CASE NOS. 18-1778, 18-1813, 18-1867, and 18-1976
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

THE PARENT/PROFESSIONAL ADVOCACY LEAGUE; DISABILITY LAW CENTER, INC.; M. W., a minor, by his parents, L.N. and A.N., on behalf of himself and other similarly situated students *Plaintiffs - Appellants/Cross-Appellees* S. S., a minor, by his mother, S.Y., on behalf of himself and other similarly situated students *Plaintiff* v. CITY OF SPRINGFIELD, MASSACHUSETTS; SPRINGFIELD PUBLIC SCHOOLS *Defendants - Appellees/Cross-Appellants* DOMENIC SARNO, in his official capacity as Mayor of City of Springfield; SUPERINTENDENT DANIEL J. WARWICK, in his official capacity as Superintendent of Springfield Public Schools *Defendants*.	On Appeal from a Judgment and Orders of the United States District Court for the District of Massachusetts

OPPOSITION / REPLY BRIEF OF CROSS-APPELLEES / APPELLANTS

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I. CROSS-APPELLEES' STATEMENT OF ISSUES

1. Did Congress act within its Constitutional authority in empowering Protection & Advocacy systems such as Plaintiff DLC to bring suits to enforce federal civil rights laws on behalf of children with mental health disabilities?

2. Did the District Court act within the permissible scope of its discretion in finding that M.W.'s intervention for purposes of appeal will aid the efficient resolution of this case?

II. CROSS-APPELLEES' STATEMENT OF THE CASE

Plaintiff DLC is the "protection and advocacy system for individuals with mental illness" ("P&A") for Massachusetts, the legal advocacy organization created and funded by Congress under the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI"). 42 U.S.C. § 10801(b)(2). "DLC is responsible for providing protection to and advocacy for the rights of Massachusetts residents with disabilities, including school students with a mental health disability." ECF No. 55, ¶ 23. Congress has also given DLC "the authority to—

> (A) investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred;
>
> (B) pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State; and
>
> (C) pursue administrative, legal, and other remedies on behalf of an individual who—
>
> > (i) was a[n] individual with mental illness; and
> >
> > (ii) is a resident of [Massachusetts]

42 U.S.C § 10804(a)(1). DLC is a Plaintiff in this case pursuant to these grants of Congressional authority. ECF No. 55, ¶ 25

DLC is compliant with statutory rules requiring that its constituents (people with mental health disabilities in Massachusetts) control the P&A's decisions.

ECF No. 55, ¶ 26-27. As required by federal law, 42 U.S.C. §§ 10805 and 15044, DLC has a multimember governing board, called the Board of Directors, which is responsible for the planning, design, implementation and functioning of the protection and advocacy agency. ECF No. 55, ¶ 28. Sixty percent of DLC's Board of Directors are individuals with disabilities and/or family members of individuals with disabilities. ECF No. 55, ¶ 29. DLC has an Advisory Council for its advocacy activities, which is chaired by a person who has received or is receiving mental health services. ECF No. 55, ¶ 30. More than sixty percent of the members of the PAIMI Advisory Council are individuals who have received or are receiving mental health services or are family members of such individuals. *Id.* DLC's Board of Directors and PAIMI Advisory Council include members who, as public school students, received services due to their disabilities and members who have children in public schools who are currently receiving services due to their disabilities. ECF No. 55, ¶ 31.

PPAL is composed of families and professionals who advocate for improved access to services for children with mental health disabilities. ECF No. 55, ¶ 21. In the twelve months prior to the filing of the original Complaint, more than 150 Springfield families, including the family of the named plaintiff, S.S., sought help from PPAL. *Id*. Many of those families sought help in connection with children who had been placed in the Public Day School or were at risk of being transferred

into the Public Day School. *Id.* PPAL was founded in 1991 and is the Massachusetts state affiliate of the Federation of Families for Children's Mental Health, a national family-run organization. *Id.* PPAL's constituents, including families in Springfield, have a direct and active role in developing PPAL's advocacy activities. *Id.* At least fifty-one percent of the members of PPAL's Board of Directors are parents of children with a mental health disability. *Id.*

The District Court denied Springfield's motion to dismiss the claims of DLC and PPAL for lack of subject matter jurisdiction, finding that DLC and PPAL had standing to bring this lawsuit. ECF No. 102. However, the District Court, *sua sponte*, granted judgment on the pleadings to Springfield on the grounds that DLC and PPAL had not sought administrative relief in their own capacities prior to bringing this lawsuit. ADD_026-40.[1] DLC and PPAL appealed that decision. Springfield cross-appealed the District Court's denial of the motion to dismiss for lack of subject matter jurisdiction.[2]

Originally, this case also had an individual Plaintiff, S.S., who brought claims on his own behalf and on behalf of a class. *See* ECF No. 55, ¶¶ 20; 39-45; 84-88. As discussed in the Moving Brief, the District Court denied S.S.'s motion

[1] Citations to "ADD_#" reference the Addendum to the Brief of Appellant/Cross-Appellees, Dec. 10, 2018 ("Moving Brief").

[2] Springfield and Plaintiffs each filed two notices of appeal, leading to the four court of appeals case numbers in the caption.

for class certification. ADD_001-24. S.S. promptly petitioned this Court for relief under Fed. R. Civ. P. 23(f). S.S. continued as an individual plaintiff for approximately a year, until he turned 18. At that point, S.S. decided to withdraw his individual claims while reserving his right to participate in any relief subsequently obtained on behalf of students in the Public Day School. S.S.'s claims were dismissed by stipulation and without prejudice. ECF No. 229.

Simultaneously with S.S.'s withdrawal, another student, S.B.,—who had also exhausted administrative remedies and filed an ADA lawsuit—sought to intervene in this case. ECF Nos. 230, 231. S.B. also moved to intervene as a petitioner in the pending Rule 23(f) petition. No. 17-8001, ECF No. 117227815. S.B.'s motion to intervene generated a dispute among the parties, in which Plaintiffs asserted that Defendants had inappropriately contacted S.B.'s parents in an effort to dissuade them from continuing this case. ECF No. 233, p. 2. Ultimately, S.B.'s motions to intervene in the District Court and this Court were withdrawn before they could be acted upon. ECF No. 240; No. 17-8001, ECF No. 6146780.

Subsequently, other children sought to intervene in the Rule 23(f) petition but did not seek to intervene in the District Court action. *See* No. 17-8001, ECF No. 6146813. As the District Court later acknowledged, it would have been futile for these children to seek intervention in the District Court: based on its class

certification ruling, the District Court would have rejected any effort by those children to intervene because they had not pursued the administrative process set forth under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA"). *See* ADD_018-20. There was continuously at least one open motion to intervene in this Court, but none of the motions were acted upon before this appeal was filed, and the Rule 23(f) petition was subsequently dismissed. No. 17-8001, ECF No. 6189750.

Shortly after the District Court entered judgment against DLC and PPAL, another student, M.W., asked the District Court for permission to intervene solely for the purpose of appealing the District Court's ruling on class certification and related holding that no child—by intervention or otherwise—could become a plaintiff in this case unless that child had exhausted opportunities under the IDEA to obtain a modification of his or her "individualized education program" ("IEP"), *see* 20 U.S.C. § 1414(d), through the Massachusetts Board of Special Education Appeals ("BSEA").[3] ECF No. 266. As explained to the District Court through declaration, M.W. would have been a member of the class S.S. sought to certify. ECF No. 273. M.W. would like to be afforded equal educational opportunity,

[3] The BSEA is the Massachusetts "state educational agency" that hears administrative appeals contesting the appropriateness of students' IEPs. *See* 20 U.S.C. § 1415(a)-(i).

including a placement in one of Springfield's "neighborhood schools"—meaning one of the schools in Springfield to which children without disabilities routinely are assigned. *See id.* at ¶¶ 7-8. The District Court allowed M.W.'s motion to intervene for purposes of appeal. ECF No. 279. Springfield then appealed the District Court's allowance of the motion to intervene. ECF No. 286.

III. CROSS-APPELLEES' SUMMARY OF THE ARGUMENT

The District Court correctly rejected Springfield's challenge to the standing of DLC and PPAL in concluding that it had subject matter jurisdiction over their claims.

As to DLC, the District Court's task was limited and straightforward. Congress unequivocally granted DLC standing to bring ADA claims on behalf of children with mental health disabilities. Uncontestably, the First Amended Complaint brings such claims. ECF No. 55. Accordingly, DLC has standing to sue on behalf of children who have been assigned to the Public Day School unless Congress exceeded its powers under the Constitution in granting DLC standing. Springfield does not even try to argue that Congress did so and would have no basis for such an argument.

Instead, Springfield asserts that the children in the Public Day School have not alleged a Constitutionally cognizable injury. That argument is unsupported by any relevant case law and amounts merely to a protestation that Plaintiffs have not yet won this case. The Complaint and the subsequent record in this case are replete with facts plausibly alleging that children in the Public Day School (both named and unnamed) are suffering concrete and particularized injuries—including an education inferior to that offered their non-disabled peers—as a result of

Springfield's misconduct. No more is needed to create a justiciable case or controversy.

Even setting aside DLC's Congressionally-granted standing, the District Court had subject matter jurisdiction over the claims of DLC and PPAL under longstanding associational standing principles. This case is core to the organizational missions of both DLC and PPAL. Their constituents have suffered injuries. And there is no reason that this case requires individual participation of each affected child. Furthermore, DLC and PPAL are not—as Springfield suggests—required to have Public Day School students and their families (or residents of Springfield) on their boards of directors in order to sue Springfield. Both organizations have statewide mandates and are controlled by Massachusetts residents with disabilities (including families of public school children with disabilities), which is sufficient for associational standing.

As to Springfield's second issue on appeal, the District Court did not abuse its discretion in allowing M.W. to intervene in this case for the purposes of appeal. Based on record support—and longstanding precedent—the District Court appropriately found that M.W. would have been a member of the class had it been certified and therefore had an interest in the case warranting his intervention.

Springfield's legal arguments against intervention are baseless. The Supreme Court has rejected Springfield's argument that a class member must

exhaust administrative remedies before intervening. Springfield's argument that M.W. has not been approved to act as a class representative is irrelevant (no such showing was required in order to legitimate intervention) and premature (any objection to M.W.'s adequacy as a class representative must be made on remand, on consideration of facts not yet in the record). Finally, to the extent Springfield is arguing that this case became moot or non-justiciable prior to M.W.'s intervention, several recent appellate decisions in cases similar to this one hold otherwise, granting or affirming motions to intervene for purposes of appeal after the original plaintiff, having become unwilling or unable to proceed with individual claims, withdrew from the case.

IV. CROSS-APPELLEES' ARGUMENT IN OPPOSITION

A. DLC and PPAL Have Standing.

DLC has standing to bring this case because "[b]y suing on behalf of mentally ill individuals, [DLC] is exercising the powers and duties assigned to it by federal statute, and that assignment is constitutional." *Ind. Prot. & Advocacy Servs. Comm'n v. Comm'r, Ind. Dep't of Corr.*, 642 F. Supp. 2d 872, 874 (S.D. Ind. 2009) ("*IPAS v. DOC*"). DLC *also* has associational standing to bring suit on behalf of Springfield children with mental health disabilities, as does PPAL.

1. DLC Has Statutory Standing to Sue *on Behalf of* Springfield Children with Mental Health Disabilities.

Springfield incorrectly asserts that DLC's "claim to standing rests on an associational basis only." Brief of Defendants-Appellees/Cross-Appellants at 49 ("Springfield Br.") That is not so. While DLC *does* have standing to sue in an associational capacity (as explained below), its right to sue on behalf of Springfield's children with mental health disabilities springs more directly from Congress's repeated enactment of statutes giving P&As standing to sue on behalf of individuals with disabilities. *See* 42 U.S.C. §§ 10801, 10804, 10805; 42 U.S.C. §§ 15043 *et seq*.; 29 U.S.C. § 794e.

a. Congress Acted Constitutionally in Appointing DLC to Sue on Behalf of Children with Mental Health Disabilities.

Springfield does not—and cannot—argue that this lawsuit somehow falls outside the scope of cases Congress empowered DLC to bring. As the Seventh Circuit recognized, *en banc*, in a case challenging the extent of a P&A's standing to bring legal actions:

> Congress phrased the PAIMI Act in terms that grant rights to the protection and advocacy system in each state. . . . The Act further provides that the system shall have the power to bring legal actions to ensure the protection of its constituents and to litigate on behalf of its constituents. A system designated under the Act "shall have the authority to pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State" and to "pursue administrative, legal, and other remedies" on behalf of individuals with mental illness . . . .
>
> As we read the statute, these powers are conferred upon a protection and advocacy system [] as a matter of federal law by virtue of its designation by a state.

Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin., 603 F.3d 365, 375-76 (7th Cir. 2010) (*en banc*) ("*IPAS v. FSS*"); *see also id.* at 383 (Posner, J., concurring) ("[PAIMI] assigns to [P&As] . . . a whistleblower, ombudsman, watchdog, advocacy, and 'private attorney general' role."); *Bernstein v. Pataki*, 233 F. App'x 21, 25 (2d Cir. 2007) (unpubl.) ("In the light of the statutory mandate granted to [P&As], we conclude that [the State P&A Director] may also adequately litigate the legal questions at issue in this action."); *IPAS v. DOC*, 642 F. Supp. 2d

at 878 ("Constitutional standing requirements cannot be waived, of course, but the statutory grant of standing to protection and advocacy groups means that the so-called 'prudential' elements of standing doctrine, including the limits on asserting the rights of others, do not apply.")

Springfield also cannot argue that Congress overstepped its constitutional authority in allowing DLC to bring this suit on behalf of students Springfield assigned to the Public Day School. The Supreme Court has upheld far more audacious grants of "representational standing" than the ones at issue here. *See Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 774 (2000) (holding that it was constitutional for Congress to give any ordinary person the ability to sue on behalf of the United States in a False Claims Act case, even when that ordinary person is not herself harmed by the conduct in question); *see also Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co*., 514 U.S. 122, 133 (1995) (recognizing that Congress may "confer[] standing upon" an appropriate agency to sue on behalf of third parties "without infringing Article III of the Constitution"). Moreover, Congress's decision to authorize suits on behalf of minors with mental disabilities by a statutorily created, federally funded, subject matter expert—the P&A—falls well within the range of representational standing that is commonly accepted as Constitutional, even in the absence of express Congressional authorization. *See*, *e.g.,* Fed. R. Civ. P. 17

(allowing a broad range of persons to "sue in their own names without joining the person for whose benefit the action is brought").[4]

Nor would Springfield have any basis to argue that Congress could not authorize DLC to seek relief, in one lawsuit rather than 200, for all children assigned to the Public Day School. *See Gen. Tel. Co. of the Nw. v. Equal Emp't Opportunity Comm'n*, 446 U.S. 318, 331 (1980) (recognizing that Congress may empower an agency to seek systemic relief under federal anti-discrimination law separate and apart from the class relief also available under Rule 23).

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[4] As now-Circuit Judge Hamilton (who also wrote the *en banc* opinion in *IPAS v. FFS*) recognized in *IPAS v. DOC*, 642 F. Supp. 2d at 876–77:

> In many fields, Congress has empowered other third parties, including state and federal agencies, to protect the rights of individuals disadvantaged for other reasons. *See, e.g.*, 42 U.S.C. § 3616a(a)(1) (authorizing fair housing organizations to "obtain enforcement of the rights granted by title VIII [of the Fair Housing Act] ... through such appropriate judicial or administrative proceedings ... as are available"); 42 U.S.C. § 2000e-5(f)(1) (authorizing the Attorney General to initiate civil actions against private employers under Title VII of the Civil Rights Act of 1964) and § 2000e-4(g)(6) (authorizing the Equal Employment Opportunity Commission to "intervene in a civil action brought ... by an aggrieved party"); 29 U.S.C. § 1132(a)(2) (granting Secretary power to initiate various civil actions under the Employee Retirement Income Security Act); 15 U.S.C. § 15c (authorizing state attorneys general to bring a federal action on behalf of the state's citizens under federal antitrust law).

b. DLC Sufficiently Alleged that Public Day School Students Have Been Injured.

Since Congress can—and did—waive the "the so-called 'prudential' elements of standing doctrine, including the limits on asserting the rights of others," *IPAS v. DOC*, 642 F. Supp. 2d at 878, DLC has standing here, if the claims of the Springfield children assigned to the Public Day School, on whose behalf DLC brings this case, constitute a "case or controversy" within Article III.[5] For there to be standing in this constitutional sense requires only plausible allegations of "injury in fact, causation, and redressability." *Hochendoner v. Genzyme Corp*., 823 F.3d 724, 731 (1st Cir. 2016).

Of this "familiar triad," Springfield contests only "injury in fact," and what Springfield is really arguing on that score is that it has merits defenses that DLC has not overcome. *See* Springfield's Br. 56 (arguing that DLC should not be able to rely on N.D.'s injury because "N.D. has not pled that she has exhausted administrative remedies under the IDEA"). However, "'standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal.' . . . An individual's plausible allegations of a personal injury will

[5] "[E]xhaustion requirements are not jurisdictional unless Congress has explicitly designated them as such." *Glob. NAPs, Inc. v. Verizon New England Inc*., 603 F.3d 71, 85 (1st Cir. 2010); *see also infra* at IV.A.3.b. Nothing in PAIMI suggests that Congress intended to divest district courts of jurisdiction over suits brought in a P&A's discretion.

generally suffice to plead an injury in fact, even if the claim is ultimately lacking on the merits." *Hochendoner*, 823 F.3d at 734.

Since Springfield's challenge to DLC's standing was made through a motion for judgment on the pleadings, the District Court properly "accept[ed] as true all well-pleaded factual averments in the . . . complaint and indulge[d] all reasonable inferences therefrom in [DLC's] favor," and then looked to see if DLC's allegation that children had been injured was "plausible." *Gustavsen v. Alcon Labs., Inc.*, 903 F.3d 1, 7 (1st Cir. 2018). As the District Court correctly recognized, Plaintiffs plausibly alleged that Springfield injures children assigned to the Public Day School by segregating them unnecessarily and providing them educational opportunities inferior to those Springfield provides other children. ECF. No. 102, pp. 14-15.

DLC was not required to single out any specific child in pleading its standing. *See IPAS v. DOC.*, 642 F. Supp. 2d at 880 (finding no "provision in the PAIMI . . . that could reasonably be read to require that [a P&A plaintiff] name a specific individual in bringing suit to redress violations of the rights of individuals with mental illness"). But, regardless whether it was required to do so, DLC also alleged, in great detail and by way of example, how placement in the Public Day School had harmed two specific Springfield children, S.S. and N.D. ECF No. 55, ¶¶ 74-83, 86-88. Moreover, at the time of its decision on standing, the District

Court had record evidence that "[i]n addition to being denied the opportunity to be educated in their neighborhood schools, the children placed in the SPS Public Day School receive an inferior education and are denied services, activities, and supports that SPS students who are educated in their neighborhood elementary and middle schools and in the high schools routinely receive." ECF No. 158-1, ¶ 33. These facts and plausible allegations were more than sufficient to establish an injury-in-fact for purposes of standing.

2. DLC Has Associational Standing as Well.

As the District Court recognized, DLC also has associational standing. (In other words, DLC has standing even setting aside the fact that Congress has specifically empowered DLC to bring suits such as this one.)

a. Precedent Supports DLC's Associational Standing.

Many courts have tested P&A standing under associational standing principles, as articulated in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). The results overwhelmingly favor DLC's argument here.

Four courts of appeals have recognized that P&As have associational standing to bring cases such as this one, where there is an individual with a mental health disability who would have standing to sue individually. *See Disability Rights Wisconsin, Inc. v. Walworth Cty. Bd. of Supervisors*, 522 F.3d 796, 803–804

(7th Cir. 2008) (recognizing P&A associational standing but finding that no individual would have had standing to bring the lawsuit); *Bernstein*, 233 F. App'x at 25 (concluding that P&A director could use doctrine of associational standing to sue on behalf of individuals with disabilities who were confined to secure psychiatric facility); *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1110 (9th Cir. 2003); *Doe v. Stincer*, 175 F.3d 879, 886 (11th Cir. 1999).[6]

District courts in seven of the other eight circuits have come to similar conclusions. *See Wilson v. Thomas*, 43 F. Supp. 3d 628, 632 (E.D.N.C. 2014); *Advocacy Ctr. for Elderly & Disabled v. La. Dep't of Health & Hosps*., 731 F. Supp. 2d 583, 596 (E.D. La. 2010); *Univ. Legal Servs., Inc. v. St. Elizabeths Hosp*., No. Civ. 105CV00585TFH, 2005 WL 3275915, *4 n.4 (D.D.C. July 22, 2005); *N.J. Prot. & Advocacy, Inc. v Davy*, No. 05-1784-SRC, 2005 WL 2416962, *3 (D.N.J. Sept. 30, 2005); *Unzueta v. Schalansky*, No. 99-4162-RDR, 2002 WL 1334854, at *3 (D. Kan. May 23, 2002); *Risinger v. Concannon*, 117 F. Supp. 2d

[6] The later decision in *Mental Hygiene Legal Service v. Cuomo*, 13 F. Supp. 3d 289, 296 (S.D.N.Y. 2014), *aff'd*, 609 F. App'x 693 (2d Cir. 2015), does not suggest otherwise. In that case, the district court specifically distinguished between P&As and other organizations ("Unlike the protection and advocacy systems in the relevant case law, 'MHLS has no advisory council of individuals who have such disabilities,' and there is no statutory mandate to maintain as much.").

61, 71 (D. Me. 2000); *Mich. Prot. & Advocacy Serv., Inc. v. Babin*, 799 F. Supp. 695, 702 n.12 (E.D. Mich. 1992).

In arguing that DLC lacks associational standing, Springfield relies on two outlier cases. Other courts have repeatedly found these cases unpersuasive, and for good reason.

Principally, Springfield directs this Court to *Association for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Center Board Of Trustees*, 19 F. 3d 241, 244 (5th Cir 1994). In that case, the appellant was a P&A, but the Fifth Circuit viewed the argument that the P&A had standing as having been largely waived. Further, the *Dallas County* decision appears to have been based at least in part on the erroneous premise that "disabled people [] are unable to participate in and guide the organization's efforts." *Id.* More recently, a district court in the Fifth Circuit has recognized that under traditional associational standing principles, P&As do have standing to sue in ADA cases on behalf of third parties. *See Advocacy Ctr. for Elderly*, 731 F. Supp. 2d at 595-96 (noting that the *Dallas County* court had construed the appellant as a "non-PAIMI organization" and that "PAIMI organizations are required by federal statute to give [people with disabilities] a central role in [their] management and activities"); *see also Risinger*, 117 F. Supp. 2d at 71 (finding unpersuasive the "cursory analysis" of the *Dallas County* court).

Springfield also points to the Eighth Circuit's outlier decision in *Missouri Protection & Advocacy Services, Inc. v. Carnahan*, 499 F.3d 803, 809-10 (8th Cir. 2007) (Springfield incorrectly calls *Carnahan* a Seventh Circuit decision. In fact, the Seventh Circuit rejected *Carnahan*'s holding, *sub silentio*, in *Disability Rights Wisconsin*, 522 F.3d at 803-804.). This Court should reject Springfield's invitation to follow *Carnahan.* The *Carnahan* court did not cite or discuss the contrary preexisting circuit authority in *Oregon Advocacy Ctr.* and *Doe*, and two subsequent circuit court decisions (*Disability Rights Wisconsin* and *Bernstein*) have not followed *Carnahan*. In addition, the *Carnahan* court appears to have looked to the wrong statutory provisions in considering Congressional intent, ignoring the provisions requiring constituent participation in the governance of a P&A. *Compare Carnahan*, 499 F.3d at 810 n.7 (focusing on 42 U.S.C. §§ 10804(c) & 10807) *with Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 307-08 (E.D.N.Y. 2009) (referencing the many cases that have relied on 2 U.S.C. §§ 10801 & 10805(a)). Given these shortcomings, it is no surprise that courts have seen *Carnahan* as "unpersuasive" and contrary to the "greater weight of authority." *Laflamme v. New Horizons, Inc*., 605 F. Supp. 2d 378, 397 (D. Conn. 2009); *see also IPAS v. DOC*, 642 F. Supp. 2d at 878 (noting the *Carnahan* court reached its conclusions "without discussion of protection and advocacy statutes or Congressional intent").

b. DLC Has Sufficient "Indicia of Membership."

Springfield spends several pages arguing that DLC is not sufficiently analogous to a "membership organization" to prevail under the *Hunt* test. As discussed above, nearly every decision on point refutes Springfield's argument. *See, e.g.*, *Doe*, 175 F.3d at 885 (holding that a P&A is analogous to the plaintiff commission in *Hunt* because a P&A "serves a specialized segment of the . . . community which is the primary beneficiary of its activities, including prosecution of this kind of litigation") (quoting *Hunt*, 432 U.S. at 344).

Moreover, Springfield's central complaint about "membership" is merely that none of the students at the Public Day School "are on either the Board of Directors [of DLC] or [its] PAIMI Advisory Council." Springfield's Br. 54. Springfield cites no authority for its assertion that a P&A (or any other organization) must show that one of its executives or advisory board members is among the injured in order to satisfy *Hunt*. Neither *Hunt* nor the many cases recognizing P&A standing impose such a requirement. The statewide nature of DLC's Board of Directors and Advisory Council are fully consistent with those of the P&As found to have associational standing in the many cases cited above. Moreover, Springfield's argument—that a P&A must have a director or council member from each community (or even each school) in a state—is clearly inconsistent with both the PAIMI statutory framework and the many cases

(including *Hunt* itself) that have recognized the associational standing of statewide organizations.

c. Individual Participation Is Not Required Here.

Springfield's contention that *Hunt*'s third prong bars DLC is likewise spurious.

First, in light of DLC's statutory authority to bring suits, this "prudential" prong, which looks to whether the participation of individual plaintiffs is necessary, does not apply in cases involving P&As. *See Or. Advocacy Ctr.*, 322 F.3d at 1113 ("[I]n light of the role Congress assigned by statute to advocacy organizations . . . Congress abrogated the third prong of the *Hunt* test.").

Second, since the District Court is not being asked to tailor educational programs to each affected child, *see infra* at V.B.4., the third *Hunt* prong does not bar this suit, even if it applied. The third prong is generally satisfied "so long as . . . individual participation of *each* injured party" is not necessary. *Warth v. Seldin*, 422 U.S. 490, 511 (1975); *see also Pa. Psychiatric Soc'y v. Green Spring Health Servs, Inc*., 280 F.3d 278 (3d Cir. 2002). Where an organization is not "requesting that the federal court award individualized relief to its members," the third prong is no obstacle to standing. *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004). "Actions for declaratory, injunctive and other forms of prospective relief"—such as this case—"have generally been held particularly

suited to group representation." *Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6, 12 (1st Cir. 1986); *see also Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 552 (5th Cir. 2010) (individual participation not required "as long as resolution of the claims benefits the association's members and the claims can be proven by evidence from representative injured members"); *Retired Chi. Police Ass'n v. City of Chicago*, 7 F.3d 584, 602 (7th Cir. 1993) (finding that individualized proof usually is not necessary in cases for injunctive and declaratory relief); *Hosp. Council of W. Pa. v. City of Pittsburgh*, 949 F.2d 83, 89 (3d Cir. 1991) ("The Supreme Court has repeatedly held that requests by an association for declaratory and injunctive relief do not require participation by individual association members.").

3. Springfield Cannot Promulgate New Bars to Standing.

Springfield asks this Court to create two novel jurisdictional bars to DLC's standing. There is no basis for either request.

a. The Presence of an Individual Plaintiff Does Not Defeat Associational Standing.

In something of a Catch-22, Springfield follows its argument that DLC does not have enough representation from Springfield with an argument that DLC cannot sue because the individual plaintiff, S.S., *was* a DLC constituent. *See* Springfield's Br. 60-61. In the only case Springfield cites for support—a case that

sought relief on behalf of one individual alone—a district court determined that it was unnecessary for a (non-P&A) organization to act as co-plaintiff when the injured individual was also a plaintiff in his own right. *See Access 4 All, Inc. v. Trump Int'l Hotel & Tower Condo*., 458 F. Supp. 2d 160, 175 (S.D.N.Y. 2006). Even assuming that *Access 4 All*'s logic would apply in a case where the plaintiff is a P&A and all the involved individuals are minors with a mental health disability—and it is not clear it would—DLC is not bringing this suit on behalf of a single individual but on behalf of all the children Springfield has placed in the Public Day School.

Furthermore, in cases involving people with disabilities, courts have consistently upheld P&A standing in cases in which affected individuals have also directly participated—singly or as representatives of a class. *See Steward v. Abbott*, 189 F. Supp. 3d 620, 631-32 (W.D. Tex. 2016) (recognizing organizational plaintiff's standing in case with class claims); *Dunn v. Dunn*, 219 F. Supp. 3d 1163, 1163 (M.D. Ala. 2016) (similar); *State of Conn. Office of Prot. & Advocacy v. Conn.*, 706 F. Supp. 2d 266, 284 (D. Conn. 2010) (similar); *Rolland v. Celluci*, 52 F. Supp. 2d 231, 242 (D. Mass. 1999) (similar); *Guckenberger v. Bos. Univ.*, 957 F. Supp. 306, 320 (D. Mass. 1997) (similar); *see also Nat'l Fed'n of the Blind of CA v. Uber Techs, Inc*., 103 F. Supp. 3d 1073, 1079-80 (N.D. Cal. 2015)

(recognizing organizational plaintiff's standing in case with individual plaintiffs); *Joseph S. v. Hogan*, 561 F. Supp.2d 280, 307 (E.D.N.Y. 2008) (similar).

b. Exhaustion Is Not a Standing Issue.

Springfield also relies on supposed exhaustion requirements in arguing against DLC's standing. This Court has held repeatedly that exhaustion is a merits defense, not a standing issue. *See, e.g.*, *Glob. NAPs*, 603 F.3d at 85 ("[E]xhaustion requirements are not jurisdictional unless Congress has explicitly designated them as such."); *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 33 (1st Cir. 2007) ("Exhaustion of administrative remedies is a jurisdictional requirement only when Congress clearly ranks it as such.").

Moreover, to the extent that Springfield seeks to rely on the statutory requirement that P&As exhaust "administrative remedies where appropriate," Springfield's Br. 63, courts have correctly held that this language does not require exhaustion where a P&A seeks systemic relief not available in the relevant administrative forum. *See, e.g.*, *Dunn*, 219 F. Supp. 3d at 1173 ("[Section] 10807's requirement is not a strict one."); *Gonzalez v. Martinez*, 756 F. Supp. 1533, 1539 (S.D. Fla. 1991) (finding that Congress "obviously intended that advocacy systems retain some flexibility in determining which informal—or inadequate—administrative remedies to pursue"). Moreover, as discussed *infra* at V.A.3. and in the Moving Brief at 40, DLC joined this suit after S.S. had already

tried—and failed—to utilize available administrative remedies. In these circumstances, DLC was well-warranted in concluding that an additional foray before a BSEA hearing officer without authority to resolve ADA or systemic complaints would be futile and unlikely to "resolve[]" issues at the Public Day School "within a reasonable time." 42. U.S.C. § 10807(a).

4. PPAL Also Has Associational Standing.

Like DLC, PPAL plausibly alleged facts sufficient to satisfy *Hunt's* three prongs. As to its constituents' injuries—the only *Hunt* element Springfield appears to challenge as to PPAL specifically[7]—PPAL alleged not only that its constituents included parents of children placed at the Public Day School, but also that its staff had assisted families of children placed in the Public Day School. As the operative Complaint states, "In the twelve months prior to the filing of the original Complaint, more than 150 Springfield families sought help from PPAL." ECF No. 55, ¶ 21. "Many of PPAL's constituents from Springfield (including families who have sought help from PPAL) have children with a mental health disability

[7] To the extent Springfield challenges PPAL's status as an association, Plaintiffs do not understand the rationale. PPAL is a traditional grassroots organization, composed of families of children with mental health disabilities. ECF No. 55, ¶ 21. Insofar as Springfield is alleging that PPAL cannot sue because its directors do not include parents of children assigned to the Public Day School, the reasons such an argument lack merit as to DLC apply equally to PPAL. *See supra* Section I.V.A.2.b.

enrolled in SPS, including children who have been placed in the Public Day School or are at risk of being transferred by SPS into the Public Day School." *Id.*

B. The District Court Acted Within its Discretion in Allowing M.W.'s Intervention.

Springfield argues that the District Court should not have allowed M.W. to intervene for purposes of appeal. While Springfield purports to have two arguments against intervention, they boil down to the same thing: that M.W. did not contest his placement at the Public Day School through the IDEA administrative appeals process. *See* Springfield's Br. 66-71.

1. M.W. Was Not Required to Exhaust Before Intervening.

Even assuming that the IDEA exhaustion requirement applies to this case—and for the reasons set forth below, it does not—M.W.'s exhaustion status did not preclude the District Court from allowing him to intervene for purposes of appeal. As the District Court correctly recognized, insofar as exhaustion is concerned, M.W. is situated virtually identically to the intervenor appellant in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977). Just as in this case, the lower court in *McDonald* refused to certify a class containing individuals who had not exhausted administrative remedies. *Id.* at 388, 389 n.6. Just like M.W., the *McDonald* intervenor would have been a member of the class had it been certified. *See id.* at 388. The Supreme Court held that the *McDonald* intervenor's non-exhaustion was no barrier to her intervention for purposes of appeal. *Id.* 390 n.8.

2. M.W.'s Adequacy as a Class Representative Is Both Sufficient and Irrelevant.

M.W. does not ask this Court to make him the class representative upon remand. On the other hand, there is no reason M.W. could not serve as class representative if this Court reverses the denial of class certification. Exhaustion status would be irrelevant if this Court agrees with Plaintiffs' analysis of either *Fry* or the futility doctrine. But even if this Court holds that a class representative is required to exhaust in this case, that does not mean that a replacement class representative must also have exhausted. In fact, in *McDonald*, the intervenor's non-exhaustion did not prevent her from becoming the replacement class representative upon remand. *See McDonald v. United Air Lines, Inc.*, 587 F.2d 357, 361 (7th Cir. 1978) (measuring class action timeliness by reference to administrative complaint filed by individual who was no longer part of the class).

Finally, even if M.W. were found inadequate to serve as a new class representative upon remand, the lack of an identified replacement class representative would not require dismissal of M.W.'s appeal. As the D.C. Circuit recently recognized, Springfield's argument to the contrary "misses the point: when the relation back doctrine applies, as it does here, named plaintiffs have no obligation to find new class representatives even if they could." *DL v. District of Columbia*, 860 F.3d 713, 722 (D.C. Cir. 2017). As in *DL*, the crucial point here is that, "but for the district court's error," the class in this case would have been

certified before S.S. dismissed his individual claims without prejudice. *Id.* at 721; *see also id.* at 722 ("Rule 23's purpose would be disserved by a rule, advocated by the District, requiring parents to find new named plaintiffs at every turn of inevitably protracted class litigation."). Rather, it would be appropriate to allow Plaintiffs a reasonable period of time to identify a different replacement class representative. *See, e.g.*, *Birmingham Steel Corp. v. Tenn. Valley Auth.*, 353 F.3d 1331, 1342 (11th Cir. 2003) (concluding that District Court abused its discretion in decertifying class without allowing class counsel a reasonable opportunity to find a replacement class representative).

3. The Case Was Not Moot or Non-Justiciable When M.W. Intervened.

In the final pages of its brief, Springfield appears to suggest that the District Court abused its discretion in allowing M.W. to intervene because S.S. had withdrawn his individual claims without prejudice. *See* ECF No. 229, ¶ 2. But at least three courts of appeals opinions within the past two years have recognized that intervention under Rule 24(a) remains appropriate when the named plaintiff in a class action withdraws his claims and an absent class member seeks to appeal as of right from an order denying class certification. *See In re Brewer*, 863 F.3d 861, 871 (D.C. Cir. 2017) (recognizing that non-named class members may intervene as of right, under Federal Rule of Civil Procedure 24(a), in order to prevent a pending petition for interlocutory review under Federal Rule of Civil Procedure 23(f) from

becoming moot); *Love v. Wal-Mart Stores*, Inc., 865 F.3d 1322, 1327 (11th Cir. 2017) (Anderson, J., concurring) ("mootness and lack of jurisdiction as to the parties to the stipulation did not affect the district court's continuing jurisdiction to entertain a motion to intervene by putative class members to appeal the district court's denial of class certification"); *Odle v. Flores,* 705 F. App'x 283, 288 (5th Cir. 2017) (unpubl.) (Graves, J., concurring in denial of rehearing *en banc*) (agreeing with the panel decision, which held that the court had jurisdiction to consider a motion to intervene by absent class members seeking to appeal a denial of class certification); *see also McDonald*, 432 U.S. at 394 (finding that prompt motion to intervene "as soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives" was timely); *Xlear, Inc. v. Focus Nutrition LLC*, 893 F.3d 1227, 1236 n.3 (10th Cir. 2018) (recognizing that its reading of the limited reach of *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017) was consistent with *In re Brewer*).

In light of these holdings, Springfield's unsupported assertion that M.W.'s intervention was impermissible because the case was "mooted," Springfield's Br. 69, carries no weight.

V. APPELLANTS' ARGUMENT IN REPLY

A. The District Court Misconstrued the IDEA Exhaustion Rule.

Springfield's efforts to rehabilitate the District Court's flawed exhaustion analysis are insufficient for three reasons.

First, under *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017), the IDEA exhaustion rule does not apply to this case *at all* because Plaintiffs are not seeking a free and appropriate public education ("FAPE") but rather equal treatment.

Second, even before *Fry*, S.S. was not required to exhaust administrative remedies (although he did) because the BSEA's record of rejecting any claim for equal treatment under the ADA and any claim for systemic relief rendered his administrative appeal futile (as he found out).

Third, even before *Fry*, and even assuming that exhaustion was not excused by futility, the District Court had no basis to conclude that the IDEA exhaustion rule required unnamed class members or organizational plaintiffs to pursue the IDEA administrative process when S.S. had already tried, and failed, to persuade the BSEA to order the same administrative relief in the same case.

1. Under *Fry*, § 1415(*l*) Does Not Apply Here.

Springfield makes almost exactly the same argument the Supreme Court rejected in *Fry*. Springfield contends that the IDEA exhaustion rule applies

because "any alleged wrongdoing [at] the [Public Day School] was part of [Springfield's] operation of an educational facility." Springfield's Br. 34. But, as the *Fry* Court recognized, the IDEA exhaustion rule does not apply in cases—like this one—where the principal "aim" of a case is "to . . . enable[e] each covered person . . . to participate equally to all others" in an educational program. *Fry*, 137 S.Ct. at 756.

a. Springfield Does Not Get to Re-Write the Complaint.

The Complaint centrally alleges that Springfield is treating students assigned to the Public Day School unequally as compared to students without disabilities. Springfield "operate[s] a discriminatory public school system that denies hundreds of children with a mental health disability equal educational opportunity and the opportunity to be educated with their peers without a disability." ECF No. 55, ¶ 1. Plaintiffs allege that Public Day School students are segregated because Springfield is unwilling to treat them as equally-deserving of an integrated public education. *See id.*, ¶ 7 ("[T]he children placed in the Public Day School do not need to be there . . . . They could be educated in neighborhood schools . . . ."). The modifications Plaintiffs seek are not for remedial education but rather for systemic changes in the way Springfield responds to children whose mental health disabilities cause behavioral difficulties. *See id.*, ¶ 60 (explaining that the accommodations Plaintiffs seek are (a) better behavioral assessments;

(b) intervention plans that rely on positive supports; (c) training on behavior management for Springfield's employees; and (d) coordination between Springfield and the students' mental health providers (collectively "SBBS")). And the aim of these modifications is to end Springfield's current practice of discriminating against students on account of their mental health disabilities. *See id.*, ¶ 70 ("Lacking adequate training and support, Public Day School staff often resort to harsh and counterproductive responses to students' behavior, including dangerous physical restraints . . . unnecessary forced isolation . . . and inappropriate arrests . . .."); *id.*, ¶ 67 ("The Public Day School operates as little more than a 'warehouse' for children with a mental health disability.").

Springfield is entitled to defend itself against these allegations on the merits. Springfield is not, however, entitled to change the Complaint. Springfield is thus entirely wrong in positing, as the basis for its exhaustion arguments, that "the issue presented is whether students at the [Public Day School] are being provided with a FAPE." Springfield's Br. 23. Even if Springfield did, in fact, provide a FAPE to every student in the Public Day School, that would not constitute a defense in this case. (After all, the IDEA does not require equal educational opportunity, *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017), which is what the Plaintiffs in this case seek.) Since Plaintiffs are demanding equal opportunity (including the cessation of discriminatory practices), rather than

services sufficient to provide a FAPE, any IDEA hearing officer would have to "turn them away empty handed," *Fry*, 137 S.Ct. at 754, as happened when S.S. brought his claims to BSEA.[8]

b. This Court Should Reject Springfield's Attempts To Use the IDEA as a Limit on the ADA

Springfield's refusal to recognize this as an equality and integration case is, at bottom, an attempted evasion of the first sentence of § 1415(*l*), which provides "[n]othing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the . . . [ADA]." Contrary to this clear statutory mandate, Springfield's core contention is that a child in a public school cannot demand integration or equal treatment under the ADA unless the IDEA would also mandate the same relief. *See* Springfield's Br. 30-31 (arguing that segregation of children with disabilities is permissible under the IDEA); Springfield's Br. 33 (arguing that any segregated placement permissible under the IDEA must also be deemed permissible under the ADA).

[8] Further, this Court cannot, consistent with *Fry*, accept Springfield's efforts to clothe its ADA violations in IDEA garb. The court of appeals decision in *Fry*, after all, reasoned that the IDEA exhaustion rule applied because "the school did use IDEA procedures" in barring the service dog from the school. *Fry v. Napoleon Cmty. Sch.*, 788 F.3d 622, 629 (6th Cir. 2015). Similarly, the District Court in this case held that the IDEA exhaustion rule applied because "[e]ach member of the class was placed [in the Public Day School] following the creation of an IEP." Add_023. The Supreme Court rightly found this rationale unpersuasive.

For the same reason, this Court must reject Springfield's argument that the IDEA exhaustion rule should apply because IDEA contains its own statutory language expressing a "preference" for integration. For sure, "the IDEA strongly prefers placing children in their least restrictive environment." *T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist*., 752 F.3d 145, 162 (2d Cir. 2014). Parents have sometimes used this "LRE" requirement to obtain more a more integrated education for their children in an IDEA appeal. *See, e.g.*, *id.* But *Fry* precludes Springfield from invoking the IDEA exhaustion rule on the grounds that, hypothetically, S.S. could have contested his unnecessary segregation (although not his unequal treatment as a result of Springfield's discriminatory practices) as an LRE issue. "Under § 1415(l), courts must consider the substance of the plaintiff's own claims. 'The statutory language asks whether a lawsuit in fact "seeks" relief available under the IDEA—not, as a stricter exhaustion statute might, whether the suit "could have sought" relief available under the IDEA (or, what is much the same, whether any remedies "are" available under that law).'" *Sophie G. by & through Kelly G. v. Wilson Cty. Sch*., 742 F. App'x 73, 78-79 (6th Cir. 2018) (unpubl.) (*quoting* Fry, 137 S. Ct. at 755); *see also Fry*, 137 S. Ct. at 757 n.10 ("The point . . . is not to show that a plaintiff . . . could *only* have proceeded under Title II [of the ADA]. . .") (emphasis in original).

The relevant point under *Fry* is that, regardless what relief they might alternatively have sought under the IDEA, Plaintiffs are in fact seeking to enforce the ADA's equality and integration mandates, consistent with *Olmstead v L.C. ex rel. Zimring*, 527 U.S. 581 (1999). *See Fry*, 137 S. Ct. at 756 (recognizing that it is the ADA, not the IDEA, that is most implicated when the "aim" of a case is "to root out disability-based discrimination, enabling each covered person to participate equally to all others in public facilities and federally funded programs"); *see also J.S., III by & through J.S. Jr. v. Houst. Cty. Bd. of Educ.*, 877 F.3d 979, 987 (11th Cir. 2017) (recognizing that the ADA is the gravamen of a complaint alleging the type of "discrimination contemplated in *Olmstead* . . . such as stigmatization and deprivation of opportunities for enriching interaction with fellow students.").[9]

Springfield is likewise off-base in its discussion of *Fry*'s hypotheticals. Springfield's argument has circular qualities: essentially that an adult could not

[9] *J.S.* is the only post-*Fry* appellate decision on remotely-analogous facts. None of the post-*Fry* cases Springfield relies upon pursued an *Olmstead* or Olmstead-like theory. None of Springfield's cases involved a request for systemic reform. To the contrary, all of Springfield's post-*Fry* cases involved individual children seeking revisions to their IEPs. *See*, *e.g.*, *Wellman v. Butler Area Sch. Dist.*, 877 F.3d 125, 133 (3d Cir. 2017) (where the plaintiff (a single individual) was principally demanding "extra study halls, tutors, and additional time to complete assignments").

seek SBBS under the IDEA because the IDEA does not apply to adults. *See* Springfield's Br. 33 ("The IDEA does not regulate adult education."). If that were the standard, then the IDEA would apply to any claim by any student seeking services, which, under *Fry*, it clearly does not. Instead, the point is—as Springfield readily admits—that "the adult student *would* have a claim under the ADA." *Id.* (emphasis added). Since, as Springfield concedes, adults outside the IDEA scheme *could* bring an *Olmstead* case much like this one, the IDEA exhaustion rule does not apply.

2. Exhaustion Was Excused Under the Futility Doctrine.

Even if the IDEA exhaustion rule might otherwise have applied, compliance with the rule was excused because any administrative effort to address the ADA claims here was futile—as S.S. found when he did, in fact, try to present these claims to the BSEA. The BSEA made it abundantly clear to S.S., as it has in other cases too, that it will not entertain the claims at issue in this case—and for several reasons.

The BSEA will not hear ADA claims, meaning that it will not entertain claims of unequal educational opportunity. In S.S.'s own appeal, faced with an unequal educational opportunity claim, the BSEA held that "the BSEA does not have jurisdiction over the ADA." ECF No. 34-1, at 1 n.2. Time and time again, BSEA hearing officers have held the same. *See* ECF No. 245-6, at 2 n.2 ("The

BSEA does not have jurisdiction over the ADA"); ECF No. 245-4, at 9; ECF No. 245-7, at 11 n.5 (same); ECF No. 248-8, at 4-6 (same).

Likewise, the BSEA has held that it lacks authority to order "systemic" relief—meaning changes that affect school policies or general practices. *See* ECF No. 245-3, at 5 ("With respect to Parents' request that I order systemic relief, I find that I have no authority to do so."), ECF No. 245-4, at 9 ("Nothing within the grants of authority to the BSEA . . . permits the BSEA to go beyond resolving the dispute between individual parties"); ECF No. 245-5, at 6-7 (same).

The BSEA has also held, repeatedly, that it lacks the ability to hear claims that depend on the experiences of more than one student. In one BSEA hearing officer's words, "[BSEA] findings must relate to the foundational issue of whether *the individual Student in this case* received FAPE during the relevant time period and whether Student and Parent had legally-adequate opportunities to participate in developing Student's IEP." ECF No. 245-4 at 8 (emphasis added).

Finally, the BSEA has made clear that it wants no part in a system that would require BSEA hearing officers to offer advisory opinions in cases bound to become federal class actions. *See* ECF No. 241-1, at 4 ("[The BSEA] does not have the experience, expertise, or institutional capacity to provide administrative fact finding on class action claims which could be of assistance to the federal court in any potential, subsequent class action litigation."); ECF 245-8, at 5 ("[T]he

[BSEA Hearing Officer's] fact-finding would likely go beyond the experience and expertise of a special education hearing officer, thereby providing little guidance to the federal courts.").

Based on similar policies in other states, several courts of appeals have held sensibly that claims like those here need not be exhausted because any effort to resolve them through administrative channels would be futile. *See, e.g.*, *Beth V. by Yvonne V. v. Carroll*, 87 F.3d 80, 89 (3d Cir. 1996) (holding that the IDEA exhaustion requirement does not apply in a case where the plaintiffs "allege systemic legal deficiencies and, correspondingly, request system-wide relief that cannot be provided (or even addressed) through the administrative process"); *Mrs. W. v. Tirozzi*, 832 F.2d 748, 757 (2d Cir. 1987) (recognizing that IDEA exhaustion is not required in cases "alleging systematic [IDEA] violations"); *Doe by Gonzales v. Maher*, 793 F.2d 1470, 1490 (9th Cir. 1986) (exhaustion under the IDEA not required in case seeking systemic relief because administrative relief would be inadequate).

Springfield's and the District Court's continued reliance on *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52 (1st Cir. 2002), is misplaced. *Frazier* was not an ADA case, did not involve a request for systemic relief, was not a class action, and did not involve allegations that required examination of more than one child's experience. The plaintiff in *Frazier* alleged that the defendants "deprived [one

child] of her statutorily protected, civil rights to a [FAPE] in violation of section 1983" and sought monetary damages for this deprivation. *Frazier v. Fairhaven Sch. Comm.*, 122 F. Supp. 2d 104, 108 (D. Mass. 2000), *aff'd*, 276 F.3d 52 (1st Cir. 2002). *Frazier* is thus worlds away from this case and in no way suggests that the law of this Circuit as to futility differs so markedly from the Second, Third, and Ninth Circuits as Springfield and the District Court appear to have assumed.

3. At a Minimum, the IDEA Exhaustion Rule Does Not Require Multiple Attempts to Exhaust the Same Claims.

In any event—even if Plaintiffs are wrong about both *Fry* and futility—S.S.'s exhaustion of administrative remedies was sufficient to satisfy any exhaustion rule that would pertain to unnamed class members, DLC, or PPAL.

a. The District Court's Assertion that Every Class Member Must Separately Exhaust the IDEA Process Was Flatly Wrong.

Springfield wisely makes no serious effort to rehabilitate the District Court's holding that each member of the putative class would have to exhaust an IDEA appeal before a class could be certified. As discussed in the Moving Brief, that holding was contrary to settled Supreme Court precedent. *See McDonald*, 432 U.S. at 389 n.6 (recognizing that it is sufficient for one class member to exhaust in a class action); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 771 (1976) (same); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975) (same). Neither this Court nor any other court of appeals has ever suggested that the IDEA's limited

exhaustion rule creates an exception to the rule in *McDonald*, *Franks*, and *Albermarle Paper*.

b. DLC and PPAL Were Not Required to Exhaust.

Springfield's arguments that DLC and PPAL should have tried to pursue the IDEA exhaustion process are also unavailing. First, as demonstrated in the Moving Brief, a constituent of DLC and PPAL did exhaust these claims. *See* Moving Br. 40. Second, DLC and PPAL had no ability to bring BSEA claims in an associational capacity, as Springfield now suggests they should have. *See* Moving Br. 39-40.

c. The PAIMI Statute Offers No Grounds for Affirmance.

Finally, Springfield's assertion that language in the PAIMI statute required DLC to exhaust is also deeply flawed. Springfield offers no reason why DLC could not rely on S.S.'s efforts to exhaust the systemic ADA claim asserted here. S.S. was (and remains) a DLC constituent. DLC brings the same claims that S.S. brought and seeks the same relief S.S. sought on behalf of himself and his peers.

Moreover—as discussed above—PAIMI's exhaustion language is conditional and fact-bound. Among other things, PAIMI excuses exhaustion when the P&A determines that its claims would "not be resolved within a reasonable time" through the administrative process. 42 U.S.C. § 10807(a). In light of the BSEA's history of rejecting ADA claims and claims for systemic relief, it seems

plain that recourse to BSEA would not have "resolved within a reasonable time" the claims here. *See supra* at V.A.2.

B. The Denial of Class Certification Should Be Reversed.

Springfield fails to present any valid rationale by which this Court could affirm the District Court's denial of class certification.

1. Plaintiffs Established Common Questions of Law and Fact.

This case presents precisely the type of common question that has led courts to certify classes in ADA cases across the country.

The common question presented here is not—as Springfield would have it—simply whether Springfield has violated the ADA. Springfield's Br. 38. Rather the issue is whether Springfield has violated the ADA through its *common* practice of failing to provide school-based behavioral services ("SBBS") (a *common* set of services) in neighborhood schools and instead segregating children with mental health disabilities manifesting in behavioral problems (a *common* set of children) in the Public Day School (a *common* school) where—because the Public Day School is both segregated and inferior—students are deprived of educational opportunities equal to those provided to their peers without a disability (a *common* harm). *See* Moving Br. 44 (emphasis added)).

Springfield makes no effort to distinguish the cases Plaintiffs rely upon or to make any argument for why those rulings were wrong. Rather, Springfield relies

entirely on *Wal-Mart* and the Seventh Circuit's decision in *Jamie S.*, neither of which addressed a situation like that here.

On the spectrum of class actions, this case and *Wal-Mart* are on opposite extremes. Where *Wal-Mart* involved a class of 1,500,000 people in thousands of locations nationwide, this case involves fewer than 500 students at a single school in a single school district. *See* ECF No. 55, ¶ 40. Where *Wal-Mart* involved thousands of different supervisors making uncoordinated decisions, this case involves a single cadre in Springfield's special education department making, nearly identical decisions about class members' school placement. *See* ECF No. 158-1, ¶ 47-49; 54. Where the *Wal-Mart* plaintiffs purposefully avoided any allegation of a common policy or practice, focusing instead on an inchoate "corporate culture" that led to disparate impacts, here the case expressly contests "whether Springfield discriminates against the class, in violation of the ADA, by failing to provide SBBS in neighborhood schools and instead placing them in the inferior Public Day School where they are segregated and deprived of educational opportunities equal to those provided their peers without a disability." Moving Br. 44.

Rather than resembling *Wal-Mart*, this case looks much more like *DL* and *Chi. Teachers Union, Local No. 1 v. Bd of Educ. of Chi.*, 797 F.3d 426, 437 (7th Cir. 2015) (acknowledging that "where the class at issue is affected in a common

manner, such as where there is a uniform policy or process applied to all[,]" "a company-wide practice is appropriate for class challenge even where some decisions in the chain of acts challenged … can be exercised by local managers with discretion"). Springfield does not address those decisions at all.[10]

Moreover, as Judge Tatel recognized in *DL*—a case involving public education—the holding in *Wal-Mart* is of marginal relevance here because it is so entwined with Title VII's requirement that plaintiffs prove that "'the *reason* for a particular employment decision'" was illegal. *DL*, 860 F.3d at 725 (quoting *Wal-Mart*, 564 U.S. at 354) (emphasis in original). In a case such as this one challenging needless segregation under Title II of the ADA (or for claims under the IDEA, for that matter) there is no need to resolve whether the people implementing the challenged practice did so for an improper "'reason.'" *See id.* ("IDEA liability does not depend on the reason for a defendant's failure and plaintiffs need not show why their rights were denied to establish that they were."); *see also Olmstead*, 527 U.S. at 598. Accordingly, as the *DL* court held, "*Wal-Mart*'s

[10] Springfield also ignores *Yates v. Collier*, 868 F.3d 354 (5th Cir. 2017); *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014); *Steward v. Janek*, 315 F.R.D. 472 (W.D. Tex. 2016); *Kenneth R. ex rel. Tri-County CAP, Inc./GS v. Hassan*, 293 F.R.D. 254 (D.N.H. 2013); and *Lane v. Kitzhaber*, 283 F.R.D. 587 (D. Or. 2012), among other ADA class certification decisions cited in the Moving Brief.

analysis of commonality in the Title VII context thus has limited relevance here." *DL*, 860 F.3d at 725.

Nor is *Jamie S.* instructive. For one thing, the *Jamie S.* court addressed a pre-*Wal-Mart* district court decision and lacked the benefit of the Supreme Court's clarification of its *Wal-Mart* holding in *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455 (2013). Thus, the *Jamie S.* court—much like the District Court in this case—appears to have misinterpreted *Wal-Mart* as requiring a plaintiff seeking class certification to make a showing of likely success on the merits. *Compare Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 498 (7th Cir. 2012) (holding that plaintiffs had not submitted "'significant proof' . . . of an illegal policy") *with Amgen*, 568 U.S. at 460 ("[T]he office of a . . . . certification ruling is not to adjudicate the case; rather, it is to select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently.'").

For another, the district court in *Jamie S.* included in the class children whose injuries arose from very different school district practices. The certified class included both children whom the school district had failed to identify as disabled and children whom the school district had identified as disabled but whose parents had not been sufficiently involved in the IDEA evaluation process. *Jamie S.*, 668 F.3d at 495. That error, the D.C. Circuit noted in *DL*, distinguished *Jamie S.* from the many cases, like this one, where all class members are injured

from a common set of practices. *DL*, 860 F.3d at 725. In *D.L*, the district court had divided an originally unworkable class into subclasses of children who claimed the same shortcomings in a large school district's "child find" practices. *Id*. at 724-25. Like the *DL* subclasses, all members of the class here challenge the same shortcomings.

Other courts, too, have rejected the notion that *Jamie S.* is a bar to certification of identifiable classes suffering common and systemic harms. The Seventh Circuit itself has recognized that *Jamie S.* does not speak to situations where a class challenges a common practice. That court has held that *Jamie S.* does not apply in an ADA class action where, as in this case, the class "share[s] a common . . . impairment . . . face[s] common . . . barriers . . . seek[s] common modification[s] . . . [and] complain[s] about the same failure to implement and enforce policies that would accommodate" their disabilities. *Lacy v. Cook Cty., Ill.*, 897 F.3d 847, 865-66 (7th Cir. 2018). A court in the Northern District of Indiana recognized that *Jamie S.* did not apply, and certified a class, in a case challenging a juvenile detention center's common practice "of placing juvenile detainees in solitary confinement as punishment or for administrative purposes." *Wilburn v. Nelson*, 3:17 cv 331, 2018 WL 5961724 at *3 (N.D. Ind. Nov. 13, 2018); *see also, e.g., O.B. v. Norwood*, 170 F. Supp. 3d 1186, 1200 (N.D. Ill.), *aff'd*, 838 F.3d 837 (7th Cir. 2016); *K.W. ex rel. D.W. v. Armstrong*, 298 F.R.D.

479, 486 (D. Idaho 2014), *aff'd*, 789 F.3d 962 (9th Cir. 2015) (reasoning that *Jamie S.* offered "no guidance" because, "[i]n that case, there was 'no such thing as a systemic failure,' and resolution of the case would require 'an inherently particularized inquiry into the circumstances of [each plaintiff's] case'").

2. Evidence of Commonality (Which the District Court Did Not and Could Not Exclude) Was Overwhelming.

Moreover, Plaintiffs demonstrated to the District Court that their case would involve common factual proof of wrongdoing and common factual proof of harm—that the case would, indeed, be decided on common issues. Plaintiffs' principal expert on class certification, Dr. Peter Leone, explained that: (A) all of the students whose records he examined could be educated in neighborhood schools if given needed services; (B) there was a common set of services that would have allowed all of the students he examined to attend neighborhood schools; (C) all of the students in the Public Day School received an inferior education as compared to the education available in Springfield's neighborhood schools.[11] *See* ECF No. 158-1.

[11] Dr. Leone is an expert in special education and in providing educational programs and services for children and adolescents with mental health disabilities. ECF No. 158-1, ¶¶ 2-7. In conducting his review, Dr. Leone reviewed the records for a statistically valid, randomly selected sample of 24 class members and interviewed 12 of these students and/or their families. *Id*. ¶¶ 8-9, 12. Dr. Leone also reviewed the Springfield school records of an additional 16 students who were not randomly selected but who had consented to participate in Dr. Leone's review, including Plaintiff S.S and interviewed the families of 7 of the 16 students,

Springfield offered no contrary evidence at all. Springfield did not attempt to show that class members had different disabilities, were subject to different policies, or were placed in schools with varying levels of educational adequacy. Nor could Springfield have done so. The members of the class have, in fact, been treated very similarly to each other. Instead, Springfield's expert focused on the merits of the claims, asserting essentially that Plaintiffs had not yet proven their ADA claim by a preponderance of the evidence. [12]

3. Typicality and Adequacy Were Satisfied

Springfield makes only passing reference to the District Court's holding that S.S. was not an adequate or typical class member. The District Court's attempted point was that S.S.'s decision not to challenge the BSEA's denial of his IDEA claim fatally distinguished him from the class.[13]

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including S.S's parents. *See id*. ¶ 18. Dr. Leone also reviewed Springfield's policies and procedures, other documents and data and 130 redacted IEPs. *Id*. ¶¶ 22-28. The District Court did not criticize Dr. Leone's methodology. Moreover, Dr. Sally Rogers, an expert in social science research design, confirmed that Dr. Leone's approach was sound and his findings well-supported. ECF No. 173-1 ¶ 20 (describing "the robustness of [Dr. Leone's] findings").

[12] Defendants' supposed expert was an attorney named Nicole LaChapelle. Ms. LaChapelle neither had, nor asserted, any training or expertise in research methods. She has no education degree. She has never written or peer-reviewed an education research article. She did not speak with a single student or parent, visit any school, or observe any class in preparing her report. ECF No. 166-2.

[13] As discussed in the Moving Brief, the District Court's conclusion on this point was built on the faulty premise that S.S. was somehow precluded from seeking any

As to typicality, "[t]he central inquiry in determining whether a proposed class has 'typicality' is whether the class representatives' ***claims*** have the same essential characteristics as the ***claims*** of the other members of the class." *Garcia v. E.J. Amusements of N.H.*, No. 13-12536, 2015 WL 1623837, at *7 (D. Mass. Apr. 13, 2015) (quoting *Barry v. Moran*, 2008 WL 7526753, at *11 (D. Mass. Apr. 7, 2008)) (emphasis added). So what matters is that, as to the ADA claims in this case, S.S. has the "same interest" and "same injury" . . . "as the class members," *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982). Springfield offers no serious argument to the contrary.

Similarly, Springfield's arguments on adequacy have no bearing on whether S.S. interests coincided with the class such that he could "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4); *see Falcon*, 457 U.S. 147; *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985). The relevant question on adequacy is merely whether the named plaintiff has "conflicts [with the unnamed class members] that are fundamental to the suit and that go to the heart of the litigation . . .." Newberg on Class Actions § 3:58 (5th ed).

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service that would also have been required under the IDEA. *See* Moving Br. 20-22.

Springfield fails to explain how S.S.'s exhaustion of administrative remedies poses such a conflict.[14]

4. The Injunctive Relief Demanded Will Be Final And Appropriate For Class As Whole.

Plaintiffs are not asking the Court for individualized determinations or a "*different* injunction or declaratory judgment against the defendant" for each class member. *Jamie S.*, 668 F.3d at 499 (emphasis in original) (citing *Wal-Mart*, 131 S. Ct. at 2557). Accordingly, in relying completely on *Jamie S.*, Springfield presents no reason by which this Court could hold that Rule 23(b)(2) was unsatisfied. The problem in *Jamie S.*, according to the court of appeals, was that the plaintiffs in that case were not, in fact, seeking a single remedy. As the Seventh Circuit explained, the *Jamie S.* plaintiffs were so differently-situated that

> In some cases it might be obvious that the child is not disabled, and no further evaluation would be required. In others, a professional evaluation would be required to determine whether the child has a disability. In others, a full IEP meeting would be needed to determine whether the child requires special-education services in order to receive a free appropriate public education. And finally, in some cases the child might be entitled to compensatory education…

Jamie S., 668 F.3d at 489.

[14] Moreover, Springfield's argument that the class representative and unnamed class members must all have the same exhaustion status is contrary to four decades of Supreme Court precedent. *See infra* Section V.A.3.a; *McDonald*, 432 U.S. at 389 n.6; *Franks*, 424 U.S. at 771 (1976); *Albemarle Paper*, 422 U.S. at 414 n.8.

Here, to the contrary, the proposed class is composed entirely of students assigned to a single segregated school, and the relief sought is uniform: an injunction requiring Springfield to stop its policy of unnecessary segregation in the unequal Public Day School. The fact that each child in the class will still be entitled to have the school – not the District Court -- develop an IEP after the injunction issues does not mean that the injunction does not constitute a remedy for the harms at issue in this case. *See Chi. Teachers Union*, 797 F.3d at 441 (reasoning that where "plaintiffs' primary goal is . . . to require the defendant to do or not do something that would benefit the whole class," class certification is appropriate even if implementing the remedy would require the defendant to make individualized determinations for class members); *Kenneth R.*, 293 F.R.D. at 269-70 (certifying class, recognizing that the injunctive relief sought by Plaintiffs would ultimately be implemented through the state's individual service planning process) (citing *Voss v. Rolland*, 592 F.3d 242, 253 (1st Cir. 2010) (approving class settlement and leaving placement decisions for the State's individual service planning process, which would take individual preferences into account)); *accord Steward*, 315 F.R.D. at 492 ("Plaintiffs are not asking the Court to order individual relief, but seek injunctions targeted at the deficiencies they allege exists within Defendants' [ ] service system . . .. Defendants' own administrative machinery—

not the Court—will be capable of conducting assessments of individual [ ] needs . . ..").

VI. CONCLUSION

The District Court's order recognizing the standing of DLC and PPAL should be affirmed, as should be the District Court's order allowing M.W. to intervene for purposes of appeal. The orders denying class certification and entering judgment on the pleadings should both be reversed. The case should be remanded for appointment of a new class representative and other, further proceedings.

Dated: February 25, 2019

Respectfully submitted,

THE PARENT/PROFESSIONAL ADVOCACY LEAGUE; DISABILITY LAW CENTER, INC.; M. W., a minor, by his parents, L.N. and A.N., on behalf of himself and other similarly situated students,

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I, Jeff Goldman, hereby certify that I have caused this brief, with a corrected addendum, to be served via ECF on February 25, 2019 on all registered participants of the CM/ECF System, including:

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