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

REPLY BRIEF OF PETITIONERS

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO 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 reply to Respondent Washtenaw Intermediate School District's brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

THE SIXTH CIRCUIT AND RESPONDENT MISAPPLY THIS COURT'S PRECEDENT

Respondent defends the Sixth Circuit's application of and reliance on this Court's decision in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). However, the holding in that case is incorrectly applied to this case.

The Sixth Circuit held that Petitioner's claims failed because, like the claims in *Lyons*, they "relied on an attenuated chain of events precluding any certainty or imminency." (Resp. Opp. at 13). Yet, this case is decidedly unlike the situation in *Lyons*.

This Court held in *Lyons* that, for the petitioner to establish a case or controversy, he "would have had not only to allege that he would have another encounter with the police but also 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." 461 U.S. at 105-06.

It is inarguable that Respondents here authorized the school closures, and thereby differ from the *Lyons* case in that the action in question was sanctioned by relevant authorities. It requires no speculation to conclude that, if and when the schools close again, the Petitioners' disabled students will be subject to the same treatment challenged in this litigation. Not only did Respondents authorize the school closures, but they authorized the transition to remote learning for disabled students without implementing any of the protections of the IDEA. This, again, satisfies the standard set forth in *Lyons*. Further, Respondents have argued vehemently, throughout this litigation, that the transition to remote learning for disabled students was necessary, justified, and authorized. There can be no doubt that another school closure will result in the same violation of disabled students' rights. Unlike in *Lyons*, Petitioners' claims do not involve a series of "ifs," but of "whens."

Respondent argues: "the Sixth Circuit held that the 'hypothetical sequence of events' required several links requiring speculative assumptions as well as legal assumptions – (1) whether COVID-19 will again present the need to close school for any length of time, (2) that closure would be a change in placement, (3) a widespread failure to follow procedural rules, and (4) a harm similar to what allegedly occurred." (Res. Opp. at 13).

This list is a manufactured attempt to cast Petitioners' claims as relying upon an attenuated chain of events. As Petitioner has argued, and argues more fully below, another school closure of at least ten days is highly likely given the stubborn persistence and continual mutation of COVID-19. The rest of the Sixth Circuit's

list follows with no speculation necessary. The closure will constitute a change in placement because, for disabled students, the move from in-person to remote learning is tantamount to a move from education to no education. Respondent relies on inapposite cases to conclude otherwise. The only "widespread failure to follow procedural rules" necessary is the school closure itself, and the attendant move to remote learning that prejudices disabled students. Since all respondents here have argued vehemently throughout this litigation that the school closures and move to remote learning were necessary, justified, and authorized, it is hardly speculative to conclude that they will happen again once COVID numbers reach the necessary levels.

With respect to the fourth listed item, Respondent concludes that it is speculative because "Petitioner students here will be older, have received more services, and may not suffer in the same way as alleged here when they are young." (Res. Opp. at 13). This is, in effect, the most speculative statement of all, as it is supported by no evidence whatsoever. Having missed foundational education during the closures, the Petitioner students are already struggling with loss of education and services and a future closure is sure to compound those losses.

Similarly, Respondent defends the Sixth Circuit's application of *Clapper v. Amnesty Int'l*, 568 U.S. 398 (2013). It argues that case involved a "chain of possible events those plaintiffs feared occurring was too attenuated to support injury-in-fact." (Res. Opp. at 14). However, as set forth above, the instant case involves no attenuated chain of events. Another school closure is likely, which will result in the violation of disabled

students' rights for the simple reason that they cannot be effectively educated in any manner other than in person. And while Respondent speculates that "[t]he Legislature could pass laws restricting or curtailing a school district's ability to close for health or safety reasons or prohibit it from closing in-person instruction for special education students in particular," there would be no reason for any such action absent intervention by this Court. (Resp. Opp. at 15). Under the Sixth Circuit's holding, the school closures resulting in the disparate treatment of disabled students is authorized.

Respondent rejects the distinction of *Clapper* as a summary judgment case, arguing that "this Court and the Sixth Circuit have frequently applied *Clapper* at the motion to dismiss stage . . . ." (Resp. Opp. at 15). However, the only Supreme Court case Respondent cites is *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014), which *reversed* the Sixth Circuit, finding that the petitioners had demonstrated an injury in fact. 573 U.S. at 168.

Respondent argues that the First Circuit's holding in *Roe v. Healy*, 78 F.4th 11 (1st Cir. 2023) is evidence that the Sixth Circuit correctly applied *Lyons* and *Clapper*. (Res. Opp. at 16). However, that another circuit court also erroneously applied the same Supreme Court precedent is not grounds for denying certiorari; it is further grounds for granting certiorari. This Court obviously is not bound by, and should not be influenced by, the erroneous holding in *Roe*.

N.D. SUPPORTS PETITIONERS' POSITION NOT RESPONDENT'S POSITION

Respondent argues that Petitioner misinterpreted *N.D. v. Hawaii Department of Education*, 600 F.3d 1004 (9th Cir. 2010). (Res. Opp. at 19-20). In fact, the Sixth Circuit misinterpreted that holding. Respondent attempts to explain away the *N.D.* Court's statement that moving a student from a regular class to home instruction constitutes a change in placement under the IDEA. 600 F.3d at 1116. It emphasizes that the holding came after this statement, and that the statement did not affect the "heart of the case." (Res. Opp. at 19).

What Respondent ignores is the reason that the Court's finding that a move from a regular class to home instruction did not affect the ultimate holding in *N.D.* – because **it did not apply** in that case. The Court described what an actual change in placement was, and then concluded that the Friday furloughs did not constitute a change in placement. The important point here is that what the Court held **was** a change in placement in *N.D.* is exactly the factual situation here, a move from in-person instruction to home instruction – not the furlough days involved in *N.D.* The furlough days did not change the students' program – the students simply got one day per week of no school. Here, the students' program was changed from regular class to home instruction – exactly the situation the *N.D.* Court found **was** a change in placement.

Further, both the Sixth Circuit and Respondent completely ignore the fact, raised below and in the Petition, that the move from in-person classes to

remote instruction affected disabled students differently than non-disabled students. In fact, it largely prevented disabled students from receiving education at all. The holding in *N.D.* is based on the conclusion that the furlough Fridays affected all students the same – disabled students were not singled out. That is not the case here, where the transition to remote learning deprived disabled students – and only disabled students – of an education altogether. Similarly, if a school moved all classes to the second floor of the school building, which floor was not wheelchair-accessible, the school could not argue that it did not violate the rights of wheelchair-bound students because the move to the second floor applied to all students. Wheelchair-bound students would obviously be excluded from participating in classes, as the disabled students here were after the move to remote instruction.

Notably, the *N.D.* Court made no distinction between a move from regular class to home instruction for all students as opposed to such a move for disabled students only. A move to home instruction – even if it applies to all students – is a change in placement. The students in *N.D.* still received services for four days per week, such as physical therapy, for which physical proximity and touch between the student and provider is required. The students in this case were entirely physically removed from service providers. Respondent, and the Sixth Circuit, cannot rely on the holding in *N.D.* while ignoring that the Court distinguished from its ruling the very situation involved here – a move from regular class to home instruction.

Again, Respondent's reliance upon other courts' incorrect application of *N.D.* is not grounds for denying certiorari, but rather for granting it. (*See* Res. Opp. at 19-20).

PETITIONER IS ENTITLED TO A DECLARATION THAT THE STUDENTS' CURRENT PLACEMENT IS IN PERSON

Petitioners argue that their request for a declaration that the students' pendency placement is in-person is present relief, not prospective. Respondent erroneously challenges this argument by pointing out that there is no proceeding pending. (Res. Opp. at 18). Respondent misunderstands the relief sought. Petitioner is not seeking stay-put relief under § 1415(j) of the IDEA; Petitioner is seeking a declaration that the students' pendency placement is in-person. Those are two very different forms of relief.

Every student with an IEP has a pendency placement at all times – 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"). This is true whether there is a proceeding pending or not. This is necessary precisely so that, if and when a proceeding is initiated and a student is to "stay put" in his current placement, it must be **already established** what his current placement is; that is his pendency placement. A student could not "stay put" in a placement if he was not already there.

Once a proceeding is initiated, the student is entitled to stay-put relief under § 1415(j), namely, public funding of his current placement during the pendency of the proceeding. Petitioners are seeking no such relief in this litigation. They are seeking a determination that the students' current placement is in person. Respondent has refused or declined to address this distinction, instead merely repeating the Sixth Circuit's erroneous conclusion that the relief is not available because no proceeding is pending. A declaration that Students' placement is in person does not prevent schools from closing without notice for non-disabled students, but it does prevent schools from closing without notifying the parents of disabled students first and addressing whether elements or services required by the student's IEP can be delivered remotely.

Respondent's argument that a court is not authorized to grant the relief sought is unpersuasive. Respondent declined to address Petitioners' argument that courts are called upon to review the merits of education officials' decisions on a regular basis, as provided by the IDEA itself. Here, Respondent, and the other defendants below, failed or refused to recognize the requirement that the students at issue be educated in person. Thus, Petitioners initiated the instant federal action, challenging the system-wide decision to close the schools and move to remote learning for all students.

THIS CASE IS NOT MOOT

Respondent argues that the case is moot, again citing other circuit court decisions. (Res. Opp. at 20-22). First, it should be noted that none of the cases cited by

Respondent address a claim for a declaration of pendency placement, which is present relief, not prospective, as set forth above. Petitioners' claim for present relief is not moot since the disabled students remain entitled to a declaration of pendency placement whether the schools are closed or not.

Further, Respondent quotes *Hawse v. Page*, 7 F.4th 685, 692 (8th Cir. 2021): "'Where it is absolutely clear that the County's disputed conduct could not reasonably be expected to recur, an action challenging a superseded public health order is moot." (Res. Opp. at 21). Here, if we have learned anything from the COVID pandemic, it is that nothing is "absolutely clear."

Respondent quotes the Third Circuit in *Clark v. Governor of New Jersey*, 53 F.4th 769, 778 (3d Cir. 2022), *cert. denied sub nom. Clark v. Murphy*, 143 S. Ct. 2436, 216 L. Ed. 2d 417 (2023), stating that "it was 'absolutely clear' that 'the pandemic such as it presented in 2020 and 2021' were [sic] not 'reasonably likely to recur.'" (Res. Opp. at 22). It is somewhat ironic that Respondent claims that Petitioner's position is speculative, given the language quoted above. It is reckless to conclude that it is "absolutely clear" that the pandemic is not likely to recur. It arguably has never ended and is often described as "waves" of infection as it mutates and re-infects the population.

Again, even if the Third Circuit's pronouncement is true, the relief sought in this action does not require another full-blown pandemic with schools closed for months over multiple school years. Respondent refuses to address the point that a change in placement need

only be **ten days** to trigger IDEA protection. Respondent argues: "And the issue here is not one or two day closures for all students in a school due to, for example, a water pipe break or a heating system failure, but the unprecedented multi-month closures that occurred in 2019-20 and in parts of 2020-21." (Res. Opp. at 22-23). A school closure need not be an "unprecedented multi-month" closure to constitute a change in placement – it need only be ten days. There is much difference between a one-day closure for a broken pipe and an "unprecedented multi-month" closure.

COVID-19 refuses to go away. Pandemic fatigue has caused most of the U.S. population to refuse to observe social distancing or masking, and while vaccination rates are high, booster rates are not. Further, continuously evolving variants may still infect those who have been vaccinated. COVID-19 rates increase regularly. It simply cannot be said that it is "absolutely clear" that it is not likely that any school, including those in Michigan, will ever close for a period of two weeks or more, which is all that is required for a change in placement. Such a conclusion is, ironically, more speculative than Petitioners' position that a shutdown of ten days or more is likely to recur, whether it be due to "lock-down" or even a high infection rate in school staff.

Respondent, like the courts it cites, relies on conclusory, speculative statements as established fact. Respondent states: "The nearly two and half [sic] years of no further long-term closures related to COVID-19, despite the surges of Delta and Omicron variants and other variants since, is **dispositive** that there is not a fair prospect that similar closures are foreseeable in

the future." (Res. Opp. at 23) (emphasis added). This is an arbitrary, and very presumptuous, conclusion, especially given the continuing precarious state of the pandemic. The mere absence of an event is in no way "dispositive" of the certainty that it will not recur. Petitioners believe another school closure of ten days or more is highly likely, Respondent's arbitrary, self-serving conclusions notwithstanding. Petitioners' claims are not moot.

RESPONDENT'S RELIANCE UPON THE GOVERNOR'S AND USDOE'S GUIDANCE IS MISPLACED

In its statement of the factual background, Respondent contends that the governor's orders suspending in-person instruction did not treat "students with disabilities . . . differently from their non-disabled peers." (Res. Opp. at 5). This ignores the fact that Respondent has affirmative duties to disabled students alone under the IDEA, including preventing the unilateral suspension of in-person instruction for disabled students. It further ignores the fact that, as discussed above, the suspension of in-person instruction did affect disabled students differently.

Respondent further highlights the governor's executive order, directing school districts "to 'strive in *good faith and to the extent practicable*, . . . to provide equal access to alternative modes of instruction to students with disabilities for the remainder of the 2019-2020 school year.'" (Res. Opp. at 5-6) (emphasis in Res. Opp.). Respondent, in fact, failed to follow this directive, as it lumped disabled students in with non-disabled students, and provided them only the same alternative modes of instruction as everyone else –

modes of instruction which they could not use effectively.

Respondent further cites USDOE guidance, providing that "'FAPE may include, as appropriate, special education and related services provided through **distance learning** provided virtually, online, or telephonically.'" (Res. Opp. at 6) (emphasis in Res. Opp.). While Respondent highlights the "distance learning" portion of this guidance, it completely ignores the "may" and "as appropriate" provisions. Distance learning was highly inappropriate for the Petitioners' disabled students and thus, was in direct contravention of the USDOE guidance.

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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