IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CRYSTAL ROBERTSON, on behalf of herself and her minor child D.R. *et al.*, Plaintiffs, v. DISTRICT OF COLUMBIA, Defendant.	Case No. 1:24-cv-00656 (PLF) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Plaintiffs bring this action on behalf of themselves and similarly situated students with disabilities aged 3-22 whom the District of Columbia has failed to provide with safe, reliable, and appropriate transportation to and from school. Defendant's failures have subjected, and continue to subject, Plaintiffs and the putative class to the same harms: deprivation of a free appropriate public education (FAPE), denial of an equal opportunity to access their education, and unnecessary segregation. Plaintiffs have filed a complaint and motion for a preliminary injunction seeking declaratory and injunctive relief for Defendant's violations of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400; Section 504 of the Rehabilitation Act, 29 U.S.C. §794(a); the Americans with Disabilities Act (ADA), 42 U.S.C. §12132; and the D.C. Human Rights Act (DCHRA), D.C. Code §2-1401 *et. seq.* ECF Nos. 2, 4.

The IDEA, the ADA, Section 504, their federal implementing regulations, and District of Columbia law require Defendant to provide students with disabilities with FAPE, which ensures equal access to education for students with disabilities without unnecessary segregation. 20 U.S.C. § 1400; 34 C.F.R. § 300; 29 U.S.C. § 794(a); 34 C.F.R. § 104; 5-E D.C.M.R. § 3000.1. To provide FAPE to students with disabilities, Defendant must provide or otherwise ensure the provision of special education and related services in conformity with each student's Individualized Education Program (IEP). 20 U.S.C. § 1401(9)(D). An IEP details, among other things, the amount of specialized instruction and related services that each student needs, including the provision of transportation services. 20 U.S.C. § 1414(d)(A)(IV). The District is failing to provide transportation services in conformity with these students' IEPs by failing to maintain a transportation system that enables students with disabilities to attend school such that they can make meaningful progress towards their IEP goals.

Additionally, Title II of the ADA mandates that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132; *see also* 28 C.F.R. § 35.130.2. The ADA regulations require public entities to "make reasonable modifications" to their programs and activities "when the modifications are necessary to avoid discrimination." 28 C.F.R. § 35.130(b)(7)(i); *see also Pierce v. District of Columbia*, 128 F. Supp.3d 250, 267 (D.D.C. 2015) (noting that public entities have affirmative obligations to satisfy Title II). In tandem with Title II, Section 504 prohibits discrimination against people with disabilities by any program or activity receiving federal financial assistance. 29 U.S.C. § 794. The DCHRA similarly makes it unlawful for an educational institution "[t]o deny, restrict, or to abridge or condition the use of, or access to, any of its facilities, services, programs, or benefits of any program or activity to any person otherwise qualified, wholly or partially, for a discriminatory reason" based on an individual's disability. D.C. Code § 2-1402.41(1). An educational institution is defined as "any public . . . institution including an . . . elementary or secondary school" or a "school system" or "an agent of an educational institution." *Id.* § 2-1401.02(8). The District is systemically failing to run a transportation system that can deliver safe, reliable, and appropriate transportation to and from school for students with disabilities, thereby denying them an equal opportunity to participate in and benefit from the District's education program and unnecessarily segregating them from their peers by reason of their disabilities in violation of the ADA, Section 504, and the DCHRA.

As set forth below, Plaintiffs and the putative class meet the requirements for hybrid class certification under Rules 23(a) and 23(b)(2) and (3) of the Federal Rules of Civil Procedure.

STATEMENT OF FACTS

Each individual plaintiff is a student with a disability with an IEP that entitles them to transportation services provided by the Defendant's Office of the State Superintendent of Education, Division of Transportation (OSSE DOT). *See* Declaration of Elizabeth Daggett, ECF No. 4-3 ¶ 7 ("Daggett Decl."); Declaration of Veronica Guerrero, ECF No. 4-9 ¶ 7 ("Guerrero Decl.); Declaration of Marcia Cannon-Clark, ECF No. 4-14 ¶ 6 ("Clark Decl."); Declaration of Joann McCray, ECF No. 4-18 ¶ 7 ("McCray Decl."); Declaration of Crystal Robertson, ECF No. 4-22 ¶ 6 ("Robertson Decl."). OSSE's mission is to provide "safe, reliable, and efficient transportation to and from school." *See* OSSE Student Transportation Family Handbook: 2023-24 School Year ("OSSE DOT Handbook"), available at https://osse.dc.gov/sites/default/files/dc/sites/osse/page_content/attachments/OSSE-DOT%E2%80%99s%202023-24%20Family%20Handbook.pdf. As of January 31, 2024, there are 4,093 students with disabilities receiving transportation services from OSSE on approximately 552 daily bus routes. *See* ECF No. 4-48, Office of the State Sch. Superintendent of Educ., *Responses to Fiscal Year 2023 Performance Oversight Questions* at 215 (2024) [hereinafter "2023 Performance Oversight Responses"]. Additionally, OSSE contracts with private transportation vendors to provide specialized transportation to approximately 368 additional students. *Id.* at 223.

OSSE transportation regularly arrives late or does not show up at all, and as a result students do not reliably get school. For example, there were over 1,000 delays and cancellations for the first five months of the current 2023-2024 school year. In the beginning of March 2024, there were over 100 routes delayed. *See* ECF No. 4 at 7. OSSE fails to accurately and timely communicate such delays and cancellations to families causing caregivers to be left guessing when the bus is coming and scrambling to get their child to school when the bus does not show up. *See* Daggett Decl. ¶¶ 12, 21, 33; Guerrero Decl. ¶ 34; Cannon-Clark Decl. ¶ 13; Declaration of Dr. Linda Bluth,

ECF No. 4-28 ¶¶ 47–48 ("Bluth Decl."). Even when transportation does show up, OSSE frequently cannot transport Plaintiffs and putative class members because it does not have the required equipment, such as child safety restraint systems, safety harnesses, lifts and ramps, dedicated aides, and/or nurses available. *See* Declaration of Dr. Paul Livelli, ECF No. 4-26 ¶ 23 ("Livelli Decl."); Daggett Decl. ¶¶ 25, 32; Guerrero Decl. ¶¶ 13, 18, 20; Cannon-Clark Decl. ¶¶ 14, 16. .

OSSE's failures cause Plaintiffs and putative class members to regularly miss large portions of their school day and disrupt their daily routines. *See generally* Robertson Decl.; Daggett Decl.; McCray Decl.; Guerrero Decl.; Cannon-Clark Decl. In addition to instructional time, class members lose time to socialize with their peers and access to various services outlined in their IEPs, such as physical, occupational, speech-language, and behavioral therapies. *See* Livelli Decl. ¶¶ 28–44; Robertson Decl. ¶¶ 26, 34; Guerrero Decl. ¶¶ 12, 27, 36; Cannon-Clark Decl. ¶¶ 27, 28; McCray Decl. ¶¶ 34, 35; Daggett Decl. ¶ 43. Defendant's actions fail to implement Plaintiff and putative class members' IEPs and constitute a denial of FAPE, denial of an equal opportunity to access their education, and unnecessary segregation. *See e.g.*, ECF No. 4-6 at 8-10 ("Daggett HOD"); ECF No. 4-20 at 9-15 ("McCray HOD"); ECF No. 4-24 at 7-9 ("Robertson HOD"); ECF No. 24-1 at 8-9 ("Guerrero HOD"); ECF No. 24-2 at 9-10 ("Clark HOD").

ARGUMENT

The individual Plaintiffs ask this Court to certify a class defined as:

> All students with disabilities aged 3-22 who, from March 7, 2022, until judgment is issued in this case, require transportation from the District of Columbia to attend school and have experienced and will continue to experience Defendant's failure to provide safe, reliable, and appropriate transportation.

This putative class meets the requirements for class certification.

I. THE PUTATIVE CLASS SATISFIES THE RULE 23(A) REQUIREMENTS FOR CERTIFICATION.

Under Fed. R. Civ. P. 23(a), one or more members of a class may sue as representative parties on behalf of all members if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Plaintiffs and the putative class meet each of these requirements.

A. The Putative Class is So Numerous that Joinder of All Members is Impracticable.

Plaintiffs' putative class is sufficiently large, lacks financial resources to bring individual claims, and includes future class members, satisfying the numerosity requirement to certify a class. Fed. R. Civ. P. 23(a)(1). "Demonstrating impracticability of joinder 'does not mandate that joinder of all parties be impossible—only that the difficulty or inconvenience of joining all members of the class make use of the class action appropriate.'" *DL v. District of Columbia.*, 302 F.R.D. 1, 11 (D.D.C. 2013) (quotation omitted), *aff'd*, 860 F.3d 713 (D.C. Cir. 2017). Generally, courts recognize that "[t]here is no specific threshold that must be surpassed" to demonstrate impracticability. *Taylor v. D.C. Water & Sewer Authority*, 241 F.R.D. 33, 37 (D.D.C. 2007) (citing *General Telephone Company of the Northwest v. EEOC*, 446 U.S. 318, 330 (1980)). However, a class with more than forty members "creates a presumption that joinder is impracticable." *Borum v. Brentwood Vill., LLC*, 324 F.R.D. 1, 15 (D.D.C. 2018). Numerosity of a class is generally satisfied "when the proposed class has at least forty members." *Coleman ex rel. Bunn v. District of Columbia*, 306 F.R.D. 68, 76 (D.D.C. 2015) (quoting *Richardson v. L'Oreal USA, Inc.*, 991 F.Supp.2d 181, 196 (D.D.C. 2013)). And the Court need only find an "approximation of the size of the class, not an 'exact number of putative class members.'" *Coleman ex. rel. Bunn*, 306 F.R.D. at 76 (quoting *Pigford v. Glickman*, 182 F.R.D. 341, 347 (D.D.C. 1998)).

The potential class here numbers well over forty members. In the District, over 4,000 disabled students' IEPs require that Defendant provide them with transportation to and from school. *See* ECF No. 4-48, at 223. There is also an unknown number of future class members: IEP determinations are made on an as-needed basis based on referrals, meaning students can become eligible for special education transportation at any time, making their joinder impracticable. *See* Off. of the State Superintendent, *Special Education Handbook*, 4-10 (2023), https://osse.dc.gov/sites/default/files/dc/sites/osse/service_content/attachments/OSSE%20Special%20Education%20Process%20Handbook%20%28Sept%202023%29.pdf (describing eligibility determinations for IEPs); *DL v. District of Columbia*, 302 F.R.D. 1, 11 (D.D.C. 2013) ("[F]uture members make joinder inherently impracticable because there is no way to know who they will be.") (internal quotation marks and citation omitted).

Additional factors also support a finding of numerosity. Many members of the putative class lack the financial resources to bring these claims individually. According to the U.S. Census Bureau, 15.1% of the District's population lives below the poverty level. U.S. Census Bureau *QuickFacts: District of Columbia*, https://www.researchondisability.org/?page=11. The percentage is even higher for residents under 18 years old, at almost 23%. U.S. Census Bureau, *S1701: Poverty Status in the Past 12 Months*, https://data.census.gov/table/ACSST5Y2020.S1701?q=poverty+in+DC+in+2020 (five-year data from 2020 American Community Survey). Studies have found that individuals with disabilities are more likely to be in poverty than those without disabilities. Ctr. for Research on Disability, *Annual Disability Statistics Collection*, 16 (2023), https://www.researchondisability.org/sites/default/files/media/2023-04/iod-2023-final-shreya-paul.pdf. Courts have found the lack of financial resources of class members and the resulting inability, or difficulty, of instituting individual suits relevant for the numerosity inquiry. *See DL*,

302 F.R.D. at 11 (explaining that for a class of "the District's youngest and most vulnerable pupils, many of whom are indigent and unable to obtain legal services," the class action lawsuit is an example of the "[e]conomic reality . . . that petitioner's suit [must] proceed as a class action or not at all") (internal citations and quotations omitted)), *aff'd*, 860 F.3d 713 (D.C. Cir. 2017). Challenging a deprivation of FAPE and discrimination requires resources and time that many putative class members simply do not have and, similar to *DL,* a class action lawsuit is appropriate here because it will allow access to the courts for many families who would otherwise be excluded from seeking relief due to their economic constraints.

Accordingly, based on the number of current class members, the explicit inclusion of future class members, and the nature of class members, including their lack of financial resources, the numerosity requirement is satisfied.

B. Plaintiffs' Claims Present Common Questions of Law and Fact.

The putative class is appropriate for certification because there are questions of law and fact common to the entire class. Rule 23(a)(2) requires that there are "questions of law or fact common to the class" and that those questions are "capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Defendant's common conduct need not affect every class member the same way, and class members "need not be identically situated." *Borum*, 324 F.R.D. at 16; *see also Meza v. Marstiller*, No. 3:22-cv-783-MMH-LLL, 2023 WL 2648180, at *10 (M.D. Fla Mar. 27, 2023) (class certification granted despite lack of incontinence supplies affecting class members in different ways); *Oster v. Lightbourne*, No. C 09-4688 CW, 2012 WL 685808 at *5 (N.D. Cal. March 2, 2012) (class certification granted where cuts to in-home support services affected named plaintiffs and class members in different ways); *Lane v. Kitzhaber*, 283 F.R.D. 587, 598 (D. Or. 2012). ("As in other cases

certifying class actions under the ADA and Rehabilitation Act, commonality exists even where class members are not identically situated."). Instead, since the Supreme Court's decision in *Wal-Mart Stores Inc. v. Dukes,* this Court has upheld that "what matters to class certification . . . is not the raising of common 'questions' — even in droves — but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Thorpe v. District of Columbia*, 303 F.R.D. 120, 145 (D.D.C. 2014).

Generally, identifying common questions and answers is straightforward in injunction cases like this one, particularly those challenging governmental policies and practices that discriminate under federal law in a manner common to the class. In such cases, "the commonality requirement can be satisfied by proof of the existence of systemic policies and practices that allegedly expose [class members] to a substantial risk of harm." *Parsons v. Ryan*, 754 F.3d 657, 681 (9th Cir. 2014); *see also Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 57 (3rd Cir. 1994) ("[i]njunctive actions 'by their very nature often present common questions satisfying Rule 23(a)(2)'"). Such exposure to "systemic and centralized policies or practices" will suffice – even if some members experience different injuries or none at all – because "these policies and practices are the 'glue' that holds together the putative class…" *Parsons*, 754 F.3d at 678, 684; *see also Ass'n for Disabled Americans v. Amoco Oil Co*., 211 F.R.D. 457, 463 (S.D. Fla. 2002) ("Plaintiffs' allegations of common discriminatory practices of ADA noncompliance, as a matter of law, satisfy the requirement that the representative plaintiffs share at least one question of fact or law with the grievances of the putative class.") (citations omitted).

Likewise, the D.C. Circuit has found the commonality factor satisfied where there is "a uniform policy or practice that affects all class members." *DL v. District of Columbia*, 713 F.3d 120, 128 (D.C. Cir. 2013). "Where a private action raises systemic issues, courts have uniformly

granted class certification to allow plaintiffs to pursue those claims, even after the Supreme Court's [then] recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011), which arguably tightened the standard for class certification." *Thorpe v. District of Columbia*, 303 F.R.D. 120, 126 (D.D.C. 2014). For example, the plaintiffs in *DL* filed a class action lawsuit alleging that the District of Columbia Public Schools failed in its duty to provide a FAPE to children ages three through five living in the District of Columbia by failing to identify, locate, evaluate, and offer special education and related services to certain children in violation of the IDEA. Class certification was eventually granted under Fed. R. Civ. P. 23 for three sub-classes in part because the question presented was a common contention among the class that could be resolved with "one stroke" and stemmed from the same "deficient and poorly implemented" policy. *DL,* 860 F.3d at 723-24. This Court provisionally certified a hybrid class seeking injunctive, declaratory, and compensatory relief alongside a motion for a preliminary injunction in a previous case involving IDEA violations. *See Charles H. v. District of Columbia*, Civil Action No. 1:21-cv-00997 (CJN), 2021 WL 2946127, at *14 (D.D.C. June 16, 2021).

Classes have also been certified in cases challenging discriminatory policies and practices affecting students with disabilities under ADA Title II and Section 504. Whether such practices exist and violate the law raise common questions sufficient to satisfy Rule 23(a)(2). *See J.N. v. Oregon Dep't of Educ*., 2021 WL 408093 (D. Or. Feb. 5, 2021) (common question of whether defendants failed to prevent the misuse of shortened school days and whether such failure constituted disability discrimination); *G.T. by Michelle v. Bd. of Educ. of Cnty. of Kanawha*, 2021 WL 3744607 (S.D. W. Va. Aug. 24, 2021), *appeal pending*, No. 21-260 (4th Cir.) (common question of whether failure to provide services and supports for students with disability-related behaviors violates Title II and Section 504); *J.R. v. Oxnard School District*, 2019 WL 4438243 (C.D. Cal.

July 30, 2019) (common question of whether school district policy of failing to provide instruction to incarcerated students violated discrimination statutes); *V.W.*, 236 F. Supp. 3d at 574-76 (finding common question whether school district's policy to not provide instruction to incarcerated youth was systematic deprivation of special education services); *G.F.*, 2015 WL 4606078, at *9-10 (same); *Chester Upland Sch. Dist. v. Pa.*, No. 12-132, 2012 WL 1473969, at *3-4 (E.D. Pa. Apr. 25, 2012) (finding common questions of whether school closures or reduction of funding will cause students with disabilities to be denied FAPE under the IDEA or services required by Section 504).

Here, the putative class brings its claims under the same statutes and seeks the same relief. Like in each of the *DL* subclasses, the harm to Plaintiffs all stems from the same "deficient and poorly implemented" policy. *DL v. District of Columbia*, 860 F.3d 713, 724 (D.C. Cir. 2017). The claims present legal and factual questions that can be answered for the class as a whole in a single stroke, including the following:

- Are Defendant's deficient policies and practices failing to ensure that students with disabilities receive safe, reliable, and appropriate transportation;
- Are Defendant's deficient policies and practices related to transportation for students with disabilities denying students with disabilities transportation they are entitled to under their IEPs;
- Are Defendant's deficient policies and practices related to transportation for students with disabilities denying students with disabilities FAPE in violation of the IDEA;
- Are Defendant's deficient policies and practices, as required by the ADA and Section 504:

a. Denying class members opportunities to participate in and benefit from educational services that are equal to the opportunities afforded students without disabilities;

b. Denying class members educational services that are as effective in affording equal opportunity to obtain the same result, gain the same benefit, or reach the same level of achievement as those provided for other students;

c. Denying class members the opportunity to receive education and other services in the most integrated setting appropriate to their needs; and

d. Failing to reasonably modify educational programs and activities as needed to avoid discrimination.

- Is Defendant adequately monitoring its transportation policies and practices to ensure they are implemented in compliance with the IDEA, Section 504, the ADA, and DCHRA.

Plaintiffs further satisfy Rule 23(a)(2)'s commonality prerequisite because the questions presented by the putative class are "susceptible to common proof." *D.L.*, 860 F.3d at 724. The common proof includes, but is not limited to, the following:

- OSSE DOT's policies and practices governing special education transportation;
- OSSE DOT's records related to the timeliness of special education transportation;
- OSSE DOT's records related to special education transportation routing systems;
- OSSE DOT's policies and practices related to staffing of bus drivers, attendants, and nurses;
- OSSE DOT's policies and practices related to fleet acquisition and maintenance;

- OSSE DOT's policies and practices regarding accommodations to students with disabilities;
- OSSE DOT's contracts with private transportation vendors;
- OSSE DOT's trip tickets memorializing student transportation services;
- OSSE DOT's records related to communication with parents;
- OSSE DOT's records related to reimbursement to families; and
- Copies of students' IEPs which demonstrate that they are students with disabilities who require special education transportation to receive a FAPE.

That certain factual distinctions may exist among the putative class members does not foreclose commonality. Where, as here, the class challenges a "general applicable policy or practice," there are questions of law or fact common to the class. *Coleman through Bunn v. District of Columbia*, 306 F.R.D. 68, 82 (D.D.C. 2015). Indeed, where "plaintiffs allege widespread wrongdoing by a defendant, a uniform policy or practice that affects all class members bridges the gap" and is sufficient under Fed. R. Civ. P. 23(a)(2). *Thorpe v. District of Columbia*, 303 F.R.D. 120, 145 (D.D.C. 2014); *see also G.T.,* 2021 WL 3744607 at *14 (noting that while "[e]ach student will need a different set of supports," the case was ultimately about "the procedures [the school district] uses, or does not use, to develop and implement those supports.").

Lane, a Title II/Section 504 case challenging segregated employment practices in which a class was certified, also strongly supports class certification here. The claims in *Lane* focused on the defendants' standard systemic conduct, raising the common question of "whether the defendants have failed to plan, administer, operate, and fund a system that provides employment services that allow individuals with disabilities to work in the most integrated setting." *Lane*, 283 F.R.D. at 598. The court specifically declined inquiring into how much each class member would benefit

from such employment services, saying "[t]hat is. . . not the common question of whether they are being denied supported employment services for which they are qualified." *Id*. As in *Lane*, Plaintiffs' claims in this case raise common questions applicable to the class as a whole, including whether Defendant's policies and practices cause Plaintiffs to be denied equal access to their education and be unnecessarily segregated. *See also Steward v. Janek*, 315 F.R.D. 472, 482 (W.D. Tex. 2016) ("The State may fail individual class members in unique ways, but the harm that the class members allege is the same: denial of specialized services. . . and unnecessary [segregation] in violation of the ADA and Rehabilitation Act"); *Kenneth R. v. Hassan*, 293 F.R.D. 254, 267 (D.N.H. 2013) (class certified based on common questions, among others, of "whether there is a systemic deficiency in the availability of community-based services, and whether that deficiency follows from the State's policies and practices.").

Finally, plaintiffs satisfy commonality because a single injunction can remedy the harm in the present case, similar to the manner in which a single injunction was able to remedy the harm for each subclass in *DL* 860 F.3d at 713. For example, in *D.L*., for the subclass organized around the District's failure to provide timely eligibility determinations, the D.C. Circuit upheld the district court's requirement that the District meet its statutory deadline 95 percent of the time and improve its performance by 10 percent in the first year and 5 percent each year thereafter until it met that 95 percent requirement. *Id.* at 724. Here too, this Court can remedy the harm by requiring defendants to provide safe, reliable, and appropriate transportation in conformity with students' IEPs. *See also Petties v. District of Columbia*, 888 F. Supp. 165, 174 (D.D.C. 1995) (Friedman, J.) (injunction mandating that the District "provide related transportation services after June 9, 1995, until the end of the school year to DCPS students placed in private special education schools.").

Here, Plaintiffs allege that Defendant's policies and practices have led to a breakdown in the provision of safe, reliable, and appropriate transportation for students with disabilities, resulting in a *de facto* deprivation of FAPE and discrimination of the putative class members. ECF No. 2 at ¶¶ 161-210. Defendant, by policy and practice, is running a transportation system for students with disabilities that cannot provide safe, reliable, and appropriate transportation and impedes students with disabilities' equal access to their education. *See* ECF No. 4-1 at 18-30. Plaintiffs and putative class members have missed instructional time, access to their peers, and numerous therapies, such as physical therapy, occupational therapy, speech-language pathology, and behavioral therapies. *See e.g.*, ECF No. 4-3, Daggett Decl., ¶ 39-44, ECF No. 4-22, Robertson Decl., ¶ 34. *and* ECF No. 4-38, Declaration of Jamie Davis Smith, ¶ 13 (missing social interactions with peers and instructional time); ECF No. 4-14, Cannon-Clark Decl., ¶ 19, 27-30 (delayed transportation jeopardizing medication doses and causing missed instructional time, occupational therapy, speech-language pathology, and physical therapy sessions); ECF No. 4-18, McCray Decl., ¶ 37 (late arrivals to school causing lower grades in morning classes); ECF No. 4-41, Declaration of Miryam Koumba, ¶ 8 (missing therapy appointments as recommended by his medical care team). Given the common issues of law and fact presented by this matter, the common proof needed to analyze plaintiffs' claims and the ability to remedy the harms incurred by the class in one stroke with an injunction as requested by plaintiffs, the putative class satisfies the commonality requirement of a Rule 23 class and certification is appropriate.

C. The Claims of the Class Representatives are Typical of the Claims of the Class.

Class certification is appropriate because plaintiffs' claims are typical of the claims of all members of the putative class. Federal Rule of Civil Procedure 23 requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). In general, "the commonality and typicality requirements tend to merge." *Borum*,

324 F.R.D. at 16 (quoting *Wal-Mart*, 564 U.S. at 349 n.5) Typicality is satisfied when the representative's claims are "based on the same legal theory as the claims of the other class members" and the "injuries arise from the same course of conduct that gives rise to the other class members' claims." *Coleman,* 306 F.R.D. at 83 (quoting *Bynum v. District of Columbia*, 214 F.R.D. 27, 31 (D.D.C. 2003)). Named plaintiffs' claims need only be typical, not identical. *See DL.* 302 F.R.D. at 14. Therefore, "[c]ourts have held that typicality is not destroyed merely by factual variations." *Wagner v. Taylor*, 836 F.2d 578, 591 (D.C. Cir. 1987) (internal quotations omitted); *see also Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 196 (D.D.C. 2013) ("the typicality requirement [is] satisfied when class representatives suffered injuries in the same general fashion as absent class members.") (internal quotation marks and citation omitted).

The named Plaintiffs allege the same claims and have suffered the same injury as all class members – Defendant's failure to provide safe, reliable, and appropriate special education transportation and the resulting deprivation of FAPE, denial of equal access to their education, and unnecessary segregation of Plaintiffs. Named Plaintiffs share relevant characteristics with the putative class: each is the parent of a child with a disability who is eligible for transportation services on their IEP; each has been denied appropriate transportation services, and each has been deprived of FAPE, denied equal access to their education, and unnecessarily segregated as a result. *See* ECF No. 4-6, Daggett HOD at 8-10 (Case No. 2023-0180); ECF No. 4-20, McCray HOD at 9-15 (Case No. 2023-0218); ECF No. 4-24, Robertson HOD at 7-9 (Case No. 2023-0203); ECF No. 24-1, Guerrero HOD at 8-9 (Case No. 2023-0251); ECF No. 24-2, Clark HOD at 9-10 (Case No. 2023-0252). Named plaintiffs and the putative class members request and are entitled to the same type of relief—declaratory, injunctive, and compensatory relief—on the same legal theories. ECF No. 2 at ¶¶ 211-73. Accordingly, the claims of the putative class "all arise from a common statutory

background and raise identical legal questions" as required to meet the typicality requirement. *Coleman*, 306 F.R.D. at 83.

D. The Named Plaintiffs and Their Counsel Will Fairly and Adequately Protect the Interests of the Class.

The final Rule 23(a) prerequisite—that plaintiffs will fairly and adequately protect the interests of the class—is also satisfied in this case. Fed. R. Civ. P. 23(a)(4). In order to satisfy this prerequisite, "1) the named representative must not have antagonistic or conflicting interests with the unnamed members of the class, and 2) the representative must appear able to vigorously prosecute the interests of the class through qualified counsel." *Twelve John Does v. District of Columbia*, 117 F.3d 571, 575 (D.C. Cir. 1997) (internal quotation marks and citation omitted). The first of these two criteria exists to prevent any "conflicts of interest" that would prove "fundamental to the suit and . . . go to the heart of the litigation." *Keepseagle v. Vilsack*, 102 F. Supp. 3d 205, 216 (D.D.C. 2015) (internal quotations and citation omitted). Meanwhile, the second criterion ensures class counsel's "competency." *Id*. at 43.

a. Putative Class Representatives Will Fairly and Adequately Represent the Class

Plaintiffs are adequate representatives of the class because they do not have any conflict with putative class members. Fed. R. Civ. P. 23(a)(4). Rather, named plaintiffs' interests are coextensive: named plaintiffs challenge the same unlawful conduct that affects the putative class and they have suffered the same harm as that of the putative class. Named plaintiffs seek forms of declaratory, injunctive, and compensatory relief that will benefit all putative class members. They seek no monetary damages for themselves alone. Each is familiar with the facts and issues in this case, having prosecuted their individual due process claims, and understands the obligations of a named plaintiff in a class action and is ready to carry out those obligations. *See* ECF No. 4-3 Daggett Decl. ¶ 57; ECF No. 4-9 Guerrero Decl. ¶ 45; ECF No. 4-15 Clark Decl. ¶ 36; ECF No.

4-18 McCray Decl. ¶ 45; ECF No. 4-22 Robertson Decl. ¶ 45; *accord Garnett v. Zeilinger*, 301 F. Supp. 3d 199, 211 (D.D.C. 2018) (finding that named plaintiffs were adequate representatives when they "attested that their lawyers informed them of the responsibilities of a class representative and that they are willing to protect the class's interests, and their declarations demonstrate an awareness of the facts of this case").

b. Plaintiffs' Counsel Meet the Requirements of Rule 23(g) And Should Be Appointed Class Counsel.

Fed. R. Civ. P. 23(a)(4) requires "the representative[s] must appear able to vigorously prosecute the interests of the class through qualified counsel." Here, Plaintiffs' counsel are qualified and experienced in class action, civil rights, and disability rights litigation, including in class actions brought pursuant to the IDEA, ADA, Section 504, and the DCHRA. *See* Exs. A, B, C, and D (Declarations of Counsel). These attorneys are capable of prosecuting this action on behalf of the putative class vigorously and efficiently and are ready to dedicate the necessary resources to do so. Therefore, Rule 23(a)'s adequacy of representation prerequisite is satisfied.

Counsel for the Named Plaintiffs request to be appointed counsel for the Plaintiff Class, pursuant to Rule 23(g). In appointing class counsel, the Court should consider: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A). Each factor establishes that appointment of the named Plaintiffs' counsel as class counsel is warranted. In assessing the competence of class counsel, "[t]he analysis begins with the rule that counsel's competence and experience are presumed in the absence of contrary proof." *Black*, 173 F.R.D at 162.

McDermott Will & Emery LLP is an international law firm committed to creating positive change for low-income individuals through its pro bono efforts. The firm's team in this matter is led by counsel Margaret Warner, who is a partner at McDermott Will & Emery LLP. Ms. Warner has significant trial experience, having served as first chair in state and federal courts in over 30 jurisdictions, including this court. Her work has spanned antitrust, commercial, class action, environmental, healthcare, insurance, mass tort, product liability, and reinsurance disputes. Many of her cases have involved high-profile public policy issues such as this one, including the Agent Orange litigation, environmental and Superfund litigation involving Love Canal and the Hudson River, sexual abuse scandals, 9/11, and COVID-19 litigation. As described further in Exhibit A, Declaration of Margaret Warner, ["Warner Decl."], Ms. Warner and her colleagues Eugene Goldman, Theodore Alexander, and Christopher Shoemaker have the experience, knowledge, and resources necessary to fairly and adequately represent the interests of the class proposed to be certified in this case.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs, led by counsel Kaitlin Banner, is a non-profit dedicated to pursuing racial justice through impact and systemic litigation. Ms. Banner graduated from the George Washington University Law School in 2008 and obtained her L.L.M. from the David A. Clarke School of Law at the University of the District of Columbia in 2012. In 2018, Ms. Banner joined the Washington Lawyers' Committee as Deputy Legal Director, where she directs the Committee's work on matters pertaining to civil rights, education, and disability rights. In this Court, Ms. Banner represented the plaintiff class in *Costa et. al v. Bazron et. al*, Civil Action No. 19- 3185 (RDM) (putative class action alleging constitutional and statutory violations by defendants at the District's public psychiatric facility, Saint Elizabeths Hospital, including responses to the COVID-19 pandemic), *Black Lives Matter et al. v. Trump et*

al., Civil Action No. 20-1469 (DLF) (putative class action alleging indiscriminate use of force against civil rights protestors at Lafayette Square), and *Charles H. et al v. District of Columbia et al*, Civil Action No. 21-00997 (CJN) (putative class action alleging discrimination under the IDEA, Section 504, and DCHRA on behalf of incarcerated students with disabilities). Ms. Banner also represented the plaintiff in *Wheeler v. American University et. al*, D.D.C. No. 20-2735 (alleging discrimination in violation of, inter alia, the Rehabilitation Act). Ms. Banner is an Adjunct Professor for Georgetown University Law School's Juvenile Justice Clinic. Prior to joining the Committee, as a Clinical Instructor at the Took Crowell Institute for At-Risk Youth at the University of the District of Columbia, Ms. Banner represented numerous individuals in IDEA due process hearings before OSSE's Office of Dispute Resolution. From 2012 to 2018, Ms. Banner was an attorney, then Deputy Program Director and Acting Director, of Advancement Project's Opportunity to Learn Program. There, Ms. Banner worked alongside communities on reducing the overuse and disparate use of zero-tolerance school discipline policies and stopping the criminalization of young people of color by employing creative legal tactics and policy reform. As described further in Exhibit B, Declaration of Kaitlin Banner ["Banner Decl."], Ms. Banner and her colleague Chelsea Sullivan have the experience, knowledge, and resources necessary to fairly and adequately represent the interests of the class proposed to be certified in this case.

The Children's Law Center, led by counsel Katherine Zeisel, is non-profit dedicated to providing free legal services in the District of Columbia to ensure that children in the District have a solid foundation of family, health, and education. As detailed in Exhibit C, Declaration of Katherine Zeisel ["Zeisel Decl."], Ms. Zeisel graduated from New York University School of Law in 2005. From 2005-2007, Ms. Zeisel was a staff attorney where she represented clients in family law, domestic violence, and immigration matters. From 2007-8, Ms. Zeisel was a staff attorney at

the National Law Center on Homeless and Poverty and continued a pro bono practice representing survivors of domestic violence in immigration matters. From 2008 to the present, Ms. Zeisel has been an attorney at Children's Law Center in the positions of staff attorney, supervising attorney, senior supervising attorney and currently as Director of Special Legal Projects. At Children's Law Center, Ms. Zeisel has represented hundreds of clients in special education, reasonable accommodation, social security, housing conditions, and family law cases. This representation included participation in litigation of special education matters, litigation in DC Superior Court, and appeals to the DC Court of Appeals and this Court of social security and special education matters.

The Arc of the United States, led by Counsel Shira Wakschlag, is the largest national community-based organization advocating for and with people with intellectual and developmental disabilities ("IDD") and serving them and their families. Ms. Wakschlag graduated from the University of California, Berkeley School of Law in 2010. In 2014, Ms. Wakschlag joined The Arc, where she is currently the Senior Director of Legal Advocacy and General Counsel focusing on matters pertaining to the civil rights of people with disabilities. Prior to joining The Arc, Ms. Wakschlag worked as a Skadden Fellow at the Disability Rights Education and Defense Fund in Berkeley, CA from 2010 to 2012. From 2013 to 2014, Ms. Wakschlag worked as an associate attorney with a plaintiffs'-side civil rights firm, Lewis, Feinberg, Lee, Renaker & Jackson, P.C. in Oakland, California.

Ms. Wakschlag has served as counsel of record in a number of class action civil rights lawsuits including *Georgia Advoc. Off. v. Georgia*, 447 F. Supp.3d 1311 (N.D. Ga. 2020) (class action lawsuit challenging a statewide segregated program for students with disability-related behaviors); *G.T. by Michelle v. Bd. of Educ. of Cnty. Of Kanawha*, Civ. Action No. 2:20-cv-00057,

2021 WL 3744607 (S.D. W.Va. Aug. 24, 2021) (class action challenging the adequacy of behavioral supports for students with disabilities); *Maniken v. Cnty. of Orange*, Case No. 30-2012-005822524 (Cal. Super. Ct., filed 2012) (class action lawsuit alleging county social services agency failed to provide reasonable accommodations to beneficiaries with disabilities); *Cogdell v. The Wet Seal, Inc*., No. 8-12-cv-01138-AG-AN, 2013 WL 8284434 (C.D. Cal. 2013 (representing employees in race discrimination class action*); Ellis v. Costco Wholesale Corp*., No. C04-3341 EMC, 2014 WL 1261574 (N.D. Cal. May 27, 2014) (representing employees in gender discrimination class action); *Connor v. First Student, Inc*., 5 Cal. 5th 1026 (2018) (representing 1,200 bus drivers in multi-plaintiff litigation alleging illegal background checks performed by employer). Ms. Wakschlag also works on a variety of other cases pertaining to disability and civil rights law in federal courts around the country. As described further in Exhibit D, Declaration of Shira Wakschlag ["Wakschlag Decl."], Ms. Wakschlag and her colleague Evan Monod have the experience, knowledge, and resources necessary to fairly and adequately represent the interests of the class proposed to be certified in this case.

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

II. THE COURT SHOULD CERTIFY A HYBRID CLASS UNDER RULE 23(B)(2) AND (3).

After the prerequisites of Rule 23(a) are satisfied, a putative class must meet one of the requirements of Rule 23(b). In this case, plaintiffs seek a hybrid certification of their class-wide declaratory and injunctive claims under Rule 23(b)(2), and their claims for compensatory education under Rule 23(b)(3).

The D.C. Circuit has endorsed hybrid certification for classes with declaratory, injunctive, and damages claims. *See Eubanks v. Billington*, 110 F.3d 87, 96 (D.C. Cir. 1997) ("[T]he court may adopt a hybrid approach, certifying a (b)(2) class as to the claims for declaratory or injunctive relief, and a (b)(3) class as to the claims for monetary relief . . . ."); *see also Bynum v. District of Columbia*, 214 F.R.D. 27, 41 (D.D.C. 2003) (certifying a (b)(2) class with respect to the plaintiffs' claims for injunctive and declaratory relief, and a (b)(3) class with respect to their claims for damages). Hybrid certification ensures that egregious conduct can be properly remedied: "if the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification. Otherwise defendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) (Posner, J.).

Plaintiffs here seek declaratory and injunctive relief with respect to the provision of safe, reliable, and appropriate transportation, and equitable relief with respect to compensatory education. Compensatory education awards constitute "discretionary, prospective, injunctive relief" that is equitable in nature—they are not damages. *See Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.C.C. 2005). However, because compensatory education awards are individualized, courts treat them similarly to damages in class actions and have certified hybrid classes. *See Order of Final Approval of Proposed Settlement Agreement*, ECF No. 213, *Charles H. v. District of Columbia,* No. 1:21-cv-00997 (D.D.C. Jan. 15, 2024) (certifying hybrid class for injunctive relief and compensatory education as part of consent motion for settlement agreement). *see also A.R. v. Connecticut State Bd. of Educ.*, No. 16-01197, 2020 WL 2092650, at *12-15 (D.

Conn. May 1, 2020) (certifying a hybrid class for plaintiffs alleging systemic violations of the IDEA wherein class members' claims for class-wide injunctive and declaratory relief were certified under Rule 23(b)(2) and class members' claims for individualized compensatory education relief were certified under Rule 23(b)(3)).

As discussed further below, Plaintiffs' claims meet the requirements under Rule 23(b)(2) and (3), and therefore hybrid certification is appropriate.

a) Plaintiffs' claims for declaratory and injunctive relief satisfy Rule 23(b)(2)

Rule 23(b) provides that a class may be maintained if either the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. Fed. R. Civ. P. 23(b)(2); *see also DL,* 302 F.R.D. at 16 (citing 2 Rubenstein, Newberg on Class Actions § 4:26 (5th ed. 2013)). The declaratory and injunctive relief that Plaintiffs and the class seek will apply to all class members and will remedy their injuries. As set forth in the Complaint, ECF No. 2 at ¶ 252, Plaintiffs are seeking a declaratory judgement that Defendant's policies and practices violate their rights under the IDEA, the ADA, Section 504 of the Rehabilitation Act, and the DCHRA. Plaintiffs are also seeking an injunction ordering Defendant to comply with the requirements of these same laws. ECF No. 2 ¶ 252; s*ee also* Plaintiffs' Motion for Preliminary Injunction, ECF No. 4.

"For purposes of satisfying Rule 23(b)(2), it is sufficient that plaintiffs have proffered evidence of systemic deficiencies in the District's system [ ] and that those deficiencies appear to be affecting the class." *Thorpe v. District of Columbia*, 303 F.R.D. 120, 151-52 (D.D.C. 2014). Courts have repeatedly certified claims under Rule 23(b)(2) that sought injunctive and declaratory relief based on systemic violations of the IDEA, Section 504, and the ADA. *See, e.g.*, *DL*, 302 F.R.D. at

16, *aff'd*, 860 F.3d 713 (D.C. Cir. 2017); *P.V. v. Sch. Dist. of Philadelphia*, 289 F.R.D. 227 (E.D. Pa. 2013); *J.N.*, 338 F.R.D. at 256. In *DL*, the court certified four subclasses, each around a common question: "whether the District fulfilled its statutory duty to have effective policies and procedures to identify disabled children . . . whether the District fulfilled its obligation to timely evaluate identified children; . . . whether the District performed its duty to provide timely eligibility determinations; and . . . whether the District provided smooth and effective transitions between Part C and Part B services as required by the IDEA." *Id.* at 13. Here, the entire class is comparable to each *D.L.* subclass: it is defined by a single unlawful uniform policy and practice that harmed each class member in the same way. Similarly, a Rule 23(b)(2) class is available when "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). For example, this court found in *Thorpe* that the plaintiffs had "proffered evidence of systemic deficiencies in the District's system" of providing long-term care services for nursing facility residents with disabilities. *Thorpe*, 303 F.R.D. at 151. Plaintiffs have offered similar evidence of systemic deficiencies in Defendant's transportation of students with disabilities. *See generally* Daggett Decl; Guerrero Decl.; Clark Decl.; McCray Decl.; *and* Robertson Decl. Remedying these alleged deficiencies would not require individualized relief, and broad injunctive and declaratory relief would benefit the class as a whole. *See Thorpe,* 303 F.R.D. at 151 (noting that the "District's alleged failure to implement an effective [policy required by ADA] is obviously an action or inaction that 'can be enjoined or declared unlawful only as to all of the class members or as to none of them.'") (citation omitted). While Defendant may have to perform an individualized inquiry to determine how best to individually accommodate class members across a wide geographic area to get them to and from school, this court need not do the same in issuing broad injunctive and declaratory relief to ensure Defendant complies with federal law. *See Davis v.*

Astrue, 250 F.R.D. 476, 487 (N.D. Cal. 2008) (noting that ("[T]he individualized determination referenced by this court is one that the agency ... is required to make under the Rehabilitation Act in considering the particular needs of its beneficiaries. This court need not make any individualized determinations.").

Finally, Rule 23(b)(2) was intended to remedy civil rights violations like those in the present case. *See Brown v. District of Columbia*, 928 F.3d 1070, 1083 (D.C. Cir. 2019) ("The Supreme Court has called civil rights cases against parties charged with unlawful, class-based discrimination like this [ADA case], prime examples of what (b)(2) is meant to capture."); *DL*, 860 F.3d at 726 ("Rule 23(b)(2) exists so that parties and courts, especially in civil rights cases like this, can avoid piecemeal litigation when common claims arise from systemic harms that demand injunctive relief."); *In re District of Columbia*, 792 F.3d 96, 102 (D.C. Cir. 2015) ("Rule 23(b)(2) was intended for civil rights cases."). Therefore, plaintiffs' claims for injunctive and declaratory relief should be certified pursuant to Rule 23(b)(2).

b) Plaintiffs' Claims for Compensatory Education Satisfy Rule 23(b)(3)

With respect to Plaintiffs' compensatory education claims, Plaintiffs meet the requirements of Rule 23(b)(3) because here, questions of law or fact common to the class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). Therefore, hybrid certification is appropriate.

a. Common Questions Predominate over Individual Questions

Questions of law or fact common to the class members predominate over any questions affecting only individual members. The predominance requirement "tests whether proposed clas-

ses are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997). As the Supreme Court has explained, the "predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016) (citation and quotation omitted). This requirement is satisfied where the class challenges a "generalized practice" that is a "central element of Plaintiffs' theory of liability . . . common to every class member." *Coleman*, 306 F.R.D. at 87. As discussed *supra* at 5-7, 17, all members of the putative class are subject to Defendant's failure to comply with, and to establish policies and practices implementing, the requirements of the IDEA, ADA, Section 504, and the DCHRA concerning the provision of transportation to students with disabilities in violation of federal and DC law. In this case, essentially every liability issue is common – whether Defendant failed to provide appropriate transportation in violation of federal and DC law.

b. A Class Action is Superior to Conducting Hundreds or Thousands of Individual Due Process Hearings

Rule 23(b)(3) also requires that a class be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). A class action is superior to other available methods for fairly and efficiently adjudicating the controversy because it would forestall an "inefficient and uneconomical flood of individual lawsuits and/or prevent inconsistent outcomes in like cases." *Id.* Superiority is typically satisfied when, as here, "common issues predominate strongly." *Id.* Rule 23(b)(3) sets out four considerations relevant to superiority, and each supports that a class action is appropriate.

First, class members are unlikely to have much, if any, interest in separate actions. *See* Fed. R. Civ. P. 23(b)(3)(A). Filing individual actions to confront a systemic violation of federal disability rights law would lead to the "repetitious litigation and possibly inconsistent adjudications" that

class actions seek to eliminate. *Aliotta v. Gruenberg*, 237 F.R.D. 4, 13 (D.D.C. 2006) (applying similar analysis to class claims involving FDIC) (citation omitted). This factor weighs strongly in Plaintiffs' favor.

Second, this court must consider whether "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class" supports superiority and certification. Fed. R. Civ. P. 23(b)(3)(B). To Plaintiffs' knowledge, no other members of the putative class have commenced litigation against Defendant with respect to its systemic failures to provide safe, reliable, and appropriate transportation since the *Petties* litigation ended in 2012. The putative class only covers students who have experienced transportation issues from March 2022 onward, long after the *Petties* case ended in 2012. *See, e.g.* ECF No. 2 at ¶ 211; *Petties v. District of Columbia*, 881 F. Supp. 63, 64 (D.D.C. 1995) (defining *Petties* class). This factor also weights in favor of certification. *See Meijer, Inc v. Warner Chilcott Holdings Co. Ill., Ltd.*, 246 F.R.D. 293, 314 (D.D.C. 2007) (finding that lack of previous litigation by class members who could not have been involved in previous class actions supported class certification on Rule 23(b)(3)(B)).

Third, it would be "desirab[le]" to "concentrate[e] the litigation" of the claims raised in this forum. Fed. R. Civ. P. 23(b)(3)(C). As this case only concerns violations of federal and local disability rights law by the District of Columbia brought by families concentrated in the District, it is highly desirable to concentrate the litigation of those claims in this forum. *See, e.g. Carollo v. United Capital Corp.*, 28 F. Supp. 3d 37, 60 (N.D.N.Y. 2021) ("The convenience of concentrating all claims against [defendant] in its own city cannot be overstated"); *Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 363 (N.D. Ga. 1996) (analyzing location of putative class members for Rule 23(b)(3)(C)); *Siquic v. Star Forestry, LLC*, Civil Action No. 3:13CV00043, 2015 WL 5818263, at

*8 (W.D. Va. Oct. 5, 2015) (noting desirability of forum due to "proximity of class counsel"). Because it is most convenient to concentrate federal disability rights class claims against the District of Columbia in the city where the putative class members, class counsel, and Defendant reside and work, the third factor weighs in Plaintiffs' favor.

Finally, there is no reason to believe that "difficulties . . . in the management of the class" present a barrier to certification. Fed. R. Civ. P. 23(b)(3)(D). To assess manageability, courts do not look at "whether [the] class action will create significant management problems, but instead determin[es] whether it will create relatively more management problems than any of the alternatives, including, most notably," thousands of "separate lawsuits by the class members." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1273 (11th Cir. 2004); *see also Allen v. Int'l Truck & Engine Corp.*, 358 F. 3d 469, 471 (7th Cir. 2004) (finding a class proceeding more manageable in comparison with the manageability problems implicated by numerous separate proceedings). Given the thousands of individual actions that could be brought by parents in the District who have suffered the same systemic failures with respect to transportation of their children with disabilities, it is commonsense that adding additional individual actions will not promote manageability. *See* ECF No. 4-48 at 223; *In re Vitamins Antitrust Litigation*, 209 F.R.D. 251, 270 (D.D.C. 2002) ("the Court is at a loss to understand how adding additional individual actions, especially in view of a trial on the merits, will promote manageability."). Thus, this factor also weighs in Plaintiffs' favor.

In sum, piecemeal litigation in this instance would not only be costly and inefficient for the parties and this Court, but would also prejudice class members who cannot afford separate representation and would therefore be unable to achieve fair adjudication of their claims. Accordingly, hybrid certification of this class action is proper under Rule 23(b)(2) and (3).

c) Plaintiff Class Will Receive Notice of the Pendency of the Class Action and Of Their Opt-Out Rights.

Notice to members of the class must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The notice must reasonably convey the required information, and must allow a reasonable time for those interested in making their appearance. *Id.* Upon certification of plaintiffs' claims for compensatory education under Rule 23(b)(3), plaintiffs will provide class members with individual notice and an opportunity to opt out of the claims for compensatory education. *See* Fed. R. Civ. P. 23(c)(2)(b). Plaintiffs' counsel has the ability and resources to do so. *See* Ex. A, Warner Decl. ¶¶ 7-8.

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

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

III. CLASS COUNSEL SATISFY RULE 23(G)(1).

Rule 23(g)(1)(A)(i) – (iv) provides that, when appointing class counsel, the court must consider the following factors: (i) "the work counsel has done in identifying or investigating potential claims in the action"; (ii) "counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action"; (iii) "counsel's knowledge of the applicable law"; and (iv) "the resources that counsel will commit to representing the class[.]" Well-supported attorney declarations may support the court's findings on all of these factors.

Plaintiffs' counsel satisfy all the Rule 23(g)(1)(A) factors in this case. As shown in the accompanying attorney declarations, lead counsel on this case worked for months to identify potential plaintiffs and investigate the claims in this action. *See* Warner Decl. ¶ 7; Banner Decl. ¶ Zeisel Decl., ¶ 8; Wakschlag Decl. ¶ 17. They have deep experience in handling class actions, including complex civil litigation involving federal disability rights claims. They also have demonstrated knowledge of the applicable law, thereby satisfying the second and third factors. Warner Decl. ¶¶ 8-13; Zeisel Decl. ¶¶ 5-8; Banner Decl. ¶¶ 5-7; Wakschlag Decl. ¶¶ 8-10, 13, 16. Finally, as counsel hail from three nationally-known nonprofit organizations and one large multinational law firm, they have committed and will continue to commit extensive resources to fully and ably representing the putative class in this matter. Warner Decl. ¶ 13; Zeisel Decl. ¶ 7; Banner Decl. ¶¶; Wakschlag Decl. ¶ 18.

Because Plaintiffs' counsel satisfy all of the Rule 23(g)(1)(A) factors here, this Court should appoint them as class counsel.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court certify a class as defined above, appoint the Plaintiffs as class representatives, and appoint Plaintiffs' counsel as class counsel.

Dated: May 3, 2024

Respectfully submitted,

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