22-939

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Z.Q., by his parent, G.J., G.J., individually and on behalf of Z.Q., J.H., by his parent, Y.H., Y.H., individually and on behalf of J.H., J.A., by his parent, D.S., D.S., individually and on behalf of J.A., M.S., by his parent, R.H., R.H., individually and on behalf of M.S., D.V., by his guardian, V.L., V.L., individually and on behalf of D.V., J.W., by his parent, A.W., A.W., individually and on behalf of J.W., D.M., by his parent, E.L., E.L., individually and on behalf of D.M., C.B., by his parent, C.B.2, C.B.2, individually and on behalf of C.B., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

—against—

NEW YORK CITY DEPARTMENT OF EDUCATION, NEW YORK CITY BOARD OF EDUCATION, RICHARD CARRANZA, in his official capacity as Chancellor of the New York City School District, NEW YORK STATE EDUCATION DEPARTMENT, NEW YORK STATE BOARD OF REGENTS, BETTY A. ROSA, in her official capacity as Interim Commissioner of Education and President of the University of the State of New York,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC. AND THE NEW YORK LEGAL ASSISTANCE GROUP IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 the following disclosure is made on behalf of these entities:

Council of Parent Attorneys and Advocates
The New York Legal Assistance Group

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

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Council of Parent Attorneys and Advocates, Inc. (COPAA) is a not-for-profit organization for parents of children with disabilities, their attorneys, and advocates. COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties. COPAA provides resources, training, and information for parents, advocates, and attorneys to assist in obtaining the free appropriate public education (FAPE) for the 7.7 million children ages 0 through 21 eligible for special education services under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq*. Our attorney members represent children in civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates, in attempts to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §1983) (Section 1983), Section 504

[1] Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *Amici* state that: (i) there is no party or counsel for a party in the pending appeal who authored the Amici brief in whole or in part; (ii) there is no party or counsel for a party in the pending appeal who contributed money that was intended to fund preparing or submitting the brief; and (iii) no person or entity contributed money that was intended to fund preparing or submitting the brief, other than *Amici* and its members.

of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504) and the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq*. (ADA).

Since the pandemic hit, COPAA has partnered with the Council of Chief State School Officers, state directors of special education, the Consortium for Citizens with Disabilities (CCD), civil rights advocates, and other partners to develop resources that support and encourage schools and families to work together to find solutions that allow children to receive equitable access to an education and the services that help without weakening or undoing civil and educational rights.

COPAA brings to this Court the unique perspective of parents and advocates for children with disabilities. COPAA has previously filed as *Amici curiae* in the United States Supreme Court in *Fry v. Napoleon Community Schools,* 137 S. Ct. 743 (2017); *Endrew F. v. Douglas County School District RE*-1, 137 S. Ct. 988 (2017); *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009); *Board of Education of New York v. Tom F.*, 552 U.S. 1 (2007); *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006); *Schaffer v. Weast*, 546 U.S. 49 (2005); and *Winkelman v. Parma City School District*, 550 U.S. 516 (2006), as well as numerous cases in the United States Courts of Appeal and in the United States District Courts.

The New York Legal Assistance Group (NYLAG) is a leading not-for-profit civil legal services organization advocating for adults, children, and families

that are experiencing poverty or have low income. NYLAG provides legal assistance in the areas of special education, immigration, government benefits, family law, disability rights, housing law, and consumer debt, among others. NYLAG impacted the lives of nearly 90,000 people last year. NYLAG's Special Education Unit (SEU) collaborates with parents to ensure students receive the educational services to which they are entitled through consultation and representation at impartial hearings, appeals, and court actions. SEU assists parents by addressing the following issues: assessing the adequacy of a child's Individual Education Program (IEP), appropriateness of school placement, and need for paraprofessionals, tutoring, or related services, including occupation therapy, physical therapy, and speech-language therapy; obtaining assistive technology; enabling children who would otherwise regress to be in a 12-month program (as opposed to the usual 10-month school year); obtaining placement in private schools, when necessary; and obtaining independent educational evaluations, thereby allowing parents to have their child evaluated by a professional who is not affiliated with the Department of Education.

As a result of school closures and the transition to distance learning, millions of children with disabilities have suffered enormous learning losses over an extended period of time, many for more than a year. *Amici* believe that IDEA requires both State and Local Educational Agencies to do the right thing and take responsibility for ensuring that students who have been deprived of their legal entitlement to FAPE

during this time receive the compensatory education that they are entitled to.

Amici requested consent to file this Motion and accompanying *Amici Curiae* brief from counsel for the parties. Plaintiffs have consented to this brief; NYCDOE has consented, and counsel for NYSED has not responded to multiple requests for consent. A Motion for Leave to File is filed with the accompanying brief.

Preliminary Statement

There can be no dispute that the extended school closures and the transition to remote learning for all or part of the school day has caused enormous learning losses for students with disabilities who were denied the free appropriate public education (FAPE) that the IDEA requires. The purpose of the IDEA is to provide for the education of all children with disabilities so that all students with disabilities, no matter their challenge, can graduate ready to enter post-secondary education and/or gain career skills that lead to an independent and meaningful life. *See* 20 U.S.C. § 1400(d)(1)(A). Without the prompt provision of appropriate compensatory education, these learning losses will have catastrophic effects on a generation of students with disabilities, severely compromising their abilities to transition to an independent and meaningful life when their eligibility for special education ends.

Defendants know full well the scale of the harm suffered by students with disabilities in New York City and the likelihood that, without prompt provision of appropriate compensatory education to all affected students, many students will

suffer severe learning deprivation that will permanently affect their lives. Students have a finite time available to them to participate in special education services, from age 0 to 21 (including early intervention), and losing many months of education is a devastating loss. As Defendants are responsible for ensuring that students receive a FAPE, it is incumbent on them to develop a plan for ensuring that each and every child who is eligible to receive compensatory education receives an offer of appropriate compensatory education services and that the services are made available for the students.

Time is of the essence in providing students with education, with delays in services only exacerbating the educational loss. Defendants should be taking action to provide continuous education to those students who are aging out of special education, and they should be developing appropriate education plans to enable students to start receiving compensatory services.

Because Defendants are responsible for ensuring students receive FAPE and because they know that students experienced, and continue to experience, devastating learning losses due to the COVID-19 pandemic, there should be no need for each student to pursue an individual due process hearing to obtain the necessary compensatory services. Defendants are required to do the right thing: they must take the initiative to ensure that each student's needs are assessed, appropriate compensatory education services are provided, and the infrastructure for providing

appropriate compensatory education in a timely way is developed. Plaintiffs' claim for the creation of a process whereby Defendants take the initiative to ensure that each student who was denied FAPE during the pandemic receives appropriate compensatory services is not subject to IDEA's exhaustion requirement. Exhaustion in these circumstances would be futile and would lead to many thousands of students with disabilities being left without the compensatory services that they are entitled to.

I. STUDENTS WHO REQUIRE SPECIAL EDUCATION EXPERIENCED AND CONTINUE TO EXPERIENCE CATASTROPHIC LEARNING LOSSES DUE TO SCHOOL CLOSURES AND THE TRANSITION TO DISTANCE/HYBRID LEARNING DURING THE PANDEMIC

That students who require special education have suffered catastrophic learning losses since schools closed, March 16, 2020, in New York State, cannot be disputed. One study found that 74% of caregivers of a student with an intellectual or developmental disability reported that their student was no longer receiving at least one therapy or educational service and some lost all their services.[2] A November GAO report noted that delivering related services for students with complex needs "was particularly difficult in a virtual setting."[3] Often the therapies

[2] S. Jeste, et al., "Changes in access to educational and healthcare services for individuals with intellectual and developmental disabilities during COVID-19 restrictions," 64 J. Intellectual Disability Research 825, 827, 830 (Nov. 2020).
[3] U.S. Gov't Accountability Office. *Distance Learning: Challenges Providing Services to K-12 English Learners and Students with Disabilities during COVID-*

"involved hands-on instruction from therapists or required specialized equipment unavailable in students' homes."[4] The GAO found that many parents were overwhelmed by being asked to assume multiple roles, including simultaneously serving as teachers and aides or related service providers.[5] There were also many parents who were unable to assist because they were responsible for working or caring for other children.[6]

These losses have been compounded for those students who require special education and also are English language learners. The GAO found that "English learners were disproportionately affected by lack of access to technology," and, therefore, these students "could not always access or fully participate in distance learning."[7] Further, even those families who had devices often did not have enough devices to meet the needs of multiple students living at home, and data limits also made it hard to access the internet.[8] Further, "school districts could not always communicate the expectations and logistics of distance learning to [ELL] students

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19 (November 19, 2020), at 16 https://www.gao.gov/assets/gao-21-43.pdf (GAO Report).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* at 9.

[8] *Id.* at 10.

and their families."[9] Thus, language barriers exacerbated the difficulties of distance learning for English learners.[10]

Students with disabilities are disproportionately impacted by a lack of access to appropriate technology - limited connectivity to the Internet, no home devices or too few devices for all family members. The reality is that many students with disabilities require specialized assistive technology that allows them to 'plug in' and access anything virtual or electronic such as the school website, curriculum and other learning materials, online teacher notes, virtual workgroups and more. Because most students with disabilities use their assistive technology while they are in class, when the school doors closed, they precipitously lost access to the very devices they need to fully participate with their peers in virtual or hybrid learning. So, for these students, their learning loss began immediately on day one.

There can be no dispute regarding the central claims in Plaintiffs' Complaint:

- Many thousands of students were denied the services consistent with their IEPs during remote learning (Complaint, ¶¶ 58-65);
- Many thousands of students were denied the necessary technology for remote learning, and even by November 18, 2020, 60,000 students were without devices and many were without access to the internet (Complaint, ¶¶ 66-71);

[9] *Id.*
[10] *Id.* at 11.

- Many thousands of students were denied remote special education instruction and resources in the appropriate language (Complaint, ¶¶ 72-75); and
- Many thousands of students were denied in-person instruction although it was necessary for them to access instruction, including summer educational and related services during the summer of 2020 when in-person instruction was permitted by the Governor's Executive Order (Complaint, ¶¶ 76-80);
- Many thousands of students were denied FAPE by the blended in-person and remote learning program (Complaint, ¶¶ 81-86); and

For students with disabilities, their entitlement to special education services is finite, starting when they are first identified as needing special education services and ending with their exit from special education, either by ending eligibility, graduation, or aging out through 23. Therefore, it is critical that they timely receive compensatory education services.

II. COMPENSATORY EDUCATION IS REQUIRED TO COMPENSATE STUDENTS FOR THEIR LEARNING LOSSES

From the outset of the COVID-19 school closures, the U.S. Department of Education (USDOE), the State Education Agencies (SEAs), and the Local Education Agencies (LEAs) all knew it would be difficult, and for some students impossible, to provide special education through distance learning. They all knew that millions of students would be denied FAPE and would not receive access to education equal to that of their nondisabled peers who were able to benefit from distance learning.

In fact, the USDOE was concerned that school districts, worried about violating IDEA and Section 504 by not providing equal access to students with disabilities who could not learn through distance learning, might simply decide not to provide any distance learning to any students. Thus, USDOE authorized the provision of distance learning: "To be clear: ensuring compliance with the Individuals with Disabilities Education 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."[11]Acknowledging that there would be children who did not "receive services after an extended period of time," the USDOE said that schools would need to determine "whether and to what extent compensatory services may be needed, consistent with applicable requirements, including to make up for any skills that may have been lost."[12]

Thus, from the outset of the pandemic, students with disabilities and their families were promised that students who did not get FAPE because of COVID-19

[11] USDOE, Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities at 1 (March 21, 2020), https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

[12] USDOE, Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students at 3 (March 16, 2020), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf.

school closures and transition to distance/hybrid learning would ultimately get the education that they were denied – FAPE and equal access – via compensatory education. DOE and NY State Guidance[13] make clear that the SEAs and LEAs were expected to take the initiative to remedy the denial of FAPE and equal access by providing appropriate compensatory education. There is nothing in the DOE Guidance and the NY State Guidance to suggest that each affected student would be required to bring a separate due process hearing in order to obtain compensatory education.

Before the district court NYDOE and NYSED relied on *Somoza v. New York City Board of Education*, 538 F.3d 106, 109 n.2 (2d Cir. 2008), for the proposition that compensatory education is only available for "gross violations of the IDEA," as if that would excuse their failure to provide a comprehensive plan for providing compensatory education to Plaintiffs and class members. That reliance is misplaced. First, the USDOE and NYSED have both explicitly stated that compensatory education is available for the denial of FAPE during the COVID-19 pandemic.

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[13] Memorandum from Christopher Suriano, Assistant Comm'r, Off. of Special Educ., N.Y. State Dep't of Educ., Supplement #2- Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State - Questions and Answers, at 5 (June 20, 2020), http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-2-covid-qa-memo-6-20-2020.pdf ("Suriano Memorandum Supplement 2").

Second, this Court has held that the "gross violation" standard for compensatory education only applies when a student is over the age of twenty-one and, therefore, no longer eligible for special education. *Garro v. State of Conn.*, 23 F.3d 734, 737 (2d Cir. 1994); *Mrs. C. v. Wheaton*, 916 F.2d 69, 75 (2d Cir. 1990). *See also Doe v. East Lyme Bd. of Educ.*, 790 F.3d 440, 456 n.15 (2d Cir. 2015). Yet, NYSED's guidance made clear that students who were over the age of 21 would be eligible for compensatory education for denials of FAPE due to the COVID-19 pandemic. It stated: "Because compensatory services is [sic] a remedy for the past denial of educational and related services that were not originally provided, they are available even after the right to FAPE has ended. Therefore, a student's attainment of age 21 or graduation with a regular high school diploma . . . does not affect his/her right to compensatory education."[14]

Third, this Court has recognized that exclusion from special education for an extended period of time is a gross violation. *See, e.g., Burr v. Ambach*, 863 F.2d 1071 (2d Cir. 1988), *vacated & remanded sub nom. Sobol v. Burr*, 492 U.S. 902 (1989), *reaff'd on reconsideration*, *Burr v. Sobol*, 888 F.2d 258 (1989) (awarding compensatory education for one-and-a-half-year denial of FAPE). As this Court explained: without compensatory education, the right to FAPE is illusory; the student "cannot go back to his previous birthdays to recover and obtain the free

[14] *Id.*

education to which he was entitled when he was younger." *Burr*, 863 F.2d at 1078. As the school closures and transition to distance/hybrid learning have resulted in extended deprivation of FAPE for many thousands of students, the gross violation standard has been met.

The USDOE has unequivocally stated that students will be entitled to compensatory education due to the closures.[15] IDEA requires that all Defendants take the necessary actions so that appropriate compensatory special education is provided to the many thousands of New York City school children who were deprived of FAPE. It is unconscionable for Defendants to require each and every student to pursue an individual due process hearing to obtain that relief. They know full well that, if an individual due process hearing was required for each student to obtain relief, many thousands of students would never get any compensatory education to remedy their FAPE deprivation .

III. PLAINTIFFS ARE NOT REQUIRED TO EXHAUST THEIR CLAIMS

Courts have long recognized that IDEA's exhaustion provision is not compulsory in every case. As the Supreme Court's most recent jurisprudence in analogous cases teaches, the exhaustion provision is a claim-processing rule and is

[15] *See* U.S. Dep't of Educ., *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (March 12, 2020), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf; *see also* USDOE, Supplemental Fact Sheet, *supra* note 11.

not jurisdictional. Therefore, the Rule 12(b)(1) motions to dismiss for lack of jurisdiction is inapplicable. Because the exhaustion provision is a claim-processing rule, there are exceptions. As demonstrated below, two exceptions to the exhaustion requirement, for systemic issues and for legal issues, apply here.

A. The Exhaustion Provision Is A Claim-Processing Rule And Is Not Jurisdictional

Because the exhaustion provision is not jurisdictional, the district court erred in granting Defendants' motions to dismiss the Complaint under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Recent Supreme Court decisions indicate that IDEA's jurisdictional provision is a claim-processing rule and not a matter of subject matter jurisdiction.

1. Recent Supreme Court Precedents Hold that Similar Provisions Are Claim-Processing Rules and Are Not Jurisdictional

Most recently, in 2019, the Supreme Court unanimously held that Title VII of the Civil Rights Act of 1964's requirement that a charge be filed with the Equal Employment Opportunity Commission prior to suit in court was a procedural prescription and not a jurisdictional requirement. *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843 (2019). The Court stated that "the word 'jurisdictional' is generally reserved for prescriptions delineating the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction)." *Id.* at 1848 (citing *Kontrick v. Ryan,*

540 U.S. 443, 455 (2004)).

The Court stated that "[c]haracterizing a rule as a limit on subject-matter jurisdiction 'renders it unique in our adversarial system.'" *Id.* at 1849 (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013)). It is unique because "challenges to subject-matter jurisdiction may be raised by the defendant 'at any point in the litigation,' and courts must consider them *sua sponte*." *Id.* (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012)). Because such challenges can be raised at any time, challenges to subject-matter jurisdiction may result in "wasted court resources and 'disturbingly disarm litigants.'" *Id.* (quoting *Auburn,* 568 U.S. at 153).

The Court stressed the distinction between subject matter jurisdiction and "nonjurisdictional claim-processing rules, which 'seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.'" *Id.* (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)). The Court stated that "A claim-processing rule may be 'mandatory' in the sense that a court must enforce the rule if a party 'properly raise[s]' it." *Id.* (quoting *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (*per curiam*)). However, "an objection based on a mandatory claim-processing rule may be forfeited 'if the party asserting the rule waits too long to raise the point.'" *Id.* (quoting *Eberhart*, 546 U.S. at 15). The Court held that Title VII's charge-filing requirement was not "of

jurisdictional cast," noting that the charge-filing requirement was separate from Title VII's provisions speaking to jurisdiction. *Id.* at 1850-51.

Previously, in *Henderson v. Shinseki*, 562 U.S. 428 (2011), the Supreme Court unanimously[16] held that the time limit for filing a notice of appeal of a final Board of Veterans Appeals decision denying a claim for service-connected disability benefits set out in 38 U.S.C. § 7266(a) was not jurisdictional. The Court noted that the terms of the deadline-setting provision, § 7266(a), "neither speaks in 'jurisdictional terms' nor refers 'in any way to the jurisdiction of the [Veterans Court].'" *Id*. at 429 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)). The Supreme Court earlier had held that an exhaustion provision was an affirmative defense when addressing the Prison Litigation Reform Act's exhaustion provision, 42 U.S.C. § 1997e(a). *Jones v. Bock*, 549 U.S. 199, 216 (2007).

IDEA's exhaustion provision, § 1415(*l*), also does not speak in jurisdictional terms or refer in any way to the jurisdiction of the court. While the Supreme Court has never addressed the question of whether IDEA's exhaustion provision, 20 U.S.C. § 1415(*l*), is a claim-processing rule or jurisdictional, its decision in *Honig v. Doe*, 484 U.S. 305 (1988) indicates that the requirement is not jurisdictional. In that case, the Court held that IDEA's stay-put provision, 20 U.S.C. § 1415(j), did not include

[16] Justice Kagan took no part in the consideration or decision of the case. 562 U.S. at 430.

an exception for dangerous students. *Id.* at 325. The Court noted that, in the event that "parents of a truly dangerous child adamantly refuse to permit any change in placement, the 10-day respite gives school officials an opportunity to invoke the aid of the courts. . ." *Id.* at 326. The Court observed that, although judicial review is normally not available until exhaustion of administrative remedies has been completed, "parents may bypass the administrative process where exhaustion would be futile or inadequate." *Id.* at 327. Thus, the Court found that school officials could likewise seek injunctive relief prior to the exhaustion of the administrative process. *Id.* at 328.

In the only Supreme Court case to address the exhaustion provision, *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017), the school district had moved to dismiss the case pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, judgment on the pleadings, and not Rule 12(b)(1). *See Fry v. Napoleon Cmty. Schs.*, 788 F.3d 622, 623 (6th Cir. 2015), *rev'd*, 137 S. Ct. 743 (2017). Therefore, the Court did not need to address whether exhaustion was jurisdictional. *Id.*

2. Circuit Courts That Have Considered Recent Supreme Court Precedent Have Either Held That IDEA's Exhaustion Provision Is a Claim-Processing Rule or Have Not Reached the Issue

Since the Supreme Court's decision in *Jones v. Bock*, *supra*, Circuit Courts have either applied the Supreme Court precedent and determined that IDEA's exhaustion provision is a claim-processing rule and not jurisdictional or have not

reached the issue, often suggesting that the provision is not jurisdictional. In an *en banc* opinion, the Ninth Circuit overruled its prior precedent holding that that IDEA's exhaustion provision is jurisdictional and held that "IDEA's exhaustion requirement is a claims processing provision that IDEA defendants may offer as an affirmative defense." *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 867 (9th Cir. 2011), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014). The Ninth Circuit came to this conclusion "[i]n light of a spate of Supreme Court cases clarifying the difference between provisions limiting our subject matter jurisdiction, which cannot be waived and must be pled in the complaint, and 'claims processing provisions,' which must be pled as an affirmative defense…." *Id.* (citing *Shinseki***,** 562 U.S. at 438-42*; Reed v. Elsevier, Inc. v. Muchnik,* 559 U.S. 154, 168-71 (2010)).

The Ninth Circuit stated, "it follows from *Jones* that the PLRA's exhaustion provision is non-jurisdictional." *Id.* at 869. The court found that §1415(*l*) was "written as a restriction on the rights of plaintiffs to bring suit, rather than as a limitation on the power of federal courts to hear the suit," and stated "[t]hat textual choice strongly suggests that the restriction may be enforced by defendants but that the exhaustion requirement may be waived or forfeited." *Id.*

The Ninth Circuit found that the exhaustion provision "appears more flexible than a rigid jurisdictional limitation," and noted that "questions about whether

administrative proceedings would be futile, or whether dismissal of a suit would be consistent with the 'general purposes' of exhaustion, are better addressed through a fact-specific assessment of the affirmative defense than through an inquiry about whether the court has the power to decide the case at all." *Id.* at 870.

This Court recently noted that it "has not been entirely clear on whether the IDEA's exhaustion requirement is a jurisdictional prerequisite or a mandatory claim-processing rule." *Ventura de Paulino v. N.Y. City Dep't of Educ.*, 959 F.3d 519, 530 n.44 (2d Cir. 2020). Because the specific case did not require a determination of the jurisdictional issue, the court stated, "'we are not forced to decide whether our precedent…, which labels the IDEA's exhaustion requirement as a rule affecting subject matter jurisdiction rather than an 'inflexible claim-processing' rule that may be waived or forfeited, remains good law . . ." *Id.* (quoting *Coleman v. Newburgh Enlarged City Sch. Dist.*, 503 F.3d 198, 204 (2d Cir. 2007)). *See also Valentín-Marrero v. Puerto Rico*, 29 F.4th 45, 53 n.4 (1st Cir. 2022) (noting disagreement among the circuits as to whether exhaustion is jurisdictional or a claims-processing requirement); *T.B. v. Northwest Indep. Sch. Dist.*, 980 F.3d 1047, 1050 n.2 (5th Cir. 2020) (noting "the Supreme Court has recently held that Title VII's administrative exhaustion requirement is not jurisdictional but is, instead, a mandatory claim-processing rule.") (citing *Fort Bend Cnty.*, 139 S. Ct. at 1851); *Wellman v. Butler Area Sch. Dist.,* 877 F.3d 125, 130 n.6 (3d Cir. 2017) ("[t]he fact

that the exhaustion requirement has exceptions suggests that it is not a jurisdictional prerequisite to our authority to hear an IDEA case")); *J.M. v. Francis Howell Sch. Dist.*, 850 F.3d 946 n.2 (8th Cir. 2017) (noting that the parents and the district court had "treat[ed] the IDEA's exhaustion requirement as jurisdictional rather than a claims-processing rule"); *Gibson v. Forest Hills Local Sch. Dist. Bd. of Educ.*, 655 F. App'x 423, 430-31 (6th Cir. 2016) (noting the Sixth Circuit had "lately broken with our own precedent and implied that the IDEA's exhaustion requirement is not jurisdictional in nature"); *Muskrat v. Deer Creek Pub. Schs.*, 715 F.3d 775, 783 (10th Cir. 2013) (noting that its prior precedent had treated IDEA exhaustion as a jurisdictional requirement and said "it is less clear our analysis is legally correct").

Even before *Jones*, the Seventh and Eleventh Circuits had held that exhaustion was not jurisdictional. *Mosely v. Bd. of Educ. of City of Chi.,* 434 F.3d 527, 533 (7th Cir. 2006); *N. B. by D.G. v. Alachua Cnty. Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996).

Because IDEA's exhaustion requirement is not jurisdictional, the district court erred in granting the Defendants' motion to dismiss.

B. The Exception for Systemic Issues Applies Here

Since *Honig, supra,* courts have consistently recognized that exhaustion can be bypassed when it is futile or inadequate, including involving systemic issues. This Court has long recognized that the exhaustion requirement is appropriately

"excused, however, when exhaustion would be futile because the administrative procedures do not provide an adequate remedy." *J.S. v. Attica Cent. Sch.*, 386 F.3d 107, 112 (2d. Cir. 2004); *see also Heldman v. Sobol*, 962 F.2d 148, 159 (2d. Cir. 1992); *Mrs. W. v. Tirozzi* , 832 F.2d 748, 756 (2d Cir. 1987); *J.G. v. Bd. of Educ. of Rochester City Sch. Dist.*, 830 F.2d 444, 446-47 (2d Cir. 1987); *Jose P. v. Ambach*, 669 F.2d 865, 868-70 (2d Cir. 1982).

Jose P. is directly on point. In that landmark case, families sought structural reform because individual administrative proceedings were inadequate to achieve appropriate education for students with disabilities. This Court noted that the Commissioner had conceded that "'he would be unable to expeditiously process the appeals of all the members of the plaintiff class were they to pursue administrative proceedings.'" 669 F.2d at 869. Thus, a structural approach was more appropriate than traditional individual adjudication. *Id.* Similarly, here, the administrative hearing process is completely inadequate to provide relief for every student who was denied FAPE during the relevant time frame. Without structural reform that provides class-wide relief, many students would never get any compensatory education. The students who were at greatest risk of receiving little to no education during the relevant time, students who are poor, whose parents have little education, and whose parents do not speak English, are those whose families have the least ability to represent themselves pro se in the administrative process.

COPAA knows firsthand that many parents would find it very difficult to obtain legal representation. Most families with children receiving special education services lack the resources necessary for legal representation, because of low family income or because of the financial strain of raising a child with a disability. One-quarter of students with IEPs have families with incomes below the poverty line and two-thirds have family incomes of $50,000 or less.[17] Many parents, desperate to help their children, mortgage their homes and raid their retirement funds, to obtain the funds to hire lawyers and pay expert fees. Others do not have those options.

Plaintiffs' complaint raises numerous policy issues that arise out of policymakers' decisions rather than students' individual facts. the question of what form compensatory services may take is an important policy question. Many students find additional education during the regular school week overwhelming. Compensatory education is a flexible remedy, and, in appropriate cases, students should be able to access compensatory education during weekends, school breaks and summers and services after age 21 as well. For example, one court approved a compensatory education award that included a "comprehensive summer camp

[17] Elisa Hyman, *et al*., *How IDEA Fails Families without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 Am. U. J. Gender Soc. Pol'y & L 107, 112-13 (2011). *See also* Kelly D. Thomason, Note, *The Costs of a "Free" Education*, 57 Duke L.J. 457, 483-84 (2007).

program with an emphasis on Braille" for a student who had been denied Braille instruction. *R. M-G v. Las Vegas City Sch.*, Civ. 13-0350 KBM-KK, 2016 WL 7666143, at *3 (D.N.M. Apr. 7, 2016).

Further, the relief sought is structural, which supports a finding that the claim is systemic. *See M.O. v. Ind. Dep't of Educ.*, 2:07-CV-175-TS, 2008 WL 4056562, at *11 (N.D. Ind. Aug. 29, 2008) (finding that relief requiring changes in the administrative hearing process were structural). The relief sought in this case is not individual but rather is structural, focused on establishing a process for awarding compensatory education in a timely way.

A district court held that the systemic exception applied to claims that Defendant NYC DOE's policies and procedures made it impossible to implement nursing, transportation, and porter service. *See J.L. on behalf of J.P. v. New York City Dep't of Educ.*, 324 F. Supp. 3d 455, 464 (S.D.N.Y. 2018). The systemic exception likewise applies here because the framework and procedures for assessing compensatory education are at issue and because the nature and volume of complaints are incapable of correction by the administrative hearing process.

That COVID-19 compensatory education claims are suitable for structural relief is demonstrated by the U.S. Department of Education's Office for Civil Rights (OCR)'s recent resolution agreement with the Los Angeles Unified School District (LAUSD). That case resolved complaints regarding the provision of

special education services, including compensatory services, during and resulting from the COVID-19 pandemic in a far-reaching settlement with LAUSD in California on April 28, 2022. OCR found, among other violations, that LAUSD erroneously "Informed staff that the district was not responsible for providing compensatory education to students with disabilities who did not receive FAPE during the COVID-19 school closure period because the district was not at fault for the closure." With this agreement, LAUSD "agreed to resolve these violations by creating and implementing a comprehensive plan to address the compensatory education needs of students with disabilities due to the COVID-19 pandemic."[18]

C. The Exception for Legal Questions Applies Here

Courts have held that exhaustion is not required for questions of law. *See Hernandez v. Graham,* No. 0942-JB-GBW, 2020 WL 6063799, at *125-26 (D.N.M.

[18] U.S. Dep't of Educ., *Office for Civil Rights Reaches Resolution Agreement with Nation's Second Largest School District, Los Angeles Unified, to Meet Needs of Students with Disabilities during COVID-19 Pandemic*. (April 28, 2022), https://www.ed.gov/news/press-releases/office-civil-rights-reaches-resolution-agreement-nations-second-largest-school-district-los-angeles-unified-meet-needs-students-disabilities-during-covid-19-pandemic.
See U.S. Dep't of Educ. Letter to LAUSD, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09215901-a.pdf (last viewed June 16, 2022);
See also, LAUSD Resolution Agreement, OCR Docket No. 9-21-5901 https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09215901-b.pdf (last viewed June 16, 2022).

Oct. 14, 2020) (exhaustion not required because misinterpretation of state health regulation as barring in-person instruction is a legal question); *K.S. v. R.I. Bd. of Educ.*, 44 F. Supp. 3d 193, 197 (D.R.I. 2014) (exhaustion not required because availability of public education for students aged 21-22 is a legal question). There are many important legal questions regarding compensatory education services that can be resolved by a court without any need for an administrative hearing. These questions include:

(1) Whether the New York City Board of Education is required to convene an IEP meeting to determine whether each student with an IEP is entitled to compensatory education and, if compensatory education is required, provide Prior Written Notice to the parents of the determination and, if compensatory services were required, include an offer of compensatory services by a date certain?[19];

(2) What notice must be provided to parents, guardians, and adult students regarding their right to compensatory education for the loss of education due to the COVID-19 pandemic?

[19] Massachusetts, for example, asked school districts to work with parents to determine compensatory services for high needs students by December 15, 2020. Coronavirus (COVID-19) Special Education Technical Assistance Advisory 2021-1: COVID-19 Compensatory Services and Recovery Support for Students with IEPs, Appendix A, at 12, https://www.doe.mass.edu/sped/advisories/2021-1-covid-compservices.docx.

(3) What guidelines or protocols will be used in determining whether students are entitled to compensatory education, how much compensatory education will be provided, and what compensatory education will be available?

(4) Whether all students who were expected to participate in distance learning but did not receive either devices and/or internet access are entitled to compensatory education services?

(5) Whether students who were not able to access distance learning because of their disabilities or language access or other circumstances, even if it was offered to them, are entitled to compensatory education services?

(6) Whether compensatory services that may be offered to parents and students include 1:1 tutoring, vocational training, and summer camps?

(7) Whether students like C.B., who turn 21 during the 2020-2021 school year and have missed extended periods of instruction since March 16, 2020, are eligible for extended eligibility and compensatory services, and whether Defendant NYC DOE is required to continue their education without interruption while a determination is made regarding their claim for compensatory education?

(8) Whether students are eligible for compensatory education if they failed to make expected educational progress toward their IEP goals and objectives or

whether NYC may require a showing of regression as a prerequisite for eligibility?

(9) Whether students who attend state-approved non-public schools pursuant to their IEPs and were denied FAPE during school closure and remote learning are eligible for compensatory education?

Exhaustion is not required before a court can resolve these important legal issues.

D. Compensatory Education Is Available as a Remedy in Class Actions without the Need for Each Individual Student to Exhaust Administrative Remedies

Courts have recognized that compensatory education may be appropriate relief in class actions, without the need for each individual student to file a separate due process claim. *See, e.g., Adam X. v. N.J. Dep't of Corr.*, 17-00188 (FLW)(LHG), 2022 U.S. Dist. LEXIS 37601 (D.N.J. Mar. 3, 2022) (approving class certification and settlement of class action that provided compensatory education for students who had been incarcerated); *A.R. v. Conn. State Bd. of Educ.,* 3:16-cv-01197 (CSH), 2020 WL 2092650, at *12 (D. Conn. May 1, 2020) (certifying a class for compensatory education claims under Rule 23(b)(3)). In *A.R.*, the court found that it was inefficient to require class members to separately litigate entitlement to compensatory education arising out of a class-wide denial of IDEA services. The court also found that the class action would promote the uniformity of decision as to

all class members.

Further, in this case, plaintiffs are seeking that Defendants establish a process and plan for providing compensatory education for Plaintiffs and class members.

IV. THE STATE COMMISSIONER OF EDUCATION IS RESPONSIBLE FOR ENSURING THAT ALL CHILDREN WITH DISABILITIES WHO WERE DENIED FAPE BECAUSE OF THE COVID-19 RESTRICTIONS RECEIVE APPROPRIATE COMPENSATORY EDUCATION SERVICES

IDEA explicitly places on the states the ultimate responsibility for ensuring that all students with disabilities are provided with a FAPE and that all other requirements of IDEA are met. 42 U.S.C. § 1412(a) & (a)(1). For nearly forty years, this Court has held that the State Department of Education is responsible for enforcing compliance with IDEA. *Jose P.*, 669 F.2d at 870-71. This Court made clear that the State educational agency is responsible for ensuring that the requirements of § 1411 *et seq.* are carried out and that all educational programs for children with disabilities in the State "meet the educational standards of the State educational agency." 20 U.S.C. § 1412(a)(11) and ensuring that "local agencies comply" with the IDEA. *See Jose P.*, 669 F.2d at 871. The state is also obligated to meet its obligation under the Rehabilitation Act of 1973, 29 U.S.C. § 794, to ensure that programs in the state do not discriminate based on disability. *See Jose P.*, 669 F. 2d at 871.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the district court's decision.

Dated: June 22, 2022

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C)

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Amici brief is proportionately spaced, has a typeface of 14 points and contains 6,411 words.

/s/ Ellen Marjorie Saideman
Ellen Marjorie Saideman

CERTIFICATE OF SERVICE

I certify that, on June 22, 2022, the foregoing document was served on all parties or their counsel of record through the CM/ECF.

/s/ Ellen Marjorie Saideman
Ellen Marjorie Saideman