20-4128

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

K.M., Individually and on behalf of M.M. and S.M., and all others similarly situated, C.N., Individually and on behalf of V.N. and all others similarly situated, J.J., Individually and on behalf of Z.J. and all others similarly situated,

Plaintiffs-Appellants,

J.T., Individually and on behalf of D.T. and all others similarly situated,

Plaintiff,

- against -

BILL DE BLASIO, In his official capacity as Mayor of New York City, RICHARD CARRANZA, In his official capacity as Chancellor of the New York City Department of Education, NEW YORK CITY DEPARTMENT OF

(See Inside Cover for Continuation of Caption)

On Appeal from the United States District Court for the Southern District of New York

BRIEF *AMICI CURIAE*
NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC., AND NATIONAL SCHOOL BOARDS ASSOCIATION
In Support of Defendant-Appellee New York City Department of Education and Affirmance

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EDUCATION, SCHOOL DISTRICTS IN THE UNITED STATES, STATE DEPARTMENTS OF EDUCATION IN THE UNITED STATES, CONNECTICUT REGIONAL SCHOOL DISTRICT NO. 10 (HARWINTON & BURLINGTON), CLAYTON COUNTY PUBLIC SCHOOLS, COBB COUNTY SCHOOL DISTRICT, DEKALB COUNTY SCHOOL DISTRICT, MARIETTA CITY SCHOOLS, CITY OF BRISTOL SCHOOL DISTRICT, PENTUCKET REGIONAL HIGH SCHOOL, TOWN OF BRANFORD SCHOOL DISTRICT, TOWN OF CLINTON and CLINTON BOARD OF EDUCATION, POMFRET CT SCHOOL DISTRICT, TOWN OF PLAINVILLE and PLAINVILLE BOARD OF EDUCATION, SEYMOUR BOARD OF EDUCATION, TOWN OF WATERTOWN and WATERTOWN BOARD OF EDUCATION, TOWN OF WINDHAM and WINDHAM BOARD OF EDUCATION, TOWN OF GROTON and GROTON BOARD OF EDUCATION, TOWN OF WALLINGFORD and WALLINGFORD BOARD OF EDUCATION, TOWN OF PLYMOUTH and PLYMOUTH BOARD OF EDUCATION, MARTHA'S VINEYARD HIGH SCHOOL, PENNSYLVANIA DEPARTMENT OF EDUCATION, ALPINE UNION SCHOOL DISTRICT, BONSALL UNION SCHOOL DISTRICT, BORREGO SPRINGS UNIFIED SCHOOL DISTRICT, CARDIFF ELEMENTARY SCHOOL DISTRICT, CARLSBAD UNIFIED SCHOOL DISTRICT, CHULA VISTA ELEMENTARY SCHOOL DISTRICT, CORONADO UNIFIED SCHOOL DISTRICT, DEHESA SCHOOL DISTRICT, DEL MAR UNION SCHOOL DISTRICT, ENCINITAS UNION SCHOOL DISTRICT, ESCONDIDO UNION ELEMENTARY SCHOOL DISTRICT, ESCONDIDO UNION HIGH SCHOOL DISTRICT, FALLBROOK UNION ELEMENTARY SCHOOL DISTRICT, FALLBROOK HIGH SCHOOL UNION DISTRICT, GROSSMONT UNION HIGH SCHOOL DISTRICT, JAMUL-DULZURA UNION SCHOOL DISTRICT, JULIAN UNION SCHOOL DISTRICT, JULIAN UNION HIGH SCHOOL DISTRICT, LA MESA-SPRING VALLEY SCHOOL DISTRICT, LAKESIDE JOINT SCHOOL DISTRICT, LEMON GROVE SCHOOL DISTRICT, MCCABE UNION SCHOOL DISTRICT, MOUNTAIN EMPIRE UNIFIED SCHOOL DISTRICT, RAMONA UNIFIED SCHOOL DISTRICT, RANCHO SANTA FE ELEMENTARY SCHOOL DISTRICT, SAN DIEGO COUNTY OFFICE OF EDUCATION, SAN DIEGUITO UNION HIGH SCHOOL DISTRICT, SAN MARCOS UNIFIED SCHOOL DISTRICT, SAN PASQUAL UNION ELEMENTARY SCHOOL DISTRICT, SAN PASQUAL VALLEY UNIFIED SCHOOL DISTRICT, SANTEE SCHOOL DISTRICT, SOLANA BEACH ELEMENTARY SCHOOL

DISTRICT, SPENCER VALLEY ELEMENTARY SCHOOL DISTRICT, SWEETWATER UNION HIGH SCHOOL DISTRICT, VALLECITOS ELEMENTARY SCHOOL DISTRICT, VALLEY CENTER-PAUMA UNIFIED SCHOOL DISTRICT, WARNER UNIFIED SCHOOL DISTRICT, CHERRY HILL PUBLIC SCHOOLS, MIDDLETOWN TOWNSHIP PUBLIC SCHOOLS, WEST ORANGE PUBLIC SCHOOLS, READINGTON TOWNSNIP PUBLIC SCHOOLS, CERTAIN SCHOOL DISTRICTS LOCATED IN THE STATE OF VIRGINIA, CERTAIN SCHOOL DISTRICTS LOCATED IN THE STATE OF CALIFORNIA, TOWN OF STRATFORD BOARD OF EDUCATION, CITY OF NORWALK BOARD OF EDUCATION, CITY OF STAMFORD BOARD OF EDUCATION, CITY OF BRIDGEPORT BOARD OF EDUCATION, OMAHA PUBLIC SCHOOL DISTRICT, AUSTIN INDEPENENT SCHOOL DISTRICT, ATLANTA INDEPENDENT SCHOOL SYSTEM, FULTON COUNTY SCHOOL DISTRICT, MINNESOTA STATE DEPARTMENT OF EDUCATION, STATE OF WASHINGTON, WASHINGTON STATE SCHOOL FOR THE BLIND, WASHINGTON STATE SCHOOL FOR THE DEAF, SOUTH CAROLINA DEPARTMENT OF EDUCATION,

Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26. 1 of the Federal Rules of Appellate Procedure, the New York State School Boards Association, Inc. and the National School Boards Association each certify that it is a non-profit organization, that it does not have a parent corporation, and that no publicly held corporation owns more than ten percent of its stock.

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INTEREST OF THE *AMICI CURIAE*[1]

The New York State School Boards Association, Inc. ("NYSSBA") is a not-for-profit membership organization incorporated under the laws of the State of New York. Pursuant to New York's Education Law, NYSSBA has a statutory responsibility for devising "practical ways and means for obtaining greater economy and efficiency in the administration of school district affairs and projects "on behalf of public school districts of the State of New York (Educ. Law § 1618). NYSSBA's current membership consists of approximately six hundred and sixty-four (664) or ninety-one percent (91%) of all public school districts and boards of cooperative educational services (BOCES) in New York State, including defendant-appellee the New York City Department of Education. NYSSBA often appears as *amicus curiae* before both federal and state court proceedings involving constitutional and statutory issues affecting public schools, and indeed has done so previously before this Court.

The National School Boards Association ("NSBA") is a not-for-profit organization representing state associations of school boards, and the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members who govern nearly 14,000

[1] This brief was not authored in any part by counsel for either party, and no person or entity other than the *Amici*, their members or counsel made a monetary contribution to the preparation or submission of this brief.

local school districts serving approximately 51 million public school students. NSBA regularly represents its members' interests before Congress and federal and state courts.

NYSSBA and NSBA submit this brief *amici curiae* by motion pursuant to Rule 29(a)(3) of the Federal Rules of Appellate Procedure, and in support of affirmance of the decision of the court below denying the plaintiffs-appellants' application for a preliminary stay-put injunction, and dismissing the plaintiffs-appellants' complaint as against all the defendants sought to be captured therein.

NYSSBA and NSBA 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 students with disabilities during the unprecedented period of crisis activated by the COVID-19 pandemic. However, NYSSBA and NSBA also have an interest in ensuring that their members are able to rely on their educational expertise to address the needs of their students with disabilities 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. NYSSBA and NSBA 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. Affirmance, on the other hand, would not leave students without a remedy. They would be entitled to individually seek, for example, compensatory education beyond their period of eligibility, as necessary to remediate any demonstrated deprivation of Free Appropriate Public Education (FAPE) during the pandemic. With these concerns in mind, NYSSBA and NSBA invite this court's attention to law and arguments that might not be brought before it and may be of special assistance.

STATEMENT OF THE ISSUES

I. Did the court below properly deny the plaintiffs-appellants' motion for a preliminary injunction?

The *amici curiae* respectfully submit the answer is yes.

II. Did the court below properly dismiss the plaintiffs-appellants' complaint for failure to exhaust administrative remedies?

The *amici curiae* respectfully submit the answer is yes.

ARGUMENT

I. THE COURT BELOW PROPERLY DENIED THE PLAINTIFFS-APPELLANTS' MOTION FOR A PRELIMINARY INJUNCTION.

Plaintiffs-appellants appeal from the opinion and order of the court below that denied their motion for a preliminary injunction and granted a motion for dismissal of their complaint.[2]

That complaint, styled as a purported class action, was filed on July 28, 2020 against 52 departments of education and every school district in the United States. It sets out 11 separate causes of action against all defendants arising under the Individuals with Disabilities Education Act ("IDEA" or "the Act") (20 U.S.C. § 1400 *et seq*.); Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794 *et. seq.*); Title II of the Americans with Disabilities Act (42 U.S.C. § 12101 *et. seq.*); and Section 1983 of the Civil Rights Act (42 U.S.C. § 1983), as well as state constitutions, statutes, laws and regulations. All are related to the closure of public schools during the COVID-19 pandemic and the concomitant shift from in-person to remote learning. Ten allege denial of a free appropriate public education (FAPE) The other, (Count IV), alleges a violation of the IDEA's stay-put

[2] References to facts in the Record are derived from the Opinion and Order of the court below and the Plaintiffs-Appellants' main brief before this court.

provision.[3] The named defendants are the New York City Department of Education ("the NYCDOE"), Bill DeBlasio in his official capacity as New York City's Mayor, and Richard Carranza in his official capacity as the Chancellor of the New York City Department of Education, collectively ("the City Defendants"). In response to the plaintiffs-appellants' motion for a preliminary injunction, the City Defendants opposed that application and filed their own motion for dismissal of the complaint as against them. For the reasons stated by the court below, the plaintiffs-appellants were allowed to proceed with their preliminary injunction motion but only against the City Defendants. Thereafter, the court below properly denied that motion, and granted the City Defendants' dismissal motion. In the process, it also properly dismissed the complaint as against all the non-City defendants for lack of personal jurisdiction, improper venue, improper joinder, and case management issues identified by the court (see, *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 486 (7th Cir. 2012)).

For all the reasons set out in the opinion and order at issue herein and those that follow, the court below properly denied the plaintiffs-appellants' motion for a preliminary injunction and this court should affirm its ruling.

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[3] Separately, the plaintiffs-appellants asserted an additional claim under the Racketeering Influenced and Corrupt Organization Act ("RICO") (18 U.S.D. §§ 1961-1968) that was initially raised by their counsel in a brief submitted in support of their request for a temporary restraining order before the court below. The *amici curiae* defer to the reasons set out in the ruling of the court below and in the defendants-respondents' brief before this court in support of the appropriateness of that court's dismissal of such claim.

a. The closure of public schools in response to the COVID-19 pandemic and the shift from in-person to remote learning did not cause a change in placement in violation of the IDEA's stay-put provision.

During the pendency of both administrative and judicial proceedings involving challenges to the classification, evaluation, and placement of a student with disabilities, the student must remain in his or her then-current educational placement (a.k.a. the child's stay-put/pendency placement) unless the school district and the parents agree otherwise (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518); see also 20 U.S.C. § 1415(i)). The term then-current educational placement "typically refers to the child's last agreed-upon educational program before the parent requested a due process hearing" (*Ventura De Paulino v. N.Y.C. Dep't of Educ.*, 959 F.3d 519, 532 (2nd Cir. 2020), citing *T.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 171 (2nd Cir. 2014); *Mackey v. Bd. of Educ. for the Arlington Cent. Sch. Dist.*, 386 F.3d 158, 163 (2nd Cir. 2004); *Zvi D. v. Ambach*, 694 F.2d 904, 906 (2nd Cir. 1982)).

The plaintiffs-appellants contend that the closure of public schools and the shift away from in-person instruction to remote learning in response to COVID-19 effectuated a unilateral change in educational placement in violation of section 1415(j) that also deprives students with disabilities of their right to FAPE. More specifically, they allege that the closure of schools and the shift to remote learning altered both where students received services and the delivery of educational

services from a school-based program to home instruction. The *amici* respectfully submit that the court below properly disagreed and denied the plaintiffs-appellants' application for a stay-put injunction.

The plaintiffs-appellants' contention discounts long-established precedent from this court that a student's educational placement refers to "the general type of educational program in which the child is placed" (*Concerned Parents & Citizens v. N.Y.C. Bd. of Educ.*, 629 F.2d 751, 753 (2nd Cir. 1980)). That includes, for example, "the classes, individualized attention and additional services a child will receive – rather than the 'bricks and mortar' of the specific school" (*T.Y. v. N.Y.C. Dep't of Educ.*, 584 F.3d 412, 419 (2nd Cir. 2009)).

According to this court, the IDEA's stay-put 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." (*T.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 171 (2nd Cir. 2014)). To the extent that the IDEA's definition of an individualized education program (IEP) includes reference to "the anticipated…location…of… services" this court has indicated the word location in that context means "the type of environment that is the appropriate place for the provision of the service" (*T.Y. v. N.Y.C. Dep't of Educ.*, 584 F.3d at 419-20 (citing *Assistance to States for the Education of Children with Disabilities*, 64 Fed. Reg. 12406, 12594 (Mar. 12, 1999)).

In this context, it is noteworthy that the U.S. Department of Education ("USDOE") has funded research on how online learning can be made more accessible for k-12 children with disabilities and related promising practices, and has highlighted IDEA requirements for the provision of FAPE to children with disabilities in virtual schools (see, U.S. Department of Education, Office of Special Education Programs, *Dear Colleague Letter*, 68 IDELR 108 (2016)).

b. The closure of public schools in response to the COVID-19 pandemic and the shift from in-person to remote learning constituted an authorized good faith effort to contain the spread of a global threat.

This court also has stated that state and local school officials have the authority "to decide how to provide [a student's] educational program" during the pendency of IDEA proceedings, "so long as the decision is made in good faith" (*Ventura De Paulino*, 959 F.3d at 534, citing *T.M.*, 752 F.3d at 171, citing *Concerned Parents & Citizens*, 629 F.2d at 756). That certainly is the case herein.

The closure of schools and the shift from in-person to remote learning were undertaken to contain the spread of a widespread unprecedented and still ongoing pandemic that initially made New York, and New York City in particular, a national epicenter.

Throughout the nation, it became imperative to weigh and consider concerns and responsibilities regarding the health and safety of students, educators and other school staff and their families, alongside the need to provide for the continued

delivery of educational services to all public school students, including plaintiffs-appellants. Recognizing the challenges posed by that imperative, USDOE issued on March 21, 2020 (four months before the filing of the complaint herein), a *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf. Therein at page 1, USDOE advised school districts nationwide they still had to provide FAPE, "consistent with the need to protect the health and safety of students with disabilities and those individuals providing education, specialized instruction, and related services to these students." (See also, USDOE, *Q&A on IDEA Part B Services Provision During the 2020-2021 School Year*, Sept. 28, 2020, https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-provision-of-services-idea-part-b-09-28-2020.pdf, wherein USDOE indicated that "the health and safety of children, families and the school community is most important.").

c. USDOE and NYS Education Department Guidance expressly allowed for the delivery of special education and related services during the COVID-19 pandemic by means other than in-person.

In the March 21, 2020 *Supplemental Fact Sheet* referenced above, USDOE acknowledged at pages 1-2 the likelihood that COVID-19's "unique and ever-changing environment" would "affect how all educational and related services and

supports are provided." It also reminded school districts "that the provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically" (*Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, at pages 1-2).[4]

Furthermore, 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"** (*Id.* at p.1) (emphasis on original). Moreover, "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" (*Id.* at p. 2). Thus, USDOE clearly

[4]The NYS Education Department issued similar guidance March 27, 2020 on the *Provision of Services to Students With Disabilities During Statewide Closures Due To Novel Coronavirus (COVID-19) Outbreak in New York State* http://www.p12.nysed.gov/specialed/publications/2020-memos/nysed-covid-19-provision-of-services-to-swd-during-statewide-school-closure-3-27-20.pdf, and in an April 27, 2020 *Supplement # 1* thereto http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-1-covid-qa-memo-4-27-2020.pdf.

contemplated the use of different methods for the delivery of educational and supportive services to students with disabilities during the pandemic.

Pertinent to this case, the *Supplemental Fact Sheet* also anticipated "inevitable delay" both in the provision of services to students with disabilities, and in the "making [of] decisions about how to provide services." With respect to any such eventuality, USDOE instructed school districts to have their "IEP teams…make an individualized determination **whether and to what extent**, compensatory services may be needed when schools resume normal operations." (*Id.*) (emphasis added). Similarly, the NYS Education Department has issued guidance to school districts on *Compensatory Services for Students with Disabilities as a Result of COVID-19 Pandemic*, June 2021, at http://www.p12.nysed.gov/specialed/publications/2021-memos/compensatory-services-for-students-with-disabilities-result-covid-19-pandemic.pdf. (See, Question 4).

Such relief constitutes an appropriate and individualized equitable remedy for demonstrated deprivations of FAPE that can extend beyond the expiration of a student's eligibility (*Doe v. East Lyme Bd. of Educ.*, 962 F.3d 649, 659 (2nd Cir. 2020), citing *Somoza v. N.Y.C. Dep't of Educ.* 538 F.3d 106, 109 n.2) (2nd Cir. 2008)). It also serves to advance the central mandate of the IDEA for the provision of a free appropriate public education that consists of special education and related

services in conformity with an IEP tailored to meet the unique needs of each particular student eligible for services under the Act (20 U.S.C. §§ 1400(d)(1)(A), 1401(3), (9), 1412(a)(1)(A), (3), (4), (5)(A); *Endrew F. v. Douglas Cty. Sch. Dist. RE–1*, 137 S.Ct. 988 (2017); *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); see also, *T.M.*, 752 F.3d at 162 explaining that [t]he IDEA's strong preference for placing children in their least restrictive environment "must be weighed against the importance of providing an appropriate education to [disabled] students" (citations omitted)).

For all the foregoing reasons the *amici curiae* respectfully submit that the closure of school districts and the shift from in-person to remote learning did not effectuate a change in educational placement prohibited by section 1415(j) of the IDEA. Accordingly, this court should affirm the ruling of the court below.

II. THE COURT BELOW PROPERLY DISMISSED THE PLAINTIFFS-APPELLANTS' COMPLAINT FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

As this court has previously explained, the IDEA's exhaustion of remedies requirement is grounded in 20 U.S.C. § 1415(i)(2)(A). That section provides that aggrieved parties may bring an action in state or federal court only after exhaustion of IDEA provisions that afford parents the right to file a complaint regarding the education of their disabled children (20 U.S.C. § 1415(b)(6)) and to seek review of those decisions through local and state administrative avenues (20 U.S.C. §

1415(f), (g); *Cave v. East Meadow Union Free Sch. Dist.*, 514 F.3d 240, 245 (2nd Cir. 2008); see also, *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 199 (2nd Cir. 2002); *J.S. v. Attica Cent. Schs*., 386 F.3d 107, 112 (2nd Cir. 2004)). The IDEA exhaustion procedures include review by an impartial hearing officer and an appeal from that hearing (20 U.S.C. § 1415(f), (g)). In New York, that review is initially conducted by an impartial hearing officer whose decision may then be appealed to a state review officer (8 N.Y.C.R.R. § 200.5(i)-(k)).

The purpose of the rule is to allow school districts to apply the educational expertise of their educators and administrators to a problem to correct their own mistakes and resolve grievances (*Cave*, 514 F.3d at 245-46, citing *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 487 (2nd Cir. 2002); see also, *Heldman v. Sobol*, 962 F.2d 148, 159 (2nd Cir. 1992)). The exhaustion requirement applies not only to claims raised under the IDEA itself, but also to those raised under other federal statutes that seek relief available under the IDEA (20 U.S.C. § 1415(l); *Cave*, 514 F.3d 478 (2nd Cir. 2002); *J.S.*, 386 F.3d at 112; *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 487 (2nd Cir. 2002); *Hope v. Cortines*, 69 F.3d 687, 688 (2nd Cir. 1995); see also, *Fry v. Napoleon Comm. Schs.*, 137 S.Ct. 743, 753 (2017)). It "hinges on whether a lawsuit seeks relief for the denial of [FAPE]" (*Fry*, 137 S.Ct. at 754). This court's affirmance of the ruling of the court below that plaintiffs-appellants' FAPE claims

were subject to exhaustion would be in concert with decisions from other circuit courts that have applied *Fry* in placement and attendance-related cases (see, *Paul G. v. Monterey Peninsula Unified Sch. Dist.*, 933 F.3d 1096, 1101 (9th Cir. 2019); *Nelson v. Charles City Comm. Sch. Dist.*, 900 F.3d 587, 591-595 (8th Cir. 2018); *S.D. v. Haddon Heights Bd. of Educ.*, 722 Fed. Appx. 119, 126 (3rd Cir. 2018)).

Under binding precedent from this court, failure to exhaust administrative remedies deprives a court of subject matter jurisdiction (*Cave*, 514 F.3d at 246; *Polera*, 288 F.3d at 483; *Hope*, 69 F.3d at 688). However, there are instances in which exhaustion of remedies may be excused. Those include situations where "(1) it would be futile to resort to the IDEA's due process procedures; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to law; or (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies…" (*Mrs. W. v. Tirozzi*, 832 F.2d 748, 756 (2nd Cir. 1987), citing H.R.Rep. No. 296, 99th Cong., 1st Sess. 7 (1985); see also, *Murphy,* 297 F.3d at 199; *Polera*, 288 F.3d at 483). They also include situations involving the assertion of claims alleging a violation of the IDEA's stay-put provision at 20 U.S.C. § 1415(j). According to this court, the "time-sensitive nature of [that provision]," makes the administrative process…'inadequate' to remedy violations [thereof]…" and "to give realistic protection to the…right"

claimed thereunder (*Murphy*, 297 F.3d at 199-200; see also, *Ventura De Paulino*, 959 F.3d 519).

The plaintiffs-appellants maintain that the court below erred in ruling that their complaint was subject to dismissal because of their failure to exhaust administrative remedies under the IDEA. In this regard, they again argue, in part, that the exhaustion of remedies rule does not apply to actions like theirs that allege a violation of the Act's stay-put provisions. However, consistent with this court's ruling in *Murphy*, 297 F.3d 195, the court below indeed determined that Count IV of their complaint alleging a failure to provide pendency under the IDEA was not subject to the exhaustion rule.

In so ruling, the court below further determined that the stay-put exception applicable to Count IV did not excuse application of the exhaustion of remedies requirement to the plaintiffs-appellants' remaining separate and distinct claims alleging a denial of FAPE. But according to the plaintiffs-appellants, the court below should not have dismissed those claims because they fall under the futility exception to the exhaustion of remedies rule. In support of this contention, they assert that neither an impartial hearing officer nor a state review officer can provide the relief sought by them – the reopening the public schools. However, their argument is misguided.

Plaintiffs seeking to avoid the exhaustion rule on futility grounds must show that '"adequate remedies are not reasonably available' or that 'the wrongs alleged could not or would not have been corrected by resort to the administrative process'" (*Coleman v. Newburgh Enlarged City Sch. Dist.*, 503 F.3d 198, 205 (2nd Cir. 2007), citing *J.G. v. Bd. of Educ. of Rochester City Sch. Dist.*, 830 F.2d 444, 447 (2nd Cir. 1987); *Heldman*, 962 F.2d 148, 158). In this context, a remedy is adequate if it "gives realistic protection to the claimed right." (*Coleman*, 503 F.3d at 205, citing *Murphy*, 297 F.3d at 199). Plaintiffs-appellants' request for an order directing the reopening of schools is inextricably intertwined to the crux of their complaint – that students with disabilities were deprived of FAPE as a result of the closing of schools and shift to remote learning. Thus, the right to be protected here is the IDEA's mandate that all disabled children be given a free appropriate public education (20 U.S.C. § 1412(a)(1)(A)). The IDEA's exhaustion of remedies requirement was specifically designed and intended by Congress to protect that right, and demonstrated deprivations of FAPE can be corrected through the IDEA's administrative process such as through the award of compensatory education services discussed under Point I. "That the carrying out of the [ ] administrative processes may take some time. . . does not equate to an inadequate remedy" (*Coleman*, 503 F.3d at 206).

Equally unavailing is the plaintiffs-appellants' argument that the court below erred by "address[ing] the exhaustion of administrative remedies before determining their F.A.P.E.-related claims." But as this court has explained, "[i]ssues related to subject matter jurisdiction may be raised at any time, even on appeal, and even by the court *sua sponte*" (*Cave*, 514 F.3d at 250) (internal citations omitted). Regardless of the stage of a proceeding, once a court determines it lacks subject matter jurisdiction it "*must* dismiss the action" (*Id*.).

Finally, the *amici curiae* are concerned that a ruling by this court that the plaintiffs-appellants' FAPE related claims were not subject to the IDEA's exhaustion of remedies rule would set a precedent that could be interpreted to permit plaintiffs to evade the rule through otherwise impermissible "artful pleadings" (see, *Fry*, 137 S.Ct. at 753). For example, a plaintiff may present a claim for the alleged deprivation of FAPE but embed it in a complaint that contains other claims for which the relief sought is not available under the IDEA, as in the case herein even though the court below properly declined to excuse exhaustion. Such an outcome would be inconsistent not only with *Fry*, but also with this court's ruling in *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478. Like in that case, the plaintiffs-appellants here also seek money damages – "self-cure" pendency vouchers, compensation for parental loss of employment or out-of-pocket expenses incurred when their children allegedly were

not provided the educational programs, placements and services called for in their IEPs, and punitive damages not available under the IDEA. However, the gravamen of their complaint – the alleged deprivation of FAPE as called for in student IEPs–can be remedied under the IDEA.

The lynchpin of the IDEA's statutory framework for the provision of FAPE is the requirement that schools and families work collaboratively on matters related to the education of their disabled child. A key to the success of that effort is the right and ability of families to seek redress through the administrative process before going to court – ensuring that the positive, constructive mechanisms set in place by Congress have a chance to work. This includes working together on the development of a child's IEP, requiring the parties to engage in a resolution session and/or mediation to resolve disagreements prior to the commencement of a due process hearing; and the conduct of such hearings by impartial hearing officers trained in special education matters to review and rule on disagreements. (See, 20 U.S.C. §§ 1414(d)(1); 1415(e)-(g)).

For all the above reasons, the *amici curiae* respectfully submit that this court should affirm the dismissal of plaintiffs-appellants' complaint for failure to exhaust administrative remedies.

CONCLUSION

For all the foregoing reasons, this court should affirm the decision of the court below and grant any such further relief as this court may deem appropriate.

Dated: June 29, 2021
Latham, New York

Respectfully Submitted,

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Federal Rules of Appellate Procedure Form 6. Certificate of Compliance With Type-Volume Limit

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(s) Jay Worona

Attorney for New York State School Boards Association, Inc.

Dated: June 29, 2021