UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

B.H., on behalf of her minor daughter D.B.; A.M., on behalf of her minor daughter M.M.; D.L., on behalf of her minor daughter D.Y.; K.C., on behalf of her minor son N.C.; L.W.; A.M.; and all others similarly situated; and EL PUENTE DE WILLIAMSBURG, INC., Plaintiffs, -versus- CITY OF NEW YORK; MAYOR MICHAEL R. BLOOMBERG, in his official capacity; POLICE COMMISSIONER RAYMOND W. KELLY, in his official capacity; ASSISTANT CHIEF THOMAS CHAN, in his official capacity; SERGEANT ROSLYN DOWNING-LEE, in her individual and official capacities; SCHOOL SAFETY OFFICER TAKASHA EDMOND, in her individual and official capacities; SCHOOL SAFETY OFFICER KEVIN MAYES, in his individual and official capacities; SCHOOL SAFETY OFFICER GREGORY RICHARDSON, in his individual and official capacities; and SCHOOL SAFETY OFFICER DAVID HARRISON, in his individual and official capacities, Defendants.	)	10 CV 0210 (RRM)(ALC)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO CERTIFY A CLASS UNDER FEDERAL RULE OF CIVIL PROCEDURE 23

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This case is a paradigmatic class action. It challenges systemic, unconstitutional policies and practices of the New York City Police Department (the "NYPD"), as implemented in New York City's public middle and high schools, on behalf of all students in those schools. Specifically, members of the NYPD's School Safety Division (the "School Safety Division") arrest or otherwise seize students for non-criminal violations of school rules and without probable cause of criminal conduct. Further, members of the School Safety Division use excessive force against students, often not incident to a lawful arrest, but allegedly to secure compliance with school rules.

These policies and practices substantially harm students at schools across New York City. Students are handcuffed, detained, and often brought to police precincts for infractions for which schoolchildren have traditionally been merely reprimanded by a teacher or school administrator. As a legal matter, these policies and practices deprive students of their federal and state law rights. As a matter of pedagogy, these policies and practices deprive students of the safe environment necessary for a successful educational experience.

The challenged policies and practices manifest themselves in episodes that are quite shocking. For example, Plaintiff L.W. was sixteen when School Safety Officers at his Queens school punched him repeatedly in the head, poked him in the eye, and handcuffed him—all because they suspected he had a cell phone, which he did not, and because he indicated that he did not want to be searched. Am. Compl. ¶¶ 109-18. Plaintiff M.M. was twelve when members of the School Safety Division at her Bronx middle school handcuffed her, perp-walked her through school, and brought her to a local police precinct, where she sat cuffed to a bench. The "offense" supposedly justifying this treatment: M.M. had doodled on her desk in erasable ink.

Id. ¶¶ 46-56; Declaration of Alexis Karteron, Ex. 17, Arrest Report of M.M.[1] The Amended Complaint describes many other episodes of equal or greater gravity.

Plaintiffs move to certify a class consisting of all students who are enrolled in, or will be enrolled in, New York City public middle schools and high schools, because all members of that class have been, or are at risk of being, subjected to unlawful seizures and/or excessive force under City-Defendants' unconstitutional policies and practices.[2] The requirements for class certification as set forth in Rule 23 are easily established here. The proposed class satisfies the numerosity requirement because there are hundreds of thousands of class members, which makes joinder impracticable. The commonality requirement is met because there are common questions of fact regarding the nature of the policies and practices described above as well as common legal questions as to whether these policies and practices violate federal and state law. The typicality requirement is satisfied because the named Plaintiffs' claims stem from the same policies and practices that give rise to the proposed class's claims. Also, Plaintiffs meet the adequacy of representation requirement because their interests and those of the class are aligned in that they seek reform with respect to policies and practices that have caused injury to them and also to other class members, and their counsel will fairly and adequately represent the class.

Finally, this lawsuit can be maintained as a class action under Rule 23(b)(2) because the policies and practices of City-Defendants apply generally to the class and final declaratory and injunctive relief will be appropriate for the class as a whole.

---

[1] All exhibits referenced hereafter are attached to the Declaration of Alexis Karteron submitted herewith.

[2] Plaintiffs seek certification only with respect to their claims against the City and its policymakers, i.e., Defendants Mayor Bloomberg, Commissioner Kelly, and Assistant Chief Chan (collectively "City-Defendants"). *See* Am. Compl. ¶ 10.

STATEMENT OF FACTS

I. THE NYPD IS RESPONSIBLE FOR SCHOOL SAFETY.

In 1998, responsibility for maintaining safety in the City's public schools was transferred from the Board of Education to the NYPD pursuant to a Memorandum of Understanding ("MOU") among the Board of Education of the City of New York, the Chancellor of the City School District, and the City of New York.[3] Ex. 2. Since that time, the number of police personnel who patrol City schools for the School Safety Division has increased by 73 percent. Am. Compl. ¶ 4. Presently, the School Safety Division employs more than 5,000 School Safety Officers, making it the fifth largest police force in the United States. *Id.* ¶¶ 1, 5; Answer to Amended Complaint on behalf of City of New York, Mayor Michael Bloomberg, Police Commissioner Raymond Kelly, Assistant Chief Thomas Chan, School Safety Agent Roslyn Downing-Lee, and School Safety Agent Takasha Edmond ("Answer") ¶¶ 1, 5. The School Safety Division also includes approximately 200 armed precinct-based police officers who are indistinguishable from the officers who patrol New York City streets, except that these officers have been assigned to patrol New York City public schools. Am. Compl. ¶ 35; Answer ¶ 1.

School Safety Officers, who are stationed at every public school in the City, wear NYPD uniforms, carry handcuffs, and are deputized with the power to arrest. Am. Compl. ¶¶ 1, 35; Answer ¶¶ 1, 35. However, unlike NYPD police officers who ordinarily receive six months of training, School Safety Officers receive at most fifteen weeks of training. Am. Compl. ¶ 37; Answer ¶ 37; Ex. 4, Testimony of James Secreto, Hearing Before the Committees on Education,

---

[3] The full title of the MOU is Memorandum of Understanding Among the Board of Education of the City of New York, the Chancellor of the City School District of the City of New York and the City of New York on the Performance of School Security Functions by the New York City Police Department for the Benefit of the City School District of the City of New York and Its Students and Staff, dated September 17, 1998. The MOU remains in effect. *See* Ex. 3, Letter of Agreement Regarding the Continuation of the September 17, 1998 Memorandum of Understanding on the Performance of School Security Functions, dated January 22, 2003.

Public Safety, and Juvenile Justice, New York City Council (Nov. 10, 2009) ("2009 Secreto City Council Testimony") at 33:23-34:3; Ex. 5, Testimony of James Secreto, Hearing Before the Committees on Education, Public Safety, and Juvenile Justice, New York City Council (Oct. 10, 2007) ("2007 Secreto City Council Testimony") at 24:14-16; Ex. 6, Letter from Defendant Raymond Kelly to Hon. Robert Jackson, New York City Council (June 11, 2007) ("Kelly Letter"). Job qualifications for School Safety Officers, which are uniform across the City, differ from those for ordinary NYPD police officers as well in that School Safety Officers are not required to have at least sixty hours of college credit or two years of military service. Am. Compl. ¶ 38; Answer ¶ 38.[4] The NYPD, not school officials, is responsible for the supervision and discipline of all School Safety Division members. Am. Compl. ¶ 40; Answer ¶ 40.

II. THE POLICIES AND PRACTICES OF CITY-DEFENDANTS ARE UNCONSTITUTIONAL.

City-Defendants have not created legally or educationally appropriate procedures for members of the School Safety Division, despite the massive influx of these NYPD personnel into schools. To the contrary, the policy and practice of unlawfully seizing and arresting schoolchildren for conduct that does not constitute probable cause of criminal activity is actually the official policy of the City-Defendants. According to the MOU, "the NYPD, through school security personnel . . . is hereby authorized to enforce rules, regulations, or procedures of the Board [of Education] . . . ." Ex. 2 at ¶ 18. Thus, the initial mandate of the NYPD with respect to school safety included enforcing school disciplinary rules.

Further, as enunciated by Defendant Police Commissioner Kelly, the highest ranking official of the NYPD, the duties of School Safety Officers include "removing unruly students" and "enforc[ing] the rules and regulations" of the "Student Disciplinary Code." Ex. 6 (Kelly

[4] Plaintiffs also understand that School Safety Officers are subjected to less rigorous medical, psychological, and character screenings. Am. Compl. ¶ 38.

Letter). At New York City Council hearings in 2007 and 2009, James Secreto, then the Commanding Officer of the School Safety Division (and Defendant Chan's predecessor), also stated that School Safety Officers are responsible for "removing unruly" students from public schools. Ex. 4 at 33:16-22; Ex. 5 at 23:5-12.

Neither Defendant Kelly nor former Assistant Chief Secreto defined the term "unruly." However, the plain meaning of that term, and the statement by Defendant Kelly that School Safety Officers are to "enforce" school rules demonstrate that as a matter of policy students will be seized for conduct that falls short of even minor criminal behavior. And, in fact, School Safety Officers have manifested such an understanding of these directives in numerous dealings with students as detailed in the Amended Complaint and the declarations submitted in conjunction with this motion. Thus, the policy and practice of unlawfully seizing and arresting schoolchildren for minor school misbehavior constitutes official municipal policy.[5]

The policy and practice of employing excessive force against schoolchildren can be established as a matter of custom and usage, given the number of complaints filed against School Safety Officers and the incidents enumerated in the Amended Complaint. For example, between 2002 and 2007, an average of 500 complaints were lodged annually against School Safety Officers (or one complaint for every eight to ten School Safety Officers). Ex. 6 (Kelly Letter). According to Defendant Kelly, 27 percent of those complaints were substantiated, a far higher rate than the 3.6 percent substantiation rate for complaints filed against regular NYPD police officers. *Id.* The number of complaints lodged against School Safety Officers in recent years is even more striking. In testimony before the New York City Council, former Assistant Chief Secreto disclosed that during 2008, 1,159 complaints had been filed against School Safety

[5] Given the number of episodes in which children have been seized for non-criminal conduct, this policy can be established as a matter of custom and usage as well.

Officers, which is a staggering rate of almost one complaint for every four School Safety Officers. Ex. 4 at 37:9-11.[6]

III. NAMED PLAINTIFFS AND OTHER PUTATIVE CLASS MEMBERS HAVE BEEN SUBJECTED TO CITY-DEFENDANTS' POLICIES AND PRACTICES.

Beyond the statistics referenced above, the Amended Complaint details episodes involving thirty schoolchildren at more than twenty schools across the five boroughs, including the named Plaintiffs, who have been subjected to the policies and practices at issue.

Plaintiff D.Y., for instance, was subjected to an unlawful seizure and excessive force for refusing to comply with an ill-advised and potentially dangerous directive from a School Safety Officer when she was only thirteen. Ex. 7, D.Y. Decl. ¶¶ 3-9. On October 7, 2009, D.Y. and two friends had just arrived at school when they were approached by two unfamiliar adults who began threatening them. *Id.* ¶ 3. A nearby School Safety Officer instructed the girls and the adults to enter the school building, which the adults did. *Id.* ¶ 4; Ex. 8, Criminal Incident Report. Afraid to join these strangers, who had just been issuing threats, D.Y. refused to enter the school, instead sending a text message to her mother asking for help. Ex. 7 ¶ 3.

Two School Safety Officers grabbed and painfully twisted D.Y.'s arms in order to force her into the building. *Id.* ¶ 5. A third School Safety Officer taunted, pushed, handcuffed, and tripped D.Y. *Id.* ¶ 8. After about an hour, D.Y.'s mother arrived and D.Y. was released to her care. *Id.* ¶ 10. Since the incident, School Safety Officers have continued to harass D.Y., and she fears that School Safety Officers will assault or arrest her again. *Id.* ¶¶ 13-14.

---

[6] Even this high complaint rate is likely artificially depressed because parents and students are often given inaccurate instructions as to how to file a complaint regarding School Safety Officers. For example, 311 operators have directed calls to the Department of Education rather than the NYPD's Internal Affairs Bureau ("IAB"), which is the only agency that has jurisdiction over such matters. In addition, School Safety Division operators have directed parents and students to School Safety borough offices instead of IAB. Am. Compl. ¶ 153.

School Safety Officers used excessive force against Plaintiff N.C., then a thirteen-year-old Bronx eighth grader, following a verbal disagreement between N.C. and his school principal. Ex. 9, N.C. Decl. ¶¶ 3-12. During this disagreement, a School Safety Officer grabbed N.C. by the hood of his sweatshirt, tearing it, and said that she would not let him go until she was "good and ready." *Id.* ¶¶ 7-8. She pushed N.C. against a wall—twice—resulting in a cut to his head that bled. *Id.* ¶¶ 9, 13. While N.C. was held against the wall, the same School Safety Officer punched him in the face, causing bruises, and struck him in the groin with her knee. *Id.* ¶ 10. After a second School Safety Officer arrived, the two School Safety Officers brought N.C. to the ground, and one of them struck N.C.'s shoulder. *Id.* ¶ 11. They then handcuffed N.C. *Id.* ¶ 12. N.C. was transported to a local precinct, where he was handcuffed to a metal bar for over two hours. *Id.* ¶ 13. N.C. was eventually released to his mother and taken to a hospital, where his injuries were treated.[7] Ex. 10, K.C. Decl. ¶¶ 4-5. N.C. has never received notice of any criminal or other legal process against him. Ex. 9 ¶ 13.

Plaintiff D.B., then a fourteen-year-old Brooklyn ninth grader, endured a similarly excessive use of force by two School Safety Officers. Following the clearing of D.B.'s book bag through her school's metal detector, Defendant Sergeant Downing-Lee, a member of the School Safety Division, tried to pull the book bag away without explanation, and a tugging match ensued between D.B. and Sergeant Downing-Lee. Ex. 11, D.B. Decl. ¶ 7. Sergeant Downing-Lee and Defendant Takasha Edmond, another School Safety Officer, began to push D.B. out of the building for no apparent reason. *Id.* ¶ 8. When D.B. demanded her coat, which had been placed in a scanner, Sergeant Downing-Lee shoved the coat in D.B.'s face and a physical confrontation ensued. *Id.* ¶¶ 9-10. D.B. was punched approximately seven times on the left side

[7] A police officer expressed concern to N.C.'s mother about the way N.C. had been treated by the School Safety Officers and provided information on filing a complaint with IAB. Ex. 10 ¶ 5.

of her head; also, the strap of her bag fell around her neck, choking her. *Id.* ¶ 10. She was then placed in a headlock, handcuffed, and arrested. *Id.* D.B. was eventually brought to the local police precinct, and following her mother's intervention, was taken to the hospital by ambulance. *Id.* ¶ 11; Ex. 12, B.H. Decl. ¶ 6. The charges brought against D.B. were eventually dismissed without D.B.'s having ever been seen by a judge. A school discipline charge brought against D.B. was dismissed as well. Ex. 11. ¶ 14.

Plaintiff A.M., a Brooklyn high school student, was fifteen years old when she was physically assaulted and unlawfully arrested at school by a member of the School Safety Division. Ex. 13, A.M. Decl. ¶¶ 4-9; Ex. 14, Arrest Report. After a school official told A.M. to proceed to detention for being in the hall during lunch, A.M. was walking toward the detention room when a School Safety Officer approached her from behind and grabbed her book bag, pulling A.M. along with it. Ex. 13 ¶ 6. When A.M. asked for the School Safety Officer's badge number, he grabbed A.M. by her wrist and forcefully twisted it behind A.M.'s back. *Id.* ¶¶ 7-8. The School Safety Officer then handcuffed A.M. and slammed her against the wall. *Id.* ¶ 8. A.M. was eventually brought to a local precinct, where she was handcuffed to a pole. *Id.* ¶ 11. A.M. was never charged with a crime. *Id.* ¶ 12.[8]

In addition to the incidents described above regarding the named Plaintiffs, the Amended Complaint contains specific allegations regarding abuses committed against twenty-four other children who attend more than twenty schools throughout the City.[9] By way of example, A.G., a

[8] The experiences of plaintiffs M.M. and L.W. are described in the Preliminary Statement, *supra* at 1-2, and in the declarations of M.M. and L.W. *See* Exs. 15, 18.

[9] *See* Am. Compl. ¶¶ 42-44, 155-206; Exs. 19-20, Declarations of K.W., B.E.; Exs. 21-29, Notices of Claim of R.M., A.G., R.B., A.H., C.R., T.G., L.S., J.G., P.C.; Ex. 30, Testimony of A.P., Hearing Before the Committees on Education, Public Safety, and Juvenile Justice, New York City Council (Oct. 10, 2007); Exs. 31-34, Testimony of C.S., M.D., Nancy Rosenbloom, and Tara Foster, Hearing Before the Committees on Education, Public Safety, and Juvenile Justice, New York City Council (Nov. 10, 2009); Ex. 35, Compl., *Crowther v. City of New York*, No. 08-cv-2671 (E.D.N.Y. filed July 2, 2008); Ex. 36, Compl., *Ramos v. City of New York*, No. 05-cv-637 (S.D.N.Y. filed Jan. 18, 2005); Ex. 37, Compl., *Cruz v. City of New York*, No. 08-cv-10055 (S.D.N.Y. filed Nov. 19, 2008); Ex. 38,

twelve-year-old seventh grader in Queens, was arrested for doodling on a school desk with a water soluble, erasable marker; just like M.M. Am. Compl. ¶¶ 198-203; Ex. 22, A.G. Notice of Claim; Ex. 39, Rachel Monahan, Queens girl [A.G.] hauled out of school in handcuffs after getting caught doodling on desk, *N.Y. Daily News* (Feb. 4, 2010). A.G. was handcuffed, brought to a precinct, and then handcuffed to a pole for over two hours. Ex. 22 at 3.

By way of further example, S.C., a high school student in Queens, was in a bathroom stall when the door was suddenly kicked in by a School Safety Officer. Am. Compl. ¶¶ 204-06; Ex. 37, Compl., *Cruz v. City of New York*, No. 08-cv-10055 (S.D.N.Y. filed Nov. 19, 2008) at ¶¶ 12-13. The door hit S.C. in the head, causing bleeding and pain, but the School Safety Officer refused to help, saying "that's life. It will stop bleeding," before leaving. Ex. 37 at ¶ 14.

R.M., as a fifteen-year-old high-school student, was severely assaulted by School Safety Officers on three separate occasions. The first two assaults were allegedly spurred by R.M.'s use of a cell phone; the third occurred after R.M. filed notices of claim with respect to the first two incidents. Am. Compl. ¶¶ 191-97; Ex. 21, R.M. Notice of Claim; Ex. 38, Compl., *Morgan v. City of New York*, No. 09-cv-3619 (E.D.N.Y. filed Aug. 20, 2009) at ¶¶ 16-19, 22-23, 28. School Safety Officers retaliated against R.M. by dragging him into a stairwell, choking him, and threatening him. Ex. 38 at ¶ 28. These outrageous abuses, like those of the named Plaintiffs and others described in the Amended Complaint, also arise out of the City-Defendants' policies and practices regarding the seizure and/or arrest of, and the use of excessive force against, students.[10]

Compl., *Morgan v. City of New York*, No. 09-cv-3619 (E.D.N.Y. filed Aug. 20, 2009).

[10] School Safety Officers have also unlawfully arrested school staff who have intervened on behalf of students. For example, in October 2007, a high school girl was arrested by School Safety Officers after arriving early to school. Am. Compl ¶¶ 42-43; Ex. 42, *People v. Federman*, 19 Misc. 3d 478 (N.Y. Crim. Ct. 2008). When Marc Federman, the principal of the school, attempted to prevent the arrest, School Safety Officers arrested Mr. Federman on charges of obstructing government activity and resisting arrest. *Federman*, 19 Misc. 3d at 480. The court concluded that "this incident highlights the tension between school administrators and the NYPD concerning a principal's authority

IV. CITY-DEFENDANTS ARE AWARE OF THESE UNCONSTITUTIONAL POLICIES AND PRACTICES, AND REFUSE TO REMEDY THEM.

Defendants Mayor Bloomberg, Commissioner Kelly, and Assistant Chief Chan (or his predecessor), decision-makers for the City of New York, have repeatedly been made aware of the referenced policies and practices. In fact, as discussed, City-Defendants have themselves enunciated the policy and practice of unlawful seizure and/or arrest. In addition, City-Defendants are aware of the statistics regarding complaints as cited above and have received copies of reports, letters, media accounts, substantiated IAB complaints, notices of claims, and pleadings documenting instances of abuse. Am. Compl. ¶¶ 219-30. Moreover, the New York City Council held hearings in 2007 and 2009, which included testimony from students, teachers, and experts regarding these issues. *Id.* ¶¶ 231-34.

Nonetheless, City-Defendants have repeatedly refused to revise their policies and practices or to create training and oversight programs to rectify the conduct of School Safety Division personnel. Given City-Defendants' intransigence, Plaintiffs had little choice but to bring this lawsuit seeking declaratory and injunctive relief to prevent future constitutional violations by City-Defendants.

ARGUMENT

Plaintiffs seek certification of a class of all New York City public middle and high school students who have been or are at risk of being subjected to unlawful seizures and/or excessive force under City-Defendants' unconstitutional policies and practices. Therefore, Plaintiffs move

---

in overseeing school premises," *id.* at 481, and dismissed the charges "in the interest of justice." *Id.* at 482. Similar incidents occurred at two Bronx schools in 2005. *See* Ex. 40, Elissa Gootman, City Faces Criticism After Bronx Principal's Arrest, *N.Y. Times* (Feb. 9, 2005); Ex. 41, David Andreatta, Busted Bx. Teach Rips "Rage" Cops, *N.Y. Post* (Mar. 11, 2005); *see also* Ex. 43, Sean Gardiner, NYPD's Schoolyard Bullies – Another recent case of police as heavies in local schools, *Village Voice* (July 16, 2008).

to certify a class consisting of all students who are enrolled in, or will be enrolled in, New York City public middle and high schools.

I. THE PROPOSED CLASS SATISFIES THE REQUIREMENTS OF RULE 23(a).

The propriety of class certification is determined by analyzing whether a plaintiff has satisfied the requirements of Rule 23, and not the merits of the underlying suit. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). Rule 23 requires a plaintiff to establish that: (1) the class is sufficiently "numerous"; (2) "there are questions of law or fact common to the class"; (3) the class representatives' claims are "typical" of those of the class; and (4) the class representatives "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). "'Rule 23 is given liberal rather than restrictive construction, and courts are to adopt a standard of flexibility . . . '" *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997) (per curiam) ("*Marisol A. II*") (quoting *Sharif v. N.Y. State Educ. Dep't*, 127 F.R.D. 84, 87 (S.D.N.Y. 1989) (ellipsis in original)). This approach is particularly appropriate in the early stages of litigation, "since the class can always be modified or subdivided as issues are refined for trial." *Woe v. Cuomo*, 729 F.2d 96, 107 (2d Cir. 1984).[11]

A. The Class Is Sufficiently Numerous that Joinder Is Impracticable.

A plaintiff must show that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Numerosity relates solely to the size of the proposed class and the practicality of joinder . . . ." *Casale v. Kelly*, 257 F.R.D. 396, 409 (S.D.N.Y. 2009). "Impracticability does not mean impossibility of joinder, but difficulty of joinder." *D.S. ex rel. S.S. v. N.Y.C. Dep't of Educ.*, 255 F.R.D. 59, 70 (E.D.N.Y. 2008). "What constitutes

[11] Plaintiffs are mindful of the Second Circuit's teachings in *In re Initial Public Offering Securities Litigation*, 471 F.3d 24 (2d Cir. 2006). There, the court indicated that a district court may sometimes be required to resolve factual disputes to determine whether the Rule 23 requirements have been met. *Id.* at 41. Thus, while Plaintiffs have no desire to burden the Court with unnecessary papers, they have submitted sworn statements and exhibits to permit the resolution of factual issues as necessary.

impracticability or numerosity depends on the particular facts of each case." *Bruce v. Christian*, 113 F.R.D. 554, 556 (S.D.N.Y 1987). However, in the Second Circuit, there is a presumption that the numerosity element is satisfied if there are at least forty class members. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995).

Given these guidelines, courts have found that numerosity was established in many actions that, like this one, challenged systemic governmental policies on constitutional or other grounds. For example, in *Bruce v. Christian*, the plaintiff brought a class action alleging due process violations stemming from the policies and practices of the New York City Housing Authority in ratifying administrative hearing decisions to terminate tenancies. 113 F.R.D. at 555. The court found the numerosity requirement satisfied even though the plaintiff had identified only sixteen cases that supported her claim, explaining that the conduct at issue "affects or will affect numerous individuals whose joinder is impracticable." *Id*. at 557. Similarly, in *Brown v. Giuliani*, also a 42 U.S.C. § 1983 case, the court certified a class represented by seven applicants to the Aid for Families with Dependent Children program on behalf of "over 500,000 individuals" who had experienced or might experience untimely payments even though the defendant claimed the class was not precisely drawn. 158 F.R.D. 251, 268 (E.D.N.Y. 1994).

In *Marisol A. v. Giuliani*, 929 F. Supp. 662 (S.D.N.Y. 1996) ("*Marisol A. I*"), *aff'd*, 126 F.3d 372 (2d Cir. 1997) (per curiam), the court certified a class represented by eleven plaintiffs in a challenge to an array of City policies concerning child welfare programs. *Id.* at 669. The class included all children who were in the custody of the City's Child Welfare Administration ("CWA") (approximately 43,000), an unknown number of children who would be in the custody of CWA, and an unknown number of all children at risk of neglect whose status was or should have been known to the CWA. *Id.* at 689-90. The court did not require the plaintiffs to

demonstrate that every child had suffered abuse because the fact that there were thousands of children at risk of abuse within the CWA was sufficient to establish numerosity. The court concluded that "a class of th[at] size easily satisfie[d] Rule 23(a)(1)." *Id.* at 690.

Here, numerosity is easily established. There are approximately 185,000 middle school students and 270,000 high school students currently enrolled in New York City public schools. Am. Compl. ¶ 33; Ex. 1, Mayor's Management Report, Supplemental Indicators. Given the citywide application of City-Defendants' policies and practices, all public middle and high school students are at risk of being subjected to an unlawful arrest and/or excessive force. Am. Compl. ¶¶ 32, 131.

In addition to the sheer size of the proposed class, other factors render joinder of all class members impracticable and militate in favor of finding that numerosity is established. "[J]udicial economy[,] . . . financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members" must also be considered. *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993) (citations omitted).

In this case judicial economy weighs heavily in favor of finding that the proposed class meets the numerosity requirement. If individual students were forced to challenge the City-Defendants' policies one at a time, such adjudications would be redundant, expensive, time-consuming, and burdensome on the courts because each student would have to establish in serial fashion the existence of the relevant policies as well as the illegality thereof. *See In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 290 (2d Cir. 1992). Clearly, class certification in this case will save the resources of "'both the court[] and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule

23.'" *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979) (second alteration in original)).

In addition, it is likely that many potential class members would be unable to litigate their claims absent certification. The vast majority of class members are minors who lack the financial resources necessary to challenge City-Defendants' actions in individual suits. *See Gulino v. Bd. of Educ. of City of New York*, 201 F.R.D. 326, 331 (S.D.N.Y. 2001) (finding numerosity met in part because many class members have limited financial resources). Moreover, putative class members may be unwilling to litigate individually for fear of retaliation by School Safety Division personnel. *See* Am. Compl. ¶ 194 ("After R.M. filed notices of claim with respect to these two incidents, School Safety Officers retaliated against him by dragging him into a stairwell, choking him, and threatening him."). Most class members are required by law to attend school, and in many instances regularly see the School Safety Division personnel who abused them. *See Mullen v. Treasure Chest Casino*, 186 F.3d 620, 625 (5th Cir. 1999) (numerosity requirement met in part because of inference that potential class members would be too fearful of retaliation to take part in lawsuits); *Horn v. Associated Wholesale Groceries, Inc.*, 555 F.2d 270, 276 (10th Cir. 1977) (same).

Finally, the relief sought in this case would benefit all class members. Plaintiffs seek broad injunctive relief to reform City-Defendants' policies, including a declaration that said policies are unlawful. Moreover, Plaintiffs will request an order directing City-Defendants, among other things, to create policies prohibiting the unlawful arrest of schoolchildren, to improve training for School Safety Division personnel, to develop appropriate disciplinary procedures for School Safety Division personnel, to ensure that school administrators have an appropriate role in maintaining school safety, and to develop a transparent mechanism for filing

complaints against School Safety Division personnel. *See Robidoux*, 987 F.2d at 936; *Nicholson v. Williams*, 205 F.R.D. 92, 98 (E.D.N.Y. 2001) (noting Second Circuit has relaxed numerosity requirement where (b)(2) class seeks declaratory and injunctive relief, and collecting cases).

B. There Are Questions of Law and Fact Common to the Proposed Class.

To establish commonality, a plaintiff must show "a single question of fact or law common to the prospective class." *Gulino*, 201 F.R.D. at 31. This burden is not especially great in constitutional cases like this because "there is an assumption of commonality where plaintiffs seek certification of an injunctive class under Rule 23(b)(2)." *Nicholson*, 205 F.R.D. at 98. In fact, when "a plaintiff alleges injury from a common policy, the commonality requirement is met." *Romano v. SLS Residential Inc.*, 246 F.R.D. 432, 444 (S.D.N.Y. 2007).

Thus, commonality is established when plaintiffs "challenge[] a practice of defendants, as opposed to defendants' conduct with respect to each individual plaintiff." *Ventura v. N.Y. City Health & Hosps. Corp.*, 125 F.R.D. 595, 600 (S.D.N.Y. 1989) (citing *Port Auth. Police Benevolent Ass'n v. Port Auth.*, 698 F.2d 150, 153-54 (2d Cir. 1983)). In this regard, a single system that fails to meet constitutional, statutory, and common law standards gives rise to common factual and legal questions. *See, e.g.*, *Marisol A. II*, 126 F.3d at 377 (commonality met because there was a "unitary course of conduct by a single system" that raised common legal questions about the child welfare system); *D.S. ex rel. S.S.*, 255 F.R.D. at 71 (finding commonality because "[r]elief for all these students is sought under the same relevant federal and state constitutional and legislative provisions").

Many courts have found that commonality was established in cases such as this, where plaintiffs allege that seizure and arrest policies violate the Fourth Amendment and place them at risk of future violations, and seek systemic injunctive relief. For example, in *Daniels v. City of New York*, a Southern District court certified a class of all "persons who have been or will be

subjected . . . to defendants' policy, practice, and/or custom of illegally stopping and/or frisking persons within the City . . . in the absence of reasonable articulable suspicion of criminal activity . . . ." 198 F.R.D. 409, 411-12, 422 (S.D.N.Y. 2001). The court found that the commonality requirement was satisfied because the plaintiffs' injuries, i.e., stops absent suspicion, "allegedly resulted from the same unconstitutional practice or policy that allegedly injured or will injure the proposed class members." *Id.* at 418.

In *Doe v. Bridgeport Police Department*, two plaintiffs sued a municipal police department for violating the Fourth Amendment rights of individuals in possession of hypodermic needles by arresting and harassing such individuals. 198 F.R.D. 325, 328 (D. Conn. 2001). The district court certified "a class of all injecting drug users, present and future" in the city, finding that the class presented the common question of "whether the defendants violate injecting drug users' fourth amendment rights by arresting them solely for the possession of . . . hypodermic syringes or needles . . . or for the possession of trace amounts of narcotic substances contained therein as residue." *Id.* at 330, 332.

In *Casale v. Kelly*, the plaintiffs sought to represent a class of individuals who were subjected to false arrest under sections of the New York Penal Code that, years earlier, had been declared to violate the Fourth Amendment. 257 F.R.D. at 401. Among the common questions identified by the court was whether the City had "failed to train, supervise, and discipline the personnel in the NYPD and district attorneys' offices properly." *Id.* at 410. In addition, the court found that the question of the appropriate remedy to the alleged constitutional violations was common to the entire class. *Id.* at 409-10.

Here, Plaintiffs' claims raise multiple common factual and legal questions that must be answered to determine whether City-Defendants' policies and practices violate the rights of class

members. Crucially, the proposed class's claims all arise from City-Defendants' policies and practices, which are established at a municipal level. More specifically, City-Defendants' policies and practices regarding arrest and the use of force apply to the entire class because the School Safety Division is managed at a municipal level pursuant to the MOU, which transferred responsibility for safety at all City schools to the NYPD. Ex. 2.

Further, throughout the City, School Safety Officers receive the same (albeit abbreviated) training. Am. Compl. ¶ 35; Answer ¶ 35; Ex. 4 at 33:23-34:3 (2009 Secreto City Council Testimony); Ex. 5 at 24: 14-16 (2007 Secreto City Council Testimony); Ex. 6 (Kelly Letter). The job qualifications required to become a School Safety Officer are uniform across the City. Am. Compl. ¶ 38; Answer ¶ 38. Also, the NYPD, not school administrators, is responsible for the discipline of School Safety Division members. Am. Compl. ¶ 40; Answer ¶ 40.[12]

All putative class members are exposed to City-Defendants' common policies and practices. All class members attend a school where School Safety Division members are present because multiple School Safety Officers are present in every public middle and high school. Am. Compl. ¶ 35. Class members thus interact on a daily basis with School Safety Division members who have been instructed to seize them if they merely misbehave. Am. Compl. ¶¶ 146, 147 (police officials state that the duties of School Safety Officers include removing "unruly" students); Ex. 4 at 33:16-22; Ex. 5 at 23:5-12; Ex. 6. Because City-Defendants' unconstitutional policies and practices are established at a municipal level, incidents of unlawful arrests and excessive force occur at schools across all five boroughs. *E.g.*, Am. Compl. ¶¶ 91-108, ¶¶ 168-

[12] Indeed, the NYPD's practice of assigning School Safety Division members to buildings, which sometimes contain multiple schools, rather than to individual schools often prevents school officials from having any meaningful influence on School Safety Division practices. Am. Compl. ¶ 35.

78, ¶¶ 214-15 (Brooklyn), ¶¶ 46-90, ¶¶ 165-67, ¶¶ 209-13, ¶ 216 (Bronx), ¶¶ 109-34, ¶¶ 155-64, ¶¶ 187-206, ¶ 208, ¶ 218 (Queens), ¶ 207, ¶ 217 (Manhattan), ¶¶ 179-86 (Staten Island).[13]

Therefore, this case presents multiple common questions of fact and multiple common questions of law. Among the common factual questions presented are: whether City-Defendants maintain a policy or practice of arresting schoolchildren absent probable cause of criminal activity; whether members of the School Safety Division employ excessive force with such frequency as to establish a custom and usage; and whether City-Defendants fail to properly train and supervise members of the School Safety Division. *See Casale*, 257 F.R.D. at 410 (issue of whether City failed to train NYPD is common question of fact).

The common legal questions include whether the described policies and practices violate the Fourth Amendment, the Fourteenth Amendment, and New York law. For example, the issue of whether the Fourth Amendment is violated by an arrest of a student based only on suspicion of a school-rule violation would be implicated as to each Plaintiff and potential class member who has been subjected to such an arrest or is at risk of being subjected to such an arrest. Similarly, there are common legal questions as to whether the use of force to secure compliance with school rules is unconstitutional. Finally, the appropriateness of the injunctive remedies sought by Plaintiffs is a common question of law. *See Casale*, 257 F.R.D. at 409-10. While Plaintiffs are only required to show a single common question, *Gulino*, 201 F.R.D. at 331, they

[13] Many class members have formally complained about the School Safety Division. In November 2009, Assistant Chief Secreto testified that during 2008 there had been 1,159 complaints against School Safety Officers. Ex. 4 at 37:9-11. This figure likely vastly undercounts the number of complaints that students and parents attempted to file due to misinformation about how to file a complaint. Am. Compl. ¶ 153; ¶ 133 (mother told to file complaint with incorrect NYPD office), ¶ 55 (mother attempted to file complaint with school). Some also may not complain for fear of retaliation. *See generally id.* ¶ 194 (School Safety Officers retaliated against child for reporting abuse by choking and threatening him); Ex. 38, Compl., *Morgan v. City of New York*, No. 09-cv-3619 (E.D.N.Y. filed Aug. 20, 2009) at ¶ 28.

show far more. This action involves multiple common questions of law *and* multiple common questions of fact, and thus easily satisfies the commonality requirement.

C. The Class Representatives' Claims Are Typical of the Claims of the Class.

Typicality "requires that the claims of the class representatives be typical of those of the class, and is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A. II*, 126 F.3d at 376 (internal quotations omitted). Notably, "[t]here is no requirement that the factual basis for the claims of all members of a purported class be identical." *Wilder v. Bernstein*, 499 F. Supp. 980, 992 (S.D.N.Y. 1980). Further, "[w]hen it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux*, 987 F.2d at 936-37; *see also Daniels*, 198 F.R.D. at 418. As the Third Circuit has noted, "[a]ctions requesting declaratory and injunctive relief to remedy conduct directed at the class clearly fit this mold." *Baby Neal v. Case*, 43 F.3d 48, 58 (3d Cir. 1994). "Typicality may be assumed" under such circumstances. *Nicholson*, 205 F.R.D. at 99.

Plaintiffs satisfy the typicality requirement here because their claims arise from the same policies and practices of City-Defendants as those of the proposed class, and both the named Plaintiffs and the class members would rely on the same legal theories. As described in greater detail above, Plaintiffs M.M., A.M., and D.Y. were seized or arrested purportedly for violations of school rules, consistent with City-Defendants' stated policy (and the School Safety Division's custom and usage) regarding seizures and arrest. Plaintiffs D.Y., L.W., D.B., N.C., and A.M. were the victims of excessive force, consistent with the School Safety Division's custom and usage regarding the use of force.

It is precisely these policies and practices that Plaintiffs seek to challenge on behalf of themselves and all class members.[14] By virtue of their continued enrollment in New York City public middle or high schools, Plaintiffs are, like their fellow class members, at risk of future constitutional violations under City-Defendants' policies. *See, e.g.*, Ex. 11, D.B. Decl. ¶ 17 (Plaintiff D.B. fears being assaulted or unlawfully arrested by School Safety Officers in the future). As such, the claims of the named Plaintiffs are "typical" of the class.

D. The Class Representatives Will Fairly and Adequately Protect the Class.

To determine whether the proposed class would have adequate representation, courts assess whether the class representatives have an interest in vigorously prosecuting the claim and whether the class representatives' interests are antagonistic to those of other class members. *Denny v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006). This assessment "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). Only fundamental conflicts that are not speculative can impair class certification. *In re Flag Telecom Holdings Ltd.*, 574 F.3d 29, 35 (2d Cir. 2009). Class counsel also must be "qualified, experienced and generally able to conduct the litigation." *In re Drexel Burnham Lambert*, 960 F.2d at 291 (citations omitted).

1. The Class Representatives' and Class Members' Interests Align.

Plaintiffs will vigorously prosecute the claims asserted in this action because their interests are entirely aligned with those of other class members. Plaintiffs have suffered harm

[14] Although many class members have not yet experienced an unlawful arrest or excessive force, this does not diminish the typicality of Plaintiffs' claims because all class members are subject to City-Defendants' policies and practices, and at risk of suffering injuries due to them. *See, e.g.*, *Marriott v. County of Montgomery*, 227 F.R.D. 159, 172 (N.D.N.Y. 2005) (finding typicality in constitutional challenge to search policy despite the fact that class representatives were involved in "a more detailed search than every member of the class" because the search occurred pursuant to a policy that applied to entire class); *Jane B. v. N.Y.C. Dep't of Soc. Servs.*, 117 F.R.D. 64, 71 (S.D.N.Y. 1987) (finding typicality requirement met for class that included unknown girls who would reside at centers in the future and were at risk of abuse because "the conditions they challenge[d] affect[ed] all members of the class and relief for all members [wa]s predicated on the same legal theory").

due to City-Defendants' unconstitutional policies and practices, and they seek to reform those policies and practices through injunctive relief. Given that City-Defendants' policies and practices affect all public middle and high schools, the relief Plaintiffs seek would inure to the benefit of all class members. Thus, Plaintiffs "possess the same interest and suffer the same injury as the class members." *Amchem Prods.*, 521 U.S. at 625 (internal quotations omitted); *Marisol A. II*, 126 F.3d at 378 ("Plaintiffs seek broad based relief which would require the child welfare system to dramatically improve the quality of all of its services . . . . In this regard, the interests of the class members are identical.").

The fact that two Plaintiffs (L.W. and D.B.) assert claims for compensatory damages does not alter this analysis because those claims are incidental to the injunctive relief sought by all. *See Ste. Marie v. Eastern R.R. Ass'n*, 72 F.R.D. 443, 450 (S.D.N.Y. 1976) ("A claim for damages may properly be considered in a (b)(2) action as long as the monetary relief is not predominate."). Indeed, courts frequently allow named plaintiffs in a (b)(2) class action to assert individual claims while serving as class representatives. *See, e.g.*, *Daniels*, 198 F.R.D. at 416; *Gelb v. AT & T*, 150 F.R.D. 76, 78 (S.D.N.Y. 1993); *Gilinsky v. Columbia Univ.*, 62 F.R.D. 178, 180-81 (S.D.N.Y. 1974) ("Rule 23(a)(4) does not require a named plaintiff to forego her individual claims.").

Here, the physical injuries for which L.W. and D.B. seek compensation arose from the same unconstitutional policies and practices that would be challenged on behalf of the class. Resolving any additional questions of liability that the damages claims raise would not conflict with the class goal of securing class-wide injunctive relief. *See Gary Plastic Packaging Corp. v. Merrill Lynch*, 903 F.2d 176, 180 (2d Cir. 1990) ("[I]t is settled that the mere existence of individualized factual questions with respect to the class representative's claim will not bar class

certification."). Thus, L.W.'s and D.B.'s claims do not create any conflict for class certification purposes or otherwise.

2. Class Counsel Is Qualified, Experienced and Able to Conduct the Litigation

Attorneys from the New York Civil Liberties Union (the "NYCLU"), the American Civil Liberties Union (the "ACLU"), and Dorsey & Whitney LLP ("Dorsey") seek to serve as class co-counsel. These counsel and their organizations easily satisfy the requirements of Rule 23(a)(4).

Arthur Eisenberg, the Legal Director of the NYCLU, will oversee the NYCLU's efforts in this matter. Mr. Eisenberg has litigated civil rights cases under 42 U.S.C. § 1983 for thirty-eight years. The cases have involved issues ranging from free speech and voting rights to race discrimination and deprivations of Fourth, Fifth, and Sixth Amendment rights. Ex. 44, Decl. of Arthur Eisenberg ¶ 3. Several of these cases have been class action lawsuits. *Id.*

Dennis Parker, who will be lead counsel for the ACLU in this case, is an attorney with the ACLU's Racial Justice Program who has litigated federal civil rights cases addressing a broad range of constitutional issues for twenty-two years. Previously he served as Chief of the Civil Rights Bureau in the Office of the Attorney General for the State of New York and as a trial attorney with the NAACP Legal Defense and Education Fund. Ex. 45, Decl. of Dennis Parker ¶ 3.

Joshua Colangelo-Bryan, a Senior Attorney at Dorsey, will be lead counsel for Dorsey on this case. He devotes a substantial portion of his practice to pro bono matters, through which he has litigated constitutional issues and 42 U.S.C. § 1983 cases, including before the Supreme Court. Ex. 46, Decl. of Joshua Colangelo-Bryan ¶ 9-10. All of these attorneys, whose qualifications are detailed in accompanying declarations, also have the benefit of their

colleagues' extensive experience as civil rights litigators and class counsel. *Id.* ¶¶ 3-4; Ex. 44 ¶ 4; Ex. 45 ¶ 4.

From an organizational perspective the NYCLU and the ACLU are deeply devoted to civil-rights and student-rights causes. In particular, the NYCLU and the ACLU have conducted research into school safety in New York for several years and are national authorities on the intersection of school safety and student rights. Moreover, the ACLU has litigated cases nationally defending the rights of students inappropriately exposed to the criminal justice system in their schools. Furthermore, Dorsey was a charter signatory of the Law Firm Pro Bono Challenge—which asks firms to contribute 3 percent of their billable hours to pro bono work—and has met the Challenge for seventeen straight years. In sum, there is no question that class counsel is qualified and committed to dedicating ample resources to this matter.

II. THE PROPOSED CLASS ACTION IS MAINTAINABLE UNDER RULE 23(b)(2).

A class action is maintainable pursuant to Rule 23 (b)(2) if "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). Notably, not all class members need be aggrieved by, or desire to challenge, a defendant's conduct in order for one or more of them to seek relief under (b)(2); rather what is necessary is that the challenged conduct be premised on a ground that is applicable to the entire class and that the proposed relief would benefit the entire class. *See Marisol A. II*, 126 F.3d at 378 (affirming class certification because the alleged harms "stem[med] from central and systemic failures"); *see also Baby Neal*, 43 F.3d at 58 (the Rule 23(b)(2) "requirement is almost automatically satisfied in actions primarily seeking injunctive relief "); *D.S. ex rel. S.S.*, 255 F.R.D. at 65 (Rule 23(b)(2) was "designed to assist litigants seeking institutional change in the form of injunctive relief") (internal quotations omitted).

As discussed, Plaintiffs seek to challenge City-Defendants' policies and practices regarding seizures and the use of force, both of which are generally applicable to the proposed class. Indeed, all of City-Defendants' actions and inactions regarding policies, training, and supervision for School Safety Division personnel are generally applicable to the proposed class. As addressed, there are School Safety Officers present in every New York City public school. All School Safety Officers receive the same inadequate training. All members of the School Safety Division operate pursuant to the same written policies. City-Defendants, rather than school administrators, have institutional authority over members of the School Safety Division. Thus, there is no question that City-Defendants' conduct applies generally to the class.

Finally, Plaintiffs seek class-wide injunctive relief in the form of systemic changes to the policies that govern the School Safety Division. Such institutional reform would, of course, be generally applicable to all class members.

CONCLUSION

The Court should certify the proposed class because Plaintiffs satisfy the requirements of Rule 23(a) and the class is maintainable under Rule 23(b)(2).

Dated this 27th day of August, 2010.

Respectfully submitted by,

/s/ Alexis Karteron
Alexis Karteron, Esq.
Arthur N. Eisenberg, Esq.
Adriana C. Piñon, Esq.
Naomi R. Shatz, Esq.
Johanna E. Miller, Esq.*
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad St., 19th Floor
New York, New York 10004
(212) 607-3300

Joshua Colangelo-Bryan, Esq.
Jonathan Montcalm, Esq.
DORSEY & WHITNEY LLP
250 Park Avenue
New York, New York 10177
(212) 415-9200

Dennis Parker, Esq.
Laurence M. Schwartztol, Esq.
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St., 18th Floor
New York, New York 10004
(212) 519-7832

Attorneys for Plaintiffs

**Not admitted in the Eastern District of New York*