No. _____

In The
Supreme Court of the United States

RITA C. SIMPSON-VLACH, ET AL.,
Petitioners,

v.

MICHIGAN DEPARTMENT OF EDUCATION, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Disabled students, unlike non-disabled students, are unable to be educated remotely. Did the Petitioners, disabled students and their parents, allege an injury-in-fact sufficient to confer standing to challenge the denial of their statutorily protected right to an education by the Department of Education and various school districts when the latter transitioned to remote learning without complying with the procedural requirements of the IDEA?

2. Are Petitioners' claims for prospective relief moot despite the continuing likelihood of future school closures?

PARTIES TO THE PROCEEDINGS

RITA C. SIMPSON-VLACH AND ALAN SIMPSON-VLACH ON BEHALF OF A.S. AND M.S.; KATHY BISHOP AND CHRISTOPHER PLACE ON BEHALF OF C.P. AND H.P.,

Petitioners

-and-

MICHIGAN DEPARTMENT OF EDUCATION; ANN ARBOR PUBLIC SCHOOLS; WASHTENAW INTERMEDIATE SCHOOL DISTRICT; DR. JEANICE KERR SWIFT; DR. MARIANNE FIDISHIN; SCOTT A. MENZEL; NAOMI NORMAN; MICHAEL F. RICE,

Respondents

RELATED PROCEEDINGS

The following related proceedings are directly related to this petition:

Rita C. Simpson-Vlach and Alan Simpson-Vlach on Behalf of A.S. and M.S.; Kathy Bishop and Christopher Place on Behalf of C.P. and H.P. v. Michigan Department of Education; Ann Arbor Public Schools; Washtenaw Intermediate School District; Dr. Jeanice Kerr Swift; Dr. Marianne Fidishin; Scott A. Menzel; Naomi Normal; Mihael F. Rice, No. 22-1724, United States Court of Appeals for the Sixth Circuit, judgment denying Appeal entered May 10, 2023 (2023 U.S. App. LEXIS 11542). Petition for rehearing en banc denied June 12, 2023 (2023 U.S. App. LEXIS 14685).

Rita C. Simpson-Vlach and Alan Simpson-Vlach on Behalf of A.S. and M.S.; Kathy Bishop and Christopher Place on Behalf of C.P. and H.P. v. Michigan Department of Education; Ann Arbor Public Schools; Washtenaw Intermediate School District; Dr. Jeanice Kerr Swift; Dr. Marianne Fidishin; Scott A. Menzel; Naomi Normal; Mihael F. Rice, No. 5:21-cv-11532, United States District Court for the Eastern District of Michigan, Southern Division, judgment dismissing case without prejudice entered on July 22, 2022 (616 F. Supp. 3d 711).

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PETITION FOR A WRIT OF CERTIORARI

Rita C. Simpson-Vlach and Alan Simpson-Vlach on behalf of A.S. and M.S.; and Kathy Bishop and Christopher Place on behalf of C.P. and H.P. respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the court of appeals (A1-A22) has not been published but is available at 2023 U.S. App. LEXIS 11542. The court's denial of rehearing en banc (A75-A76) has not been published but is available at 2023 U.S. App. LEXIS 14685. The opinion of the United States District Court for the Eastern District of Michigan (A23-A74) is published at 616 F. Supp. 3d 711 (E.D. Mich. 2022).

The Sixth Circuit held that Petitioners do not meet the requirements of Article III standing because they did not allege continuing harm stemming from the Respondents' transition to remote instruction in March 2020. The Sixth Circuit also held that the case is moot with respect to prospective relief because the closure of schools is not likely to recur.

JURISDICTION

On July 22, 2022, the U.S. District Court for the Eastern District of Michigan issued a judgment denying relief to Petitioners and dismissing their case without prejudice. On August 17, 2022, Petitioners filed their notice of appeal. The Sixth

Circuit entered its Opinion and Judgment on May 10, 2023. Petitioners filed a Petition for Rehearing/Rehearing En Banc on May 24, 2023, which was denied on June 12, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

The statutes/regulations involved are the following:

- 20 U.S.C. § 1400(d), which provides:

> **(d) Purposes**
> The purposes of this chapter are-
>
> (1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;
>
> (B) to ensure that the rights of children with disabilities and parents of such children are protected; and
>
> (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

- 20 U.S.C. § 1415(j), which provides:

(j) Maintenance of current educational placement
Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

INTRODUCTION

This case raises an often recurring question of exceptional importance to children with disabilities. While the COVID-19 pandemic has affected all of us, perhaps its harshest impact is on our most vulnerable citizens, including disabled children. This case addresses the statutorily protected rights of such children in the educational context.

When restaurants, businesses, government offices, and places of worship closed at the outset of the pandemic, schools followed suit. Many school districts, including those involved here, attempted to alleviate the effect of missed classroom time by switching to remote learning. While it may be arguable that remote education was a viable, even if only temporary, option for non-disabled students, it is inarguable that remote education was not a viable option for disabled students for various reasons.

For most disabled students, education is challenging under the best circumstances. Disabled students often have emotional and mental health issues that must be navigated, along with learning and any physical disabilities. It is precisely because of these issues that disabled students receive an Individualized Education Program that is intended to address their special educational needs. These issues make learning remotely, on a computer screen, difficult, if not impossible. The result for the Student-Petitioners here is that, because of their disabilities, and like most disabled students, they simply cannot be educated remotely.

This simple fact means that when the Respondents transitioned all schools to remote learning they effectively prohibited the Student-Petitioners from being educated. This deprived them of their right to a free appropriate public education, as guaranteed by Congress in the IDEA. While the pandemic presented unavoidable challenges, the Respondents made no effort to comply with the procedural requirements of the IDEA in finding a workable solution. Disabled students were lumped in with non-disabled students and fell through the cracks. It is our nation's long and unfortunate history of such neglect of disabled students that led Congress to enact the IDEA in the first place. Petitioners brought this action to address the Respondents' violation of their rights.

However, the District Court and the Sixth Circuit did not allow Petitioners to get out of the gate, ruling that they lacked standing to bring their claims. In affirming the dismissal of Petitioners' claims, the Sixth Circuit misapplied this Court's precedent in concluding that Petitioners failed to show an injury-in-fact. If this Court does not intervene, disabled students will be set up to lose their education again if, and when, the schools close again.

The Court further discarded the fact that Petitioners sought non-prospective relief, holding that it lacked authority to grant such relief. If this holding stands, federal courts will be unable to review administrative decisions, thwarting Congress' express intent in explicitly providing just such authority.

Finally, the Sixth Circuit held that Petitioners' claims are moot, concluding that another school closure is unlikely. The Court relied on an irrelevant case in coming to this erroneous conclusion. This Court's intervention is necessary to reverse the deprivation of educational rights suffered by disabled students.

STATEMENT OF THE CASE

A. Legal Background

The Individuals with Disabilities Education Act ("IDEA") creates a substantive obligation by a school district to offer a free appropriate public education ("FAPE") to all disabled students in the district. The FAPE is provided in connection with an individualized education program ("IEP") created for each disabled student, along with any additional services, such as occupational therapy, physical therapy, transportation, and nursing, among others, that the child needs to be educated. The education must, among other things, be provided under public supervision and direction, meet the standards of the state educational agency, and include an appropriate preschool, elementary school, or secondary school education in the state involved. 20 U.S.C. § 1401. The instruction must also be provided at no cost to parents. *Id.*; *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007).

Congress, recognizing that the expense of special education and related services places a

significant financial burden on school districts, "offers federal funds to States in exchange for a commitment" to provide a FAPE "to all children with certain physical or intellectual disabilities." *Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154, 158 (2017).

Once a State accepts IDEA funds, it is bound to implement due process procedures for a parent to contest whether the education provided is appropriate for their child. The IEP is the primary vehicle for providing each child with the promised free appropriate public education. Crafted by a child's IEP team, a group of school officials, teachers, and parents, the IEP spells out a personalized plan to meet the child's educational needs. 20 U.S.C. § 1414(d)(1)(A)(i)(II)(bb), (d)(1)(B). "Most notably, the IEP documents the child's current 'levels of academic achievement,' specifies 'measurable annual goals' for how she can 'make progress in the general education curriculum,' and lists the 'special education and related services' to be provided so that she can 'advance appropriately toward those goals.'" *Fry*, 580 U.S. at 158–59 (quoting 20 U.S.C. § 1414(d)(1)(A)(i)(I), (II), (IV)(aa)). The IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 399, 402 (2017).

B. Factual and Procedural Background

In March 2020, Ann Arbor Public Schools closed due to COVID-19, eventually transitioning to remote learning, (ECF 1 at 39). Petitioner-Students

were students receiving services under IEPs to ensure that they received a FAPE under the IDEA.

A.S. was classified with a specific learning disability relating to mathematics calculation. A.S.'s IEP required aids in all subjects, a mixed classroom for some subjects, and specific help with math and organizational skills. A.S. received remote instruction through May 2021 and was then transitioned to hybrid learning. (ECF 1 at 54-65).

M.S. was classified with a specific learning disorder relating to reading and ADHD. M.S.'s parents notified the school district that virtual learning was not working on August 20, 2020. M.S. was suffering from emotional dysregulation and mental health challenges. M.S. was engaging in self-harm, would turn off the screen and leave during virtual learning sessions, and engaged in incidents of violence. M.S. had a connection with a therapist, as a supplemental service, which degraded once sessions were provided online. The school district amended M.S.'s IEP on August 27, 2020, and noted that M.S. was not meeting writing goals and struggled with dyslexia and required supplementary aids for all subjects. M.S. received remote instruction through May 2021 and was then transitioned to hybrid learning. (ECF 1 at 68-76).

C.P. was classified as "Other Health Impairment" and suffered from limited alertness and difficulty staying focused and recalling details. C.P. suffered from high anxiety. C.P.'s IEP reflected low test scores and requirements for communication assistance. C.P. received remote instruction through

May 2021 and was then transitioned to hybrid learning. (ECF 1 at 82-88).

H.P. was classified as "Other Health Impairment" and suffered from limited alertness to education with a diagnosis of ADHD. H.P. required multiple sensory supports. H.P. became distracted and lonely during virtual learning. H.P. received remote instruction until January 2021 when her mother placed her in private school. (ECF 1 at 96-102).

The 2021-2022 school year was mostly in person. But students were delayed from returning from winter break in January 2022 for one week. (A3)

Petitioners filed a Complaint in District Court on June 30, 2021. They alleged that the COVID-related closures and move to virtual learning violated the IDEA, state statutes, the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Fourteenth Amendment. Petitioners requested class action certification. Petitioners also requested a preliminary injunction prohibiting Respondents from reverting to virtual learning and determining that IDEA-qualified students had in-person educational placement during the pendency of litigation. The Michigan Department of Education filed a Motion to Dismiss on July 29, 2021, which was followed by Ann Arbor Public Schools' and Marianne Kerr Swift's Motion to Dismiss on August 19, 2021. The remaining Respondents filed a Motion to Dismiss on August 19, 2021. Petitioners filed their Responses on September 8 and September 9 of 2021

and Respondents' replies were filed September 21 and 23 of 2021. The case was dismissed without prejudice on July 22, 2022, and Petitioners filed a Notice of Appeal on August 17, 2022.

The appeal was docketed in the Sixth Circuit on August 19, 2022. Petitioners filed their Initial Brief on October 24, 2022. Respondents Ann Arbor Public Schools and Mariann Kerr Swift filed their brief on November 20, 2022; Respondents Michigan Department of Education filed their Brief on November 21, 2022; and Respondents Scott Menzel, Naomi Normal, and Washtenaw Intermediate School District filed their brief on November 28, 2022. Petitioners' reply brief was filed December 19, 2022.

The Sixth Circuit affirmed the District Court on May 10, 2023. Petitioners filed a Petition for Rehearing En Banc on May 24, 2023, which was denied on June 12, 2023.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT ERRED IN HOLDING THAT PETITIONERS LACKED STANDING

A. Injury-in-Fact

The Sixth Circuit addressed only the injury-in-fact prong. The Petitioners have alleged an injury-in-fact.

1. Prospective Relief

In holding that the Petitioners have not alleged an injury-in-fact relative to their claim for prospective relief, the Sixth Circuit relied on two of this Court's cases: *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), and *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013). (A10-A11). These cases do not resolve the issue here.

In *Lyons*, the plaintiff sought injunctive relief against police officers who, during a traffic stop, employed an unprovoked chokehold on him. *City of Los Angeles*, 461 U.S. at 97–98. This Court held that, to have standing for injunctive relief, the plaintiff must show that police would again stop him for an offense. *Id.* at 105–06. This Court quoted *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974), which held that "[i]t was to be assumed that '[plaintiffs] will conduct their activities within the law . . . ." *Id.* at 103. Here, there is no legal assumption that COVID-19 numbers will not again increase, prompting another shutdown from the Respondents. This Court in *Lyons* held the plaintiff had "to make the incredible assertion either (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or (2) that the City ordered or authorized police officers to act in such manner." *Id.* at 106.

Here, the Respondents *have* authorized the challenged conduct. They have argued that, relative to the March 2020 shutdown, they violated none of the IDEA requirements, committed no systemic

violations, and that the switch to remote learning for the Student-Petitioners did not constitute a change in placement. In short, they fully justified their conduct as an inevitable effect of the shutdown. Thus, while it was unreasonable for the plaintiff in *Lyons* to claim he would be subject to another chokehold in a later encounter with police, here, the Respondents will again commit the same violations of law in the event of another shutdown. A school shutdown constitutes a change in placement; that is not hypothetical. Furthermore, the prior conduct in *Lyons* involved individual police officers; the March 2020 shutdown involved all Michigan schools. Thus, while it was unreasonable for the plaintiff in *Lyons* to argue that all police officers always use chokeholds, here, a future shutdown will likely apply to all schools.

Clapper similarly is inapposite. That case involved private entities challenging a federal statute that authorized government interception of communications with foreign individuals or entities. This Court held the respondents could not show that future government interception of their communications with foreign clients was imminent enough to confer Article III standing. *Clapper*, 568 U.S. at 414.

Clapper is distinguishable on multiple grounds. This Court held: "[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Id.* at 408 (cleaned up). This Court

held further: "we have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs . . . ." *Id.* at 409. Here, no branch of the federal government is involved, and this case involves no actions by a political branch in the field of intelligence gathering and foreign affairs.

Further, this Court in *Clapper* gave several reasons for its ruling. This Court held that any future injury due to interception of communications was speculative, because the respondents had presented no evidence of any past monitoring of their communications under the challenged statute. *Id.* at 411. This Court concluded that this "failure . . . substantially undermines their standing theory." *Id.* Here, there is no dispute that the alleged injury occurred in the past.

Additionally, this Court in *Clapper* held that, even if the respondents could show that the government will seek authorization to acquire communications under the statute, they can only speculate about whether the government will obtain such authorization. *Id.* at 413. Here, there is no question that the Respondents can close the schools and revert to remote learning; indeed, they have argued throughout this litigation that they were authorized to take such actions.

This Court held that, even if the government got authorization to acquire foreign communications, it is unclear whether it would succeed in doing so. *Id.* at 414. Here, if and when the Respondents close the

schools again, there is no question that they will succeed. Finally, this Court held that, even if the government conducted surveillance, the respondents could only speculate about whether the government would intercept their communications. *Id.* Here, there is no question that if the Respondents close the schools, the Student-Petitioners will be excluded from in-person learning. Thus, the "speculative chain of possibilities" that precluded standing in *Clapper* does not exist here. *Id.*

Notably, the Sixth Circuit has distinguished *Clapper* on grounds that also distinguish it from this case. In *Parsons v. U.S. Dep't of Just.*, 801 F.3d 701, 715 (6th Cir. 2015), the Court "note[d] that *Clapper* was dismissed for lack of standing at the summary judgment stage. The burden on the plaintiffs was therefore significantly higher—they could not rest on mere allegations but had to set forth by affidavit or other evidence specific facts demonstrating their injuries and causation" (cleaned up). By contrast, the *Parsons* Court held that the plaintiffs "need only allege facts adducing that their injuries are fairly traceable to the [defendants'] actions." *Id. Clapper* is distinguishable for the same reasons here. And in *Kanuszewski v. Michigan Dep't of Health & Hum. Servs.*, 927 F.3d 396, 410 (6th Cir. 2019), the Sixth Circuit clarified that *Clapper* does not require 'literal[] certain[ty]' but at least a 'substantial risk' that the harm will occur." (quoting *Clapper*, 568 U.S. at 414 n.5)). Here, there may be no certainty of another school closure, but there is a substantial risk.

Similarly, in *Fed. Election Comm'n v. Cruz*, 596 U.S. 289 (2022), this Court distinguished *Clapper*, holding that the plaintiffs' problem in *Clapper* "was that they could not show that they had been or were likely to be subjected to that policy in any event." By contrast, in *FEC*, the plaintiffs' injuries were directly caused by the threatened enforcement of the challenged provisions. *Id.* As in *FEC*, the Petitioners have already been injured by the Respondents' conduct. The Sixth Circuit simply set forth the reasoning in *Lyons* and *Clapper* and concluded, without independent analysis, that "Plaintiffs' case is difficult to distinguish from *Lyons* and *Clapper*, so they too have not claimed an injury permitting injunctive or declaratory relief." Because *Lyons* and *Clapper* are distinguishable, the Sixth Circuit erred.

In fact, the Petitioners have alleged a future injury. As long as COVID-19 remains volatile, the risk of a future school closure is real and ever-present. Introducing vaccines has not stamped out the virus; vaccine-resistant variants continue to appear, and while vaccination rates may be high, booster rates are significantly lower. That the schools closed again in January 2022 while this litigation was pending proves future closures are possible. It cannot be concluded that it is unlikely the schools will ever close again; they already did. The Sixth Circuit minimized the January 2022 closing, holding that "[a] week-long delay before returning to in-person instruction is different in kind from the unprecedented closures that began in March 2020." (A21). Yet, the Sixth Circuit overlooked that, to constitute a change in placement for IDEA purposes,

a future closure need not be like the "unprecedented" closure of March 2020; it just needs to be ten days. 10 U.S.C. § 1415(k)(1)(B). The Sixth Circuit only addressed whether another March 2020-type closure is likely. That was error.

2. Non-Prospective Relief

Further, the Petitioners seek a declaration that the Student-Petitioners' pendency is in-person. This relief is not prospective at all and does not depend on another school closure.

§ 1415(j) of Title 20, the IDEA's "stay put" provision, requires that disabled students remain "stay put" in their educational status quo during the pendency of any legal challenges to their educational placement. This educational status quo is the student's pendency placement. Every disabled Student is entitled to a pendency placement at all times, whether or not any proceedings are pending. There is no such thing as a special education student without a pendency placement. *See, e.g.*, *Gabel ex rel. L.G. v. Bd. of Educ. of Hyde Park Cent. Sch. Dist.*, 368 F. Supp. 2d 313, 325 (S.D.N.Y. 2005) (A student must have a pendency placement, as a finding that a Student does not have a pendency placement is "an impossible result"). Students are not assigned a pendency placement in the first instance when there is a change in placement; students have a pendency placement at all times. Thus, this declaratory relief is not prospective, but present.

The Sixth Circuit essentially held that it was not authorized to grant such relief: "the plaintiffs ask the court to determine in the first instance which, if any, students' IEPs require in-person services, a decision a court is not in the position to make." (A12). The Sixth Circuit held that IEP teams make such decisions. (A12-A13). If that holding stands, then district courts in the Sixth Circuit will never be allowed to review administrative rulings, even though the IDEA explicitly authorizes such review. Federal courts are often called on to review the substantive conclusions of administrative officers, including whether educational placements comply with the IDEA. That is precisely what the Petitioners are asking for here, and what the Sixth Circuit has held it is not authorized to do. That was error. The Petitioners argue that all of their IEPs require in-person educational services. That did not stop the Respondents from switching them to full-time remote education during the shutdown. The only remedy the Petitioners have is for a federal court to declare their rights under the IEPs, which the federal courts are authorized by the IDEA to do.

The Sixth Circuit held that "it is not clear that the initial March 2020 closure would have implicated the stay-put provision. (A13). The Sixth Circuit cited *N.D. ex rel. parents acting as guardians ad litem v. Hawaii Dep't of Educ.*, 600 F.3d 1104, 1116–17 (9th Cir. 2010), for the conclusion that the school closure did not constitute a change in placement because it affected all students. (A13). *N.D.* is inapposite. That case involved furlough Fridays, where no students received education on Fridays for a portion of the school year. *N.D. ex rel. parents acting as guardians*

ad litem, 600 F.3d at 1108. But the furlough Fridays in that case affected all students the same: no student received any education on Fridays. This distinction cannot be overstated.

In *N.D.*, the Ninth Circuit held, "We agree with the district court that the stay-put provision of the IDEA was not intended to cover system-wide changes in public schools that affect disabled and non-disabled children alike, and that such system-wide changes are not changes in educational placement. *N.D. ex rel. parents acting as guardians ad litem*, 600 F.3d at 1108. We now know, beyond cavil, transitioning from in-person learning, to remote, online learning did not affect disabled children and non-disabled children alike—there was a disparate impact on students with disabilities. Indeed, many disabled students were utterly incapable of learning remotely.

But this Court need only read *N.D.* more closely to find that it **actually supports** the Petitioners' position here. The Ninth Circuit in *N.D.* found that moving from in-person instruction in the classroom to home instruction was an impermissible change in placement. The *N.D.* Court held: "More specifically we conclude that under the IDEA a change in educational placement relates to whether the student is moved from one type of program—i.e., regular class—to another type—i.e., **home instruction**." *N.D. ex rel. parents acting as guardians ad litem*, 600 F.3d at 1116 (emphasis added).

Here, the school closures did not affect all students the same. The Respondents switched to remote learning. Non-disabled students, presumably, were able to receive education remotely. The Student-Petitioners here were not. Thus, unlike their non-disabled peers, the Student-Petitioners received no (useful) education during the shutdown. The school closure constituted a change in placement.

B. Causation and Redressability

While the Sixth Circuit did not address the causation and redressability prongs of the standing analysis, the Petitioners have satisfied them. No doubt, the injuries alleged by the Petitioners were caused by the school closure and failure to comply with the concomitant IDEA requirements. These failures were the responsibility of the Respondents. Further, the Petitioners' injuries would be redressed by the relief sought: the injunctive relief will require the Respondents to comply with the IDEA requirements; the declaratory relief will ensure that the Student-Petitioners' pendency placement is in-person, which will prevent the future suffering of the injuries caused by the actions challenged here; and the assignment of a Special Monitor will ensure that the Student-Petitioners receive the compensatory education to which they are entitled.

II. THE SIXTH CIRCUIT ERRED IN HOLDING THAT THE PETITIONERS' CLAIMS FOR PROSPECTIVE RELIEF ARE MOOT

The Sixth Circuit held that "the case is also moot with respect to requests for prospective relief." (A20). The District Court did not address mootness. The Sixth Circuit held: "Students have returned to in-person learning, and the chances of another extended closure remain low." (A20). The Sixth Circuit gave little to no independent analysis, but relied on *Resurrection Sch. v. Hertel*, 35 F.4th 524 (6th Cir.), *cert. denied,* 143 S. Ct. 372 (2022) (en banc). (A20-A21).

Resurrection Sch. is inapposite. In that case, the Court held that for the case not to be moot, the state would have to impose a mask mandate like the one challenged. *Id.* at 528. That is not the case here. Any unilateral school closure for over ten days, whether COVID-19-related or otherwise, without complying with the concomitant IDEA requirements, constitutes an impermissible change in placement under IDEA. Further, the Court in *Resurrection Sch.* held that any future mask mandate would not involve the same legal controversy, because this Court had since blocked COVID-19 orders based on the Free Exercise Clause. Thus, the issue in that case was based on the exceptions to the mandate, and whether they had free-exercise implications. *Id.* This case involves no free-exercise issues.

The Sixth Circuit noted only the "changed circumstances" mentioned in *Resurrection Sch.* (A21).

But the Court in *Resurrection Sch.* considered the "changed circumstances" as only one of the several reasons for finding mootness, including the issues discussed above. The Court concluded: "For **all the reasons** recited above—the changed circumstances since the State first imposed its mask mandate, the substantially developed caselaw, the lack of gamesmanship on the State's part—we see no reasonable possibility that the State will impose a new mask mandate with roughly the same exceptions as the one originally at issue here." *Id.* at 530 (emphasis added). Again, the Sixth Circuit noted that the issue was the exceptions to the mandate, and whether they implicated the Free Exercise Clause. Here, future school closures need not look like the prior closure for Petitioners' claims to be valid.

The Sixth Circuit held that it is "unlikely that another school closure—particularly one substantially similar to that which began in March 2020—is going to occur . . . ." (A21). Any future closure need not be "substantially similar" to the March 2020 closure to violate the law; a closure of more than ten days constitutes a change in placement—and is not permissible. The Sixth Circuit discounted the relevance of the January 2022 closure, holding that "[a] week-long delay before returning to in-person instruction is different in kind from the unprecedented closures that began in March 2020." (A21).

In fact, a week-long closure after this litigation began is very relevant to whether closure of over ten days, cumulatively in a school year, is likely to recur.

The Sixth Circuit disagreed with the argument that the "more than eighteen months of largely uninterrupted in-person learning" is not probative of whether there will be another closure. (A21-A22). In fact, there was another closure in January 2022. That closure is more probative of the likelihood of another one than the preceding and later absences of a closure. The "more than eighteen months" with no school closure is not enough to show a closure will never happen again; it already did.

Additionally, it must be noted that the Sixth Circuit only held that the claims for prospective relief are moot. (A20). As argued throughout this litigation, the Petitioners have valid claims for compensatory relief and for non-prospective declaratory relief, which are not moot, even if the claims for prospective relief are.

III. THESE ISSUES ARE RIPE FOR REVIEW AND THIS CASE IS AN APPROPRIATE VEHICLE FOR THIS COURT'S REVIEW

These issues are ripe for review. Issues of standing and mootness are fundamental legal concepts, and erring in applying them, as the Sixth Circuit did here, results in litigants being deprived of their day in court.

The IDEA protects the educational rights of more than seven million disabled students in the

United States.[1] The IDEA is widely applied, and litigated, throughout the federal court system. The incorrect interpretation of the doctrines of standing and mootness, which are at issue here, has widespread and devastating consequences on these crucial rights. This case presents this issue squarely before the Court, which may resolve the conflict by ruling in this matter.

CONCLUSION

The petition for a writ of certiorari should be granted to maintain the rights of special education children to a free, appropriate, public education under the Individuals with Disabilities Education Act.

Respectfully submitted,

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November 9, 2023

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[1] According to the National Center for Education Statistics, in the 2020-21 school year, 7.2 million students received special education services under the IDEA.
See https://nces.ed.gov/programs/coe/indicator/cgg/students-with-disabilities