UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DL, et al.,	)	
	)	
Plaintiffs,	)	
	)	**Civil Action No. 05-1437 (RCL)**
v.	)	
	)	
DISTRICT OF COLUMBIA, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' MOTION TO DECERTIFY CLASS

Defendants respectfully move this Court, pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, to decertify the Plaintiff class. Based on admissions of the named Plaintiffs in response to discovery, they lack standing to continue to represent the class to assert any claim for ongoing harm resulting from the District's alleged failures to comply with certain provisions of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.*; Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a); the Due Process Clause of the Fifth Amendment; D.C. Code § 38-2501; and/or various District of Columbia regulations, as alleged in the First Amended Complaint.[1] Because they lack standing, the named Plaintiffs cannot fairly and adequately protect the putative interests of the class concerning the injunctive and declaratory relief sought.

Further, as to the remaining issue of what (if any) individual remedies are available for "funds expended to obtain evaluations, special education and related services as a result of defendants' violations of federal law" (1st Am. Compl. (Docket

[1] The District also submits that there is no private right of action for the broad systemic relief sought by Plaintiffs, and will address that issue in a separate motion.

No. 61) at 35), the District submits that this issue (1) is not appropriate for certification under Federal Rule of Civil Procedure 23(b)(2), under which the class was certified, and (2) is not suitable for class treatment because common issues do not predominate.

The grounds for this motion are set forth more fully in the attached memorandum of supporting points and authorities. A proposed order is submitted herewith.

Respectfully submitted,

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CERTIFICATION

I hereby certify that on March 23, 2011, I attempted to contact counsel for Plaintiffs but was unable to secure consent to the relief requested herein.

/s/ Sarah A. Sulkowski
SARAH A. SULKOWSKI
Assistant Attorney General

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DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DECERTIFY CLASS

In this class action seeking declaratory and injunctive relief, Plaintiffs allege that Defendants (hereinafter, "the District") violated their rights under the Individuals with Disabilities in Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.*; Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a); the Due Process Clause of the Fifth Amendment; D.C. Code § 38-2501; and various District of Columbia regulations. (*See* 1st Am. Compl. (Docket No. 61) at 29-33.)

On September 1, 2005, Plaintiffs moved for certification pursuant to Federal Rule of Civil Procedure 23(b)(2), "in order to seek declaratory and injunctive relief." (Aug. 25, 2006, Order (Docket No. 57) at 2; *see also* Pls.' Mem. in Support of Mot. for Certification (Docket No. 5-1) at 7 ("class certification is appropriate here because plaintiffs are challenging defendants' widespread, systemic failures to comply with their Child Find and FAPE obligations and are seeking prospective injunctive relief").) The Court certified the class pursuant to Federal Rule of Civil Procedure 23(b)(2) on August 25, 2006. (*See id.*)

On February 23, 2011, Plaintiffs provided the District with supplemental interrogatory responses. (*See* Pls.' Resp. to Defs.' 3d Interrogatories, attached hereto as Exhibit 1.) In those sworn responses, Plaintiffs averred that no named Plaintiff has any interest in any claim now pending before the Court. (*See id.* at 3.)

Accordingly, the District now moves to decertify the class on the grounds that no named Plaintiff has standing to assert a claim for prospective injunctive relief, as required by Rule 23(b)(2), and that the named Plaintiffs no longer satisfy the commonality and typicality requirements of Rule 23(a). Further, the District also seeks to decertify the class on the grounds that any calculation of individual remedies due for "funds expended to obtain evaluations, special education and related services as a result of defendants' violations of federal law" (1st Am. Compl. (Docket No. 61) at 35) is inherently individualized and thus is not suitable for class treatment.

II. LEGAL STANDARD

Rule 23(a) requires that a class be represented by named plaintiffs who can establish that (1) the class is so numerous that joinder of all of its members is impracticable; (2) the case involves questions of fact or law that are common to all class members; (3) the named plaintiffs' claims are typical of those of the class; and (4) the named plaintiffs will fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a).

Under Rule 23(b)(2), a class may be maintained only if all of the requirements of Rule 23(a) are satisfied and "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2). "Plaintiffs bear the burden of establishing that there is a 'reasonable basis for crediting their assertions' as

to each Rule 23 requirement." (Docket No. 57 at 3 (brackets omitted) (quoting *Wagner v. Taylor*, 836 F.2d 578, 587 n.57 (D.C. Cir. 1987)); *see also McCarthy v. Kleindienst*, 741 F.2d 1406, 1414 n.9 (D.C. Cir. 1984).)

The Supreme Court has characterized class-certification orders as "inherently tentative," such that the certifying court "remains free to modify them in the light of subsequent developments in the case." *Gen. Tel. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982), *quoted in Lightfoot v. District of Columbia*, Civil Action No. 01-01484 (CKK), 2011 U.S. Dist. LEXIS 1983, at *26-*27 (D.D.C. Jan. 10, 2011). "In fact, as the 'gatekeeper' in the certification context, district courts may abuse their discretion by failing to revisit their preliminary certification decisions where continued certification is no longer appropriate." *Lightfoot*, 2011 U.S. Dist. LEXIS 1983, at *27. Reconsideration of class certification is particularly appropriate where, as here, the Court "has the benefit of a significantly more developed evidentiary record, as well as a more concrete sense of the nature of the claims and defenses remaining in this action," than it did at the time of its initial decision on certification. *Id.* at *28-*29. This certainly is true here, where the class was certified in 2006, and the status of the named Plaintiffs has since changed markedly.

In revisiting the certification question, the Court must "conduct a rigorous analysis to ensure that all the requirements of class certification are satisfied, and actual, not presumed, conformance is indispensable." *Id.* at *31 (internal quotation marks and brackets omitted).

III. ANALYSIS

In certifying the class in this matter, this Court found that Plaintiffs had satisfied the commonality requirement of Rule 23(a)(2) by, *inter alia*, asserting "that their common injury can only be rectified by injunctive and declaratory relief." (Docket No. 57 at 6.) This simply is no longer the case. Rather, Plaintiffs now expressly concede that all of the named Plaintiffs "allege violations of federal and local law occurring . . . prior to 2008" and, therefore, that "their claims are *no longer relevant to the remaining issues in this case*." (Ex. 1 at 3 (emphasis added).)

Having thus abandoned their claim for injunctive relief, Plaintiffs no longer satisfy the commonality requirement, as the resolution of their remaining claims—to the extent that such claims exist at all—will require an individualized inquiry into the circumstances of each alleged deprivation and the appropriate compensation (if any) therefor, rather than the crafting of a single, broad-based, prospective remedy. *See George v. Duke Energy Ret. Cash Balance Plan*, 259 F.R.D 225, 240 (D.S.C. 2009) ("Individual circumstances specific to each class member preclude class treatment of Plaintiffs' . . . claim. . . . The court is denying certification because Plaintiffs have failed to establish the threshold commonality requirement of Rule 23(a)."); *Wiseman v. First Citizens Bank &Trust Co.*, 215 F.R.D. 507, 511 (W.D.N.C. 2003) ("Because individual issues will predominate this litigation, . . . class certification is inappropriate."); *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005) ("awards compensating past [IDEA] violations rely on individualized assessments"); *id.* ("designing [an individual plaintiff's IDEA] remedy will require a fact-specific exercise of discretion by either the district court or a hearing officer"); *Friendship Edison Pub.*

Charter Sch. Collegiate Campus v. Nesbitt, 532 F. Supp. 2d 121, 124 (D.D.C. 2008) ("It is not enough that an award of compensatory education is based on a prospective consideration of a student's needs—without an adequate record, after all, those needs cannot be accurately measured or an award properly individualized.").[2]

Moreover, even if Plaintiffs could argue, in contravention of their sworn interrogatory responses, that the class representatives' claims continue to be common to and typical of the class, the class must nonetheless be decertified for failure to meet Rule 23(b)(2)'s requirement that the equitable claim predominate over claims for compensatory relief. Because no named Plaintiff asserts any injury postdating 2007, and therefore none has standing to seek prospective injunctive relief, the only claims that the named Plaintiffs can assert are for compensation—that is, money damages. Such claims cannot support continued class certification under Rule 23(b)(2), even if they could somehow be common to the class as a whole (which, the District submits, they cannot). *See Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 530 (D.C. Cir. 2006) ("Subsection (b)(2) was not intended to extend to cases in which the appropriate final relief relates exclusively or predominantly to monetary damages." (internal quotation marks omitted) (quoting FED. R. CIV. P. 23 advisory committee's note)); *Sosna v. Iowa*, 419 U.S. 393, 402 (1975) ("There must not only be a named plaintiff who has . . . a [live] case or controversy at the time the complaint is filed, and at the time the class action is certified

[2] Indeed, Plaintiffs appear to recognize that their claims for backward-looking compensatory relief are not susceptible to class treatment. (*See* Pls.' Pretrial Statement (Docket No. 207) at 20 ¶ 6 ("plaintiffs intend to meet and confer with defendants within 30 days *after the Court issues its decision on the matters presented at trial* and propose a procedure for addressing class members' claims for individual relief" (emphasis added)).)

by the District Court pursuant to Rule 23, but there must be a live controversy at the time this Court reviews the case." (footnotes omitted)).

Finally, the named Plaintiffs can no longer even establish the fundamental federal prerequisite of Article III standing to seek injunctive relief, because they cannot show a likelihood that they themselves are likely to be denied a FAPE in the future. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (a plaintiff's "standing to seek the injunction requested depend[s] on whether he [is] likely to suffer *future* injury" from the challenged practice (emphasis added)); *Cruz v. Am. Airlines, Inc.*, 356 F.3d 320, 328-29 (D.C. Cir. 2004) (no Article III standing to seek prospective injunction where likelihood of future injury is entirely speculative).

As the Supreme Court explained in *Lyons*, it simply is not enough that the complained-of activity may at some future time happen again to some unspecified person; rather, to establish standing, a plaintiff must show that he himself is likely to suffer future injury from that practice. In *Lyons*, for example, the plaintiffs claimed that the Los Angeles police had violated their constitutional rights by subjecting them to unwarranted strangleholds. *See* 461 U.S. at 97-98. The Court held that the mere possibility that some future police officer would use an unconstitutional stranglehold was not enough to confer Article III standing to seek prospective equitable relief:

> Of course, it may be that among the countless encounters between the police and the citizens of a great city such as Los Angeles, there will be certain instances in which strangleholds will be illegally applied and injury and death unconstitutionally inflicted on the victim. As we have said, however, it is no more than conjecture to suggest that in every instance of a traffic stop, arrest, or other encounter between the police and a citizen, the police will act unconstitutionally and inflict injury without provocation or legal excuse. And it is surely no more than speculation to assert either that Lyons himself will again be involved in one of these unfortunate instances, or that he will be arrested in the future and provoke

> the use of a chokehold by resisting arrest, attempting to escape, or threatening deadly force or serious bodily injury.

Id. at 108; *see also id.* at 109 ("The equitable doctrine that cessation of the challenged conduct does not bar an injunction is of little help in this respect, for Lyons' lack of standing does not rest on the termination of the police practice but on the speculative nature of his claim that *he* will again experience injury as a result of that practice even if continued." (emphasis added)).

IV. CONCLUSION

Because the named Plaintiffs disavow any claim of a continuing violation, they no longer satisfy the commonality requirement of Rule 23(a) with respect to their claims for prospective injunctive relief, nor can they show that equitable claims predominate over claims for compensatory relief, as required by Rule 23(b)(2). Finally, and most fundamentally, they cannot establish Article III standing to seek forward-looking equitable relief, because they cannot show more than a speculative likelihood of future injury. For all of these reasons, the class must be decertified.

Respectfully submitted,

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ORDER

Upon review of Defendants' motion to decertify the Plaintiff class, any opposition thereto, and the entire record in this matter, it is hereby

ORDERED that the motion is GRANTED, and it is further

ORDERED that the Plaintiff class is DECERTIFIED.

Date: _____

_____
Hon. Royce C. Lamberth
Chief Judge
United States District Court