No. 23-750

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

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioners' claims pursuant to the Individuals with Disabilities Education Act ("IDEA") fail where the long-term school closure due to COVID-19 did not act as a "change in educational placement."

2. Whether Petitioners' failure to exhaust their administrative remedies provided by the IDEA acts as a bar to their claims where no exception to the exhaustion requirement applies.

3. Whether the Court should ignore Petitioners' admission in the Third Circuit that *Perez v. Sturgis Public Schools*, 143 S. Ct. 859 (2023), is inapplicable to the current matter where Petitioners' alternative claims only seek relief available under the Individuals with Disabilities Education Act ("IDEA").

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INTRODUCTION

In March 2020, a global pandemic precipitated a public health crisis which altered public and private life as the nation knew it. Upon the orders of the Governor of New Jersey, all New Jersey public schools closed for health and safety reasons to protect all students and staff from the impact of a previously unseen virus sweeping the world. Respondent Audubon Public Schools ("Audubon") complied with these orders, as did the many other school districts named in this lawsuit.

During this unprecedented global pandemic, the U.S. Department of Education issued guidance in March 2020, expressly stating that the Individuals with Disabilities Education Act ("IDEA") permitted schools to provide special education students with instruction and services as practical during the pandemic closures. Moreover, the New Jersey Legislature modified N.J.A.C. 6A:14 on April 1, 2020 to permit school districts to deliver special education and related services to students with disabilities via telemedicine and telehealth or through electronic communications during the public health related school closures.

Following the initial phase of the pandemic, each of the students returned to in-person instruction. The 2021-22 school year was in-person, except for two days in January 2022 when Audubon reverted to remote instruction while a COVID-19 variant was surging.

The 2021-22 school year was in person, as was the 2022-23 school year, and the 2023-24 school year thus far. There have been no recent recommendations from

any local, state, or national health entities or experts that school close to in-person instruction. To be brief, the closures have long since ended and this dispute is moot. Despite two and a half years of nearly continuous in-person instruction, Petitioners persist with speculative claims and hypothetical injuries-in-fact stemming from a future pandemic related closure of schools.

Compounding these procedural deficiencies are Petitioners' mistaken assertions about the IDEA process. The Third Circuit rejected these misconceptions, holding that the transition from in-person to virtual instruction was not a change in educational placement where the change affected abled and disabled students alike. Further, as Petitioners admitted that they have failed to exhaust the administrative remedies provided by the IDEA, the Third Circuit correctly held that the court lacked subject matter jurisdiction over both (1) Petitioners' IDEA claims and (2) Petitioners' claims seeking relief available under the IDEA administrative process. *Perez v. Sturgis Public Schools*, 143 S. Ct. 859 (2023).

The Court should deny review.

STATEMENT

A. Legal background

1. Congress intended the IDEA "to open the door of public education to all qualified children and required participating States to educate handicapped children with nonhandicapped children whenever possible." *Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 78 (1999) (citations and internal markings omitted). The States have the "primary responsibility for developing and executing educational programs for handicapped children, [but] imposes significant requirements to be followed in the discharge of that responsibility." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 52 (2005) (citation omitted).

States and school districts have the responsibility for providing required programs and services pursuant to the IDEA. The statute requires that States and school districts create administrative procedures to review decisions regarding the "identification, evaluation, . . . educational placement of the child, or the provision of a free appropriate public education." 20 U.S.C. § 1415(b)(1)(E).

New Jersey implements these requirements through N.J.A.C. 6A:14: Special Education. The chapter sets forth the rules for the provision of a free and appropriate public education ("FAPE") to students with disabilities, including all substantive and procedural safeguards afforded by State and Federal law. The corollary to these requirements is that parents are

required to exhaust such administrative procedures before seeking review in court. 20 U.S.C. § 1415(l).

2. The IDEA requires that a disabled student "shall remain in the then-current educational placement of the child" throughout "the pendency of any proceedings conducted pursuant to this section." 20 U.S.C. § 1415(j). The "proceedings conducted pursuant to this section" refers to an adversarial due process administrative hearing. 20 U.S.C. § 1415(c)(2), (f). A special education student's "placement" is committed in the first instance to the student's Individual Education Plan ("IEP") team. 34 C.F.R. § 300.116(a).

B. Factual and Procedural Background

1. In March 2020, Governor Phil Murphy issued an executive order to close all New Jersey schools due to the COVID-19 pandemic. Exec. Order No. 104 (March 16, 2020). All public elementary and secondary schools, including charter and renaissance schools, were ordered closed beginning on Wednesday, March 18, 2020 and remained closed as long as Executive Order 104 was in effect.

2. In light of schools closing due to the public health crisis, the U.S. Department of Education released guidance related to the delivery of special education programs and services. It emphasized that complying with the IDEA "**should not prevent any school from offering educational programs through distance instruction**." (emphasis original). The Fact Sheet further stated that a Free Appropriate Public

Education ("FAPE") "may include, as appropriate, special education and related services provided through **distance learning** provided virtually, online, or telephonically." *Id*. at pp. 1-2 (emphasis added). Further, the DOE advised that "it may be unfeasible or unsafe" in certain circumstances to provide services in-person including "hands-on physical therapy, occupational therapy," or other services. *Id*. at p. 2.

3. In accordance with Governor Murphy's valid executive orders, Respondent Audubon closed its schools to in-person learning in March 2020. Schools gradually reopened over the 2020-21 school year, starting with a hybrid of distance and in-person learning and transitioning to full-time in-person instruction. Exec. Order No. 175 (Aug. 13, 2020); Exec. Order No. 214 (Jan. 11, 2021).

4. On July 28, 2020, Petitioners' Counsel, the Brain Injury Rights Group ("BIRG"), filed a purported nationwide class action complaint against, among others, "THE SCHOOL DISTRICTS IN THE UNITED STATES" in the United States District Court for the Southern District of New York, alleging substantially identical allegations to the claims in the instant matter. *J.T. v. de Blasio*, 500 F. Supp. 3d 137 (S.D.N.Y. 2020). Among other things, the plaintiffs in *J.T. v. de Blasio* alleged that, when schools throughout the country were shut down due to the pandemic, the change to remote learning automatically altered the educational placement of every special needs student in the United States such that they were denied FAPE. *Id*. at 147-48.

The District Court for the Southern District of New York emphatically rejected the purported class action. The Court found that none of the student plaintiffs had established that his or her educational placement had been changed for three reasons, two of which are particularly relevant to this matter. *Id*. at 186-88. Firstly, the USDOE issued guidance indicating that the provision of remote services does not work a "change in educational placement." *Id*. at 187-88. Second, the plaintiffs were challenging an administrative decision of general applicability that applied equally to abled and disabled students, and "[s]uch an order does not work a change in pendency." *Ibid*.

Perhaps as a gambit to obtain *in personam* jurisdiction in the Southern District of New York, BIRG tried to assert that the over 13,000 out-of-state defendants could be sued pursuant to the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68. The RICO Case Statement in *J.T. v. de Blasio* named the same school districts and superintendents that are now named in the instant matter. The Southern District of New York dismissed the RICO claims, stating that "[f]rankly, the RICO allegations here asserted reek of bad faith and contrivance . . . [t]his effort to inject racketeering into what is simply an IDEA lawsuit is bad faith pleading writ large." *Id*. at 172.

5. Undeterred by the decision in *J.T. v. de Blasio*, Petitioners brought a substantially similar action in the District Court of New Jersey in October 2021, challenging the switch to distance learning in the 2019-20

and 2020-21 school years for their children with disabilities. Petitioners filed suit for themselves and on behalf of a putative class of all other similar situated school-aged children with disabilities covered by IDEA in New Jersey and their parents. It is noteworthy that Schools had reopened and classroom instruction returned to normal prior to the filing of this Complaint.

Petitioners amended their complaint and articulated eight separate causes of action all seeking relief available pursuant to the administrative process afforded under the IDEA. Count 1 alleged four distinct "systemic" violations of the IDEA for the (1) failure to provide prior written notice, (2) lack of meaningful participation by Petitioners in IEP decisions, (3) failure to convene IEP meetings prior to or after the school closures, and (4) failing to provide FAPE on the same level as non-disabled peers. Count 2 alleged a violation of section 504 of the Rehabilitation Act. Count 3 alleged violations of the Americans with Disabilities Act ("ADA"). Counts 4 and 5 assert violations of Petitioners' Equal Protection rights. Count 6 alleges violations of the New Jersey Administrative Code and New Jersey Special Education Statute. Count 7 alleged that Respondents violated the New Jersey Civil Rights Act. Count 8 contended that Respondents violated the New Jersey Law. Finally, Petitioners asserted in Count 9 violations of RICO, alleging that a scheme was concocted to falsely represent IDEA compliance during the pandemic to obtain federal IDEA funds.

6. The district court considered motions to dismiss filed by several of the Respondents and concluded

that the Petitioners had not exhausted their administrative remedies, nor shown an exception applied. Particularly, the District Court held that the change from in-person to virtual learning applied to abled and disabled students alike. (Pet. App., p. A34) (*citing D.M. v. New Jersey Dep't of Educ.*, 801 F.3d 205, 215 (3d Cir. 2015) (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")) (emphasis added). Further, the Court disposed of Petitioners' alleged "systemic" claims, as the alleged issues "implicate individualized inquiries regarding the notice each School District Defendant provided, each student Plaintiff's particular IEP, and how each student Plaintiff's access to educational opportunities compared to that of their non-disabled peers in the same school district." (Pet. App., p. A36). Because Petitioners failed to exhaust administrative remedies and, because no exception applied, the District Court dismissed Counts One through Eight for want of subject matter jurisdiction.

The District Court also dismissed the RICO count because, among other deficiencies, the Petitioners "allege[d] only indirect harm flowing from the allegedly fraudulent scheme" and therefore lacked standing.

The District Court allowed Petitioners the option to amend their Amended Complaint, but Petitioners chose to stand on their Amended Complaint. The District Court then issued its final order.

7. The Third Circuit affirmed. (Pet. App., p. A19). It began by citing the Third Circuit's well-established exhaustion requirement for IDEA. While a party may dispute the results of the due process hearing by filing a federal lawsuit, that party must "complet[e] the IDEA's administrative process, i.e., exhaust[ ]" administrative remedies before any such lawsuit is filed. *Batchelor v. Rose Tree Media Sch. Dist.*, 759 F.3d 266, 272 (3d Cir. 2014); *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 558 (3d Cir. 2010); 20 U.S.C. § 1415(i)(2). As this Court recently held, the exhaustion requirement applies to lawsuits brought under the "Constitution, the [ADA], [Section 504], or other Federal laws protecting the rights of children with disabilities" when the remedy requested is one the IDEA makes available. 20 U.S.C. § 1415(l); *Perez v. Sturgis Pub. Sch.*, 143 S. Ct. 859, 864 (2023).

The Third Circuit rejected Petitioners' argument that initiating the administrative process satisfies the IDEA's administrative exhaustion requirement. (Pet. App., p. A10 (*citing Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (exhaustion "means using all steps that the agency holds out")). The Third Circuit further held that 1) the District Court was correct not to apply the systemic exception where Petitioners alleged no barrier to the administrative hearing process itself and 2) the District Court was correct in determining that there was no change in educational placement where the decision applied to all students (abled and disabled) during an unprecedented and life-threatening health crisis. (Pet. App., pp. A10-16).

As the Third Circuit noted in footnote 7, this Court held that exhaustion is not required when a plaintiff seeks "a form of relief . . . [the] IDEA does not provide." *Perez*, 143 S. Ct. at 864. Citing this Court's decision in *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985), the Third Circuit noted that prospective injunctive relief and retroactive reimbursement are remedies available under the IDEA. The Third Circuit also gave Petitioners the opportunity to address *Perez* in supplemental briefing prior to rendering a decision; however, Petitioners asserted that *Perez* was inapplicable to their case. (Pet. App., p. A9, footnote 7). The Third Circuit then performed its own analysis, finding that the Amending Complaint does not seek compensatory damages and only seeks remedies provided by the IDEA. *Id*. As such, the Third Circuit also dismissed Counts Two through Eight as subject to the exhaustion requirement because Petitioners sought IDEA remedies and these claims concerned the denial of a FAPE. (Pet. App., p. A16, footnote 11 (*citing* 20 U.S.C. § 1415(l); *Perez*, 143 S. Ct. at 864-65).

The Third Circuit also affirmed the dismissal of the RICO count. Upon close review of the Petition, Petitioners do not appear to challenge the Third Circuit's decision as to the dismissal of the RICO count.

8. The Third Circuit then denied en banc review.

9. This is not the only lawsuit that BIRG has brought alleging substantially similar claims. BIRG brought substantially similar claims in the following states/courts: Massachusetts (*Nancy Roe et al. v. Charles*

Baker et al., 624 F. Supp. 3d 52 (D. Mass. 2022), *aff'd*, *Roe v. Healey*, No. 22-1740 (1st Cir. Aug. 14, 2023)); Michigan (*Simpson-Vlach et al. v. MDOE*, 616 F. Supp. 3d 711 (E.D. Mich. 2022), *aff'd*, *Simpson-Vlach et al. v. MDOE*, No. 22-1724 (6th Cir. May 10, 2023), petition for cert. pending,. No. 22-1724)); Virginia (*Bills et al. v. Virginia Department of Education et al.*, 605 F. Supp. 3d 744 (W.D. Va. 2022) (*pending appeal*)); Illinois (*Simmons v. Pritzker et al.*, 2022 U.S. Dist. LEXIS 186387 (N.D. Ill. Oct. 12, 2022), *appeal dismissed*, *Simmons v. Pritzker*, 2023 U.S. App. LEXIS 28659 (7th Cir. Ill., Oct. 26, 2023), *aff'd*, *Simmons v. Pritzker*, 2023 U.S. App. LEXIS 33080 (7th Cir. Ill., Dec. 14, 2023)); Connecticut (*Horelick et al. v. Lamont et al.*, 3:21-cv-1431-MPS (D. Conn. Sept. 7, 2023)); and California (*Angel et al. v. Cindy Marten et al.*, 2023 U.S. Dist. LEXIS 105417 (C.D. Cal. June 15, 2023)).

In every single case, the subject court dismissed the claims of Petitioners' counsel.

REASONS FOR DENYING THE PETITION

I. The Third Circuit's Opinion correctly held that the "stay-put" provision of the IDEA was not implicated as the transition from in-person to virtual instruction was not a "change in educational placement"

a. A change in educational placement did not occur and has not occurred

Petitioners failed to adequately plead or prove that a universal change from in-person instruction to virtual learning that affected abled and disabled students alike in response to a global pandemic constitutes a change in educational placement.

An "'educational placement' means the general educational program of the student" and refers to the type of educational program into which a child is placed, including the "classes, individualized attention and additional services a child will receive." *N.D. v. Hawaii Dept. of Educ.*, 600 F.3d 1104, 1116 (9th Cir. 2010); *DePaulino v. N.Y. City. Dept. of Educ.*, 959 F.3d 519, 526 (2d Cir. 2020) (internal quotations omitted).

When determining whether a change of educational placement occurred, courts draw the line between (1) changes that specifically affect children with disabilities and (2) changes motivated by budgetary or administrative concerns that affect a general student population.

Changes that affect children with disabilities specifically "should be given an expansive reading, at least

where changes affecting only an individual child's program are at issue." *D.M. v. New Jersey Dep't of Educ.*, 801 F.3d 205, 215 (3d Cir. 2015). Such a change in placement occurs where a "student is moved from one type of program—i.e., regular class—to another type—i.e., home instruction. A change in the educational placement can also result when there is a significant change in the student's program even if the student remains in the same setting." *N.D.*, 600 F.3d at 1116. *See also Sch. Dist. of Phila. v. Post*, 262 F. Supp. 3d 178, 194 (E.D. Pa. 2017) (a change in placement exists when a child is moved from "regular education 100% of the day to removal from the regular classroom for 45-90 minutes per day"); *Knox Cty. v. M.Q.*, 62 F.4th 978 (2023) (placement may include "push-in" services).

However, where a policy affects the whole of a student body, courts find that this does not constitute a change in educational placement, as students with disabilities are not disparately treated from their non-disabled peers in the manner intended by Congress when enacted the IDEA. *N.D.*, 600 F.3d at 1108 (holding that a system-wide, financially motivated closure of schools on Fridays was "not [a] change[ ] in educational placement"); *see also id*. at 1116 ("When Congress enacted the IDEA, Congress did not intend for the IDEA to apply to system wide administrative decisions . . . [t]o allow the stay-put provisions to apply in this instance would be essentially to give the parents of disabled children veto power over a state's decisions regarding the management of its schools.").

As such, the Third Circuit correctly held that "decisions affecting a group as a whole 'are broad "policy" decisions rather than individual choices concerning particular children.'" *See*, *D.M. v. N.J. Dept. of Educ.*, 801 F.3d 205, 217 (3d Cir. 2015) (*quoting De Leon v. Susquehanna Cmty. Sch. Dist.*, 747 F.2d 149, 153 (3d Cir. 1984)); *see also Bills v. Va. Dept. of Educ.*, 605 F. Supp. 3d 744, 755 (W.D. Va. 2022) ("where Defendants moved all students—regardless of disability—to remote learning the change was similarly system-wide").

"[F]iscal and administrative decisions may impact the education that a student receives under IDEA, but only indirectly; reallocating funds, for example, does not itself violate IDEA." *D.M.*, 801 F.3d at 214; *see also Bills v. Va. Dept. of Educ.*, 605 F. Supp. 3d 744, 755 (W.D. Va. 2022).

The determination to close school buildings during the COVID-19 pandemic as ordered by Governor Murphy and continue education via virtual instruction was just such a policy decision. *See* N.J. Exec. Order 104 (2020). *J.T. v. de Blasio*, 500 F. Supp. 3d 137, 187-90 (S.D.N.Y. 2020) is instructive. In *J.T.*, COVID-19 related school closures were found not to violate the IDEA because (1) "the agency charged with administering the IDEA program ha[d] issued guidance indicating that the provision of remote services [did] not work a change in placement," and (2) "an order shutting schools to all students (abled and disabled) and all staff during an unprecedented and life-threatening health crisis. . . . was of general applicability . . . and

[did] not work a change in pendency." *Ibid.*; *see also Roe v. Baker*, 624 F. Supp. 3d 52, 58-59 (D. Ma. 2022), *aff'd* 78 F.4th 11 (1st Cir. 2023) ("[T]he 'stay put' provision is not implicated in the unusual and unprecedented circumstances" of the COVID-19 pandemic, and where there are "no allegations that [Petitioners] were singled out during the pandemic. . . ."). Petitioners have proffered no coherent, let alone persuasive, reasoning as to why the *J.T.* court's reasoning was in error.

Petitioners attempt to invoke a disparate impact theory to support their allegation that, while the entirety of the student population was affected, students with disabilities were uniquely affected. However, Petitioners' disparate impact argument is only supported by speculative effects on a student's learning. *See* Pet. Brief, p. 30 ("uninterrupted physical therapy may be necessary . . . [c]hildren with emotional challenges may be unable. . . ."). Such speculative injuries are not supported by the IDEA itself, which concerns itself with Individualized Education Programs specifically tailored to individual students' needs. *See* 20 U.S.C. § 1414 (dealing evaluations and education programs exclusively as pertains to each individual child). While Petitioners may be upset that students engaged in virtual learning, such dissatisfaction does not constitute a change in educational placement.

b. Because a change in educational placement did not occur, the "stay-put" provision does not apply

Where "an administrative due process proceeding is pending" and "the local educational agency is attempting to alter the student's then-current educational plan," 20 U.S.C. § 1415(j)'s "stay-put" acts as an automatic injunction against changing a child's education placement." However, a "stay-put" is not triggered until a change in educational placement is both proposed and challenged. Here, and where there is no change in educational placement and no effective use of the administrative process, the "stay-put" provision does not apply.

Once invoked, stay-put "requires the continued implementation of the child's original IEP." *Y.B. o/b/o S.B. v. Howell Twp. Bd. of Educ.*, 4 F.4th 196, 199 (3d Cir. 2021). During the pendency of proceedings, "stay-put" requires that a child remains in their then-current educational placement in order to maintain the educational status quo. *Y.B. o/b/o S.B. v. Howell Twp. Bd. of Educ.*, 4 F.4th 196, 200 (3d Cir. 2021).[1] This "reflect[s] Congress's conclusion that a child with a disability is best served by maintaining her educational status quo until the disagreement over her IEP is resolved." *Id.* at 200 (*quoting M.R.*, 744 F.3d at 118). The placement

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[1] *V.D. v. New York*, 403 F. Supp. 3d 76, 91 n. 9 (E.D.N.Y. 2019) states that "it is questionable" as to whether a challenge to a "neutral state law that applies to *all* children" would qualify as a § 1415 proceeding for the purposes of stay-put. (emphasis in original).

maintained by "stay-put" is determined "by the date the dispute between the parents and the school district first arises and proceedings conducted pursuant to the IDEA begin." *M.R.*, 744 F.3d at 112 (internal quotation omitted).

When, as in the instant matter, decisions are made to close a school or furlough teachers, "the 'stay-put' rule [does] not apply . . . because 'nothing in the legislative history or the language of the [IDEA] implies a legislative intent to permit interested parties to utilize the automatic injunctive procedure of ['stay-put'] to frustrate the fiscal policy of participating states." *See Bills v. Va. Dept. of Educ.*, 605 F. Supp. 3d 744, 755 (W.D. Va. 2022); *D.M. v. N.J. Dept. of Educ.*, 801 F.3d 205, 213 (3d Cir. 2015) (*quoting Tilton ex rel. Richards v. Jefferson Cty. Bd. of Educ.*, 705 F.2d 800 (6th Cir. 1983)).

Petitioners' misguided assertions regarding the "stay-put" provision are not based in law, but, instead, tenuously depend on the mistaken belief that courts should abandon Article III's command to adjudicate cases or controversies to proactively intervene before Petitioners even speculate regarding hypothetical injuries. Petitioners invoke the legally unsupported theory of "implication" to argue that the courts should have enjoined school closures in the face of a public health crisis caused by a previously unseen virus which, to date, has claimed the lives of over one million Americans.

Despite Petitioner's arguments, "stay-put" is not, "triggered" such that it restrains the district even absent an affirmative action by the parent—it must be invoked by a party challenging a district's proposed change to an educational placement. *M.R. v. Ridley Sch. Dist.*, 744 F.3d 112, 124 (3d Cir. 2014); *see also Drinker by Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 867 (3d Cir. 1996). Where there is (1) no change in educational placement and (2) no beginning to the administrative process, "stay-put" is not "implicated." To find otherwise would instruct the judiciary to engage in fishing expeditions to enjoin properly made policy determinations until a potential dispute, which parents may or may not bring to address hypothetical injuries, is adjudicated. As such, the Court should deny the petition on this basis.

II. The Third Circuit's Opinion correctly held that Petitioners' failure to exhaust administrative remedies is not excused by any exception to the exhaustion requirement

a. Petitioners failed to exhaust their administrative remedies

It is clear that Petitioners failed to exhaust their administrative remedies prior to filing this lawsuit; they have so admitted. (Pet. App., p. A10) ("The Parents contend that they satisfied the exhaustion requirement because, as set forth in the Amended Complaint, they 'were in the process of exhausting their administrative remedies' "). The Court's analysis could stop here.

The IDEA's procedural safeguards guarantee parents meaningful input regarding their child's education, as they can seek a due process hearing to raise complaints regarding educational placement. *J.T. v. de Blasio*, 500 F. Supp. 3d 137, 191-92 (Nov. 13, 2020) (*quoting Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). The NJDOE's regulations provide parents with the right to file a due process petition, receive a hearing before an ALJ, or even seek emergent relief if a child's "pendency" or "stay-put" rights were violated. N.J.A.C. 6A:14-2.7(a); N.J.A.C. 6A:14-2.7(r), N.J.A.C. 6A:12.1.

Because claims pursuant to the IDEA require intensive analysis of an individual child's needs, the law requires each individual student-plaintiff to exhaust the IDEA administrative procedures before seeking relief obtainable through the IDEA procedures from the federal courts. *Perez v. Sturgis Public Schools*, 143 S. Ct. 859 (2023); *N.J. Prot. & Advocacy, Inc. v. N.J. Dep't of Educ.*, 563 F. Supp. 2d 474, 484 (D.N.J. 2008). This allows agencies to apply their expertise, develop the factual record, and "bar[] plaintiffs from circumventing IDEA's exhaustion requirement by taking claims that could have been brought under IDEA and repackaging them as claims under some other statute." *J.T. v. Dumont Pub. Sch.*, 438 N.J. Super. 241, 260 (App.Div. 2014) (*citing Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 281 (3d Cir. 1996)).

When seeking remedies available under the IDEA, failure to exhaust administrative remedies under the IDEA deprives a court of subject matter jurisdiction. *Batchelor v. Rose Tree Media Sch. Dist.*, 759 F.3d 266,

272 (3d Cir. 2014). "Congress intended plaintiffs to complete the administrative process before resorting to federal court." *Ibid*. Petitioners, by their own admission, had not exhausted administrative remedies under 20 U.S.C. § 1415(i)(2) at the time suit was filed. (A32). As such, the lower courts did not err in finding a lack of subject matter jurisdiction over Petitioners' claims.

Petitioners argue that merely starting the due process hearing procedures "exhausts" the administrative process. The Third Circuit correctly rejected this argument, as both statute and this Court require the conclusion of the administrative process. 20 U.S.C. § 1415(i)(2)(A); *Woodford v. Ngo*, 548 U.S. 81, 90 (2006); *see also Batchelor*, 759 F.3d at 272 (holding that a party must "complete the IDEA's administrative remedies before any [] lawsuit is filed"). Petitioners lacked the "findings and decision" from a due process hearing at the time suit was filed, foreclosing them from satisfying the administrative exhaustion requirement. 20 U.S.C. § 1415(i)(2)(A).

Therefore, the Third Circuit properly found that Petitioners did not satisfy the IDEA's administrative exhaustion requirement, depriving the court of subject matter jurisdiction.

b. No exceptions are present in this matter which excuse Petitioners' failure to exhaust administrative remedies

Petitioners have failed to articulate any compelling reason why they should be excused from exhausting the administrative process. Framing a complaint as a class action challenge does not automatically convert the case into the kind of systemic violation that renders the exhaustion requirement futile. *J.T. v. Dumont Pub. Sch.*, 553 F. App'x 44, 54 (3d Cir. 2013).

The Third Circuit has recognized limited rationales for excusing administrative exhaustion under the IDEA: "where: (1) exhaustion would be futile or inadequate; (2) the issue presented is purely a legal question; (3) the administrative agency cannot grant relief; [or] (4) exhaustion would cause severe or irreparable harm." *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 275 (3d Cir. 2014) (*citing Komninos v. Upper Saddle River Bd. of Educ.*, 13 F.3d 775, 778 (3d Cir. 1994)). Furthermore, where the cause of action does not arise out of the IDEA, or seeks relief not offered by the IDEA, the exhaustion requirements do not apply. *Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154 (2017); *Perez v. Sturgis Pub. Sch.*, 143 S. Ct. 859, 856 (2023).

Because Petitioners' claims are not "systemic" and because they fall under none of the other above-referenced exceptions, the petition should be denied.

i. The systemic exception does not apply

While exhaustion may be excused when plaintiffs allege systemic legal deficiencies and request system-wide relief that cannot be provided or addressed through the administrative process, *J.T. v. Dumont Pub. Schs.*, 553 App'x 44, 54 (3d Cir. 2013), Petitioners' claims do not implicate "policies which undermine access to the administrative hearing process itself." *T.R. v. Sch. Dist. of Phila. L.R.*, 4 F.4th 179, 193; *see also id.* at 192 (discussing cases in which the court recognized the systemic exception because the plaintiffs' problems could not have been remedied by administrative bodies and noting that the exception was largely limited to procedural violations that effectively deprive plaintiffs of an administrative form).

Petitioners' claims of "systemic violations" as enunciated in the Amended Complaint each "implicate individualized inquiries regarding the notice each School District Defendant provided, each student Plaintiff's particular IEP, and how each student Plaintiff's access to educational opportunities compared to that of their non-disabled peers in the same school district." (Pet. App., p. A36). As such, Petitioners stating that their claims are "systemic" are belied by the actual claims themselves.

Petitioners have not, and cannot, articulate how they were deprived of an administrative forum. This is, simply, because they were not. The closure of schools due to the public health crisis did not restrict

Petitioners' access to an administrative forum in any manner, nor do Petitioners allege that their access to an administrative forum was hindered.

Delving further into the specifics involving Petitioner T.D. makes clear that access to the administrative process was not withheld. Petitioner T.D. did file a due process request; however, it was dismissed without prejudice due the failure to comply with the requirements of the federal and state regulations. App'x at 47. When a parent requests a due process hearing, the Board of Education shall have an opportunity to resolve the matter during a resolution meeting. N.J.A.C. 6A:14-2.7(h). The resolution meeting can only be waived by mutual agreement of the parties, in writing. N.J.A.C. 6A:14-2.7(h)(9). If the matter is not resolved within thirty days, then the petition shall be transmitted to the OAL for a hearing. N.J.A.C. 6A:14-2.7(h)(4). If a parent does not cooperate with the Board's efforts to schedule the resolution meeting or participate in mediation within the appointed thirty-day time frame, the district is entitled to seek dismissal. 34 C.F.R. § 300.510(b)(4). If the Board demonstrates that it made reasonable efforts to secure the cooperation of the parents to participate in the resolution process, and the parents failed to do so, the Board's request to dismiss the due process petition should be granted. 34 C.F.R. § 300.510(b)(4).

In a decision dated October 27, 2021 (just nine (9) days after filing the initial Complaint in the instant matter), the Hon. Elaine B. Frick, ALJ concluded that petitioner "failed to respond in a timely or meaningful

manner, in accord with the mandates of the federal and state regulations." *See* App'x at 60. Without reiterating the totality of T.D.'s and her counsel's failure to respond to Audubon's repeated requests for a resolution meeting pursuant to the federal and state regulations, ALJ Frick determined that "[T.D.'s] responses are not reflective of a sincere desire to comply with the regulations and came after the thirty days had expired. [T.D.'s] communications do not represent reasonable and cooperative steps to meaningfully engage in the mandated resolution process." *Ibid*. ALJ Frick dismissed T.D.'s due process petition, "for failure to comply with the requirement that petitioner cooperate in the scheduling of a resolution meeting or mediation session in a timely manner." *Ibid*. It is clear from this determination that the COVID closure did not bar T.D. from the administrative process: rather, the failure to meaningfully engage in the administrative process led to the dismissal of her due process petition.

In support of its purported "systemic" exception argument, Petitioners cite *N.Y. State Assoc. for Retarded Children, Inc. v. Carey*, 612 F.2d 644 (2d Cir. 1979) which is easily distinguishable from the circumstances surrounding Petitioners' claims. In *N.Y. State Assoc. for Retarded Children, Inc.*, the Second Circuit found that the New York City Board of Education violated the Rehabilitation Act of 1973; Education of the Handicapped Act; and the Due Process and Equal Protection Clauses. In said case, the Board of Education specifically excluded developmentally disabled children carrying the hepatitis B virus from regular public

school classes and activities solely by reason of their disability. *Id*. at 11-12. This is markedly different from the case at hand in which all public schools students were moved to a remote learning environment in response to a public health emergency of international concern. As such, *N.Y. State Assoc. for Retarded Children, Inc.* lends no support for Petitioners' argument that the COVID closure constituted a systemic violation of the IDEA.

Additionally, the other cases offered in support of Petitioners' case, *Pennsylvania Assoc. for Retarded Child. v. Com. of Pa.*, 343 F. Supp. 279 (E.D. Pa. 1972) and *Mills v. Board of Education of Dist. of Columbia*, 348 F. Supp. 866 (1972), do not share similar circumstances with those surrounding the COVID closure policy. In *Pa. Assoc. for Retarded Children v. Pennsylvania*, the parents of developmentally disabled children brought a class action against defendants which challenged several statutes which excluded the children from educational programs on the basis of the disabled children's disabilities. Similarly, in *Mills v. Board of Education of Dist. of Columbia*, a class of developmentally disabled children brought action against defendants to enjoin defendants from excluding the children from publicly supported education on the basis of the children's disabilities. Again, these cases do not contemplate circumstances in which all public school instruction was required to be delivered virtually to all public school students regardless of disability or any other identifiable characteristic.

Petitioners have not demonstrated that their access to administrative forums has been compromised. Further, Petitioners have failed to state any case law in their Petition which supports the contention that despite having access to administrative forums, Petitioners are entitled to the systemic exception. Therefore, the lower courts correctly concluded that the systemic exception to the exhaustion requirement is inapplicable to Petitioners' claims.

ii. The administrative process was not futile

What Petitioners seek is for this Court to grant Petitioners an injunction to hold in their pocket to disrupt the future fiscal, regulatory, and administrative determinations of the State of New Jersey. Petitioners' inability to subvert the political will of New Jersey's citizens through conjectural claims in the administrative process does not render that process futile.

The hundred-year-old prohibition on conjectural or hypothetical claims is uniformly recognized: a plaintiff must show "that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). *See also O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (*citing Mellon*). The Court further explained that "imminence . . . cannot be stretched beyond its purpose . . . that the alleged injury is not too speculative for Article III

purposes—that the injury is *certainly* impending." *Clapper v. Amnesty International, USA*, 568 U.S. 398, 409 (2013) [emphasis original].

In *City of Los Angeles v. Lyons*, 461 U.S. 95, 102-03 (1983), the Court described a chain of events with multiple necessary conditions that must occur before the alleged future injury would occur. Following that method, both the First Circuit (in *Roe v. Healey*, 79 F.4th 11 (2023)) and the Sixth Circuit (in *Simpson-Vlach et al. v. MDOE*, No. 22-1724 (6th Cir. May 10, 2023), petition for cert. pending, No. 22-1724) rejected claims involving the same allegations as Petitioners make here and involving the Petitioners' counsel. In both cases, the claims were dismissed as lacking standing and as moot.

The plaintiffs in *Roe* and *Simpson-Vlach* alleged that the COVID-19 related school closures deprived their children of FAPE. *See, e.g.*, *Roe* at 15. They claimed, like here, that the Governor's closure orders and the school districts' implementation of remote learning, altered their IEPs without prior written notice or parental participation. *See, e.g.*, *Roe* at 17-18. These actions and other failures allegedly caused skill regression and loss of competencies. *See, e.g.*, *Roe* at 18. In other words, the exact same claims Petitioners bring here.

Following this Court's precedent, the First Circuit rejected arguments that the "ever present" COVID-19 virus "with the imminent *possibility* of further variants" provided standing. *Id*. at 21 [emphasis added].

The First Circuit rejected these arguments, holding that "merely invoking the possibility of these events is not enough to show that they are 'certainly impending' or that there is a 'substantial risk' they will occur." *Id*.

The First Circuit relied upon the Sixth Circuit's recitation of an attenuated series of events that must happen for the claimed harm to recur. Just like in *Simpson-Vlach*, Petitioners' claims require a "hypothetical sequence of events" requiring several links of speculative and legal assumptions: (1) that COVID-19 will again present the need to close school for any length of time, (2) that such a closure would constitute a change in placement, (3) that there would occur a widespread failure to follow procedural rules, and (4) that a harm would be suffered similar to what has allegedly occurred in the instant case. *Id.* at 22. The first is speculative given the wide availability of preventative medicine for all ages, vaccine boosters to maintain a high level of immunity, natural immunities built up in the community at large, and new pharmaceutical options to treat infections. The second is a legal assumption refuted by case law, as detailed *supra*. The third requires speculation that a school district would not hold IEP meetings if a similar pandemic occurred. The last is similarly speculative because, even if all precedent events were to take place, Petitioner students may not suffer in the same way as alleged here.

In essence, Petitioners argue that the IDEA would be violated if the above-stated sequence plays out. This all but concedes the hypothetical and speculative

nature of the issue before the Court, as their argument hinges on the *possibility* of a future school closure.

Petitioners' claims are not concrete, not imminent, and based wholly on speculation and conjecture. It is unlikely that another school closure—particularly one substantially similar to that which began in March 2020—will occur, let alone lead to the same alleged IDEA violations.

While Petitioners' claims remain moot and while they have failed to support their requested relief, the Third Circuit has held that the unavailability of the specific relief sought by Petitioners does not in and of itself render the IDEA's administrative process futile. *T.R. v. Sch. Dist. of Phila.*, 4 F.4th 179, 192-93 (3d Cir. 2021).

Prior to filing suit, the Petitioners did not complete due process hearings. Petitioners have failed to demonstrate that the completion of the due process hearings would be futile or inadequate. Petitioners were able to apply for emergent relief on the basis that a school district had violated an individual student's pendency rights via N.J.A.C. 6A:14-2.7(r). At the very least, were Petitioners to have meaningfully engaged in the administrative process prior to filing suit, Petitioners would have been provided the opportunity to develop a record in support of their claim that the closure of school buildings resulted in a denial of their pendency rights. The record obtained through the administrative process, by itself, renders the administrative process

productive and dispels any notion of futility in the instant matter.

III. The Third Circuit's Opinion correctly held and relied upon Petitioners' admission that *Perez v. Sturgis Public Schools*, 143 S. Ct. 859 (2023), is inapplicable to the instant matter as Petitioners only seek relief available under the IDEA

a. Petitioners do not request compensatory damages

As stated above, Petitioners failed to exhaust their administrative remedies prior to filing this lawsuit; they have so admitted. (Pet. App., p.A10) ("The Parents contend that they satisfied the exhaustion requirement because, as set forth in the Amended Complaint, they 'were in the process of exhausting their administrative remedies.' ").

After *Perez* was decided, the Third Circuit provided the parties with the opportunity to file supplemental briefing addressing the impact, if any, of *Perez*. Given the opportunity to address *Perez*, Petitioners asserted that *Perez* was inapplicable to their case. (Pet. App., p. A9, footnote 7). Now, and for the very first time in a petition for writ of certiorari to the Supreme Court, Petitioners claim that the Third Circuit failed to consider *Perez* when it dismissed Petitioners' claims.

First, the Third Circuit correctly and properly analyzed *Perez* and found that it is inapplicable to the instant matter. The exhaustion requirement applies to

lawsuits brought under the "Constitution, the [ADA], [Section 504], or other Federal laws protecting the rights of children with disabilities" when the remedy requested is one the IDEA makes available. (Pet. App., p. A9) (*citing Perez*, 143 S. Ct. 859, 864 (2023)). Delving further, the Third Circuit stated that the IDEA's remedies include prospective injunctive relief and retroactive reimbursement. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985). The Third Circuit held that "compensatory and punitive damages" are unavailable under the IDEA. (Pet. App., p. A9, footnote 7) (*citing Chambers ex rel. Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 186 (3d Cir. 2009)).

In reviewing the Amended Complaint, the Third Circuit held that the Petitioners only requested remedies provided by the IDEA and did not seek compensatory damages. (Pet. App., p. A9, footnote 7). As such, the *Perez* decision was considered and correctly deemed inapplicable to Petitioners' claims.

b. Petitioners fail to plead future injury-in-fact to support injunctive relief, which would potentially be available to Petitioners under the IDEA

In a desperate grasp to apply *Perez* to the instant matter, Petitioners point to their requests for "declaratory and injunctive relief" in an attempt to salvage their procedurally deficient claims. However, the Third Circuit reiterated this Court's holding that "prospective injunctive relief" is available under the IDEA,

thus keeping this matter out of *Perez*'s ambit. See *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985).

However, even if *Perez* was analogous to the instant matter—and it patently is not—it would remain for the Petitioner "to establish the other elements of standing (such as a particularized injury); plead a cognizable cause of action . . . ; and meet all other requirements." *Uzuegbunam v. Preczewski*, 131 S. Ct. 792, 802 (2021). Therefore and to seek such injunctive relief, Petitioners needed to plead a future injury that is "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted).

As argued *supra* in Section II(b)(ii), Petitioners fail to so plead. Petitioners admit that much of the requested relief is "prospective, rather than retrospective." (Pet. Brief, p. 36).

CONCLUSION

The Third Circuit correctly applied this Court's well-settled precedent on the issues of change in educational placement, administrative exhaustion, and the nature of relief sought. Moreover, Petitioners' speculative and hypothetical claims are based on the specter that another school closure event as occurred in March 2020 would recur in the foreseeable future.

The petition should therefore be denied.

Respectfully submitted,

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February 9, 2024