (last visited Jan. 8, 2019); *Training and Informational Materials*, NYLPI, <http://www.nylpi.org/disability-rights-home/education/training-and-informational-materials> (last visited Jan. 8, 2019); *NYLAG.org Now Thumb Friendly*, N.Y. LEGAL ASSISTANCE GROUP (Nov. 1, 2016), <http://nylag.org/news/2016/11/a-more-responsive-website>. These local resources are important now more than ever with a stripped-down federal Office of Special Education Programs website, a U.S. Education Secretary who is confused about her obligations to enforce the IDEA, and a congress that appears keen on slashing funds for poor children with disabilities. See Erin Einhorn & Sarah Darville, *What We Learned (and Didn't) About Betsy DeVos at Her Confirmation Hearing*, FIVETHIRTYEIGHT (Jan. 18, 2017), <https://fivethirtyeight.com/features/what-we-learned-and-didnt-about-betsy-devos-at-her-confirmation-hearing>; Joyce Tsai, *Betsy DeVos: U.S. Government Special Ed Website Is Back Up, After Public Outcry*, EAST BAY TIMES (Feb. 17, 2017), <http://www.eastbaytimes.com/2017/02/17/betsy-devos-u-s-government-special-ed-website-is-back-up-after-public-outcry>; Choices in Education Act, H.R. 610, 115th Cong. (2017) (proposing an educational voucher program that would restrict the U.S. Secretary of Education from imposing requirements on states with respect to elementary and secondary education).

102. See N.Y. STATE EDUC. DEP’T, *supra* note 22.

103. See Hyman, Rivkin & Rosenbaum, *supra* note 13.

104. According to FOIL data obtained by a firm in Mahopac, New York, IHOs rule for parents in eighty-one percent of cases against the DOE. See McMAHON, *supra* note 8, at 12. Despite parents’ high success rate, some IHOs and at least one SRO almost never ruled for the parent: In the 2002–2003 through

FAPE.¹⁰⁵ The impartial hearing was fashioned as a last resort, a safeguard for parents when a school district does not provide their student with appropriate services.¹⁰⁶ Nor was the system designed to favor wealthy families who have the resources to dedicate to fighting for their children's services.¹⁰⁷ The IDEA places an affirmative obligation upon school districts to find all children eligible for special instruction and provide them with a FAPE—not at some point in the future, but at the moment the student needs the services.¹⁰⁸

New York City's goal to serve all students with disabilities in all schools is precisely what the IDEA mandates. To achieve that goal, DOE employees must be trained to eliminate the evaluation, placement, and litigation delays that plague the current implementation of the IDEA. New York City's most vulnerable children cannot afford to wait.¹⁰⁹

2009–2010 school years, twenty-two of the 193 hearing officers in New York State *never* ruled for the parent. *Id.* at 10. Likewise, in 187 decisions, the SRO found for the school district in three out of four appeals. *R.E. v. N.Y.C. Dep't of Educ.*, 785 F. Supp. 2d 28, 39 (S.D.N.Y. 2011), *rev'd*, 694 F.3d 167 (2d Cir. 2012). In tuition reimbursement cases in which the IHO's decision was reversed, the SRO ruled in favor of the school district ninety-eight percent of the time; in cases in which the IHO's decision was upheld, the SRO had found in favor of the school district seventy-six percent of the time. *W.T. v Bd. of Educ. of Sch. Dist. of N.Y.C.*, 716 F. Supp. 2d 270, 283 (S.D.N.Y. 2010).

105. *See* 20 U.S.C. §§ 1400(d), 1412(a)(3) (2017).

106. *See id.* § 1415.

107. *See* *Mr. A. v. N.Y.C. Dep't of Educ.*, 769 F. Supp. 2d 403, 428 (S.D.N.Y. 2011) (“[T]he exercise of rights under the IDEA cannot be made to depend on the financial means of a disabled child's parents.”).

108. § 1412(a)(3).

109. *See* Martin Luther King Jr., *Letter from Birmingham Jail*, 26 U.C. DAVIS. L. REV. 835, 839 (1993) (“[W]ait' has almost always meant 'Never.' We must come to see . . . that 'justice too long delayed is justice denied.'”).