

23-374

*United States ex rel. Donohue v. Buffalo Pub. Sch. Dist.*

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1                   At a stated term of the United States Court of Appeals for the Second Circuit,  
2 held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of  
3 New York, on the 26<sup>th</sup> day of April, two thousand twenty-four.  
4

5 **PRESENT:**

6                   **DENNIS JACOBS,**  
7                   **MICHAEL H. PARK,**  
8                   **ALISON J. NATHAN,**  
9                   *Circuit Judges.*

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12 **United States of America *ex rel.* Patrick**  
13 **Donohue,**

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15                   *Plaintiff-Appellant,*

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17                   **v.**

23-374

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19 **Buffalo Public School District, Kriner**  
20 **Cash, in his official capacity as**  
21 **Superintendent, Stamford Public School**  
22 **District, Dr. Tamu Lucero, Somerville**  
23 **Public School District, Mary Skipper, in**  
24 **her official capacity as Superintendent,**  
25 **New York City Department of Education,**  
26 **Richard Carranza, in his official capacity**  
27 **as the former Chancellor of the New York**  
28 **City Department of Education, Meisha**  
29 **Porter, in her official capacity as the**  
30 **current Chancellor of the New York City**

1 Department of Education, Chicago Public  
2 School District, Jose J. Torres, in his  
3 official capacity as Superintendent, Wake  
4 County Public School District, Cathy  
5 Quiroz Moore, in her official capacity as  
6 Superintendent, Niagara Falls Public  
7 School District, Mark Laurrie, in his  
8 official capacity as Superintendent,  
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10 *Defendants-Appellees.\**  
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13 **FOR PLAINTIFF-APPELLANT:**

Rory J. Bellantoni & Ashleigh C. Rousseau,  
Brain Injury Rights Group, Ltd., New York,  
NY.

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17 **FOR DEFENDANTS-APPELLEES:**

Cavette A. Chambers, Corporation Counsel,  
& Robert E. Quinn, Deputy Corporation  
Counsel, City of Buffalo Law Department,  
Buffalo, NY *for Buffalo Public School  
District & Kriner Cash, in his official  
capacity as Superintendent.*

Ryan P. Driscoll, Berchem Moses P.C.,  
Milford, CT *for Stamford Public School  
District & Dr. Tamu Lucero.*

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Joshua R. Coleman, Murphy, Lamere &  
Murphy, P.C., Braintree, MA *for Somerville  
Public School District & Mary Skipper, in  
her official capacity as Superintendent.*

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Richard Dearing, Susan Paulson, & Claude S.  
Platton, Assistant Corporation Counsel, *for*  
Sylvia O. Hinds-Radix, Corporation Counsel  
of the City of New York, New York, NY *for*  
*New York City Department of Education,*  
*Richard Carranza, in his official capacity as*  
*the former Chancellor of the New York City*  
*Department of Education & Meisha Porter,*  
*in her official capacity as the current*  
*Chancellor of the New York City Department*  
*of Education.*

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Joseph Victor Willey, Katten Muchin  
Rosenman LLP, New York, NY *for Richard*

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\* The Clerk of Court is respectfully directed to amend the caption accordingly.

1 *Carranza, in his official capacity as the*  
2 *former Chancellor of the New York City*  
3 *Department of Education & Meisha Porter,*  
4 *in her official capacity as the current*  
5 *Chancellor of the New York City Department*  
6 *of Education.*

7 Ruchi Verma, General Counsel, & Thomas  
8 A. Doyle, Assistant Deputy General Counsel,  
9 Board of Education of the City of Chicago,  
10 Law Department, Chicago, IL *for Chicago*  
11 *Public School District & Jose J. Torres, in his*  
12 *official capacity as Superintendent.*

13 Christopher Seusing, Wood Smith Henning  
14 & Berman, LLP, New York, NY *for Wake*  
15 *County Public School District & Cathy*  
16 *Quiroz Moore, in her official capacity as*  
17 *Superintendent.*

18 Jonathan P. Shaub & Nicholas Tam, Shaub,  
19 Ahmuty, Citrin & Spratt LLP, Lake Success,  
20 NY *for Niagara Falls Public School District*  
21 *& Mark Laurrie, in his official capacity as*  
22 *Superintendent.*

23 Appeal from an order of the United States District Court for the Southern District of New  
24 York (Woods, *J.*).

25 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**  
26 **DECREED** that the order of the district court is **AFFIRMED**.

27 Proceeding on behalf of the United States under the False Claims Act, Patrick Donohue  
28 brought claims against thousands of school districts and counties across the United States for  
29 providing remote services to special needs students during the Covid-19 pandemic. He then filed  
30 a Second Amended Complaint (“SAC”), which significantly reduced the number of defendants  
31 but continued to press his claims that Appellees charged the federal government for remote  
32 services provided to special needs students in violation of both the Individuals with Disabilities  
33 Education Act (“IDEA”) and section 411(k)(13) of the Medicare Catastrophic Coverage Act of

1 1988, 42 U.S.C. § 1396b(c). Appellees moved to dismiss. A magistrate judge issued a report and  
2 recommendation (the “R&R”) recommending dismissal of Donohue’s claims without leave to  
3 amend, and the district court adopted the R&R in full. We assume the parties’ familiarity with the  
4 remaining underlying facts, procedural history of the case, and issues on appeal.

5 Under Rule 72(b) of the Federal Rules of Civil Procedure, a party must file “specific written  
6 objections” to proposed findings and recommendations in a magistrate judge’s R&R to avoid  
7 waiver. We review those portions of a grant of a motion to dismiss that address such specific  
8 objections de novo, and we consider all other arguments—including insufficiently specific  
9 arguments—waived. *See, e.g., Mario v. P & C Food Markets, Inc.*, 313 F.3d 758, 766 (2d Cir.  
10 2002). Donohue waived almost all of his arguments by failing to present them in his objections to  
11 the R&R. We consider only the three that remain.

12 First, the district court properly reached common merits issues rather than first addressing  
13 personal jurisdiction and the propriety of venue for each defendant because it was clear that it had  
14 personal jurisdiction and that venue was proper for at least some defendants. *See Chevron Corp.*  
15 *v. Naranjo*, 667 F.3d 232, 246 n.17 (2d Cir. 2012). The law of the case did not require the district  
16 court to transfer venue for each defendant rather than dismissing even though the magistrate judge  
17 previously had transferred claims against some defendants to the Eastern District of Virginia.  
18 Whether there was personal jurisdiction over the remaining defendants, and whether venue for the  
19 claims against them was proper in the Southern District of New York, was a new issue not  
20 previously raised. Regardless, the law-of-the-case doctrine is discretionary, *see Aramony v. United*  
21 *Way of Am.*, 254 F.3d 403, 410 (2d Cir. 2001), and the district court had good reason to reach  
22 common merits questions rather than to assess venue and personal jurisdiction for each defendant.

1           Second, the district court properly dismissed Donohue’s worthless-services claims under  
2 the False Claims Act. Donohue did not object to the R&R’s recommendation that his claims be  
3 dismissed for failing to allege scienter—a sufficient reason to affirm. But even if he had objected,  
4 the SAC does not allege facts showing that any misrepresentation or omission in any claim made  
5 to the federal government was knowingly material. We evaluate materiality under the False  
6 Claims Act based on three factors: “(1) whether the government expressly designates compliance  
7 with a particular statutory, regulatory, or contractual requirement as a condition of payment; (2)  
8 the government’s response to noncompliance with the relevant contractual, statutory, or regulatory  
9 provision; and (3) whether the defendants’ alleged noncompliance was minor or insubstantial.”  
10 *United States ex rel. Forman v. AECOM*, 19 F.4th 85, 110 (2d Cir. 2021) (internal quotation marks  
11 omitted). The SAC pleads no facts tending to show that any of these factors weigh in favor of  
12 materiality, and Donohue has misrepresented the content of the only alleged statutory requirement  
13 for payment that he has identified—42 U.S.C. § 1396b(c). See *United States ex rel. Donohue v.*  
14 *Carranza*, No. 22-cv-189(AJT/IDD), 2022 WL 3226191, at \*5-6 (E.D. Va. July 1, 2022)  
15 (dismissing the SAC’s transferred claims in part because Donohue’s “claims regarding [42 U.S.C.  
16 § 1396b(c)’s] requirements are not reflected in the law’s text”), *aff’d sub nom. United States ex*  
17 *rel. Donohue v. Loudoun Cnty. Pub. Sch. Dist.*, No. 22-1835, 2023 WL 7548198 (4th Cir. Nov.  
18 14, 2023) (per curiam).

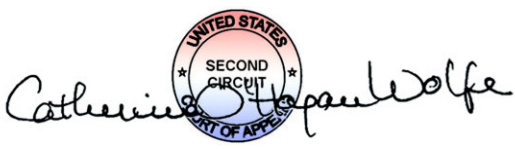
19           Third, the district court properly denied leave to amend the SAC as futile. Donohue could  
20 not plausibly allege scienter or materiality given the guidance of federal agencies indicating that  
21 schools could provide remote services to students covered by the IDEA. He has never identified  
22 even the type of factual allegations that he might add to the SAC to remedy its pleading  
23 deficiencies. And his continued mistaken assertions below that his claims were subject to the

1 pleading standard set out by Rule 8 of the Federal Rules of Civil Procedure, rather than the more  
2 stringent Rule 9(b) standard applicable to False Claims Act claims, *see United States ex rel.*  
3 *Chorches v. Am. Med. Response, Inc.*, 865 F.3d 71, 81 (2d Cir. 2017), refute any claim that he  
4 could remedy the pleading defects in the SAC.

5 \* \* \*

6 We have considered the remainder of Donohue’s arguments and find them to be without  
7 merit. For the foregoing reasons, we **AFFIRM** the order of the district court.

8 FOR THE COURT:  
9 Catherine O’Hagan Wolfe, Clerk of Court

A handwritten signature in cursive script, reading "Catherine O'Hagan Wolfe". The signature is written in black ink and is positioned over a circular official seal. The seal is for the United States Second Circuit Court of Appeals, featuring the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS" around the perimeter, with two stars on either side of the word "CIRCUIT".