UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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J.T., Individually and on behalf of D.T.;
K.M., Individually and on behalf of M.M. and S.M.;
J.J., Individually and on behalf of Z.J.;
C.N., Individually and on behalf of V.N.; and,
All Others Similarly Situated,

Plaintiffs,

- **against** -

BILL de BLASIO, in his official capacity as the Mayor of New York City;
RICHARD CARRANZA, in his official capacity as the Chancellor of the New York City Department of Education; the **NEW YORK CITY DEPARTMENT OF EDUCATION;** the **SCHOOL DISTRICTS IN THE UNITED STATES**; and, the **STATE DEPARTMENTS OF EDUCATION IN THE UNITED STATES**,

Defendants.

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CASE NO.: **20 – cv – 5878 (CM)**

DECLARATION OF PETER G. ALBERT IN SUPPORT OF ORDER TO SHOW CAUSE

Peter G. Albert, an attorney admitted to practice law in the State of New York and before this Court, declares under penalties of perjury as follows:

1. Plaintiff J.T. is the parent and natural guardian of D.T., Plaintiff K.M. is the parent and natural guardian of M.M. and S.M., Plaintiff J.J. is the parent and natural guardian of Z.J., and Plaintiff C.N. is the parent and natural guardian of V.N.[1]

2. J.T. and D.T. are residents of Atlantic Highland, New Jersey, and the Middletown

[1] The initials of the names of the Plaintiffs/Parents and their children ("Students"), rather than their full names, are used herein consistent with the federal Family Educational Rights and Privacy Act, 20 U.S.C. §1232(g) (34 C.F.R. Part 99)("FERPA") to protect the privacy of the parties.

Township School District ("Middletown"). D.T. is a 15-year old boy with a disability whose disability classification is "multiply disabled." Middletown is legally required to provide D.T. with a "free appropriate public education" ("FAPE"), set forth in an "individualized education program" ("IEP"), pursuant to the federal Individuals with Disabilities Education Act, 20 U.S.C. §1400, et seq. ("IDEA"). For the 2019-2020 school year, Middletown provided D.T. with an IEP that set forth an educational program and placement that was intended to provide him with educational benefits. D.T.'s IEP provided, in relevant part, attendance in special education classes for students with learning or language disabilities, as well as Occupational Therapy, Speech-Language Therapy, and special transportation. A redacted copy of D.T.'s IEP is annexed hereto as Exhibit "A".

3. K.M. and S.M. are residents of Staten Island, New York, and the New York City Department of Education ("NYCDOE"). S.M. is a 6-year old girl with a disability whose disability classification is "autism." NYCDOE is legally required to provide S.M. with a "free appropriate public education" ("FAPE"), set forth in an "individualized education program" ("IEP"), pursuant to the federal Individuals with Disabilities Education Act, 20 U.S.C. §1400, et seq. ("IDEA"). For the 2019-2020 school year, NYCDOE provided S.M. with an IEP that set forth an educational program and placement that was intended to provide her with educational benefits. S.M.'s IEP provided, in relevant part, attendance in an 8:1:1 special education classes for academic subjects, as well as Occupational Therapy, Physical Therapy, Speech-Language Therapy, and a 1:1 paraprofessional. A redacted copy of S.M.'s IEP is annexed hereto as Exhibit "B".

4. K.M. and M.M. are residents of Staten Island, New York, and the New York City Department of Education ("NYCDOE"). M.M., who is the brother of Student S.M., is a 6-year old boy with a disability whose disability classification is "autism." NYCDOE is legally required to

provide M.M. with a "free appropriate public education" ("FAPE"), set forth in an "individualized education program" ("IEP"), pursuant to the federal Individuals with Disabilities Education Act, 20 U.S.C. §1400, et seq. ("IDEA"). For the 2019-2020 school year, NYCDOE provided M.M. with an IEP that set forth an educational program and placement that was intended to provide him with educational benefits. M.M.'s IEP provided, in relevant part, attendance in an integrated co-teaching class for academic subjects, as well as Occupational Therapy, Physical Therapy, and Speech-Language Therapy. A redacted copy of M.M.'s IEP is annexed hereto as Exhibit "C".

5. J.J. and Z.J. are residents of Meriden, Connecticut, and the Meriden Public School District ("Meriden"). Z.J. is an 8-year old boy with a disability whose disability classification is "autism." Meriden is legally required to provide Z.J. with a "free appropriate public education" ("FAPE"), set forth in an "individualized education program" ("IEP"), pursuant to the federal Individuals with Disabilities Education Act, 20 U.S.C. §1400, et seq. ("IDEA"). For the 2019-2020 school year, Meriden provided Z.J. with an IEP that set forth an educational program and placement that was intended to provide him with educational benefits. Z.J.'s IEP provided, in relevant part, attendance in a regular education and special education class, as well as Speech-Language Therapy, social skills instruction, counseling services and behavioral supports. A redacted copy of Z.J.'s IEP is annexed hereto as Exhibit "D".

6. C.N. and V.N. are residents of Leander, Texas, and the Leander Independent School District ("Leander"). V.N. is a 7-year old girl with a disability whose primary disability classification is "other health impaired." Leander is legally required to provide V.N. with a "free appropriate public education" ("FAPE"), set forth in an "individualized education program" ("IEP"), pursuant to the federal Individuals with Disabilities Education Act, 20 U.S.C. §1400, et seq. ("IDEA"). For the 2019-2020 school year, Leander provided V.N. with an IEP that set forth

an educational program and placement that was intended to provide her with educational benefits. V.N.'s IEP provided, in relevant part, attendance in a general education class with in-class support and Speech Therapy. A redacted copy of V.N.'s IEP is annexed hereto as Exhibit "E".

7. Upon information and belief, by on or about March 16, 2020, each of the school districts ("Local Educational Agency") (*see* 20 U.S.C. §1401(19) and 34 C.F.R. §300.28) attended by the Students named herein were unilaterally closed. Such closures required the Students to remain home and changed in-person instruction to "remote learning," if any. For example, March 13, 2020, was the last day of classes in New York City schools due to New York City Mayor Bill de Blasio[2] ("Mayor de Blasio") and the Chancellor of New York City Department of Education Richard Carranza[3] ("Chancellor Carranza") unilaterally moving all instruction to "remote learning" where students and staff would remain at their homes until April 20, 2020. Subsequently, on April 11, 2020, Mayor de Blasio and Chancellor Carranza announced schools would remain closed and all services would continue to be provided through "remote learning" for the remainder of the 2019-2020 school year.[4]

8. School districts across the country requested the Secretary of Education to grant waivers from IDEA requirements and providing FAPE during the coronavirus crisis.[5] While the United States Department of Education ("USDOE") and state education departments provided great flexibility in the provision of educational services during the coronavirus crisis, there has been no change in federal or state law. On April 27, 2020, the USDOE presented a Report to Congress from United States Education Secretary Betsy DeVos ("Secretary DeVos") which

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[2] https://www.nytimes.com/2020/03/15/nyregion/nyc-schools-closed.html
[3] Messages from New York City Department of Education Chancellor, Richard Carranza: https://www.schools.nyc.gov/learn-at-home/chancellor-s-message-for-families
[4] https://www.nbcnews.com/news/us-news/new-york-city-mayor-says-schools-will-stay-closed-rest-n1181856
[5] https://edsource.org/2020/disability-rights-groups-school-administrators-spar-over-possible-changes-to-special-education-laws/628376

specifically did not recommend giving school districts the option to bypass major parts of federal special education law.[6] "While the Department has provided extensive flexibility to help schools transition, there is no reason for Congress to waive any provision designed to keep students learning," Education Secretary Betsy DeVos said in a statement.[7]

9. Extensive research has established and confirmed the safety and value of reopening schools. (*See* Complaint, ¶¶ 51 - 80).

10. On July 9, 2020, the CDC Director, Dr. Robert Redfield, made a statement proposing that he considers closing schools a more extensive health issue than reopening schools: "I'm of the point of view as a public health leader in this nation, that having the schools actually closed is a greater public health threat to the children than having the schools reopen. I think really people underestimate the public health consequences of having the schools closed on the kids. I'm confident we can open these schools safely, work in partnership with the local jurisdictions." In addition, he addressed the fact that the virus does not detrimentally affect younger individuals, continuing, "I don't think we should go overboard in trying to develop a system that doesn't recognize the reality that this virus really is relatively benign to those of us that are under the age of 20." Dr. Redfield added that the CDC is ready to collaborate with each school or each school district to safely reopen schools.[8]

11. When the LEAs closed their doors effective on or about March 16, 2020, they unilaterally stopped providing the special education and related services set forth in Students' IEP. This cessation of the special education and related services, guaranteed to the Students through

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[6] https://www2.ed.gov/documents/coronavirus/cares-waiver-report.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

[7] https://www.ed.gov/news/press-releases/secretary-devos-reiterates-learning-must-continue-all-students-declines-seek-congressional-waivers-fape-lre-requirements-idea

[8] https://bongino.com/cdc-director-keeping-schools-closed-is-greater-public-health-risk-than-reopening/

their respective IEPs, was effectuated without notice to the Students' Parents, the Plaintiffs herein. Such unilateral substantial and material modification of mandated education and related services was violative of the IDEA's due process requirements. Moreover, such unilateral substantial and material modification of mandated education and related services constituted an unlawful change of placement for each Student herein. And, in this regard, upon information and belief, each Student herein was adversely affected by this unilateral substantial and material modification of mandated education and related services.

12. Thus, Defendants knowingly, willfully, and deliberately violated the rights of the Students and Parents herein by acting in bad faith.

13. The Defendants' unilateral change in the Students' educational program and placement was violative of the "stay put" or "pendency" provision of the IDEA, codified at 20 U.S.C. § 1415(j); *see also* 34 C.F.R. § 300.518(a) and in New York State, N.Y. Educ. L. § 4404(a).

14. A disabled student's "then current educational placement" must be maintained during the pendency of a due process challenge under the IDEA and subsequent administrative and/or judicial proceedings. In the instant case, the educational program and placement set forth in the disabled student's most recently implemented Individualized Education Program ("IEP") must be maintained during the pendency of the due process challenge herein.

15. The unilateral changes made to the Students' educational program and placement herein, are fundamental changes in, or elimination of, a basic element of the Students' educational programs. (*see Sherri A.D. v. Kirby*, 975 F.2d 193, 206 (5th Cir. 1992); *see also Erickson v. Albuquerque Public Schools*, 199 F.3d 1116, 1121 (10th Cir. 1999).

16. A Student is defined as a student who was 3 to 21 years of age between March 2020 and July 2020, and who is classified as having a disability as defined by IDEA (20 U.S.C. §

1401(3)), who have qualifying disabilities under Section 504, and who are afforded protection under Section 504 and the Americans with Disabilities Act, and who were denied these rights because of their disability by the Defendants. Students are also entitled to receive educational benefits from the LEAs as per their respective State Constitutions or statutes.

17. During the month of March 2020, Defendants unilaterally closed its schools and required students and staff to remain home, thereby altering the educational program status quo of the Plaintiffs. The Defendants essentially failed to provide the Students with the special education and related services set forth in their IEPs. Due to the actions of Defendants, they have denied Plaintiffs a FAPE under IDEA.[9]

18. Pursuant to the IDEA, Parents sent statutory Ten Day notices to their respective LEAs advising that the LEA improperly modified the Students' IEPs, denied their pendency rights under Section 1415(j) of the IDEA, and requesting relief for such violations.

19. Pursuant to the IDEA, Parents subsequently filed due process complaints with their LEAs alleging violations of the IDEA and Section 504 on the basis of the LEAs unilaterally modifying the Students' IEPs, without notice, and by failing to maintain the Students' pendency programs and placements.

20. The Defendants unilaterally, substantially, and materially altered the Students' "status quo" educational program and placement as it relates to the Students' pendency rights. The

[9] The maximum amount of time a school district can displace a student and change the educational program without triggering a violation of 20 U.S.C. § 1415(j) is 10 school days based on *Honig v. Doe*, 484 U.S. 305, 325, 325-26 n.8, 98 L. Ed. 2d 686, 108 S. Ct. 592 (1987). However, this unilateral action of a suspension by the school district may create a "change in placement," and by the terms of the IDEA, a change in placement can only occur with the consent of the parents, or after written notice, and the opportunity for a hearing. However, not all suspensions constitute a prohibited "change in placement." "Where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for [**11] up to 10 schooldays." Id. at 325. The Supreme Court adopted the ten-day limit from the Office of Civil Rights ("OCR") of the Department of Education, which decided that "a suspension of up to 10 school days does not amount to a 'change in placement.'" Id. at 325 n.8. Based on this cut-off, the Court found that suspensions of twenty and thirty days' duration were impermissible. Id.

IDEA includes a number of procedural safeguards "that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." *Honig v. Doe*, 484 U.S. 305, 311-12, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988); *Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78, 82, 83 (3d Cir. 1996). Accordingly, the stay-put provision "protect[s] handicapped children and their parents during the review process" by "block[ing] school districts from effecting unilateral change in a child's educational program."

21. The Defendants blatantly disregarded these procedural safeguards and simply failed to comply with these long-established federal laws and regulations.

22. First, the Defendants unilaterally, substantially, and materially altered the location of where the Students were to receive services - - from a school classroom to the most restrictive environment along the continuum of service - - at the Students' home. A unilateral change from a classroom to total isolation at home, would further violate the Supreme Court's express preference for educating students in the least restrictive environment and with their typically developing peers. *Honig*, 484 U.S. at 313 (1988).

23. Second, the Defendants unilaterally, substantially, and materially altered the delivery of these services by precluding the Students from receiving any in-person services by special education teachers or related service providers, including any supplemental support as documented in the Plaintiff-Students' IEP.

24. Third, no Students' IEP provides for the remote provision of special education or related services. Rather, the Students' IEPs require their services to be provided as a direct service. In most instances, Defendants also unilaterally, substantially, and materially altered the frequency and duration of the Students' related services, if provided at all.

25. There is no “pandemic exception” to the IDEA and if a student’s educational program becomes unavailable, then the stay-put provision requires the school district to find a comparable alternative placement. *See Knight v. District of Columbia*, 278 U.S. App. D.C. 237, 877 F.2d 1025, 1028 (D.C. Cir. 1989) ("This court has held that if a student's 'then current educational placement' becomes unavailable, [the district] must provide him with a 'similar' placement pending administrative and judicial approval of its eventual plans."); *McKenzie v. Smith*, 771 F.2d 1527-33 (D.C. Cir. 1985); *F.S. v. District of Columbia*, 2007 U.S. Dist. LEXIS 27520, 2007 WL 1114136 (D.D.C. 2007).

26. Assuming, arguendo, that a state governor’s school closure order supersedes federal laws (IDEA, Section 504, ADA) protecting the rights of disabled students and their parents, then such legal insulation falls away since governors have rescinded those orders relating to special education students as of July 2020.

27. As a result of the violations committed by the Defendants, during the adjudication of the due process complaints, Plaintiffs seek either an immediate reopening of the schools to implement a substantially similar educational program as outlined in the Students’ IEPs, or alternatively, have a “Pendency Voucher” issued to Parents to provide an opportunity to self-cure the violations of the Defendants.

28. As a result of the violations committed by the Defendants, Parents also seek independent evaluations for the purpose of determining the extent to which the Students exhibit regression and/or loss of competencies and abilities due to the loss of, or substantial change to, the Students’ educational program and placement.

29. Additionally, the Parents seek to have their respective LEAs' Committee on Special Education promptly convene after the completion of the requested independent evaluations for the purpose of ascertaining the Students' current needs and abilities to develop modified IEPs reflecting the loss or substantial and material alterations of the Students' special education and/or related services.

30. As a result of the gross violations committed by the Defendants, the Parents seek compensatory damages from their respective LEAs. Compensatory education is an award of educational services designed to remedy a deprivation in the child's education. An award of compensatory education serves to correct a violation of the IDEA that resulted in the child's regression. Regression refers to the failure to maintain an acquired skill in an identified goal area of concern as a result of an interruption of special education instruction or support services.

31. Due to the intentional and willful actions of the Defendants, Parents were required to "fill in" and expend time to compensate for the failure of their school districts, which resulted in lost income, out-of-pocket expenses, and/or loss of employment. As a result of the intentional and willful violations committed by the Defendants, Parents shall seek both compensatory damages as well as punitive damages.

32. Defendants discriminated against the Students, who are qualified individuals under the ADA, by prohibiting the provision of in-person academic and related services and the opportunity to participate or benefit from such services. "Remote learning" is not "equal" to the "aid, benefit or service" nor is it as effective as in-person services that were required by the Students' IEPs.

33. This is the Plaintiffs' first such application for relief.

Dated: New York, New York
August 20, 2020

Respectfully submitted,

/ s: Peter Albert /

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