No. _____

In The
Supreme Court of the United States

JENNICA CARMONA, ET AL,

Petitioners,

v.

NEW JERSEY
DEPARTMENT OF EDUCATION, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

Carissa P. Shipley, Esq.
Counsel of Record
Rory J. Bellantoni, Esq.
Brain Injury Rights Group, Ltd.
300 East 95th Street, Suite 130
New York, New York 10128
carissa@pabilaw.org
rory@pabilaw.org

Counsel for Petitioners

LANTAGNE LEGAL PRINTING
1108 East Main Street Suite 1201 Richmond VA 23219 (800) 847-0477

QUESTIONS PRESENTED FOR REVIEW

1. Whether the move from in-person to virtual educational instruction and support services constitutes a change in placement under the Individuals with Disabilities Education Act ("IDEA").

2. Whether the panel erred in holding that well-established exceptions to the administrative exhaustion requirement applicable to the Individuals with Disabilities Education Act ("IDEA") did not apply to Plaintiffs' claims, thereby stripping them of standing.

3. Whether this Court should intervene to clarify and preserve the integrity of the exceptions to the administrative exhaustion requirement for Section 504 of the Rehabilitation Act of 1973 ("§ 504"), 29 U.S.C. § 794(a); 34 C.F.R. § 104.4(a), Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132; 28 C.F.R. § 35.104, 42 U.S.C. § 1983 and the Equal Protection Clause of the Fourteenth Amendment claims based on the denial of Free Appropriate Public Education ("FAPE") in light of this Court's findings in Luna Perez v. Sturgis Public Schools, 598 U.S. 142.

PARTIES TO THE PROCEEDING

The Petitioners here are: JENNICA CARMONA, Individually, and as Parent and Natural Guardian of B.A.; KERRY GALLAGHER, Individually, and as Parent and Natural Guardian of K.G.; ANGELLE KURSAR, Individually, and as Parent and Natural Guardian of D.K.; JAMES NAZZARO, Individually, and as Parent and Natural Guardian of J.N.; NICOLE TIERNEY, Individually, and as Parent and Natural Guardian of K.D.; LISA DRISCOLL, Individually, and as Parent and Natural Guardian of M.D.; DIANA LOGRASSO, Individually, and as Parent and Natural Guardian of K.I.; KELLY OSTERMAN, Individually, and as Parent and Natural Guardian of J.L.; TINA DELORENZO, Individually, and as Parent and Natural Guardian of N.D.; MUNIRA EDMONDS, Individually, and as Parent and Natural Guardian of A.K. and all other similarly situated; GABRIELLE KINDER, Individually, and as Parent and Natural Guardian of A.M..

The Respondents here are: New Jersey Department of Education; Audubon Public School District; Camden City School District; Camden County School District; Cape May County Public School District; Essex County Public School District; Gloucester County Public School District; Lower Cape May Regional School District; Manasquan Public School District; Matawan Aberdeen Regional School District; Middle Township Public School District; Middletown Township Public School District; Monmouth County Public School District; Morris County Public School District; Ocean County Public School District; Roxbury Township Public

School District; Rumson-Fair Haven Regional High Schools; Toms River Regional School District; Washington Township School District; West Orange Public Schools; COMMISSIONER ANGELICA ALLEN-MCMILLAN, In her official capacity; AVE ALTERSITZ, In her official capacity; DR. J. SCOTT CASCONE; JOSEPH CASTELLUCCI, In his official capacity; ANDREW DAVIS, In his official capacity; DR. JUDITH DESTEFANO-ANEN, In her official capacity; THOMAS GIALANELLA, In his official capacity; DEBRA GULICK, In her official capacity; ROGER JINKS, in his official capacity; DR. FRANK KASYAN, in his official capacity; JOSEPH MAJKA, In his official capacity; KATRINA MCCOMBS, In her official capacity; JEFFREY MOHRE, In his official capacity; CHARLES MULLER, in his official capacity; DR. LOVELL PUGH-BASSETT, in her official capacity; LORETTA RADULIC, in her official capacity; DR. LESTER RICHENS, in his official capacity; DAVID SALVO, in his official capacity; MARY ELLEN WALKER, in her official capacity; JOSEPH S. ZARRA, in his official capacity.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 all Petitioners make the following disclosures: (1) Petitioners are parents and disabled school children and therefore have no parent corporations and do not sell stock. (2) There is no publicly held corporation or other entity, which is not a party to the proceeding before this Court, with a financial interest in the outcome of the proceeding. (3) This is not a bankruptcy appeal.

RELATED PROCEEDINGS BELOW

The following proceedings are related directly to this case:

In the United States Court of Appeals for the Third Circuit, Carmona et al v. NJ Dept of Ed. et al., Case No. 22-2874. Dismissal affirmed on September 8, 2023. Plaintiffs Motion for Rehearing/ Reconsideration En Banc denied October 10, 2023.

In the United States District Court for the District of New Jersey, Carmona, et al v. NJ Dept. of Ed. et al., Case No. 21-18746. Preliminary Injunction denied May 24, 2022. Final Order dismissing the Complaint and Motion for Preliminary Injunction entered September 12, 2022.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Federal Rules

Federal Regulations

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit filed September 8, 2023 is located at Appendix Page A1. Opinion of the United States District Court for the District of New Jersey filed August 23, 2022 is located at Appendix page A24. The Third Circuit's Order on Rehearing filed October 10, 2023is located at Appendix page A50

JURISDICTION

The order at issue was entered on October 10, 2023 by the Third Circuit United States Court of Appeals, in Case No.22-2874, styled *Carmona, et al v. NJ Dept. of Ed. et al., et al*. The Third Circuit affirmed the dismissal of Petitioners' Amended Complaint and denial of Petitioners' Motion for a Preliminary Injunction.

This case arises under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1401, et seq., Section 504 of the Rehabilitation Act of 1973 ("§ 504"), 29 U.S.C. § 794(a); 34 C.F.R. § 104.4(a), Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132; 28 C.F.R. § 35.104, 42 U.S.C. § 1983 and the Equal Protection Clause of the Fourteenth Amendment, the Racketeer Influenced and Corrupt Organizations ("RICO") Act of 1970, 28 U.S.C. § 1961-1968, and the concomitant implementing regulations, case law, and public policy.

Jurisdiction is proper in the United States Supreme Court, pursuant to the Constitution of the

United States of America, Article III, Sec. 2, which extends the judicial power of the United States Supreme Court "to all cases, in law and equity, arising under this Constitution, [and] the laws of the United States" both of which are at issue in this appeal. The claims at issue in this case arise under federal law, and the state government decisions which harmed civil rights of citizens of the United States of America, namely disabled school children and their parents. Jurisdiction is sought invoked pursuant to 28 USCS § 1254.

FULL TEXT COPIES OF ALL CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE

Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, et seq.

(a) Short title. This title [20 USCS §§ 1400 et seq.] may be cited as the "Individuals with Disabilities Education Act".

(b) [Omitted]

(c) Findings. Congress finds the following:

> (1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(2) Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142) [enacted Nov. 29, 1975], the educational needs of millions of children with disabilities were not being fully met because—

(A) the children did not receive appropriate educational services;

(B) the children were excluded entirely from the public school system and from being educated with their peers;

(C) undiagnosed disabilities prevented the children from having a successful educational experience; or

(D) a lack of adequate resources within the public school system forced families to find services outside the public school system.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975 [enacted Nov. 29, 1975], this title [20 USCS §§ 1400 et seq.] has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.

(4) However, the implementation of this title [20 USCS §§ 1400 et seq.] has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

(5) Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—

(A) having high expectations for such children and ensuring their access to the

general education curriculum in the regular classroom, to the maximum extent possible, in order to—

(i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and

(ii) be prepared to lead productive and independent adult lives, to the maximum extent possible;

(B) strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home;

(C) coordinating this title [20 USCS §§ 1400 et seq.] with other local, educational service agency, State, and Federal school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965, in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent;

(D) providing appropriate special education and related services, and aids and supports in the regular classroom, to such children, whenever appropriate;

(E) supporting high-quality, intensive preservice preparation and professional development for all personnel who work with children with disabilities in order to ensure that such personnel have the skills and knowledge necessary to improve the

academic achievement and functional performance of children with disabilities, including the use of scientifically based instructional practices, to the maximum extent possible;

(F) providing incentives for whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports, and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children;

(G) focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results; and

(H) supporting the development and use of technology, including assistive technology devices and assistive technology services, to maximize accessibility for children with disabilities.

(6) While States, local educational agencies, and educational service agencies are primarily responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.

(7) A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an equal educational opportunity for all individuals.

(8) Parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways.
(9) Teachers, schools, local educational agencies, and States should be relieved of irrelevant and unnecessary paperwork burdens that do not lead to improved educational outcomes.
(10)

(A) The Federal Government must be responsive to the growing needs of an increasingly diverse society.

(B) America's ethnic profile is rapidly changing. In 2000, 1 of every 3 persons in the United States was a member of a minority group or was limited English proficient.

(C) Minority children comprise an increasing percentage of public school students.

(D) With such changing demographics, recruitment efforts for special education personnel should focus on increasing the participation of minorities in the teaching profession in order to provide appropriate role models with sufficient knowledge to address the special education needs of these students.

(11)

(A) The limited English proficient population is the fastest growing in our Nation, and the growth is occurring in many parts of our Nation.

(B) Studies have documented apparent discrepancies in the levels of referral and placement of limited English proficient children in special education.

(C) Such discrepancies pose a special challenge for special education in the referral of, assessment of, and provision of services for, our Nation's students from non-English language backgrounds.

(12)

(A) Greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.

(B) More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population.

(C) African-American children are identified as having intellectual disabilities and emotional disturbance at rates greater than their White counterparts.

(D) In the 1998–1999 school year, African-American children represented just 14.8 percent of the population aged 6 through 21, but comprised 20.2 percent of all children with disabilities.

(E) Studies have found that schools with predominantly White students and teachers have placed disproportionately high numbers of their minority students into special education.

(13)

(A) As the number of minority students in special education increases, the number of minority teachers and related services personnel produced in colleges and universities continues to decrease.

(B) The opportunity for full participation by minority individuals, minority organizations, and Historically Black Colleges and Universities in awards for grants and contracts, boards of organizations receiving assistance under this title [20 USCS §§ 1400 et seq.], peer review panels, and training of professionals in the area of special education is essential to obtain greater success in the education of minority children with disabilities.

(14) As the graduation rates for children with disabilities continue to climb, providing effective transition services to promote successful post-school employment or education is an important measure of accountability for children with disabilities.

(d) Purposes. The purposes of this title [20 USCS §§ 1400 et seq.] 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)

(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.

29 U.S.C. § 794 (Section 504 of the Rehabilitation Act of 1973)

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

34 C.F.R. § 104.4(a)

General. No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.

42 U.S.C. § 12101 et seq. (the Americans with Disabilities Act of 1990)

(a) Findings. The Congress finds that-

(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;
(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;
(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;
(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and
(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose. It is the purpose of this chapter-

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of

discrimination faced day-to-day by people with disabilities.

Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

28 C.F.R. § 35.101 et seq. (Part 35 - Nondiscrimination on the Basis of Disability in State and Local Government Services)

(a) Purpose. The purpose of this part is to implement subtitle A of title II of the Americans with Disabilities Act of 1990 (42 U.S.C. 12131-12134), as amended by the ADA Amendments Act of 2008 (ADA Amendments Act) (Pub. L. 110-325, 122 Stat. 3553 (2008)), which prohibits discrimination on the basis of disability by public entities.

(b) Broad coverage. The primary purpose of the ADA Amendments Act is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the ADA Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of "disability" in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of

the ADA. The primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of "disability." The question of whether an individual meets the definition of "disability" under this part should not demand extensive analysis.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

USCS Const. Amend. 9

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

USCS Const. Amend. 14

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Constitution of the United States of America, Article III, Sec. 2

Article III

Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1292(a)(1)
(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

Fed. R. App. P. 35(b)
(b) PETITION FOR HEARING OR REHEARING EN BANC. A party may petition for a hearing or rehearing en banc.

(1) The petition must begin with a statement that either:(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to

the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

Fed. R. App. P. 40(4)

(4) *Action by the Court.* If a petition for panel rehearing is granted, the court may do any of the following: (A) make a final disposition of the case without reargument; (B) restore the case to the calendar for reargument or resubmission; or (C) issue any other appropriate order.

34 C.F.R. § 300.324(4)

(4)*Agreement.*(i) In making changes to a child's IEP after the annual IEP Team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP Team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP.(ii) If changes are made to the child's IEP in accordance with paragraph (a)(4)(i) of this section, the public agency must ensure that the child's IEP Team is informed of those changes.(5)*Consolidation of IEP Team meetings.* To the extent possible, the public agency must encourage the consolidation of reevaluation meetings for the child and other IEP

Team meetings for the child.(6)*Amendments.* Changes to the IEP may be made either by the entire IEP Team at an IEP Team meeting, or as provided in paragraph (a)(4) of this section, by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent must be provided with a revised copy of the IEP with the amendments incorporated.

STATEMENT OF THE CASE

Statement of Facts Resulting in the Petition

Petitioners are children with disabilities and their parents. Petitioners bring this action on behalf of their children and themselves. Respondents are the New Jersey Department of Education, public-school districts in New Jersey, and individual decision-makers. (A4). This Petition for a Writ of Certiorari involves an Order of the Third Circuit United States Court of Appeals made in an Unpublished Opinion and Judgment dated September 8, 2023, and denied for rehearing/rehearing en banc on October 10, 2023. (A1, A50).

On March 16, 2020, Governor Phil Murphy signed Executive Order No. 104, indefinitely closing all New Jersey public and private preschools, elementary, and secondary schools. (A4). School closures have continued on and off at the whim of school and state officials since that date. On December 29, 2021, Respondent Camden City Public School District and many other school districts across New Jersey announced that classes and

instruction would be delivered remotely for at least two weeks beginning January 3, 2022.

These closures are coupled with Respondents' articulations that they may close schools wherever they see fit, according to their own determinations. As a result, the threat of school closures is ongoing. School closures jeopardize the constitutional rights of not only the Petitioners here, but also the constitutional rights of about 22,141 students with disabilities in the proposed class with a qualifying disability under Individuals with Disabilities Education Act ("IDEA") in the State of New Jersey. Respondents claim they have the authority to do so under the COVID-19-related Orders from 2020. But these closures were implemented as recently as 2022 and remain a threat as COVID variants continue to emerge. Therefore, Plaintiffs continue to seek relief pursuant to the Amended Complaint, preserving their right to an in-person education.

Concise Summary of the Argument

This case presents a question of exceptional importance, as depriving an IDEA-protected student of the "special education services necessary to provide him with free appropriate public education would constitute the deprivation of a right guaranteed under federal law." *Quackenbush v. Johnson City Sch. Dist.*, 716 F.2d 141 (2d Cir. 1983). Special education children are particularly vulnerable—the infant or child is "always the ward of every court wherein his rights or property are brought into jeopardy and is entitled to the most jealous case that no injustice be done to him." *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195 (2d Cir. 2002).

A student protected by IDEA is entitled to additional protections beyond what the average public-school student receives. Under 20 U.S.C. § 1415(j), they are entitled to "stay-put" in their current educational placement and cannot be removed for over ten school days. Their parents also have a voice in their child's education. This right to input includes several procedural safeguards, including prior notice of changes to the child's education. Both children and parents suffer violations of IDEA each time schools are closed or moved to remote learning.

By dismissing the Amended Complaint, the District Court failed to require schools in New Jersey to provide disabled school children with a free appropriate public education ("FAPE") as required by IDEA. The New Jersey Department of Education has repeatedly allowed its subsidiary school districts to unilaterally transfer students from their current educational placement of in-person learning to a remote, virtual instruction platform. The District Court for New Jersey and the Third Circuit refused to enter an injunction, preventing the Respondents from unilaterally changing the current educational placement of Petitioners and those similarly situated students in the purported class, and therefore, the lower courts abrogated the IDEA by both dismissing Petitioners Amended Complaint and denying Petitioners an injunction.

The District Court dismissed the Amended Complaint based on a failure to exhaust administrative remedies, and the Third Circuit affirmed. Yet Petitioners demonstrated that exceptions to the exhaustion requirements applied to

their IDEA claims, and exhaustion was not required for claims brought under other Titles, and therefore, the dismissal of Counts One through Eight was improper. Communicable disease neither changes the IDEA nor alters the availability of systemic remedies for Petitioners' disabled school children. Simply because virtual education applied to all students does not excuse the change in placement for each student.

Basis for Federal Jurisdiction in the Lower Court

Appellate jurisdiction was proper in the Third Circuit United States Court of Appeals under 28 U.S.C. § 1291, 28 U.S.C. § 1292(a)(1). The case arises under IDEA. 20 U.S.C. § 1401, *et seq.*, Section 504 of the Rehabilitation Act of 1973 ("§ 504"), 29 U.S.C. § 794(a); 34 C.F.R. § 104.4(a), Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132; 28 C.F.R. § 35.104, 42 U.S.C. § 1983 and the Equal Protection Clause of the Fourteenth Amendment, and the concomitant implementing regulations, caselaw, and public policy.

ARGUMENT FOR GRANTING THE WRIT

I. The Third Circuit Panel Erred in Holding That Exceptions to the Exhaustion Requirements are Inapplicable.

Petitioners acknowledge that IDEA generally requires parties to exhaust administrative remedies before bringing a claim in federal court. 20 U.S.C. § 1415. But courts have long recognized exceptions to the IDEA exhaustion requirement. 20 U.S.C. § 1415(i)(2); 20 U.S.C. § 1415(j); *Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154 (2017); *A.W. ex rel. Wilson*

v. Fairfax Cnty. Sch. Bd., 548 F. Supp. 2d 219 (E.D. Va. 2008); *Komninos by Komninos v. Upper Saddle River Bd. of Educ.*, 13 F.3d 775, 778 (3d Cir. 1994). Exhaustion of administrative remedies under IDEA is not necessary when: (1) it is improbable that adequate relief can be obtained by pursuing administrative remedies; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; or (3) it would be futile to resort to the IDEA's due process procedures. 20 U.S.C. § 1415(i)(2)(A); *Fry*, 580 U.S. 154; *Am. C.L. Union of New Jersey v. Dep't of Just.*, 548 F. Supp. 219, 222 (D.D.C. 1982); *Ventura de Paulino v. New York City Dep't of Educ.*, 959 F.3d 519 (2d Cir. 2020); *Doe By & Through Brockhuis v. Arizona Dep't of Educ.*, 111 F.3d 678 (9th Cir. 1997); *Beth V. by Yvonne V. v. Carroll*, 87 F.3d 80 (3d Cir. 1996); *Ass'n for Cmty. Living in Colorado v. Romer*, 992 F.2d 1040 (10th Cir. 1993); *DL v. D.C.*, 450 F. Supp. 2d 11 (D.D.C. 2006). Exhaustion is also excused for claims that invoke the "stay-put" provision of the IDEA. 20 U.S.C. § 1415(j). The stay-put provision provides an automatic injunction preventing the student's removal from their agreed-upon educational placement and requires school districts to implement the last agreed-upon IEP.

At the heart of all Petitioners' claims is that they were not given a voice in their children's education. There was no notice that educational placements were being changed, and then extensions, discontinuations, and reenactments of

the virtual learning requirement were done unilaterally and without parental input.[1]

A. Exhaustion is not required for claims invoking the "stay-put" provision of the IDEA

1. A change in location can be a change in placement and was a change in placement in this case.

A change in educational placement occurs when 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 v. Hawaii Dep't of Educ.*, 600 F.3d 1104, 1116 (9th Cir. 2010). Plaintiffs contend this applies to school districts that unilaterally institute virtual or remote instruction. See *R.B. v. Mastery Charter Sch.*, 532 F. App'x 136 (3d Cir. 2013) (Third Circuit concluded that removing the student from her school would significantly affect the student's learning experience).

A FAPE requires "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Bd. of Educ. of Hendrick Hudson Cent.*

---

[1] Where Plaintiffs are not given full notice of their procedural rights under the IDEA, they need not exhaust administrative remedies. *N.D. ex rel parents acting as guardians ad litem* at 1116, citing *Covington v. Knox Cnty. Sch. Sys.*, 205 F.3d 912, 917 (6th Cir. 2000), *amended on denial of reh'g* (May 2, 2000), and *abrogated by Luna Perez v. Sturgis Pub. Sch.*, 598 U.S. 142 (2023), amended on denial of reh'g (May 2, 2000). Here, Plaintiffs were not given full notice of their procedural rights as guaranteed by the IDEA.

Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176 (1982). "Under the IDEA a district must provide a FAPE which entails both "special education" and "related services" 20 U.S.C. § 1401(9). 'The term 'related services' means transportation, and such developmental, corrective, and other supportive services. .. as may be required to assist a child with a disability to benefit from special education….' 20 U.S.C. § 1401(36)(A). Related services include, among other things, speech and audiology services, psychological services, and physical and occupational therapy. *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259 (3d Cir. 2007).

Here, hands-on services that could not be effectively delivered virtually were necessary to allow children to benefit from instruction. The children could not benefit from instruction without these services and were denied an education.

Prior decisions by the Third Circuit show that a change in location can be a change in placement. The Third Circuit has held that a charter school's unilateral disenrollment of *even one* student with disabilities was contrary to the student's existing IEP, and thus constituted a change in placement that violated IDEA's stay-put provision. *R.B. v. Mastery Charter Sch.*, 532 F. App'x 136 (3d Cir. 2013). The student's IEP delineated the name of the school where her IEP would be implemented. In *R.B.*, the Third Circuit concluded that the removal of the student from her school violated IDEA. *Id.* Under IDEA, a student's educational placement changes when a student is moved from one type of program to another—i.e., from regular class to home instruction. *N.D. ex rel. parents acting as guardians*

ad litem at 1116. In this case, all the Students' IEPs (and all the Students' IEPs in the proposed class of New Jersey students with disabilities) listed the name of the school where the IEP would be implemented. Even though this case is distinct, as Plaintiffs here have had only portions of their IEPs functionally discontinued instead of all services, the loss of those needed services led to the loss of benefit of the services still provided.

The physical location of the implementation of the IEP is integral to whether the child receives a FAPE. Parents are encouraged to visit proposed school locations and must include in their due process complaints whether that location is appropriate or not. For example, a school may have every service needed by a student but not be wheelchair accessible. The IEP could be implemented in that case, but the education is nonetheless inaccessible. Similarly, moving an IEP from a school to virtual instruction may deny the student needed services. A school's resource room often includes tools needed for physical or occupational therapy, such as standing frames and systems, gait trainers, sensory swings, vestibular suspension systems, and other specialized equipment unlikely to be found in the student's home. When a child receives physical therapy and other hands-on services virtually, the change in location constitutes a change in placement.

Again, Plaintiffs recognize that all children were affected in some way by the transition to virtual learning, but Plaintiffs were affected disparately. Whereas a mainstreamed child has the foundation necessary to sit at a computer, see the

screen, understand spoken words, and interact with peers, the Plaintiffs here need supportive services like physical therapy to obtain and keep that foundation. Without effective supportive services, the foundation crumbles, their physical ability to use a computer deteriorates, and virtual education is inaccessible. Without the tools needed to access their education, their placement has changed.

The District Court found that because all students' status quo placements were changed, no individual disabled student was considered to have experienced a change in status quo placement: "the School District Defendants moved from in-person to virtual instruction for all students." (Dkt. 125, p. 8). This is the equivalent of saying that a school building is "open" to every student, despite removing all wheelchair ramps. Just because a change was applied to every student does not mean the effect was equal. "Of particular relevance here, an IEP focuses on the services needed to provide a student with a FAPE, not on the brick-and-mortar location where those services are provided." *Y.B. on behalf of S.B. v. Howell Twp. Bd. of Educ.*, 4 F.4th 196 (3d Cir. 2021). The change in placement alleged is not the move from the school building to home, but the move from physical therapy, occupational therapy, and other services to either no services or ineffective "virtual" services. Plaintiffs ask this Court to declare that providing services requiring physical contact between the service provider and the student virtually is a change in placement, not subject to exhaustion.

2. School closures followed by virtual learning was an actual change in placement which should have invoked the stay-put provision.

IDEA's stay-put provision, 20 U.S.C. § 1415(j), provides an automatic injunction preventing the removal of the student from their agreed-upon educational placement, and requires school districts to implement the last agreed-upon IEP. *Ventura de Paulino*, 959 F.3d at 529; *Olu-Cole v. E.L. Haynes Pub. Charter Sch.*, 930 F.3d 519 (D.C. Cir. 2019); *D.M. v. New Jersey Dep't of Educ.*, 801 F.3d 205 (3d Cir. 2015); *N.D. ex rel. parents acting as guardians ad litem*, 600 F.3d 1104; *Casey K. ex rel. Norman K. v. St. Anne Cmty. High Sch. Dist. No. 302*, 400 F.3d 508 (7th Cir. 2005); *Johnson ex rel. Johnson v. Special Educ. Hearing Off., State of Cal.*, 287 F.3d 1176 (9th Cir. 2002); *Drinker by Drinker v. Colonial Sch. Dist.*, 78 F.3d 859 (3d Cir. 1996); *Bd. of Educ. of Cmty. High Sch. Dist. No. 218, Cook Cnty., Ill. v. Illinois State Bd. of Educ.*, 103 F.3d 545 (7th Cir. 1996); *Kuszewski ex rel. Kuszewski v. Chippewa Valley Sch.*, 131 F. Supp. 2d 926, 928 (E.D. Mich. 2001), *aff'd sub nom. Kuszewski v. Chippewa Valley Sch. Dist.*, 56 F. App'x 655 (6th Cir. 2003). The question then becomes whether the move from in-person instruction, physical therapy, and occupational therapy to virtual services is placement which triggers the "stay-put" provision. Plaintiffs contend it does.

The U.S. Supreme Court "has emphasized that the provision's text is 'unequivocal' and 'states plainly' that the child 'shall' remain in his current educational placement 'during the pendency of any proceedings initiated under the act." *Ridley School*

Dist. v. M.R., 2015 WL 1619420, at *4. Where, as here, the stay-put provision is invoked or triggered both by school closures and then again by a change in placement and services, the courts focus on identifying the student's "then-current educational placement," the program (including the school named in the IEP and classroom) that was in effect before a school district unilaterally changed the student's educational placement (the educational status quo). *Ventura de Paulino*, 959 F.3d at 532. A child is entitled to an injunction against any district-proposed change that would move her from her "then-current educational placement." *V.D. v. State*, 403 F. Supp. 3d 76 (E.D.N.Y. 2019); citing *D.M. v. New Jersey Dep't of Educ.*, 801 F.3d 205, 211 (3d Cir. 2015). Not only do the facts here support that closures and virtual learning were a "district-proposed change," but they were not just proposed—they were discussed privately and executed without any notice or input from parents or service providers. An automatic injunction may be issued under IDEA's stay-put provision without administrative proceedings. *D.M. v. New Jersey Dep't of Educ.*, No. CIV.A. 14–4620 ES, 2014 WL 4271646, at *6 (D.N.J. August 28, 2014). Here, children were simply told that schools were closed, the doors were locked, and staff were sent home.

The "language of 1415(j) is unequivocal and admits of no exceptions... stay-put provision is designed to ensure stability and consistency in a disabled child's education when that consistency may otherwise be elusive." *D.M.*, 2014 WL 4271646, at *6; *K.T. ex rel. S.W. v. W. Orange Bd. of Educ.*, No. 01CIV.3208 (WGB), 2001 WL 1715787, at *2

(D.N.J. October 23, 2001) (internal quotations and citations omitted). The stability, consistency, and continuity of education and related services are of utmost importance to most children but are critical to disabled students. The protection of IDEA so strictly adhered to for even one child is even more important when it is disregarded for all of New Jersey's students with disabilities. Uninterrupted physical therapy may be necessary to ensure the child can sit up in a wheelchair and engage with a teacher virtually. Children with emotional challenges may be unable to process the interruption to their normal schedule and may be denied the services needed to help them regulate that emotional disruption. Children with sensory issues may be denied access to a resource room. Sending home all New Jersey disabled school children is a change in placement that should have triggered IDEA protections, so educators and parents could work together to determine how an IEP could be implemented virtually, if at all.

Therefore, where the IDEA's stay-put provision is implicated, the provision triggers the applicability of an automatic injunction designed to maintain even one child's educational status quo while the parties' dispute is being resolved.[2] *Ventura*

---

[2] The traditional preliminary injunction standards do not apply to a request for an injunction under 20 U.S.C. § 1415(j). *Ventura de Paulino*, 959 F.3d at 529. Due to the automatic nature of the remedy under § 1415 (j), a Court need not apply the standard test for an injunction under Fed. R. Civ. P. 65. *Cronin v. Bd. of Educ. of E. Ramapo Cent. Sch. Dist.*, 689 F. Supp. 197, 202 (S.D.N.Y. 1988), see *Cochran v. D.C.*, 660 F. Supp. 314, 319 (D.D.C. 1987)(although traditional preliminary injunction standards were not met, the district court found that

de Paulino, 959 F.3d at 529. When all disabled children in New Jersey were sent home, all the student's IDEA's stay-put provisions were implicated.

Yet no injunction was issued, and the Court below found exhaustion was required. Even if exhaustion was required to determine compensatory education damages, the courts should have prohibited further closures without an educational plan in place for each special education student to ensure that all services are provided and provided effectively. But as discussed below, this relief is unavailable in the administrative forum.

Defendants have adopted a COVID closure policy that is contrary to the law and constitutes a systemic violation of the IDEA.

While Defendants have argued that a change to virtual learning applies to every student and is, therefore, not a change in any student's placement, they also paradoxically argue that the move to virtual learning is not a systemic policy. But a policy adopted by Defendants that applies to every disabled student and their parents is a systemic change for which administrative exhaustion is excused.

The lower Courts erred by concluding that no change in placement occurs for *any student*, where the change applies to *all students*. Specifically, the District Court stated that "system-wide decision of general applicability does not work a change in pendency" (A34), and was then upheld by the Third

---

an injunction under the stay-put provision would nonetheless issue).

Circuit. (A15). However, if one student cannot be moved, then all students cannot be moved on the same basis. But if they are removed to home instruction en masse (as was the case here because of the school shutdowns), then a systemic exception to the exhaustion requirement is applicable. Additionally, while the school closures applied to all students in New Jersey, they affected students differently—students with disabilities were affected much more than students without disabilities.

The response of the School Districts in New Jersey is that COVID-19 shutdowns constitute exceptions to the IDEA requirement, which maintains every student's educational status quo. See, 20 U.S.C. § 1415(c)(1). The District Court concluded that the higher Courts would not second-guess a system-wide administrative decision made to protect the lives and health of students and staff. (A33). That said, a communicable disease does not change the requirement that schools must remain open for school children with disabilities.

In *New York State Ass'n for Retarded Child., Inc. v. Carey*, 466 F. Supp. 479 (E.D.N.Y. 1978), *aff'd,* 612 F.2d 644 (2d Cir. 1979), the Court found that excluding developmentally disabled children who were hepatitis B carriers from public-school programs constituted a change in educational placement. The Second Circuit held that there was a danger of communication of hepatitis B among mentally disabled children, which did not exist for developmentally-typical children. *New York State Ass'n for Retarded Children, Inc.*, 466 F. Supp. 479; *see also Jeffrey S. by Ernest S. v. State Bd. of Educ. of State of Ga.,* 896 F.2d 507, 510 (11th Cir. 1990).

It is also illogical to conclude that so long as all students' placements are changed, a change of placement has not occurred for any student, yet this is the logic outlined in the decision of the District Court and the Third Circuit. The District Court's reasoning for denying Plaintiffs' motion for a preliminary injunction, that a change from in-person to remote instruction is not a change in educational placement, carries through to the District Court's dismissal of the case. (A33) The District Court compounds this logical error by stating that the Third Circuit has "instructed that a change in educational placement 'should be given an expansive reading, at least where changes affecting only an individual child's program are at issue." (A34). But the District Court ultimately applied an expansive reading here, where the educational programs of *all the children* in New Jersey were at issue (which is much more severe than a decision relating to a single child). The Third Circuit then upheld this analysis.

Not only does a system-wide decision change pendency when it changes the effectiveness of services provided, and not only does it qualify as a systemic change exempting a complaint from administrative exhaustion, but it also misunderstands and misinterprets that very purpose of the IDEA. The District Court stated Congress did not intend for IDEA to apply to system-wide administrative decisions. (A35). Yet the historical context of IDEA absolutely intended it to apply to system-wide administrative decisions, because the decisions made were first to exclude children with disabilities from education and then to "warehouse"

disabled children by separating them. See *Pennsylvania Ass'n for Retarded Child. v. Com. of Pa.*, 343 F. Supp. 279 (E.D. Pa. 1972) and *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (1972).

The lower Courts have thus reasoned through the issue in two ways, arguing that a systemic change cannot constitute a change in pendency, and that the change was not systemic for exhaustion purposes. Each of these arguments undermines the soundness of the other to reach a conclusion not intended by Congress, which is too problematic to be adopted. And these decisions allow all children with disabilities in New Jersey to be sent home. They thus show that a systemic exception to the exhaustion requirement applies.

It is improbable that adequate relief can be obtained through the administrative process. Exhausting administrative remedies would be futile.

Though *Fry* separates the doctrine that adequate relief is unobtainable from the doctrine of futility, and either one or the other is an adequate exception to exhaustion, the two are often intertwined, as they are here. While administrative law judges can apply their educational expertise to a particular case to make both a determination of whether a student has received a FAPE and consider what remedies can restore a student's knowledge to what it should have been had FAPE not been denied, their power to implement relief is limited, generally by state law. What Plaintiffs seek here is not a compensatory education award. In fact, all students have concluded their underlying administrative

cases to obtain the relief that administrative law can offer. The last of the Plaintiffs concluded administrative proceedings during the pendency of the District Court case.

Plaintiffs seek a finding that a change from in-person to virtual learning is a change in placement that triggers the procedural protections under IDEA—particularly the notice requirement, and reconvenes the CSE so that the parent has a voice in what services, if any, the student can receive remotely. This finding would then prevent schools from unilaterally closing and changing the placement of IDEA students, whether or not mainstreamed children are sent home.

When governors, superintendents, and school boards can close schools with little to no notice, engaging in the administrative process would be futile, and it could take weeks to months to reach a hearing. Essentially, closures are an issue capable of repetition but can escape review at the administrative level. Furthermore, even if a student requested an administrative-law judge find virtual education inappropriate and that placement should be in-person, such an order is likely unavailable to the judge or not binding on those who decide school district, or state-wide closures. Requiring in-person placement until the district can work with the parents or go through the administrative process to determine what, if any, services can be provided remotely is more logical.

As for futility, when Congress adopted the predecessor statute to the IDEA, Senator Williams warned that "exhaustion of the administrative procedures established under this part should not be

required for any individual complainant filing a judicial action in cases where such exhaustion would be futile either as a legal or practical matter." *Rose v. Yeaw*, 214 F.3d 206 (1st Cir. 2000), citing *Christopher W. v. Portsmouth Sch. Comm.*, 877 F.2d 1089, 1094 (1st Cir. 1989) (quoting 121 Cong. Rec. 37416 (1975)). In the underlying cases, as Respondents admit, the Governor was responsible for the shut-down order, which closed schools. At the time of the shut-down, the Students' IEPs necessarily and appropriately required in-person schooling and were being implemented. Deviating from the IEPs, Respondents sent students home (to the most restrictive environment) and failed to provide parents with a 10-day notice of a change in placement. Respondents next failed to reconvene IEP meetings to discuss how virtual instruction would impact students with disabilities.

Eventually, students were returned to their original educational placements, but intermittent closures and individual changes to virtual instruction continued to occur. Much of the Petitioners' requested relief under IDEA is prospective, rather than retrospective. This prospective relief is neither available under IDEA nor through the administrative process. ALJs can only enter orders about one to two school years in which FAPE was denied, and can only enter orders regarding compensatory education, reimbursement for private education, and other remedies specifically tailored to redress that particular child's loss of competencies. They cannot enter many types of orders regarding education moving forward, such as providing all disabled New Jersey school children

with the injunctive relief Petitioners have sought in federal litigation. In addition, futility case-by-case, requiring every student with an IEP to exhaust an administrative complaint about prospective failures likely to occur because of a school's clear past record would overwhelm the administrative system (the relief sought is necessarily systemic).

II. The Court failed to consider the Supreme Court's Guidance in *Perez v. Sturgis* when it dismissed Plaintiffs' non-IDEA claims.

The Court heard arguments and released its decision in *Luna Perez v. Sturgis Pub. Sch.*, 598 U.S. 142 (2023) while this case was pending in the Third Circuit—Plaintiffs also moved for reconsideration of the Third Circuit's decision.

The gravamen of Plaintiffs' claims in this suit is a failure by Defendants to provide a FAPE under IDEA. But Plaintiffs also bring claims under federal antidiscrimination statutes, alleging that Defendants' COVID-related closures had a disparate impact on them, which led to a loss of education more significant than their peers in the average public-school class. On March 21, 2023, the Court decided another case with a similar core issue—*Luna Perez*, 598 U.S. 142.

Mr. Perez, after settling his IDEA claims at the administrative level, sued the Sturgis Public Schools for ADA violations. His complaint stemmed from Sturgis' failure to provide him, a Deaf student, with an aide who knew sign language when they managed to provide him with an aide at all. Sturgis continued to pass Mr. Perez from grade to grade, while assuring his family that he would graduate.

When the time came for Mr. Perez to graduate, Sturgis refused to graduate him. Because of his IDEA claims, Mr. Perez received additional education. He also sought compensatory damages available only under ADA claims, which could not be provided under IDEA. While Plaintiffs here have not requested compensatory damages, they have requested declaratory and injunctive relief, which is similarly unavailable as a remedy under IDEA.

The District Court and the Sixth Circuit found that Mr. Perez had not exhausted the administrative process by not including his request for compensatory damages under the ADA during his IDEA due process hearings. Mr. Perez argued, as do Plaintiffs here, that he must only exhaust the administrative process if he pursued a suit under another federal law for remedies that the IDEA also provides.

In a unanimous opinion, Justice Gorsuch, writing for the Court, found Mr. Perez's reading was correct. The Court rejected Sturgis' argument that when IDEA and ADA claims result from the same underlying harm, the administrative process must be exhausted even when the requested relief or remedy is unavailable at the administrative level. The Third Circuit has fallen into the same quagmire as the Sixth Circuit did in that case and failed to distinguish the claims by remedy available under distinctive Acts but instead lumped the claims together due to their gravamen. Plaintiffs here only request relief, which is unavailable at the administrative level, as all named Plaintiffs have concluded their administrative cases.

The Court considered and distinguished *Fry*, 580 U.S. 154, which found that the exhaustion requirement does not apply unless the plaintiff "seeks relief for the denial of" a free and appropriate public education "because that is the only relief" the IDEA can provide. In contrast, "this case presents an analogous but different question–whether a suit admittedly premised on the past denial of a free and appropriate education may nonetheless proceed without exhausting IDEA's administrative process if the remedy a plaintiff seeks is not one IDEA provides. "*Perez* at 6. The Court finds that in both cases, "the question is whether a plaintiff must exhaust administrative process under IDEA that cannot supply what he seeks. And here, as in *Fry*, we answer in the negative." *Perez* at 6.

To the extent that Plaintiffs' claims one through eight allege violations of federal antidiscrimination statutes and request declaratory and injunctive relief as a remedy, exhaustion was not required.

III. This Court's Intervention is Necessary to Protect Vulnerable Students from Denial of FAPE due to Unilateral Change of Placement

According to the United States Supreme Court, a FAPE requires "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Board of Educ. of Hendrick Hudson Central School Dist., Westchester County*, 458 U.S. 176. Schools nationwide were closed through various executive actions, which seemed to trickle down to

individual district or state disclosures without checks or balances. While some States, such as California, have assured parents that this will not happen again, others, such as New Jersey, have implemented shutdowns unilaterally and unapologetically.

While the damage or benefit to mainstreamed children should be of concern, a history of discriminatory and dismissive administrative practices by school districts resulted in a federally protected right to education for disabled children. The District Court of New Jersey and the Third Circuit are among several courts that have allowed children with disabilities to be treated as typical children in abrogation of the IDEA.

Because IDEA offers States federal funds to help educate children with disabilities, participating States must impose procedural safeguards. *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386 (2017); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295 (2006); 20 U.S.C. § 1415. IDEA requires participating States to impose procedural safeguards for the general welfare of children and their parents. 20 U.S.C. § 1415. *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 533 (2007); *Honig v. Doe*, 484 U.S. 305, 318–20 (1988)*; Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 58 (1st Cir. 2002).

These safeguards allow notice to, and participation by, the parent in the student's educational planning and placement, and they were ignored by New Jersey's move to virtual learning. While the question of how many hours of compensatory education and services are required to

get these children back to the education level they were at before the closure is best left to educational experts, only the Court has the power to ensure that students with disabilities are not sent home again.

This Court should order that in-person or virtual learning is a matter of placement, and that changing not just educational instruction, but also physical therapy and other services, from in-person to virtual, is, in fact, a change of placement. In the case of a new variant or the next pandemic, it is less damaging to special education students to remain in a school that is otherwise emptied of mainstream children, while providers and parents work to determine which services can be delivered virtually, rather than sending them home for weeks, months, or years, and placing the burden of proof and production on the parent to start a Due Process Complaint.

While schools were last closed in 2022, the ability to revert to remote instruction remains a real and extensively damaging prospect. Each day a child is denied a FAPE by procedural dereliction of a school system, he or she is harmed yet again. See *Cox v. Brown*, 498 F. Supp. 823, 828–29 (D.D.C. 1980) (irreparable harm results when students "[lack] each day of their young lives an appropriate education, one that is sensitive to their particular disabilities, commensurate to their levels of understanding, and fulfilling their immediate needs"). As the Court in *Blackman v. D.C.*, 277 F. Supp. 2d 71, 79–80 (D.D.C. 2003) held:

> [T]he failure of the District to comply with its statutory obligations and provide appropriate educational

> placements can have a devastating impact on a child's well-being …. A few months can make a world of difference in the life of that child.

Blackman v. D.C., 185 F.R.D. 4, 7–8 (D.D.C. 1999), quoting *Foster v. District of Columbia*, Civil Action No. 82–0095, Memorandum Opinion and Order of February 22, 1982, at 4 (D.D.C. February 22, 1982); *see also Spiegler v. D.C.*, 866 F.2d 461, 466–67 (D.C. Cir. 1989). The Court should find that a change in education from in-person to virtual is a change in placement.

CONCLUSION

For the preceding reasons, the Writ of Certiorari should be granted.

Dated: January 8, 2024
New York, New York

Respectfully Submitted,

/s/ Carissa P. Shipley
Carissa P. Shipley, Esq.
Brain Injury Rights Group, Ltd.
300 East 95th Street, Suite 130
New York, New York 10128
Tel.: 646.850.5035
carissa@pabilaw.org