UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHRISTINE SIMMONS, as Parent and Natural Guardian of T.S. and CHRISTINE SIMMONS, Individually; HSINYI LIU, as Parent and Natural Guardian of B.W. and HSINYI LIU, Individually, and All Others Similarly Situated, Plaintiffs, v. JAY ROBERT ("J.B.") PRITZKER, in his official capacity as Governor of Illinois, ILLINOIS STATE BOARD OF EDUCATION, CITY OF CHICAGO SCHOOL DISTRICT 299, BOARD OF EDUCATION OF THE CITY OF CHICAGO, RONALD AMUNDSEN HIGH SCHOOL, OTTAWA TOWNSHIP HIGH SCHOOL #140, DR. CARMEN I. AYALA, in her official capacity as Superintendent of Education of Illinois; PEDRO MARTINEZ, in his official capacity as Chief Executive Officer of Chicago, Public Schools; MIGUEL DEL VALLE, in his official capacity as President of the City of Chicago Board of Education; and MICHAEL CUSHING, in his official capacity as Superintendent of Ottawa Township Public Schools, Defendants.	Case No.: 1:22-cv-00123

PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION

I. STATEMENT OF THE FACTS

On Monday, January 3, 2022, the Governor of Illinois, J.B. Pritzker ("Governor Pritzker"), stated he would not act to close schools during the current surge of the COVID-19 variant, publicly known as "Omicron."[1]

The next day, on January 4, 2022, President Joseph Biden ("President Biden") declared all schools should remain open despite the ongoing nationwide surge of COVID-19 cases due to the Omicron variant:

> "We have no reason to think at this point that Omicron is worse for children than previous variants. We know that our kids can be safe when in school, by the way. That's why I believe schools should remain open. They have what they need."[2]

That same day, the Illinois State Board of Education Superintendent, Carmen Ayala ("Superintendent Ayala"), said school districts should not declare an adaptive pause due to staffing shortages:

> "If the school is following guidance regarding masking, testing, and identifying and excluding COVID-19 cases and their close contacts, then an adaptive pause should not be necessary to mitigate an outbreak, and students are best served by continuing to provide in-person instruction. Please note that an adaptive pause means a temporary shift to remote learning for attendance days. Alternatively, schools may choose to take nonattendance days at any time for any reason and make up those attendance days later in the year. A school or school district may only enter into an adaptive pause with remote learning in consultation with the local health department and consistent with guidance or requirements from such local health department."[3]

Notwithstanding the President and Superintendent's clear instructions to keep schools open for in-person learning, Chief Executive Officer of the Chicago Public Schools (CPS), Pedro Martinez,

[1] https://news.wttw.com/2022/01/04/cps-cancel-wednesday-classes-if-teachers-union-votes-work-remotely
[2] https://www.webmd.com/lung/news/20220105/schools-should-stay-open-omicron-biden
[3] https://www.chicagotribune.com/coronavirus/ct-covid-staffing-shortages-close-schools-20220105-rcwbtqpbxfgfdagnaufm64c43i-story.html

released a statement that the "Chicago Teachers' Union (hereinafter, "CTU") voted not to report to work [January 5][4], therefore classes would be canceled for all CPS students.[5]

On January 5, 2022, as Chicago Public Schools remained empty, the Secretary of the United States Department of Education, Miguel Cardon ("Secretary Cardona"), repeated his previous calls for schools to stay open by stating "students suffered enough" and schools should remain open:

> "I know we have the tools to get our school safely open. And we have to do everything in our power to give our students the best opportunity for success. And that means giving them an in-person learning opportunity."[6]

Later that day, the Mayor of Chicago, Lori Lightfoot ("Mayor Lightfoot"), reacted to the CTU's arbitrary vote not to return to schools:

> "We are committed to remaining at the table with CTU leadership and negotiating a fair agreement. But what we cannot accept is unilateral action to shut down the entire District, depriving hundreds of thousands of students of the safe, in-person schooling environment they need."[7]

However, in the interim, students must suffer while the Mayor capitulates to a "fair agreement" to appease those self-blinded teachers ignorant to the suffering of their students and the constitutional rights afforded to them under State and federal law.

Also, on January 5, 2022, Ottawa Township High School District 140 ("OTHSD #140") communicated with parents via a Facebook group page and sent out a survey asking parents their opinion about in-person versus remote learning.[8] However, the form did not specify nor ask any

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[4] Educational Researcher, Vol. XX No. X, pp. 1 – 4 DOI: 10.3102/0013189X211031551. Article reuse guidelines: sagepub.com/journals-permissions © 2021 AERA.https://journals.sagepub.com/doi/full/10.3102/0013189X21103155

[5] On January 6, 2022, the Chicago Teachers' Union was sued by several parents with children enrolled in the Chicago Public School in the matter of *Golden v. Chicago Teachers Union, AFT-IFT Local 1*, Case No. 2022CH00144 because of CTU's and obstruction of the return to in-person instruction and illegal strike. [**See, Exhibit 1 attached**].

[6] https://www.newsnationnow.com/us-news/education/education-secretary-cardona-says-schools-should-stay-open/

[7] https://www.courthousenews.com/chicago-schools-closed-after-teachers-union-votes-to-work-remotely/

[8]https://forms.office.com/Pages/ResponsePage.aspx?id=GAjgUsTWSEG6clYpZ8s5vdJ8LXQ7mwBBlGH1piFPPLdUNFlQNFlXODlCNVBNWjVDT0pINEowMlE3RC4u&fbclid=IwAR2BERfQJGcfPwNqRb1xQIzcpYqcj3TWtZTK8Itoji-MOBrt2SxPDHNqiEA

parent about their child's disability status or IEP. It is also unclear whether the survey was conducted by alternative means to include parents within their District who do not utilize Facebook.

Studies have shown that special education students suffer more than non-disabled students in almost all aspects of life; in a pandemic, where students are deprived of the educational plan tailored by educational and medical professionals to meet their specific needs, only results in exponential and unnecessary suffering for special education students.

Plaintiffs seek a Temporary Restraining Order/Preliminary Injunction to enjoin ISBE, CPS, and OTHS #140 from changing the Plaintiffs' and putative class members' current educational placement from in-person instruction to remote online virtual instruction in violation of the IDEA. If CPS, OTHSD #140 or other local education agencies ("LEAs") intend to move to remote online virtual instruction, Defendants and all other LEAs must provide notice of the proposed change of placement to all students with Individual Education Programs ("IEPs"), and dates for IEP meetings to discuss how the districts will ensure the students receive a free and appropriate public education ("FAPE) during such closure of in-person instruction.

Conversely, Plaintiffs contend that the school district can proactively plan to staff special education classrooms and some general education classrooms[9] for in-person instruction for students with qualifying special needs under IDEA, who simply cannot learn remotely.

II. LEGAL STANDARDS

A. 20 U.S.C. § 1415(j) – Automatic Injunction of the IDEA's Stay-Put Provision

[9] General education classrooms are included in Plaintiffs' request because if a student has an IEP that indicates that they must be integrated into the general education classrooms for [X]% of the day (as this is the least restrictive environment), then Defendants are required to allow those classes containing integrated special education students to remain in-person to adhere to the terms of the IEP, and prevent transferring the student to a more restrictive environment (*i.e.* depriving the student of their right to be educated alongside their non-disabled peers).

The "stay put" provision of the IDEA (20 U.S.C. § 1415(j)) provides, "during the pendency of any proceedings conducted pursuant to this section unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child." 20 U.S.C. § 1415(j), 34 C.F.R. § 300.518. The stay-put provision is a procedural safeguard for parents and children that seeks to preserve the status quo and " 'give the child's parents the choice of keeping the children his existing program until their dispute with the school authorities is resolved.'" (internal citation omitted). *Aaron M. v. Yomtoob*, 2003 U.S. Dist. LEXIS 21252. Furthermore, the stay-put provision prevents the School District Defendants from effecting unilateral change in a child's educational program." *R.B.*., 532 F. App'x at 139–40; *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 72 (3d Cir. 2010); *Susquenita Sch. Dist. v. Raelee S. By & Through Heidi S.*, 96 F.3d 78, 83 (3d Cir. 1996); *See Honig v. Doe*, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988). A parent may invoke the stay-put provision when a school proposes a change in the child's "then-current educational placement." *See Jackson by Thompson v. Franklin Cty. Sch. Bd.*, 765 F.2d 535, 538 (5th Cir. 1985), *abrogated by Honig v. Doe*, 484 U.S. at 305 (1988); *20 U.S.C. § 1415(j).*

Many Courts have referred to § 1415(j), IDEA's "stay-put" provision, as an automatic injunction.[10] *Casey K. ex rel. Norman K. v. St. Anne Cmty. High Sch. Dist. No. 302*, 400 F.3d 508 (7th Cir. 2005); *Johnson ex rel. Johnson*, 287 F.3d 1176; *Drinker by Drinker v. Colonial Sch. Dist.*, 78 F.3d 859 (3d Cir. 1996); *Bd. of Educ. of Cmty. High Sch. Dist. No. 218, Cook Cty., Ill. V. Illinois State Bd. of Educ.*, 103 F.3d 545 (7th Cir. 1996); *Kuszewski ex rel. Kuszewski v. Chippewa Valley Sch.*, 131 F. Supp. 2d 926, 928 (E.D. Mich. 2001), *aff'd sub nom. Kuszewski v. Chippewa Valley Sch. Dist.*, 56 F. App'x 655 (6th Cir. 2003); *Ridley School Dist. v. M.R.*, 2015 WL 1619420, at *4

[10] *See Casey K. ex rel. Norman K. v. St. Anne Cmty. High Sch. Dist. No. 302*, 400 F.3d 508, 511 (7th Cir. 2005) (comparing a stay put injunction to an automatic stay in a bankruptcy case) (citing *Honig*, 484 U.S. at 326–37).

(The U.S. Supreme Court "has emphasized that the provision's text is 'unequivocal' and 'states plainly' that the child 'shall' remain in his current educational placement 'during the pendency of any proceedings initiated under the act'"); *see Tennessee Dep't of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996).

As provided under §1415(j), the automatic stay remedy is statutory and does not require the Court to apply the standard test for an injunction under Fed. R. Civ. P. 65. *Cronin v. Bd. of Educ. of E. Ramapo Cent. Sch. Dist.*, 689 F. Supp. 197, 202 (S.D.N.Y. 1988), s*ee Cochran v. D.C.*, 660 F. Supp. 314, 319 (D.D.C. 1987) (although traditional preliminary injunction standards were not met, the district court found that injunction under stay-put provision ***would nonetheless issue***). The purpose of the stay-put provision is to give the child's parents the choice of keeping the child in [their] existing program until their dispute with the school authorities is resolved. *Board of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Illinois State Bd. of Educ.*, 79 F.3d 654, 659-660 (1996). The Act provides that during any proceedings to enforce it, "the child shall remain in the then-current educational placement of such child" ***unless the parents agree otherwise***. 20 U.S.C. § 1415(e)(3)(A). *Id.* at 656 (emphasis added).

The Seventh Circuit provides that the traditional preliminary injunction which requires the equitable balance of interests "has no place in [the IDEA] context" and "dilute[s] the statutory framework…the statute guarantees that [the child] and his parents be able to rely on an uninterrupted education during a contest between the school board and the parents." *Board of Educ. v. Illinois State Bd. of Educ*., 10 F. Supp 2d 971 at 980 (1998) (N.D. Ill.); (omitting internal citation).

Plaintiffs herein maintain that the current educational placement is in-person learning, and during the pendency of this action, it should be maintained as afforded to Plaintiffs by law.

B. Fed. R. Civ. P. 65

Fed. R. Civ. P. 65(2) governs injunctions and restraining orders and in pertinent part:

> (2) persons bound. The Order binds only the following who receive actual notice of it by personal service or otherwise: (A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

Fed. R. Civ. P. 65(2).

If granted, Plaintiffs request that the Court's Order enjoin CTU from engaging in unlawful behavior, such as directly interfering with the FAPE afforded to Plaintiffs and other students similarly situated as set forth by this Court. Should CTU "vote" to arbitrarily transition to remote online learning, CTU would be in contempt of the proposed Order, as the organization comprises teachers within the jurisdiction—those tasked with delivering the IEP as designed to provide a FAPE to students.

III. ANALYSIS

A. Plaintiffs are not Required to Exhaust Administrative Remedies

Generally, IDEA requires parents to exhaust administrative remedies before turning to the federal courts, courts have recognized other exceptions to the IDEA's general requirement that a party exhaust administrative remedies before bringing a claim in Federal Court. The Seventh Circuit explains as follows:

> [T]he exhaustion requirement is not absolute and is considered futile and excused where: the administrative remedy would be inadequate, the school has adopted a policy or practice of generalized applicability that is contrary to the IDEA, or the Plaintiff is making systematic allegations of IDEA violations.

(quoting *Honig*, 484 U.S. at 327). *M.O. v. Ind. Dep't of Educ*., 2008 U.S. Dist. LEXIS 66632*; 2008 WL 4056562; *citing Honig*, 484 U.S. at 327; *McQueen ex rel. McQueen Colo. Springs Sch. Dist. No. 11*, 488 F.3d 868, 875 (10th Cir. 2007); *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303-04 (9th Cir. 1992).

> "These exceptions often overlap, and courts often find that exhaustion is futile because of the presence of one or more of the other exceptions." *Id., citing,*

> *e.g., Cave v. East Meadow Union Free Sch. Dist.*, 514 F.3d 240, 249 (2d Cir. 2008) (combining the exceptions when it stated that "the exhaustion requirement does not apply when the pursuit of the administrative remedies would be futile because the agency either was acting in violation of the law or was unable to remedy the alleged injury") (internal quotations omitted).

In *Hoeft v. Tucson Unified School District*, the Ninth Circuit explained that when determining the validity of a policy is purely a matter of law, there is less reason to require IDEA exhaustion because "agency expertise and an administrative record are theoretically unnecessary in resolving the issue at hand." 967 F.2d 1298 (1992); *See also, Christopher W. v. Portsmouth Sch. Comm.*, 877 F.2d 1089, 1095 (1st Cir. 1989) (noting that the purposes of the exhaustion doctrine are not furthered when the issue is a matter of law).

B. This Court Should Issue a Temporary Restraining Order (TRO) to enjoin Defendants from transitioning Plaintiffs to remote, virtual instruction without complying with the procedural safeguards by IDEA.

The IDEA provides a plethora of procedural rights for parents who seek remedy against a school district that fails to provide a student with a FAPE. IDEA requires a local educational agency (LEA) to give prior written notice of any action proposed by the LEA regarding the provision of a FAPE, specifically where the proposed action results in a change in the placement of student's educational program – the educational status quo. *See* 20 U.S.C. §1415(c)(1). Congress envisioned a significant parental role in the preparation of the IEP, as such, the Act establishes a variety of procedural protections that ensure parents have an opportunity to seek review of decisions with which they disagree. *Cronin*, 689 F. Supp. at 200-01, citing *Honig*, 108 S. Ct. at 598.

There are several procedural safeguards the IDEA includes "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*, 484 U.S. at 311-12. For example,

20 U.S.C. § 1415(b)(3) ***requires*** prior written notice to the child's parents whenever the local educational agency (LEA) ***proposes*** initiating or changing an IEP, and 20 U.S.C. § 1415(c)(1) describes what is required in that notice. Each Plaintiff's educational "status quo" is defined as "the last, uncontested status which preceded the pending controversy." *N.D. ex rel. parents acting as guardians ad litem*, 600 F.3d 1104 (9th Cir. 2010).

Without judicial intervention, it is abundantly clear that LEAs will independently, or at the behest of their unions, arbitrarily close their doors to students despite clear direction by superior officials not to do so and federal law that dictates otherwise. The State of Illinois currently educates upward of 1,887,316 students, of which approximately fifteen percent (15%) have disabilities (283,098 students).[11] For comparison, Aurora, Illinois has an estimated population of 200,000 people—the number of disabled students to be negatively affected by the flippant and arbitrary transition(s) to remote online learning represents a population ***significantly larger than that of Illinois' second-largest city***.

When state agencies deviate from student IEPs, and those deviations deprive students of a reasonable chance of achieving passing marks and advancing from grade to grade, those agencies fail to provide FAPE in violation of IDEA. *Endrew F. ex rel. Joseph F.*, 137 S. Ct. at 100; *Charles H.*, 2021 WL 2946127, at *2; *see, Reid ex rel. Reid v. D.C.*, 401 F.3d 516, 519 (D.C. Cir. 2005); 20 U.S.C. § 1414(d)(1)(A)(i)(IV)(bb). "A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." *Grafton Sch. Dist. v. JL*, 2020 U.S. Dist. LEXIS 119546 (citing *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9th Cir. 2007).

[11] http://www.illinoisreportcard.com/State.aspx?source=studentcharacteristics&source2=iep&Stateid=IL

Each day a child is denied a FAPE by such procedural dereliction of a school system, the student is harmed yet again. *See Cox v. Brown*, 498 F. Supp. 823, 828-829 (D.D.C. 1980) (irreparable harm results when students "[lack] each day of their young lives an appropriate education, one that is sensitive to their particular disabilities, commensurate to their levels of understanding, and fulfilling their immediate needs"). As the Court in *Blackman v. D.C.*, 277 F. Supp.2d 71, 79-80 (D.D.C. 2003) held:

> [T]he failure of the District to comply with its statutory obligations and provide appropriate educational placements can have a devastating impact on a child's well-being. "Any agency whose appointed mission when it loses sight of the fact that, to a young, growing person, time is critical. While a month in the life of an adult may be insignificant, the rate at which a child develops and changes, especially one at the onset of biological adolescence with or without special needs like those of our Plaintiff, a few months can make a world of difference in the life of that child.

Blackman v. D.C., 185 F.R.D. 4, 7-8 (D.D.C. 1999) (quoting *Foster v. District of Columbia*, Civil Action No. 82-0095, Memorandum Opinion and Order of February 22, 1982, at 4 (D.D.C. February 22, 1982))[12]

Defendants unilaterally, substantially, and materially altered the Plaintiff-Students' "status-quo" educational program relative to the Plaintiff-Students' placement without notice, parental consent, meaningful input, and the IDEA's other procedural safeguards. Defendants unilaterally closed their schools in March 2020 and now again on January 5, 2022. As a result, students were required to remain home, their constitutional rights seemingly suspended in the void, while the transition to at-home clearly alters the educational program status quo of the Plaintiff-Students in violation of the IDEA and other federal law. Defendant also failed to provide the Plaintiff-Students

[12] *See also, Spriegler v. D.C.*, 866 F.2d 461, 466-67 (D.C. Cir. 1989) (Act's procedural requirement for periodic and individualized assessment of each special education child "evinces a recognition that children, particularly young children, develop quickly and that a placement decision that may have been appropriate a year ago may no longer be appropriate today.").

with the special education and related services outlined in their IEPs and thereby denied Plaintiffs a FAPE as required by IDEA.[13]

A school district's unilateral removal of a disabled student from their educational program, or alteration of the student's educational program, for more than ten days in a school year, constitutes a "change in placement," **which must be undertaken only within the protective framework of the IDEA.** *Honig*, 484 U.S. at 323; *Parents of Student W. v. Puyallup Sch. Dist*., No. 3, 31 F.3d 1489, 1495 (9th Cir. 1994)(emphasis added). Congress has not articulated a COVID exception to the IDEA.[14]

In *M.R. v. Ridley Sch. Dist.*,[15] the Court of Appeals for the Third Circuit provided a valuable discussion of the automatic preliminary injunction included in IDEA's "stay-put" rule:

> "Once a court ascertains the student's current educational placement, the movants are entitled to an order [maintaining that placement] without satisfaction of the usual prerequisites to injunctive relief.'" Drinker by Drinker, 78.F.3d at 864 (quoting *Woods v. N.J. Dep't of Educ.*, No. 93-5123, 20 Indiv. Disabilities Educ. L. Rep. (LRP Publications) 439, 440 (3d Cir. September 17, 1993))); *see Pardini v. Allegheny Intermediate Unit*, 420 F.3d 181, 188 (3d Cir. 2005) ("Congress has already balanced the competing harms as well as the competing equities"); *Zvi D. by Shirley D. v. Ambach*, 695 F.2d 904, 906 (2d Cir. 1982) ("The statute substitutes an absolute rule in favor of the status quo for the court's discretionary consideration of the factors…").
>
> *Id*. at 118-119 (footnotes omitted; emphasis added).

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[13] The maximum amount of time a school district can unilaterally displace a student and change the educational program without triggering a violation of 20 U.S.C.§1415(j) is 10 school days – cumulatively during any school year. Honig, 484 U.S. at325, 325-26 n.8. Such unilateral action by a 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. *Honig*, 484 U.S. 305, the ten-day limit was adopted by the Supreme Court in Honig from the Department of Education's Office of Civil Rights ("OCR"), which decided that "a suspension of up to 10 school days does not amount to a 'change of placement.'" *Honig*, 484 U.S. at 325 n. 8.

[14] *See*, CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT, PL 116-136, ("CARES Act"), March 27, 2020, 134 Stat 281, required the Secretary of Education to prepare a report regarding whether waivers of the IDEA's requirements were necessary during the pandemic. In her report, then-Secretary of Education Betsy Devos expressly declined to request "waiver authority for any of the core tenets of the IDEA"— including, "most notably," the right to a FAPE--leaving those obligations in place. U.S. Sec'y of Educ. Betsy Devos, Report to Congress: Recommended Waiver Authority under Section 3511(d)(4) of Division A of the CARES Act 11 (2020). *LV v. New York City Dept. of Educ.*, 03-CV-9917 (LAP), 2021 WL 663718, at *6 (S.D.N.Y. Feb. 18, 2021).

[15] *M.R. v. Ridley Sch. Dist.*, 744 F.3d 112 (3d Cir. 2014).

Plaintiff's IEPs share a commonality in that none of the current IEPs contain language about virtual instruction, remote, at-home, or distance learning instruction or services. Under this case law, here, this Court should grant an automatic injunction enjoining Defendants from moving Plaintiffs and putative class members from in-person instruction to remote, virtual instruction. Under Ridley, the Court should look to Plaintiffs' IEPs "actually functioning when the 'stay put' provision was "triggered" or "invoked." Ridley Sch. Dist. v. M.R., 575 U.S. 1008 (2015).

If CPS and OTHS #140 and other LEAs unilaterally change each Student-Plaintiff's current educational placement to a temporary transition to remote or distance learning, CPS and OTHS #140 would be violating the IDEA and depriving each Student of their right to a FAPE under the Act.

Accordingly, this Court should enjoin CPS, OTHSD #140, and the ISBE from moving the Plaintiffs and the putative class members from in-person instruction to remote online virtual instruction in violation of the IDEA. If Defendants intend to move the Student Plaintiffs to remote online virtual instruction, they must provide notice of the change of placement to all students with Individual Education Programs ("IEPs") and dates for IEP meetings to discuss how CPS and OTHSD #140 will ensure the students receive a FAPE during such closure or ensure that those special education classrooms and some general classrooms (as cited above) remain open for in-person learning.

C. This Court Should Issue a Temporary Restraining Order (TRO) Enjoining ISBE, CPS and OTHSD #140 from Allowing its School Districts to Move Plaintiffs to Remote, Virtual, Instruction in Violation of the IDEA

In *Honig*, the Supreme Court noted that in enacting the IDEA, Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students from school. *Honig*, 484 U.S. at 323; *Drinker by Drinker*, 78 F.3d at 864. A school

district's removal of a disabled student from their educational program, or alteration of the Student's educational program, for more than ten days cumulatively in a school year, constitutes a "change in placement," which must be undertaken only within the protective framework of the IDEA. *Honig*, 484 U.S. at 323; *D.M.*, 801 F.3d 205.

By the terms of the IDEA, a change in placement may only occur with the parents' consent or after written notice and the opportunity for a hearing. *Id.* Determining whether there has been a "change" requires examining the child's IEP. *Gore v. D.C.*, 67 F. Supp. 3d 147 (D.D.C. 2014). Changing the location where a student receives services does not amount to a change in educational placement if the new setting replicates the educational program contemplated by the Student's original assignment. *D.K. v. D.C.*, 983 F. Supp. 2d 138 (D.D.C. 2013); *James v. D.C.*, 949 F. Supp. 2d 134 (D.D.C. 2013). If the new location ***DOES NOT REPLICATE*** the educational program contemplated by the Student's original assignment, a change in educational placement has occurred.

When a change in a child's IEP is sought, such as a transfer from in-person learning to a remote learning platform, regardless of whether the party seeking the change is the school district or the parents, the burden of showing that the placement is appropriate rests with the school district. *S.H. v. State-Operated Sch. Dist. of City of Newark,* 336 F.3d 260 (3d Cir. 2003). In Order for a placement to be "appropriate," the School District must show that the proposed change would provide Plaintiffs and those of the purported class with a ***meaningful*** educational benefit. *Id.* at 271. Here, Defendants cannot show that a transition to online remote learning would provide those students under the IDEA with a meaningful educational benefit.

As provided in 105 ILCS 5/14-1.02, Defendant ISBE is responsible for making "[s]uch rules [to] ensure that a free appropriate public education is available to all children with disabilities.

Furthermore, it requires that the Defendant ISBE ensure that children with special needs undergo "a case study fully reviewed by professional personnel in a multidisciplinary staff conference and only upon recommendation of qualified specialist . . . if available." 105 ILCS 5/14-8.02(b).

These statutes incorporate IDEA requirements for the State of Illinois. To secure IDEA Part B federal funds, each State must have procedures that protect the rights of students with disabilities. Defendants ISBE, CPS, and OTHSD #140 are responsible for ensuring compliance with IDEA. Therefore, this Court should enjoin ISBE, CPS, and OTHSD #140 from allowing its school districts to move the Student Plaintiffs and all others similarly situated to online remote learning.

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request a Temporary Restraining Order pursuant to IDEA §14167(j) and Fed. R. Civ. P. 65 and 65(2). As such, this Order would bind the parties, the parties' officers, and other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

Dated: January 9, 2022

Respectfully submitted,

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PLAINTIFFS' CERTIFICATE OF SERVICE

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I hereby certify that on January 9, 2022, I electronically filed the Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction with the Clerk of the Court using the ECF System, which will provide electronic copies to all attorneys of record in this matter.

Dated: January 9, 2022

Respectfully submitted,

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EXHIBIT 1

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

LAUREL GOLDEN, AMELIA KESSEM, JANE SIAVELIS, MICHELLE SHVARTSER, ROBERT BARTLETT, DENISE HEITZ, *and* JOSEPH WARNKE Plaintiffs, v. CHICAGO TEACHERS UNION, AFT-IFT LOCAL 1, Defendant.	Case No. 2022CH00144 In Chancery Injunction / Temporary Restraining Order

Complaint

1. This lawsuit is brought by parents of children who are enrolled in Chicago Public Schools (CPS) against the Chicago Teachers Union (CTU), the exclusive bargaining representative of teachers employed by CPS. CPS has held district-wide, 5-days-a-week, in-person schooling since the beginning of the 2021–2022 school year. However, on January 4, 2022, CTU held a meeting of delegates and a vote of its members, in which they voted to refuse to work in-person. Although CTU claims its teachers are willing to work remotely, teachers may not work remotely without the approval of the Chicago Board of Education. CTU members voted to refuse to teach under the conditions set forth by CPS. That is a strike by definition.

2. The Illinois Educational Labor Relations Act (IELRA or "the Act") sets forth the conditions under which CTU and its members may hold a strike. Not all of the conditions set forth in the Act that are required before a strike may happen have been met in this case. As a result, the strike by CTU and its members is illegal.

3. Plaintiffs, parents of children of CPS students, will be harmed by CTU's strike because their children will be denied schooling and they will be forced to arrange child care because their children are unable to attend school. Therefore, Plaintiffs bring this lawsuit seeking relief in the form of immediate injunctive relief, declaratory relief, and damages.

Parties

4. Plaintiff Laurel Golden is the parent of three children who attend public schools operated by CPS.

5. Plaintiff Amelia Kessem is the parent of two children who attend public schools operated by CPS.

6. Plaintiff Jane Siavelis is the parent of one child who attends a public school operated by CPS.

7. Plaintiff Michelle Shvartser is the parent of one child who attends a public school operated by CPS.

8. Plaintiff Robert Bartlett is the parent of one child who attends a public school operated by CPS.

9. Plaintiff Denise Heitz is the parent of one child who attends a public school operated by CPS.

10. Plaintiff Joseph Warnke is the parent of one child who attends a public school operated by CPS.

11. The Chicago Teachers Union is an "employee organization" or "labor organization" as defined by the Illinois Educational Labor Relations Act, 115 ILCS

5/2(c). Additionally, CTU is an "exclusive representative" as defined by the Illinois Educational Labor Relations Act, 115 ILCS 5/2(d), as it has been recognized by CPS as the exclusive representative of CPS teachers.

Jurisdiction

12. This Court has subject matter jurisdiction over this matter under 735 ILCS 5/2-701 because Plaintiffs seek a declaratory judgment that Defendant's actions violate the Illinois Educational Labor Relations Act, 115 ILCS 5/1, *et seq*.

13. This Court has personal jurisdiction over the Defendant because this lawsuit arises from Defendant's actions in the State of Illinois.

14. Venue is proper in Cook County because Plaintiffs reside in Cook County, Illinois, Defendant is located in Cook County, and all the relevant actions that concern this matter have taken place in Cook County.

Factual Allegations

I. The Collective Bargaining Agreement.

15. In November 2019, CPS and CTU entered a five-year (2019–2024) collective bargaining agreement governing the wages, hours, terms and conditions of employment of teachers employed by CPS. Part of that agreement provides:

> During the term of this Agreement, the [CTU] agrees not to strike nor to picket in any manner which would tend to disrupt the operation of any public school in the city of Chicago or of the administrative offices or any other facility of the [CPS]. During the term of this Agreement, the [CPS] agrees not to engage in any lockout.

16. Section I Preamble of the collective bargaining agreement between CPS and CTU provides:

The purpose of this Agreement is to reaffirm the parties' common responsibility to maintain a collaborative and collegial collective bargaining relationship that furthers the parties' shared goal of delivering high quality instructional programs and significantly advancing a well-rounded public education for the students of the Chicago public school system. Through free and open dialogue, the parties have identified the educational objectives for the Chicago Public Schools (hereinafter referred to as "CPS") and have designed this Agreement to further those objectives through good faith cooperation now and in the future.

The parties firmly believe that a well-rounded public education is an absolute necessity for any graduate to be considered college-, career- and citizenship-ready. The parties also recognize that a well-rounded public education includes, but is by no means limited to, providing students with an enriched, diverse and comprehensive curriculum that allows them to obtain essential knowledge and skills; engage in critical and creative thinking; develop independent inquiry skills and an appreciation for the arts, music and literature; improve their physical and emotional health; prepare for leadership roles in their communities; attain the technical skills necessary to become career-ready; develop the academic discipline and proficiency in the intelligent use of technology necessary to become college-ready; and ultimately graduate from the Chicago public school system prepared to become productive and self-confident citizens capable of ethical participation in a free and democratic society.

In addition, the parties recognize that the achievement of these educational objectives requires substantial short- and long-term financial investments in public education and that the fulfillment of the aspirations described in this Preamble will require dramatic and cooperative changes in education funding at the federal, state and local levels; a commitment to good faith collaboration; mutual agreement on priorities and values; and the adoption of proven or research-based educational methods and instructional practices.

Furthermore, to foster a cosmopolitan spirit and better develop CPS students as tolerant and unbiased citizens, the BOARD and the UNION shall work affirmatively to the end that each student may have the educational advantage of an integrated school.

Finally, this Agreement is intended to affirm that the parties' shared goals will only be achieved if bargaining unit employees are fairly and adequately recognized and rewarded for their contributions to the

> educational process and provided with a wholesome work environment based on mutual respect and the highest level of professionalism. The guiding principles set forth in this Preamble shall remain at the forefront of the parties' negotiations now and in the years to come until these shared educational aspirations become a reality for each and every student and employee of the Chicago public school system.

17. The CBA has neither expired nor been terminated since CPS and CTU reached an agreement.

II. CTU's repeated threats to illegally strike during the COVID-19 pandemic.

18. Due to the COVID-19 pandemic, Governor Pritzker closed schools in Illinois, including CPS schools, starting on Tuesday, March 17, 2020. CPS implemented remote learning shortly thereafter. Based on requirements promulgated by the State of Illinois, CPS implemented remote learning programs for all students through the end of the 2019–2020 school year.

19. CTU repeatedly used the threat of a member strike, which it knew or should have known would have been illegal, as a negotiating tactic before and during the 2020–2021 school year.

20. Although CPS knew or should have known that any strike that CTU engaged in would have been unlawful, it continued to allow CTU to make such threats rather than obtaining relief from the Illinois Educational Labor Relations Board or from a court.

21. During the summer of 2020, CPS began floating a hybrid learning model that it proposed to start using at the beginning of the 2020–2021 school year. Under this

model, students would rotate into buildings two days a week for in-person classes, while learning remotely the remaining three days of the week.

22. CTU opposed starting the 2020–2021 school year with the hybrid learning model, including threatening a strike.[1] In August 2020, CPS backtracked on its plan to start the school year with hybrid learning, instead acknowledging that it would start the school year with district-wide remote learning, although under a different model than it used in the spring of 2020. CPS acknowledged that this remote learning program would last through at least the first semester, with the hope that it could start the hybrid plan to begin the second semester on November 9.

23. On October 16, 2020, the CPS announced a plan to resume in person learning for pre-kindergarten and students in special education clusters. This plan did not indicate a date by which CPS would implement this plan. In response, on October 23, 2020, CTU filed an unfair labor practice with the Illinois Educational Labor Relations Board ("Board"), asserting that CPS failed to negotiate in good faith with it on an issue of safety. The Board denied CTU's request to enjoin CPS's plan.

24. On November 17, 2020, CPS set forth the following schedule for return to in-person learning at CPS:

- January 4, 2021: Return of Pre-K and cluster program staff
- January 11, 2021: Students in pre-K and cluster programs return
- January 25, 2021: Return of K-8 staff
- February 1, 2021: Return of K-8 students

[1] https://www.cbs58.com/news/chicago-public-schools-will-start-the-school-year-all-virtual.

25. On December 7, 2020, CTU filed a renewed motion for injunctive relief with the Board. That motion was denied by the Board by a 2-1 vote.

26. On January 4, 2021, CPS began its return of pre-K and cluster program teachers. Approximately 50% of the teachers that were required to return on January 4, did so. On Friday, January 8, 2021, CPS announced that any teacher who was required to show up in person who did not starting Monday, January 11, would not be paid.

27. On Thursday, January 21, 2021, CTU held a meeting of its delegates in which it voted to approve a measure that would encourage its pre-K, cluster, and K-8 teachers to continue to work remotely on Monday, January 25, despite CPS's requirement that those teachers report to their school buildings starting that day. The measure would authorize all teachers to stop work, remote and in-person, and strike if CPS prevented its K-8 teachers from working remotely by cutting off their remote access. CTU gave its members until midnight on Saturday, January 23, to vote whether to authorize the measure. On Sunday, January 24, CTU announced that 86% of its membership submitted a vote on the measure, and of the members who submitted a vote, 71% voted to authorize the measure.

28. On Sunday, January 24, 2021, CPS acquiesced to CTU's bad-faith behavior and announced that it would allow its K-8 teachers to continue working remotely while it attempted to work out a compromise with CTU.

29. CPS and CTU did not come to an immediate agreement, such that on Tuesday, January 26, CPS announced to its parents that pre-K and cluster students should not

report to school on Wednesday, January 27, because it could not guarantee enough teachers would be in the building.

30. Eventually CTU and CPS reached an agreement to permit a return to in-person learning for K-8 students at the beginning of March 2021.

31. Ultimately CTU's threats pushed back reopening of K-8 schools by at least a month.

32. Meanwhile, under Governor Pritzker's vaccine plan, teachers became eligible to receive the COVID-19 vaccines on January 25, 2021, as part of "Phase 1B," which covered "residents over the age of 65 and frontline essential workers."[2]

33. In March of 2021, CTU and CPS agreed that high schools would reopen for at least partial in-person instruction on April 19, 2021, the beginning of the fourth quarter of CPS's school year.

34. Under that schedule, Chicago Public High Schools would open more than a month after elementary and middle schools reopened (on March 1 for kindergarten through fifth grade and March 8 for sixth through eighth grade).

35. As with the other reopening agreements, the April 19 date would require CTU members to report for in-person work prior to the first day of in-person classes. Specifically, CTU members were expected to report for in-person work during the week of April 12, 2021.

36. However, CTU then reneged on that agreement.

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[2] *Governor Pritzker Announces Initial Launch of Phase 1B of the COVID-19 Vaccine Administration Plan*, Illinois.gov (Jan. 22, 2021), https://www.illinois.gov/news/press-release.22682.html.

37. On April 11, 2021, CTU voted to put all of its teachers back on remote learning.

38. Therefore, CTU members failed to report for in-person work starting on April 14, as agreed to with CPS.

39. On April 15, 2021, CTU and CPS reached an agreement, which saw high school students return to in-person learning on Monday, April 19, 2021.

III. CPS returned to in-person learning for the 2021–2022 school year until CTU voted to refuse to teach in person starting January 5, 2022.

40. CPS returned to district-wide, 5-days-a-week, in-person schooling for the 2021–2022 school year. From August 2021 through the end of 2021, CPS held district-wide, in-person schooling.

41. Just as they had been among the first to receive their initial doses, teachers were eligible for COVID-19 booster shots by the end of September 2021.[3] This is because they are essential workers and expected to be teaching in-person.

42. Nonetheless, in December 2021, CTU began questioning the safety of in-person schooling with the omicron-variant of COVID-19. On December 28, 2021, CTU held a meeting of delegates and electronically polled its members if they would "support a district-wide pause and temporary shift to remote learning." Of the CTU members who responded, 91% said they would participate in a "remote-work action" after winter break.

[3] Megan Cerullo, *Here are the workers now eligible for a COVID-19 booster shot*, CBS News (Sept. 27, 2021, 7:18 AM) https://www.cbsnews.com/news/covid-19-vaccine-booster-shot-workers-eligible/.

43. In response, CPS sent a district-wide email indicating that schools would remain open for in-person education on Monday, January 3, 2022, the scheduled return date after CPS's winter break.

44. CTU continued to vocalize its concerns about teacher safety because of the omicron variant of COVID-19, yet nonetheless did not call for a strike beginning January 3, 2022. Teachers and students, thus, returned to school on January 3, and January 4, 2022.

45. On Tuesday, January 4, 2022, however, CTU held an evening meeting of delegates to determine whether to ask its membership whether to withhold in-person teaching, as required by CPS, and provide teaching remotely only, even though teachers may not work remotely without approval of the Chicago Board of Education. CTU initially would allow members to vote electronically until 9 PM, but extended voting until 10 PM on Tuesday, January 4, 2022.

46. In response, CPS indicated that if CTU voted to withhold teaching in person, as the district required, then it would be forced to cancel classes on Wednesday, January 5, 2022, because it could not ensure enough teachers would be available for the students. In addition, CPS indicated that any teacher that did not show up to work in-person on Wednesday, January 5, 2022, would not be paid and would be placed on "no pay status."

47. At 10:51 PM on January 4, 2022, CTU announced that 73% of its members had voted to withhold in-person teaching, and provide only remote teaching, starting

January 5, 2022.[4] Because CTU members refused to teach under the conditions set forth by CPS—in-person instruction—CTU members are, by definition engaged in a strike.

48. CTU indicated that "The action will end when one of the following conditions is met: The current surge in cases substantially subsides, or the mayor's team at CPS signs an agreement establishing conditions for return that are voted on and approved by the the [sic] CTU House of Delegates."[5]

49. In response to CTU's strike, CPS cancelled classes on Wednesday, January 5, 2022 and again, on Thursday, January 6, 2022, because it could not guarantee enough teachers would be in the schools to teach CPS students.

50. CTU never sent a notice of intent to strike to CPS, the regional superintendent, or the Educational Labor Relations Board. And less than 24 hours elapsed from the time CTU members voted on its measure to authorize a strike on January 4, 2022, and when they did not show up for work in-person the next day, in contrast to the requirement under Illinois law that 10 days elapse from the vote to authorize a strike to the time a strike begins.

51. With respect to the issue of whether it is safe for teachers to return to school in-person due to COVID-19, CPS and CTU have not engaged in mediation.

52. With respect to the issue of whether it is safe for teachers to return to school in-person due to COVID-19, CPS and CTU have not engaged in any fact-finding pursuant to 115 ILCS 5/13(b)(2.5).

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[4] https://twitter.com/CTULocal1/status/1478590050107543552?s=20.
[5] https://twitter.com/CTULocal1/status/1478590050107543552?s=20.

IV. The Illinois Educational Labor Relations Act.

53. Section 13 of the Act provides the requirements for educational employees to strike. In relevant part, Section 13 states:

> educational employees in a school district organized under Article 34 of the School Code shall not engage in a strike except under the following conditions:
> (1) they are represented by an exclusive bargaining representative;
> (2) mediation has been used without success and, for educational employers and exclusive bargaining representatives to which subsection (a-5) of Section 12 of this Act applies, at least 14 days have elapsed after the Board has made public the parties' offers;
> (2.5) if fact-finding was invoked pursuant to subsection (a-10) of Section 12 of this Act, at least 30 days have elapsed after a fact-finding report has been released for public information;
> (2.10) for educational employees employed in a school district organized under Article 34 of the School Code, at least three-fourths of all bargaining unit employees who are members of the exclusive bargaining representative have affirmatively voted to authorize the strike; provided, however, that all members of the exclusive bargaining representative at the time of a strike authorization vote shall be eligible to vote;
> (3) at least 10 days have elapsed after a notice of intent to strike has been given by the exclusive bargaining representative to the educational employer, the regional superintendent and the Illinois Educational Labor Relations Board;
> (4) the collective bargaining agreement between the educational employer and educational employees, if any, has expired or been terminated; and
> (5) the employer and the exclusive bargaining representative have not mutually submitted the unresolved issues to arbitration.

115 ILCS 5/13(b).

54. Article 34 of the School Code, 105 ILCS 5/34-1, applies only to cities having a population exceeding 500,000, which therefore applies only to CPS.

55. Aside from 115 ILCS 5/13, no other provision in Illinois law authorizes CTU to strike.

56. Further, no provision of Illinois law, no contract, and no local ordinance authorizes CTU, its members, or CPS teachers to provide teaching remotely without approval by the Chicago Board of Education.

Count I
CTU's strike is not authorized by Section 13 of the Act or any other provision of Illinois law.

57. Plaintiffs reallege the preceding paragraphs of this Complaint as though fully set forth herein.

58. Section 13 of the Act, 115 ILCS 5/13, prohibits educational employees from engaging in a strike unless specific conditions are met. Among those conditions, in this case, the following conditions have not been met:

- 115 ILCS 5/13(b)(2) requires mediation to have been used without success and at least 14 days have elapsed after the Board has made public the parties' offers.
    - The parties have not engaged in mediation over the safety issues alleged by CTU related to in-person learning.
- 115 ILCS 5/13(b)(2.5) requires at least 30 days have elapsed after a fact-finding report has been released for public information pursuant to fact-finding invoked pursuant to Section 12(a-10) of this Act.
    - The parties never engaged in fact-finding with respect to the safety issues CTU alleges are at issue with in-person learning.

- 115 ILCS 5/13(b)(2.10) requires at least three-fourths of all bargaining unit employees who are members of the exclusive bargaining representative have affirmatively voted to authorize the strike.
    - According to CTU, only 73% of its members voted to withhold in-person teaching, less than the three-fourths required to authorize a strike.
- 115 ILCS 5/13(b)(3) requires that at least 10 days have elapsed after a notice of intent to strike has been given by the exclusive bargaining representative to the educational employer, the regional superintendent and the Illinois Educational Labor Relations Board.
    - CTU never sent a notice of intent to strike to CPS, the regional superintendent, or the Board. And less than 10 days elapsed since CTU closed member voting on its measure to authorize a strike. Thus, this condition could not have been met.
- 115 ILCS 5/13(b)(4) requires that the collective bargaining agreement between the educational employer and educational employees, if any, has expired or been terminated.
    - The Collective Bargaining Agreement between CPS and CTU has neither expired nor been terminated.

59. In summary, the conditions that the Act requires to have been met before educational employees can legally strike have not been met.

60. Nonetheless, without a basis under Illinois law, CTU has instructed all of its members to withhold in-person teaching from all CPS students.

61. CTU has no basis to claim that its vote to withhold in-person learning is not a strike. "[T]he test is not whether the union calls its action a strike, but whether the effect of its action is equivalent to that of a strike. *Chi. Bd. of Educ. v. Chi. Teachers Union*, *11 (Illinois Educational Labor Relations Board, May 18, 2017). As stated, teachers may not work remotely unless they have approval of the Chicago Board of Education, which they do not have. "[T]he test is whether the union's conduct constitutes a concerted failure to report for work," *id.* at *12, including a sick-out, slow-down, or other work action not facially denominated a strike. Here, the union's conduct resulted in its members failing to report to work for in-person instruction, which forced CPS to cancel classes on January 5 and 6.

62. Therefore, the actions of CTU to authorize its members, educational employees of CPS, to strike by withholding in-person teaching for all of CPS, are illegal.

63. Plaintiffs, parents of CPS students, are harmed by CTU's illegal actions because their children are being denied schooling and they have had to secure child care for their children.

WHEREFORE, Plaintiffs respectfully pray that the Court grant the following relief:

A. Enter a declaratory judgment that the current collective bargaining agreement between CPS and CTU provides that CTU may not authorize a strike and that CTU's actions to stop in-person teaching violated the collective bargaining agreement;

B. Enter a declaratory judgment that the facts of this case show that the conditions required for educational employees to strike under Section 13 of the Act are not met and therefore CTU's actions to stop in-person teaching constitute an illegal strike;

C. Enter temporary, preliminary, and permanent injunctive relief preventing CTU from continuing to authorize its members to stop in-person teaching unless and until all the conditions set forth in Section 13 of the Act are met and such actions do not violate the collective bargaining agreement;

D. Award Plaintiffs damages in the form of lost income and the cost of securing child care while CTU and its members were on strike;

E. Award Plaintiffs their reasonable costs and expenses; and

F. Award Plaintiffs any additional relief the Court deems just and proper.

Dated: January 6, 2022

Respectfully submitted,

Laurel Golden, Amelia Kessem, Jane Siavelis, Michelle Shvartser, Robert Bartlett, Denise Heitz, and Joseph Warnke,

/s/ Jeffrey M. Schwab

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