22–1740

United States Court of Appeals
For the First Circuit

NANCY ROE, as parent and natural guardian of A.R., and individually; AMY MARANVILLE, as parent and natural guardian of P.M., and individually; MARIA POPOVA, as parent and natural guardian of S.P., and individually,

Plaintiffs - Appellants,

v.

MAURA TRACY HEALEY, in her official capacity as Governor; MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION; BROOKLINE PUBLIC SCHOOLS; SOMERVILLE PUBLIC SCHOOLS; WELLESLEY PUBLIC SCHOOLS; JEFFREY C. RILEY, in his official capacity as Commissioner of Education; DR. LINUS J. GUILLORY, JR., in his official capacity as Superintendent of Brookline Public Schools; MARY E. SKIPPER, in her official capacity as Superintendent of Somerville Public Schools; DR. DAVID LUSSIER, in his official capacity as Superintendent of Wellesley Public Schools,

Defendants - Appellees.

On Appeal from the United States District Court
For the District of Massachusetts
Honorable Richard G. Stearns, District Judge

Brief of *Amici Curiae* National School Boards Association,
Maine School Boards Association, Massachusetts Association of School Committees,
and Rhode Island Association of School Committees
in Support of Defendants-Appellees and Affirmance

Francisco M. Negrón, Jr.*
Chief Legal Officer
National School Boards Association
1680 Duke Street, FL2
Alexandria, VA 22314
(703) 838-6722
Circuit Bar No. 120630

John Foskett
Valerio, Dominello & Hillman LLC
One University Avenue
Suite 300B
Westwood, MA 02090
(617) 862-2005
Circuit Bar No. 14227

*Counsel of Record, Counsel for *Amici Curiae*

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, the National School Boards Association, the Massachusetts Association of School Committees, the Maine School Boards Association, and the Rhode Island Association of School Committees make the following disclosures as *amici curiae*:

1. No amicus is a publicly held corporation or other publicly held entity.
2. No amicus has a parent corporation;
3. No amicus has 10% or more of its stock owned by a corporation.

By: /s/Francisco M. Negrón, Jr.
Francisco M. Negrón, Jr.
Attorney for Amici Curiae
National School Boards Association
Massachusetts Association of School Committees
Maine School Boards Association
Rhode Island Association of School Committees

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INTEREST OF *AMICI CURIAE*

Amicus curiae the National School Boards Association (NSBA), founded in 1940, is a non-profit organization representing state associations of school boards and the Board of Education of the U.S. Virgin Islands. NSBA advocates for equity and excellence in public education through school board leadership. Public schools serve millions of public school students, regardless of their disability. NSBA regularly represents its members' interests before federal and state courts, and has participated as amicus curiae in numerous cases addressing the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq*.

The Massachusetts Association of School Committees, Inc., (MASC) is a Massachusetts corporation incorporated under G. L. chapter 180. MASC's members consist of the approximately 320 Massachusetts school committees in cities, towns, and regional school districts. MASC represents the interests of its members in supporting and enhancing public elementary and secondary education within the Commonwealth. The issues presented to the Court have substantial implications for MASC's members, which provide services to students

with disabilities under IDEA and its state counterpart daily and which were impacted by pandemic-related school closures.

The Maine School Boards Association (MSBA) is recognized as a non-profit educational advisory organization under Me. Rev. St. tit. 30-A § 5724(9). The members of MSBA are 221 of the 229, or 97%, of local district school boards representing the municipal and regional school administrative units in the State of Maine. The mission of MSBA is to enhance the education of all students in Maine's public schools by identifying the needs of local school boards through board development, information, and support services, and by advocating for all Maine public schools at the state and national levels. MSBA offers its insights to the court to ensure it understands the impact its decision will have on school board policy in Maine.

The Rhode Island Association of School Committees (RIASC) is a non-profit organization dedicated to developing the effectiveness of Rhode Island School Committee members in meeting their role and responsibilities in promoting student achievement in safe and challenging learning environments, while playing a leading role in shaping and advocating public education policy at the local, state, and national levels. RIASC, on behalf of its school committee members, is

uniquely positioned to explain to this Court how its decision will affect public education in Rhode Island.

Amici fully support the rights of all children with disabilities to receive a free appropriate public education that addresses their unique educational needs. So do their members, who have acutely experienced the full weight of their legal responsibilities toward disabled students during the unprecedented period of crisis activated by the COVID-19 pandemic. *Amici* also have an interest in ensuring that their members are able to rely on their educational expertise to address the needs of students in a manner that is both consistent with IDEA requirements for the provision of a free appropriate public education and the dictates of unprecedented exigent circumstances. *Amici* are concerned that a reversal of the opinion and order of the court below would set a precedent that would severely restrict the ability of state and local school authorities to adapt to unprecedented conditions beyond their control, while providing appropriate services to all eligible students. Affirmance, on the other hand, would not leave students without a remedy. They would be entitled to pursue their rights under detailed state requirements consistent with IDEA's procedural framework to remediate any demonstrated deprivation of free appropriate public

education (FAPE) during the pandemic. With these concerns in mind, *Amici* invite this court's attention to law and arguments that might not be brought before it and may be of special assistance.

FRAP 29(a)(2) STATEMENT

All parties have consented to the filing of this *amicus* brief.

FRAP 29 (a)(4)(E) STATEMENT

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *Amici Curiae* state that (i) no party's counsel authored this brief in whole or in part; (ii) no party or party's counsel contributed money to fund the preparation or submission of this brief; and (iii) no person other than *Amici Curiae* and their counsel contributed money to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This appeal is brought by the parents and guardians of three students with disabilities (collectively "Plaintiffs") who seek declaratory and prospective injunctive relief in a putative class action against the Governor of Massachusetts, the Department of Elementary and Secondary Education (DESE), and three local school districts. Plaintiffs have asserted several claims filed under the labels of different

statutes and provisions, but the claims share a common, core premise. The gravamen of all is that the rights of students with disabilities to a FAPE under IDEA were violated by the closure of Massachusetts schools to all in-person learning beginning in March 2020 under emergency orders issued by the Governor as the COVID pandemic rapidly emerged and accelerated in Massachusetts with deadly impact.[1]

The District Court denied the sought-after injunction. It rejected the theory that the cessation of in-person learning for all students, and the substitution of remote learning, transgressed the "stay put" provision in IDEA, 20 U.S.C. §1415(j), that effectively enjoins a change in a disabled student's educational placement for more than ten days without following specified procedures. Separately, the District Court dismissed Plaintiffs' claims on the merits, ruling that Plaintiffs had failed to satisfy the prerequisite for filing suit requiring that they

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[1] The Governor's orders exempted special needs students enrolled in residential schools. Governor's COVID-19 Order #3 (issued March 15, 2020) https://www.mass.gov/doc/march-15-2020-school-closure-order/download; Governor's COVID-19 Order #16 (Issued March 25, 2020) https://www.mass.gov/doc/march-25-school-closure-extension-order/download; Governor's COVID-19 Order #28 (issued April 21, 2020) https://www.mass.gov/doc/april-21-2020-school-closure-extension-order/download.

first follow the collaborative and administrative process established by IDEA, 20 U.S.C. § 1415(i)(2)(A).

The District Court correctly applied well-entrenched law and the fundamental policies of IDEA. A contrary ruling would erode state and local administrative authority over school operations, and the carefully designed individualized process that is at the heart of an eligible student's FAPE as protected by IDEA. That process is designed ensures that all eligible students receive appropriate services.

Courts faced with analogous circumstances have declined to find that a large-scale administrative closure of schools due to a health or safety emergency triggers a "stay put" right to individual injunctions requiring in-person learning for certain students despite the risk. Courts also have declined to find that an alleged denial of FAPE in such emergencies allows an end-run around IDEA's administrative procedures. Instead, courts have repeatedly recognized that school closures due to budgetary or other administrative concerns do not invoke "stay put," and families' claims of FAPE violations must be addressed through the IDEA process carefully designed for that purpose. *Amici* respectfully urge this court to affirm.

ARGUMENT

I. The court below properly applied IDEA's "stay put" provision.

The stay put provision in 20 U.S.C. § 1415(j) provides in pertinent part:

> 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.

Neither the statute nor its implementing regulations define "then-current educational placement." The Supreme Court has stated that the purpose of this provision was to "prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings." *Sch. Comm. Of the Town of Burlington, Massachusetts v. Dep't of Educ.*, 471 U.S. 359, 373 (1985); *see also Honig v. Doe*, 484 U.S. 305, 323 (1988) (noting the "stay put" provision was intended "to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school").

Federal courts interpreting the stay put requirement have applied it in a variety of scenarios, using similar standards to determine whether a change of placement triggering the requirement has taken place. *See generally* Perry A. Zirkel, *Stay-Put Under The IDEA: The Latest Update,* 404 Ed. L. Rptr. 398 (West 2022). Some courts have found that "the meaning of 'educational placement' falls somewhere between the physical school attended by a child and the abstract goals of a child's [individualized education program]." *Board of Educ. of Community High School Dist. No. 218, Cook County, Ill. v. Illinois State Bd. of Educ*., 103 F.3d 545, 548 (7th Cir. 1996); The Second Circuit has explained, "a court typically looks to (1) 'the placement described in the child's most recently implemented IEP'; (2) 'the operative placement actually functioning at the time when the stay put provision of the IDEA was invoked'; or (3) 'the placement at the time of the previously implemented IEP.'" Zirkel, *citing Doe v. E. Lyme Bd. of Educ*., 790 F.3d 440 (2d Cir. 2015) [citations omitted].

An eligible student's educational placement is the setting where a child's services are delivered rather than the particular school. S*ee, e.g., A.W. v. Fairfax County School Bd.*, 372 F.3d 674 (4th Cir. 2004)("[T]he touchstone of the term 'educational placement' is not the

location to which the student is assigned but rather the environment in which educational services are provided); *White v. Ascension Parish Sch. Bd*. 343 F.3d 373 (5th Cir. 2003)("'Educational placement,' as used in the IDEA, means educational program-not the particular institution where that program is implemented."). For this reason, an administrative decision to move all children to another similar school when one school is shut down is not a change in placement, *Concerned Parents v. N.Y. Bd. of Educ*., 629 F.2d 751 (2d Cir. 1980); neither is a minor alteration such as a change in transportation services, *DeLeon v. Susquehanna Cmty. Sch. Dist*., 747 F.2d 149 (3d Cir. 1984).

Courts considering the stay put requirement in the context of an administrative decision – budgetary or otherwise – to close a particular school or an entire school system, have declined to find a "change in placement" for purposes of stay put, or have declined to apply the stay put requirement altogether, even if a change in placement had taken place. A system- or school-wide shutdown affects all students in attendance, rather than the educational program of an individual child alone. The stay put requirement was designed to address the latter. *See, e.g. N.D. v. Haw. Dep't of Educ*., 600 F.3d 1104 (9th Cir. 2010); *Carmona v. Dep't of Educ*., CV 21-18746, 2022 WL 3646629 (D.N.J.

Aug. 23, 2022); *J.T. v. de Blasio,* 500 F. Supp. 3d 137 (S.D.N.Y. 2020); *J.C. v. Fernandez,* 77 IDELR ¶ 15 (D. Guam 2020) (pandemic change to virtual instruction). Courts have been reluctant to allow an automatic injunction requiring a student to stay in a placement that state and local authorities have closed to all students due to budget or other administrative concerns. *See Tilton by Richards v. Jefferson County Bd. of Educ*., 705 F.2d 800, 804 (6th Cir. 1983), *citing Epperson v. Arkansas*, 393 U.S. 97, 100 (1968)(Finding that a budget-based residential facility closure did not implicate the stay put requirement, and noting well-settled law that "'[b]y and large, public education in our Nation is committed to the control of state and local authorities….' These authorities do not, by electing to receive federal funds…, abdicate their control of the fiscal decisions of their school systems."); *Weil v. Board of Elementary & Secondary Educ*., 931 F.2d 1069, 1072-1073 (5th Cir. 1991)(Where an abrupt transfer of student from one school building to another within the district was due to a closure, even if it could be considered a change in educational placement sufficient to invoke the statute's prior written notice requirement, the school's failure to give this notice was not actionable. "The purpose of prior notice in the context of a proposed change in educational placement is

to inform the parents timely of the proposed change and of their right to request a hearing thereon. …. However, if the change in 'educational placement' is necessitated by the closure of a facility for reasons beyond the control of the public agency, the 'stay-put' provisions … do not apply") [citations omitted].

A. The District Court properly found no reasonable application of the stay put requirement in the context of statewide pandemic-related school closures.

The District Court declined to hold that the stay put requirement barred the pandemic-driven closure of all in-person learning in Spring 2020.

First, the court noted that "there are *no allegations that the student-plaintiffs were singled out during the pandemic* - school closing and remote instruction "'*affect[ed] all public schools and all students, disabled and non-disabled alike*'" *Roe v. Baker*, --- F.Supp.3d ---, 2022 WL 3916035 (D. Mass. Aug. 31, 2022) [citation omitted] [emphasis added]. The court observed that the congressional policy to defer to state and local leaders regarding management of schools "is particularly salient" in this case because:

> [i]ndividual students' and parents' preferences cannot, through the vehicle of the IDEA, countermand the decision of the Governor and school administrators to

> undertake systemic measures to avert the palpable health risks faced by students and school staff posed by teaching in an in-person environment.

Id. at 9 (citation omitted).

Second, the court relied on March 2020 guidance issued by the United States Department of Education (USDOE). That guidance stated that because of the health crisis "the provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically…."[2] The court concluded "[i]t follows that the defendants' decisions to close schools physically and resort to remote education were contemplated and permitted by the USDOE in fulfilling the schools' duty to provide a FAPE." *Id.* at 10.[3]

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[2] Department of Education, Office of Special Education Programs, *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities* (March 21, 2020) https://sites.ed.gov/idea/idea-files/supplemental-fact-sheet-addressing-risk-covid-19-preschool-elementary-secondary-schools-serving-children-disabilities-march-21-2020/.

[3] The court also observed that Plaintiffs' request for prospective injunctive relief was barred in the absence of any evidence that school-wide closures similar to those in Spring 2020 were remotely contemplated or plausible. *Id.* at 11.

The proper scope and meaning of the stay put provision in the context of school-wide closures was limned in *N. D. v. Haw. Dep't of Educ*., 600 F.3d 1104 (9th Cir. 2010). There, the court rejected a claim that Hawaii's decision to shut down public schools on seventeen Fridays and concurrently to furlough the teachers was barred. Discerning that "the overarching goal of the IDEA is to prevent the isolation and exclusion of disabled children, and provide them with a classroom setting as similar to non-disabled children as possible," the *N.D*. court held that the State's decision did not result in "a change in the educational placement of disabled children" because "[t]he children continue to attend the same school, have the same teachers, and stay in the same classes [and] [t]he educational setting of the disabled children remains the same post-furloughs." *Id*. at 1116. "Congress did not intend," the court summarized, "for the IDEA to apply to system wide administrative decisions" and *"[a]n across the board reduction of school days* such as the one here *does not conflict with Congress's intent of protecting disabled children from being singled out*." *Id*. [emphasis added].

Like the District Court here, three other courts also have applied this analysis to validate the temporary, pandemic-driven closure of all

in-person learning against challenges based on the stay put provision. *See J.T. v. de Blasio*, 500 F. Supp. 3d 137, 189-190 (S.D. N.Y. 2020); *Bills v. Virginia Dep't of Educ*., 605 F. Supp. 3d 744, 755 (W.D. Va. 2022)(holding that there was no change in placement because the defendants had "moved all students—regardless of disability—to remote learning"); *Carmona v. Dep't of Educ*., CV 21-18746, 2022 WL 3646629 (D.N.J. Aug. 23, 2022).[4]

These decisions are consistent with the well-established law interpreting the stay put provision discussed above. Simply put, that provision "does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers while his administrative and judicial proceedings are pending. Instead, it guarantees only the same general level and type of services that the disabled child was receiving." *T.M. v. Cornwall Cent. Sch. Dist*., 752 F.3d 145, 171 (2d Cir. 2014), citing *Concerned Parents & Citizens v. N.Y.C. Bd. of Educ*., 629 F.2d 751, 753, 756 (2d Cir. 1980). *Concerned Parents & Citizens,* in turn, held that a transfer from one school to another school in the same school district with similar but less

[4] The District Court cited the decisions in *N.D.*, *J.T.*, and *Bills*. *Roe v. Baker*, --- F.Supp.3d ---, 2022 WL 3916035 (D. Mass. Aug. 31, 2022). All three district court decisions are the subject of appeals.

"innovative" programs was not a change in educational placement. *Id.* at 754. *See also Ms. S. v. Vashon Island Sch. Dist*., 337 F.3d 1115, 1134 (9th Cir. 2003)(where implementation of a child's IEP becomes impossible within the district, the stay put placement should be "as close as possible under the circumstances.").

The stay put provision "does not eliminate … the school district's preexisting and independent authority to determine *how* to provide the most-recently-agreed-upon educational program"; instead, "'[i]t is up to the school district,' not the parent, 'to decide how to provide that educational program [until the IEP dispute is resolved], so long as the decision is made in good faith.'" *De Paulino v. New York City Dep't of Educ*., 959 F.3d 519, 534 (2d Cir. 2020) [citation omitted] [emphasis in original]. *See also Brookline School Committee v. Golden*, 628 F. Supp. 113, 116 (D. Mass. 1986), stating "[e]ducational agencies must not modify *fundamentally* a child's educational placement without notice [but] they also must be given sufficient latitude in determining *how* to educate a given child." [emphasis added].

B. The school closures and move to remote learning ordered by the Governor exemplify administrative closures not subject to "stay put" requirements.

The context of this case is an especially compelling occasion for applying the longheld standard that a child's "placement" under the IDEA is not tied to a certain in-person learning context. As noted above, the USDOE recognized in its March 2020 guidance that "it may be unfeasible or unsafe for some institutions, during current emergency school closures, to provide hands-on physical therapy, occupational therapy, or tactile sign language educational services" and therefore "[t]he determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency." USDOE Supplemental Fact Sheet at 2. The USDOE made "*clear [that] ensuring compliance with the Individuals with Disabilities Act (IDEA), Section 504 of the Rehabilitation Act (Section 504), and Title II of the Americans with Disabilities Act should not prevent any school from offering educational programs through distance instruction.*" *Baker*, 2022 WL 3916035, at*4 citing USDOE Supplemental Fact Sheet [emphasis in original]. The agency added that "where technology itself imposes a barrier to access or where educational materials simply are

not available in an accessible format [school districts] may still meet their legal obligations [through] equally effective alternate access to the curriculum or services provided to other students." USDOE Supplemental Fact Sheet at 2. The USDOE therefore expressly contemplated the use of different methods for the delivery of educational and supportive services to students with disabilities during the pandemic.

When Governor Baker issued three emergency school closure orders in March and April 2020, the pandemic was escalating unchecked in Massachusetts and elsewhere with no known effective treatments, no vaccines, no immunity, only nascent knowledge of the virus's behavior, and rapidly increasing hospitalizations and deaths. In April 2020, the Governor announced that he was extending the in-person closures through the end of the school year because it "was imperative to protect the safety and well-being of the more than 1 million public and private school students statewide as well as tens of thousands of educators entrusted with their care — and those they have contact with."[5] If there is any context in which Congress's policy

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[5] James Vaznis and Bianca Vázquez Toness, *Baker orders schools stay closed through the end of the school year, THE BOSTON GLOBE*

exempting school-wide closures from the stay put provision should be eroded – and *amici* assert that there is none – this context clearly furnishes no such occasion.

The court in *J.T.* stated the incontrovertible: a system-wide decision to close in-person learning that "was the product of … a health crisis of unprecedented proportions — and [was] made to protect the lives and health of students and staff" is one that the courts should not "second guess." *J.T., supra*, 500 F.Supp. 3d at 190. The Governor's exceptions for "'essential' workers" (Appellants' Brief at 22) do not suggest otherwise. In the context of the public emergency, the Governor properly could conclude (as he did) that law enforcement/public safety personnel and first responders; food supply workers; workers handling the supply of water and wastewater treatment; workers maintaining public utilities; and health care professionals all had to be exempt because those services simply could not be performed remotely and they are vital to protecting the public health and safety. Other services – as important as it is that they be performed in-person – could

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(Updated Apr. 21, 2020, 5:08 PM), https://www.bostonglobe.com/2020/04/21/nation/coronavirus-boston-massachusetts-april-21/.

nonetheless be provided adequately in remote settings during a time when the safety of those receiving the services, of those providing the services, and of their families and close contacts, was in jeopardy. The USDOE made this emphatically clear regarding a FAPE. *See also Thaddeus v. Secretary of the Exec. Office of Health and Human Services*, 101 Mass. App. Ct. 413, 423, 193 N.E.3d 472 (2022)(sustaining pandemic-based restrictions on in-person visits by parents with their children in the State's custody where "in-person contact posed a significant health risk not only to the child and the parents, but also to the various adults (foster parents, guardians, social workers, and the like) who must enable such contact").

State and local leaders must be able to take measures to protect their students, staff, and communities during an acute health emergency. Courts throughout the nation have long recognized a school board's legal obligation to ensure the wellbeing of all students in its care and control: "This control extends to health, proper surroundings, necessary discipline, promotion of morality and other wholesome influences, while parental authority is temporarily superseded." *Richardson v. Braham*, 125 Neb. 142, 249 N.W. 557, 559 (Neb. 1933). Long ago, the Supreme Court validated vaccination requirements in

public schools, finding that the vaccine ordinances did not confer "arbitrary power, but only that broad discretion required for the protection of the public health." *Zucht v. King*, 260 U.S. 174 (1922).

If courts may override state and local decisions to shut down schools in the face of dire health risks, local school boards' *in loco parentis* duty and their ability to provide for the safety and welfare of their students and staff would be eviscerated.

II. The Court below properly applied IDEA's exhaustion requirement, as the gravamen of the complaint is a violation of FAPE.

The District Court dismissed plaintiffs' claims on the merits because it is undisputed that they did not exhaust their administrative remedies under IDEA. *Baker*, 2022 WL 3916035, at *14. IDEA's exhaustion requirement is grounded in 20 U.S.C. § 1415(i)(2)(A), which provides that aggrieved parties may bring a judicial action only after following the IDEA provisions that afford parents the right to file a complaint regarding the education of their eligible children, § 1415(b)(6), and to seek review of those decisions through local and state administrative avenues, § 1415(f) and (g). These procedures include review by an impartial hearing officer and an appeal from that hearing, 20 U.S.C. § 1415(f) and (g). This mandate of IDEA "applies

even when the suit is brought pursuant to a different statute so long as the party is seeking relief that is available under subchapter II of IDEA." *Rose v. Yeaw*, 214 F.3d 206, 210 (1st Cir. 2000), citing 20 U.S.C. § 1415(l). IDEA explicitly requires that, before filing a civil action "seeking relief that is also available under [IDEA], the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under [IDEA]." 20 U.S.C. § 1415(l). The Supreme Court clarified in *Fry v. Napoleon Community Schools*, 580 U.S. 154 (2017) that "exhaustion is not necessary when the gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee—what the Act calls a 'free appropriate public education.'" *Id*. at 158. Courts should look at the gravamen of the complaint brought under another statute when determining whether it "seeks relief for the denial of an appropriate education." *Id*. at 169.

This court has articulated the strong policy that undergirds deference to the procedural requirements. Exhaustion "'enables the [educational] agency to develop a factual record, to apply its expertise to the problem, to exercise its discretion, and to correct its own mistakes, and is credited with promoting accuracy, efficiency, agency

autonomy, and judicial economy.'" *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 60 (1st Cir. 2002) (citation omitted).[6] *Frazier* noted the "special benefits" of IDEA's exhaustion requirement:

> The IDEA's administrative machinery places those with specialized knowledge – education professionals – at the center of the decisionmaking process, entrusting to them the initial evaluation of whether a disabled student is receiving a free, appropriate public education. These administrative procedures also ensure that educational agencies will have an opportunity to correct shortcomings in a disabled student's individualized education program (IEP). … This too makes sense because the problems attendant to the evaluation and education of those with special needs are highly ramified and demand the best available expertise.

Id. at 60-61.

The *Frazier* court concluded that "[a]llowing plaintiffs to bypass the IDEA's administrative process en route to state or federal court disrupts this carefully calibrated balance and shifts the burden of factfinding from the educational specialists to the judiciary. That

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[6] As this court explained, in Massachusetts the "impartial due process hearing" to which an aggrieved parent is entitled takes place before the Bureau of Special Education Appeals (BSEA), which is "empowered … to handle such appeals through mediations and hearings," citing 603 CMR 28.08. *Frazier*, 276 F.3d at 58-59.

phenomenon is directly at odds with the method of the IDEA…" *Id*. at 61.

These judicial observations reflect IDEA's cornerstone of teamwork between families and schools to ensure that every eligible student with a disability receives a FAPE. That process begins with the establishment of an *individualized* education program through collaboration of the student's IEP Team, consisting of the parents, at least one regular education teacher, at least one special education teacher, and a representative of the "local education agency," *i.e*., the school district administration. This joint effort results in designing the placement and services that best meet the student's specific needs, as well as goals and benchmarks that measure his or her progress. The required collaboration continues even when disputes arise, including informal dispute resolution and mediation. Ultimately, if a due process hearing must take place, it occurs before a hearing officer trained in the requirements of IDEA under expedited timelines and procedures, with an agreed-to resolution always in play. *See* 20 U.S.C. §§ 1400(c), 1414(b) and (d), 1415(f) and (g); 34 C.F.R. §§ 300.510, 300.512, 300.515.

By mandating that parents exhaust IDEA's administrative remedies in situations where a FAPE is at issue, the statute provides a pathway that allows the school to "bring their expertise and judgement to bear," *Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1*, 580 U.S. 386, 404 (2017), and to correct any errors quickly. The procedures aim to determine an appropriate program for the child swiftly and to minimize the prospect of undermining irrevocably the essential family/school relationship. Preservation of that relationship is far less likely if a party can proceed directly to protracted, contentious, and adversarial litigation before a court that is unaided by a developed record.

IDEA's mandatory exhaustion requirement contains no codified exceptions.[7] This court has ruled that any exceptions to the exhaustion requirement are limited and "a party who seeks to invoke an exemption bears the burden of showing that it applies." *Frazier, supra*, 276 F.3d at 59, citing *Honig v. Doe*, 484 U.S. 305, 326-327 (1988). Here, Plaintiffs concede that they have not exhausted their remedies under

[7] The Supreme Court currently is considering a case in which the Petitioner asks the Court to read a futility exception into the statute when the IDEA claims have been settled. *Perez v. Sturgis Pub. Sch.*, 3 F.4th 236 (6th Cir. 2021), *cert. granted*, 143 S. Ct. 81 (2022).

IDEA. In addition, the burden to show that any exception applies cannot be met in this case.

First, Plaintiffs assert that the closure of schools to in-person learning was "a practice of general applicability contrary to the law," citing *Parent/Professional Advocacy League v. City of Springfield*, 934 F.3d 13, 27 (1st Cir. 2019) (Appellants' Brief at 18). To the extent that Plaintiffs refer to what this court described as suits alleging "systemic" violations of IDEA's goals and objectives, this case falls outside of such an analysis. *Id*.

In *Parent/Professional Advocacy League*, this court explicitly declined to decide "whether to adopt such an exception in this circuit," but did address the types of claims that would satisfy the exception if it were available. *Parent/Professional Advocacy League, supra,* 934 F.3d at 28. The court observed that other circuits have decided that to fit this exception "the alleged violations must be 'truly systemic . . . in the sense that the *IDEA's basic goals are threatened on a system-wide basis*'" and pointed to "suits alleging systemwide violations of the processes for identifying and evaluating students with disabilities." *Id*. at 27 [citations omitted] [emphasis added]. But the unique context of this case does not lend itself to the "systemic violation" exception as

defined by this court because the switch to remote learning did not deprive *all* students with disabilities of a FAPE (Appellants' Brief at 20, 21). Under the individualized approach IDEA requires, a court may not assume that every student with a disability was impeded by remote learning without regard to each student's specific disability; the extent of the disability; the student's individual skills, aptitudes, and abilities; the student's specific needs; the specific services in the student's IEP; and the available methods for delivery of those services.

This court has rejected a "systemic violation" exception as alleged here precisely because "[a] finding that *one student* with a *certain type and degree of mental health disability* should have been mainstreamed *would not mean that another student with a different type, or even just a different degree, of mental health disability* should have received the same services or been mainstreamed." *Parent/Professional Advocacy League, supra*, 934 F.3d at 27-28 [emphasis added]. *See also R.Z. v. Cincinnati Pub. Schools*, 1:21-cv-140, 2021 WL 3510312 (S.D. Ohio Aug. 10, 2021), rejecting an alleged exception to the exhaustion mandate because "there is no dispute that Plaintiff's claims require individualized analysis [and] simply adding allegations that other students with disabilities might also have been

impacted does not suffice to forego the administrative exhaustion that the IDEA requires."

The impact of the use of remote learning on one particular student's FAPE is fundamentally different from its impact on another's and is driven by a myriad of highly individualized factors that are at the core of an IEP. These may include at least such elements as the student's access to, and ability to use, devices and the internet; the availability of family support in the student's home; whether there are alternative means of supported communication for the student; the student's skills in using such technology as text-to-speech or speech-to-text; and the student's ability to pay attention to auditory and visual detail. The conclusion that remote learning deprived all "disabled" students of a FAPE cannot be sustained under applicable law. If anything, the argument demonstrates why exhaustion is the general rule and why it must be followed here.

Plaintiffs also assert a second exception to exhaustion grounded in alleged "futility," arguing that hearing officers do not have authority to mandate that schools reopen for in-person learning (Appellants' Brief at 17). While this court has recognized a futility exception to the

IDEA exhaustion requirement,[8] this case does not present the appropriate circumstances to invoke it. In *Doucette v. Georgetown Pub. Schools,* 936 F.3d 16 (1st[t] Cir. 2019), the court held:

> Futility applies when (1) the plaintiff's injuries are not redressable through the administrative process, …, and (2) the administrative process would provide negligible benefit to the adjudicating court…

Id. at 31.

Neither factor is present here.

First, as explained above, because each student's FAPE needs and experience with remote learning differ, retraction of the closure orders would not ensure FAPE for each student. The IDEA process is designed to assess the specific needs of each student considering the type and extent of his or her disability and how those needs can be addressed through any number of possible alternatives for delivery of the prescribed services. A disagreement regarding those options as resolved by a BSEA hearing officer with expertise in the statute's requirements could provide more than "negligible benefit" to a

[8] As noted above, the Supreme Court will soon rule in a case in which the Petitioner asserts such an exception in the IDEA settlement context. *Perez v. Sturgis Pub. Sch*., 3 F.4th 236 (6th Cir. 2021), *cert. granted*, 143 S. Ct. 81 (2022).

reviewing court. *Doucette, supra*, 936 F.3d at 31. In fact, BSEA hearing officers have authority to, and do, order compensatory educational services to make up for any FAPE deficiency.

Second, the administrative process would not have been "futile" here because there was a state-wide procedure in place to ensure students receives future services to address pandemic-related deficiencies. In *Doucette*, this court expressly ruled that available relief under the IDEA process that forecloses a futility claim includes "future special education and related services to ensure or remedy a past denial of a FAPE." *Doucette, supra*, 936 F.3d at 32. That type of relief was explicitly provided in Massachusetts regarding any impacts on the ability of disabled students to receive a FAPE resulting from the Spring 2020 closures.

In August 2020, DESE issued Advisory 2021-1, "COVID-19 Compensatory Services and Recovery Support for Students with IEPs."[9] This 18-page document was released as the 2020-2021 school year was about to begin, including the phased-in resumption of in-

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[9] Massachusetts Department of Elementary and Secondary Education, Coronavirus (COVID-19) Special Education Technical Assistance Advisory 2021-1: COVID-19 Compensatory Services and Recovery Support for Students with IEPs (Updated Sept. 3, 2020) https://www.doe.mass.edu/covid19/sped.html.

person learning. DESE's Advisory directed that school districts conduct IEP Team meetings, including parents, for every eligible student in the district. Those meetings were to be directly focused on the specific effects of the closure for each student. *Id.* Noting that "it is critical to identify and address the impact of the interruptions caused by the unexpected suspension of in-person education due to the COVID-19 pandemic on students with IEPs," DESE described the explicit purpose: to "fully consider information and input provided by parents regarding their child's ability to access remote learning and the student's progress during school closure" and to "determine how to effectively address each of these areas timely and comprehensively, …, addressing the unique needs and circumstances of each individual student." *Id*. at 2. The determination of needed services "must be based on information provided by the parents and data and information available from other sources, and be information-based, individualized determinations … addressing the unique needs and circumstances of each individual student." *Id.* at 4. DESE made clear that a determination of "needed CCS and recovery support will be provided *in addition to a student's current IEP services.*" *Id*. at 7 [emphasis added]. DESE prioritized this process for several categories of "[s]tudents with

complex and significant needs," requiring that their determinations be made by December 15, 2020. *Id.* at 12. Finally, DESE expressly provided that "[p]arents or guardians may pursue dispute resolution options through the [BSEA] including a facilitated IEP Team meeting, a mediation, and/or a due process hearing [and] [a] parent or guardian may also file a complaint with the Department's Problem Resolution System." *Id.* at 11.

In addition, DESE allowed for continuing assessment regarding any impacts of remote learning during the 2020-2021 school year, including for "[s]tudents with disabilities in districts that were fully remote for three or more months during the 2020-21 school year" and for "[a]ll students with disabilities who had significant difficulty accessing remote learning offered by the school district due to the nature or severity of the child's disability, technology barriers, language access barriers, or barriers resulting from the pandemic."[10]

The procedures and forward-looking monitoring directed by DESE is precisely the sort of relief that the IDEA process is designed

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[10] Massachusetts Department of Elementary and Secondary Education, *Frequently Asked Questions for Schools and Districts Regarding Special Education SY 2021-2022* (Revised Jul. 8, 2021) https://archives.lib.state.ma.us/bitstream/handle/2452/846533/on1260633025.pdf.

for and that this court has ruled will preclude application of the "futility" exception. *Doucette, supra*, 936 F.3d at 32.[11]

The Advisory was a thorough implementation of the process required by IDEA, including families' rights to pursue any disagreements or alleged shortcomings in the BSEA.[12] This case is not an appropriate vehicle for expanding exceptions to the exhaustion requirement.

CONCLUSION

For the foregoing reasons, *amici* urge this court to affirm the decision of the court below denying the motion for preliminary injunction and allowing defendants' motion to dismiss.

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[11] The *Doucette case* involved a fundamentally different and narrow type of relief – a claim under 42 U.S.C. § 1983 seeking "money damages for medical expenses arising from [the student]'s seizures and the physical, emotional, and psychological harm that [he] experienced." *Id*. at 32. Even then, this court noted that it "already has the benefit of the administrative record developed during the 2010 due process hearing in which the [parents] sought an alternative placement for [the student], as well as the required documentation from the [parent]s' 2012 pursuit of an alternative placement." *Id*. The court reiterated that "further record development is not necessary in this case because of the documentation already available from the administrative processes in 2010 and 2012." *Id*. at 32 n.22.

[12] Plaintiffs' complaint was filed on October 26, 2021 - fourteen months *after* the DESE advisory was issued, four months *after* the ensuing 2020-2021 school year had concluded, and two months into yet another school year.

Respectfully submitted,

Francisco M. Negrón, Jr.*
Chief Legal Officer
National School Boards Association
1680 Duke Street, FL 2
Alexandria, VA 22314
(703)838-6722
Circuit Bar No. 120630
*Counsel of Record
Counsel for *Amici Curiae*

John Foskett
Valerio, Dominello &
Hillman LLC
One University Avenue
Suite 300B
Westwood, MA 02090
(617) 862-2005
Circuit Bar No. 14227

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Dated: March 16, 2023

/s/ Francisco M. Negrón, Jr.
FRANCISCO M. NEGRÓN, JR.
Attorney for *Amici Curiae*

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FRANCISCO M. NEGRÓN, JR.
Attorney for *Amici Curiae*