

**Brief of *Amici Curiae* National School Boards Association,  
Maine School Boards Association,**

## CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, the National School Boards Association, Massachusetts Association of School Committees, 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.

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Massachusetts Association of School Committees

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

The Maine School Boards Association (MSBA) is recognized as a non-

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 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





first follow the collaborative and administrative processes established by

## ARGUMENT

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

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

|   |                                                                                                                                                   |   |
|---|---------------------------------------------------------------------------------------------------------------------------------------------------|---|
| w | During the pendency of any proceedings conducted pursuant to this section, unless                                                                 | i |
| T | State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child. | w |

Neither the statute nor its implementing regulations define "then-current educational placement." The Supreme Court has stated that the purpose of this provision is to maintain the child's current educational placement.

Federal courts interpreting 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 (5<sup>th</sup> Cir. 2003) (“Educational placement, as used in the IDEA, means educational program at 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 (2<sup>nd</sup> Cir. 1980); neither is a minor alteration such as a change in transportation services. *DeLeon v. Susquehanna Cmty. Sch. Dist.* 747 F.2d 149 (3<sup>rd</sup> 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. Courts have declined to apply the stay put requirement altogether, even if a change in placement had taken place. A system- or schoolwide 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. e.g. *N.D. v. Haw. Dep’t of Educ*, 600 F.3d 1104 (9<sup>th</sup> Cir. 2010); *Carmona v. Dep’t of Educ*, CV 21-18746, 2022 WL 3646629 (D.N.J. 2022).

Aug. 23, 2022)J.T. v. de Blasi500 F. Supp. 3d 137 (S.D.N.Y. 2020);2022);ar5.h(a)



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

Id. at 9(citation omitted).

Second, the court relied on March 2020 guidance issued by the United States Department of Education

2

decisions to close

schools physically and resort to remote education were contempt5.

The proper scope and meaning of the stay provision in the context of schoolwide closures was limited. *N. D. v. Haw. Dept 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 "children continue to attend the same school, have the same teachers, and stay in " bic-0.7 (i) c



“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. Goldstein*, 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 person learning context. As noted above, the USDOE recognized in its March 2020 guidance that “

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 7. 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. Baker said "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."<sup>5</sup> If there is any context in which Congress's policy

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<sup>5</sup> James Vaznis and Bianca Vázquez Toney, Baker orders schools stay closed through the end of the school year, THE BOSTON GLOBE (Apr. 20, 2020), <https://www.boston.com/news/education/2020/04/20/baker-orders-schools-stay-closed-through-the-end-of-the-school-year/>.

exempting schoolwide closures from the stay put provision should be eroded –and amici assert that there is one – this context clearly furnishes no such occasion.

The court in J.T. stated the incontrovertible: a systemwide 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



public schools finding that the vaccine ordinances did not confer

even when the suit is brought pursuant to a different statute so long as the party is seeking relief that is available under chapter II of IDEA.” Rose v. Yeaw, 214 F.3d 206, 210 (1st

autonomy, and judicial economy. *Frazier v. Fairhaven Sch. Comm.*,  
276 F.3d 52, 60 (1<sup>st</sup> Cir. 2002) (citation omitted).<sup>6</sup> Frazier noted the  
“special benefits” of IDEA’s exhaustion requirement:

The IDEA’s administrative machinery places

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 parent, at least one regular education teacher, at least one special education teacher, and a representative of the local education agency. 34 C.F.R. § 300.324(a)(1).

By mandating that parents exhaust IDEA's administrative remedies in situations where FAPE is an issue, the statute provides a pathway that allows the school "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

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

First, Plaintiffs assert that the closure of schools to person learning was “a practice of general application 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.

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 basic goals are threatened on a systemic 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 (Appellant's 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, attitudes, 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 2827-2828 [emphasis added]. See also R.Z. v. Cincinnati Pub. Schs., No. 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

IDEA exhaustion requirement, this case does not present the appropriate circumstances to invoke *Doucette v. Georgetown Pub. Schools*, 936 F.3d 161 (1st Cir. 2019), the court held:

Futility applies when (1) the

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 procedure in place to ensure students receive future services to address pandemic-related deficiencies. In *Doucette*, this court expressly ruled that available relief under the IDEA process that forecloses a futurity claim includes future special education and related services to ensure or remedy denial of a FAPE.” *Doucette*, supra, 936 F.3d at 32. The 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.”<sup>9</sup> This 18-page document was released as the 2020-2021 school year was about to begin, including the phase in resumption of in-

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<sup>9</sup> 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 (dated Sept. 3, 2020) <https://www.doe.mass.edu/covid19/sped.html>

person learning. DESE 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. Noting that “it is critical to identify and address the impact of the interruptions caused by the unexpected suspension of 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. DESE stated 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.

complex and significant needs requiring that their determinations be made by December 15, 2020. at 12. Finally, DESE expressly provided that [p]arents or guardians may pursue dispute resolution options through the [SEA] 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 2020-21 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" <sup>10</sup>

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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<sup>10</sup> Massachusetts Department of Elementary and Secondary Education, Frequently Asked Questions for Schools and Districts Regarding Special Education SY 2020-21 (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

Respectfully submitted,

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Dated: March 16, 2023

/s/ Francisco M. Negrón, Jr.

CERTIFICATE OF SERVICE FORM  
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I hereby certify that on March 7<sup>th</sup> 2023 I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the document will be sent electronically to all registered participants identified in the Notice of Electronic Filing.

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