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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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

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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, NYe3 (e)3.5 (,)6.2 ( )]Tic

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.

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 th

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

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

supports are provided." It also reminded school districts "that the provision of FAPE may include, as appropriate, special education and related services provided through dist

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*

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),

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

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

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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 (2

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 exco e

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 re (to)8.2(i)8.5 (lJ6.444 0 Td[(t/.6 (s)8.4oe)20.6 (ir)a

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(s) Jay Worona

Attorney for New York State School Boards Association, Inc.

Dated: June 29, 2021