No. _____

In the Supreme Court of the United States

ANNE DAVIS, ON BEHALF OF BRAEDEN DAVIS,
Petitioner,

v.

DISTRICT OF COLUMBIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DIANA M. SAVIT
SAVIT & SZYMKOWICZ LLP
4520 East-West Highway
Suite 700
Bethesda, MD 20814

CHARLES A. MORAN
MORAN & ASSOCIATES
1100 H Street, NW
Suite 810
Washington, DC 20005

ROMAN MARTINEZ
Counsel of Record
BLAKE E. STAFFORD
RUTH HIRSCH
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
roman.martinez@lw.com

Counsel for Petitioner

QUESTIONS PRESENTED

The Individuals with Disabilities Education Act (IDEA) ensures that children with disabilities have access to an educational plan tailored to their unique needs, and it sets forth procedures for resolving disputes between families and school officials over the development and implementation of that plan. Section 1415(j) of the IDEA, known as the "stay-put" provision, guarantees that "during the pendency of any [IDEA] proceedings" related to such disputes, the child "shall remain in [the child's] then-current educational placement." 20 U.S.C. § 1415(j).

The questions presented are:

1. Whether and to what extent Section 1415(j) imposes obligations on school officials when a child's exact pre-dispute educational placement is no longer available.

2. Whether Section 1415(j)'s stay-put mandate applies during the appeal of an adverse district court decision resolving an IDEA dispute.

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties to the proceedings below.

RELATED PROCEEDINGS

United States Court of Appeals (D.C. Cir.):

Davis ex rel. Davis v. District of Columbia, No. 21-7134 (Aug. 15, 2023), *reh'g denied* (Sept. 27, 2023)

United States District Court (D.D.C.):

Davis ex rel. Davis v. District of Columbia, No. 21-cv-02884 (Nov. 19, 2021)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Anne Davis, on behalf of her son Braeden Davis, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-18a) is reported at 80 F.4th 321. The opinion of the district court (App. 19a-36a) is available at 2021 WL 11680748.

JURISDICTION

The court of appeals entered its judgment on August 15, 2023 (App. 1a-18a) and denied rehearing on September 27, 2023 (App. 36a-38a). On December 18, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 23, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the petition appendix. App. 73a-86a.

INTRODUCTION

This petition presents two fundamentally important questions under the Individuals with Disabilities Education Act (IDEA), a statute designed to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). To that end, the IDEA requires school districts to provide IDEA-eligible

students a free appropriate public education, and it creates a process for resolving disputes with and compelling compliance by the school district.

At issue in this case is Section 1415(j) of the IDEA, known as the "stay-put" provision. Under Section 1415(j), a child "shall remain in [the child's] then-current educational placement" during the pendency of any IDEA litigation. The purpose of the stay-put provision is to ensure consistency in the child's education in the event of a dispute, thereby obliging the school district to maintain a child's placement during the frequently lengthy adjudication process. *See Honig v. Doe*, 484 U.S. 305, 323-25 & n.8 (1988). The provision thus operates as a sort of automatic injunction, protecting the child from disruption of his or her education while the dispute is being resolved.

The first question presented is whether and to what extent Section 1415(j) continues to protect children from disruption when the child's exact pre-dispute educational placement becomes unavailable. The circuits are intractably divided on this issue. The Seventh, Ninth, and Eleventh Circuits have held that the school district must replicate the child's pre-dispute placement "as closely as possible." The Fourth, Fifth, and Sixth Circuits, now joined by the D.C. Circuit, have held that the school district has no obligation at all in these circumstances.

The circuit split over Section 1415(j) has persisted for more than a decade, and this Court should now resolve it. Indeed, the stay-put provision is a vital component of the IDEA's framework, reflecting Congress's "unequivocal[]" mandate for school districts to preserve the status quo and ensure the continuity of educational services during the pendency of any disputes. *Honig*, 484 U.S. at 323.

The split in the lower courts undermines that objective. And the D.C. Circuit's resolution of this issue is both wrong and harmful to children with disabilities, as it enables school districts to shirk their obligations under the IDEA anytime a child's current placement becomes unavailable.

The second question presented is equally important—whether Section 1415(j)'s stay-put mandate continues in effect when a child appeals an adverse district court ruling on the child's IDEA claim. It plainly does: The stay-put obligation applies "during the pendency of any proceedings conducted pursuant to [Section 1415]," and a federal appeal of an IDEA ruling easily qualifies as an IDEA proceeding. The Department of Education has long recognized as much, as have the Third and Ninth Circuits as well as multiple state appellate courts. But the D.C. Circuit has adopted an outlier interpretation under which the stay-put mandate terminates at the conclusion of district court proceedings. The Court should resolve this circuit split and ensure that children receive stay-put protections throughout the entire duration of their IDEA cases, just as Congress intended.

This case illustrates the importance of getting Section 1415(j) right. Petitioner Anne Davis's son, Braeden Davis, has multiple disabilities, including autism spectrum disorder. To ensure Braeden's safety and educational progress, he requires educational services as well as around-the-clock supervision at a residential center. The District of Columbia agrees and has approved his placement at multiple private residential facilities. But Braeden's last residential facility unilaterally discharged him without input from his parents or the District, and the

District has been unable to locate another one. Ms. Davis is challenging the District's failure to provide Braeden with a free appropriate public education, and Section 1415(j) entitles him to stay-put protection that replicates—as closely as possible—his pre-dispute educational placement until the dispute is finally adjudicated. But the D.C. Circuit held that the District has no stay-put obligations to Braeden whatsoever, despite Section 1415(j)'s clear mandate. The result has been to disrupt Braeden's education and force his family to incur substantial expenses to keep Braeden safe and provide some semblance of the services he needs.

This should not stand. Congress enacted the stay-put provision to minimize educational disruption and protect children with disabilities while their parents and schools litigate disputes over their educational placement. On both issues, the D.C. Circuit's approach departs from Section 1415(j)'s text and undermines its core purpose. The petition should be granted.

STATEMENT OF THE CASE

A. Legal Background

1. The IDEA seeks to "ensure that all children with disabilities have available to them a free appropriate public education"—known as a "FAPE"—that "emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A); *see id.* § 1401(9). To realize that goal, the IDEA offers federal funds to States to provide "special education and related services" to children with disabilities, *id.* § 1411(a)(1), in exchange for the State's commitment that its school

districts will make a FAPE available to every eligible child with a disability in the State, *id.* § 1412(a)(1)(A).

Under the IDEA, the "primary vehicle" for providing a FAPE is through an appropriately developed "individualized education program" (IEP) tailored to the child's individual needs. *Fry v. Napoleon Cmty. Schs.*, 580 U.S. 154, 158 (2017) (citation omitted). The IEP reflects "collaboration among parents and educators" that aims to address each "child's individual circumstances." *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 391 (2017).

Once an IEP has been created, the local education agency must provide an educational placement in which a particular student's IEP can be implemented. *See* 20 U.S.C. § 1414(e). This placement generally must be the "[l]east restrictive environment" possible so that the child can be educated alongside children without disabilities, unless "the nature or severity of the disability of a child is such that education in regular classes . . . cannot be achieved satisfactorily." *Id.* § 1412(a)(5)(A).

The IDEA also creates a process for resolving disputes between families and school officials regarding the provision of a FAPE. *See Fry*, 580 U.S. at 159; *see* 20 U.S.C. § 1415. If a child's parent is not satisfied with a proposed IEP, or with any matter relating to the "placement of the child, or the provision of a free appropriate public education to such child," the parent may file a "due process complaint" with the local or state educational agency. 20 U.S.C. § 1415(b)(6)-(7). If the complaint cannot be consensually resolved, the parties proceed to a "due process hearing" before an administrative hearing officer, who issues a decision determining "whether

the child received a [FAPE]." *Id.* § 1415(f)(1)(A), (3)(E).

Following the administrative proceedings, the losing party may "bring a civil action" under the IDEA "in any State court of competent jurisdiction or in a district court of the United States." *Id.* § 1415(i)(2)(A). The court receives the record of the administrative proceedings and can hear additional evidence before rendering its decision. *Id.* § 1415(i)(2)(C). The parties may then seek review in state or federal appellate courts.

2. The IDEA's dispute-resolution process can "take[] years to run its course—years critical to the child's development." *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 361 (1985). Congress accordingly enacted Section 1415(j) of the IDEA, known as the "stay-put provision." That provision, titled "Maintenance of current educational placement," provides, in relevant part, that

> [D]uring the pendency of any proceedings conducted pursuant to [Section 1415], 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 . . . until all such proceedings have been completed.

20 U.S.C. § 1415(j).

In practice, the stay-put provision serves as a sort of automatic preliminary injunction, ensuring that the school district maintains the child's educational placement to preserve the status quo pending resolution of the underlying educational dispute. As this Court has emphasized, the statute'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." *Honig*, 484 U.S. at 323.

Without stay-put protection, a child could be denied a FAPE for years if no appropriate interim placement were designated during the time in which the often "ponderous" IDEA proceedings play out. *Burlington*, 471 U.S. at 370. In that circumstance, the only recourse available to the child's parents would be to try to obtain the "extraordinary and drastic remedy" of a traditional preliminary injunction. *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008). The mandatory language of the stay-put provision thus automatically ensures consistency in the child's previously-agreed placement, and receipt of IDEA-required educational services, while any dispute is resolved by a hearing officer and the courts.

B. Factual Background

This case was brought by Anne Davis on behalf of her son Braeden, who qualifies for services under the IDEA due to his multiple disabilities, including autism spectrum disorder. App. 20a. Braeden first began receiving special education services from the District in 2006, when he entered school. *See B.D. v. District of Columbia*, 817 F.3d 792, 794-95 (D.C. Cir. 2016). From 2009 through 2016, Braeden's education consisted of tutoring and occupational therapy outside of a regular school setting. *Id.* at 795; C.A. App. 102-103, 118.

By 2016, it became apparent that Braeden's non-residential educational programming was insufficient to address his needs, and that the Davis home was not a safe place for Braeden given his potential for self-harm. *See* C.A. App. 191-92. That year, Braeden's

parents placed him in a residential facility, Monarch Center for Autism in Shaker Heights, Ohio. *Id.* at 104, 121. In September 2018, an IDEA hearing officer approved this as an IDEA placement, and in June 2019, the District accepted it as Braeden's official placement. *Id.*

Although Braeden made progress in Monarch's school, he did not do well in the residence, and Monarch eventually informed Braeden's parents that he would be discharged on March 5, 2020. *Id.* at 104, 121-22. In August 2020, Braeden was accepted at Community Services for Autistic Adults and Children (CSAAC), a private residential and educational institution in Maryland. *Id.* at 105, 122. The District accepted this placement as proper for Braeden pursuant to his IEP and funded Braeden's enrollment at CSAAC. *Id.*

On March 29, 2021, a new IEP was completed for Braeden. This IEP once again identified a residential treatment center as his proper placement. It also specified the services he needs, such as (1) supervision, including "[two] designated staff to maintain his safety and the safety of others" and a dedicated aide for school day hours; (2) educational services, including specialized instruction, behavioral support services, speech-language pathology, and occupational therapy; (3) residential services, including support to practice functional living skills like chores and laundry; and (4) specialized transportation. *See* C.A. App. 24-25, 31-37, 44.

On October 1, 2021, CSAAC unilaterally notified the District that it planned to discharge Braeden. App. 21a. Before the discharge, the District contacted alternative private residential facilities, but no facility indicated that it would accept Braeden. *Id.*

at 22a. On October 21, 2021, the District offered to fund some interim services for Braeden. *Id.* at 6a-7a. But the District's initial offer did not include the dedicated aide or residential services required by Braeden's IEP. *Compare* C.A. App. 31-32, 34, 44 (IEP), *with* C.A. App. 92 (initial offer of interim services). Although the District later offered to reimburse limited aide coverage, that coverage fell far short of what Braeden's IEP specified. *See* C.A. App. 179. Moreover, the District required the Davises to arrange for and transport Braeden to and from any required services. But transporting Braeden is difficult and requires specialized equipment and staff, and many providers would not accept the District's reimbursement rates or delayed reimbursement procedures. *Id.* at 105-06, 194. Braeden therefore could not actually use even the limited services the District did offer.

CSAAC discharged Braeden on October 31, 2021. *Id.* At that point, Braeden was essentially left with nowhere to go except back to the family home, which had already proved a dangerous environment for him. Braeden's parents were left on their own to provide him with a safe living environment at their own expense. App. 23a.

C. Proceedings Below

1. On October 28, 2021—a few days before Braeden was discharged from CSAAC—Ms. Davis filed an administrative due process complaint against the District on Braeden's behalf. C.A. App. 98-115. The District had not secured Braeden a safe residential environment, an aide, or continuous behavioral support, all of which his IEP required, and all of which would be lost upon his discharge from

CSAAC. The complaint therefore asked the District to provide a safe place for Braeden to live, along with his IEP services, or comparable services, until a new residential placement could be found. *Id.* at 107. It also requested an award of compensatory education services to account for any failure of the District to maintain his placement. *Id.*; App. 69a; *see also Olu-Cole v. E.L. Haynes Pub. Charter Sch.*, 930 F.3d 519, 531 (D.C. Cir. 2019) (explaining compensatory education as an IDEA remedy). Along with her complaint, Ms. Davis also asked the hearing officer to issue a stay-put injunction under Section 1415(j). C.A. App. 184.

On November 1, 2021, Ms. Davis filed a lawsuit in federal court seeking injunctive relief under Section 1415(j)'s stay-put mandate during the pendency of the underlying IDEA dispute. *Id.* at 116-28. Ms. Davis alleged that Braeden's discharge from CSAAC without a new residential center or an arrangement to provide comparable services impermissibly changed Braeden's placement, without Braeden's IEP team determining that such a change was appropriate. *Id.* at 126-27. She sought an injunction requiring the District to provide comparable services to those Braeden would have received under his IEP in a residential setting—namely, a safe place to live with specialized education services and continuous behavioral support—until a new residential placement could be found. App. 19a-20a; C.A. App. 124.

On November 10 and 19, 2021, respectively, the IDEA hearing officer and district court each denied Ms. Davis's request for stay-put relief under Section 1415(j). *See* App. 35a, 44a-46a. The district court concluded that the IDEA's stay-put requirement did

not apply because Braeden's educational placement at CSAAC had become unavailable through no fault of the District, and because the District could not place Braeden at an alternative residential facility. *Id.* at 34a. The district court further concluded that the District had no affirmative obligation to provide Braeden services that "create[d] or approximate[d]" his appropriate educational placement. *Id.* at 29a.

2. Ms. Davis appealed the district court's denial of stay-put relief to the D.C. Circuit. In March 2022—while that appeal was pending—the IDEA hearing officer issued a mixed ruling on the merits of Braeden's IDEA claim. *Id.* at 66a-69a. On the one hand, the officer held that the District had denied Braeden a FAPE after October 31, 2021 by not "providing the student services that would approximate the March 29, 2021 IEP 'as closely as possible.'" *Id.* at 65a-66a. The officer ordered the District to provide day programming approximating non-residential services specified in Braeden's March 29, 2021 IEP "as closely as possible." *Id.* at 66a. Nonetheless, the officer refused to order the District to provide Braeden with the residential services required by his IEP, or to reimburse the Davises for the money they had spent on residential and behavioral support. *Id.* at 66a-67a.

In June 2022, Ms. Davis supplemented her complaint in the district court action to challenge the unfavorable portions of the hearing officer's merits ruling. *See* D. Ct. Doc. 40. The district court then stayed the case pending the resolution of the still-pending stay-put appeal in the D.C. Circuit. *See* Minute Order (D.D.C. June 23, 2022).

3. In August 2023, the D.C. Circuit affirmed the district court's November 2021 denial of stay-put relief, on two alternative grounds. App. 1a-18a.

First, the D.C. Circuit held that "the stay-put provision does not apply when a student's educational experience changes due to circumstances beyond the school district's control." *Id.* at 10a-13a. The court reasoned that Section 1415(j) has only a "limited utility"—it "is intended to shield against a *school district's* unilateral attempt to change a student's placement," and is thus "inapplicable where a change [in placement] is not instigated by the school district." *Id.* at 12a. As a result, the court concluded that "the stay-put provision is inapplicable" here because "neither CSAAC's decision to end Braeden's residency nor the lack of available openings" at any other residential center that the District had identified "was attributable to any action taken by the District." *Id.* at 10a-12a.

Second, the court alternatively held that even if the provision applied, "Ms. Davis's requested relief is beyond the District's responsibility under [Section 1415(j)]." *Id.* at 13a-16a. The court reasoned that the District was not required to provide a placement that hews "as closely as possible" to Braeden's IEP. *Id.* at 14a. Rather, because the District could not find a "similar" placement that "fully implement[ed]" Braeden's IEP by giving him "residential services," it was not obligated to do anything. *Id.* at 14a-15a. As a result, the District is not required to provide Braeden the services identified in his IEP.

4. To date, the District has not identified a residential placement for Braeden. Braeden still requires extensive around-the-clock support and close supervision for purposes of safety and educational

progress. *See id.* at 52a-53a. Since early 2023, he has been living in a different residential facility at his parents' sole expense. His underlying FAPE case against the District remains pending in the district court.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD DECIDE HOW SECTION 1415(j) APPLIES WHEN THE PRE-DISPUTE PLACEMENT IS UNAVAILABLE

The first question presented readily satisfies this Court's criteria for certiorari. The D.C. Circuit's decision implicates an acknowledged circuit conflict over the meaning of Section 1415(j) in cases where a child's educational placement has become unavailable. That issue is exceptionally important, as it concerns the scope of a fundamental and broadly applicable provision of the IDEA's statutory scheme. Because the D.C. Circuit's resolution of that question is wrong in a way that will perpetuate non-compliance with the IDEA and harm children with disabilities, this Court's review is warranted.

A. The Circuits Are Divided Over Section 1415(j)'s Applicability When The Pre-Dispute Placement Is Unavailable

Section 1415(j) provides that a student "shall remain" in his or her "then-current educational placement" during the pendency of IDEA proceedings. 20 U.S.C. § 1415(j). The circuits are split over how that obligation applies when the then-current educational placement becomes unavailable. *See* Natalie Granada, *The IDEA's Stay-Put Provision: A Staple of Pandemic IEP Litigation?*, 2021 U. Chi. L. Forum 441, 451 (2021) (noting the "circuit split" over

"how the IDEA's stay-put provision functions when the last agreed-upon placement is no longer available").

1. Three circuits have recognized—directly at odds with the D.C. Circuit's decision in this case—that when a student's then-current placement becomes unavailable, Section 1415(j) requires the school district to provide a placement that tracks the previous placement as closely as possible.

The Ninth Circuit first reached this conclusion in *Ms. S. ex rel. G. v. Vashon Island School District*, 337 F.3d 1115 (9th Cir. 2003), *cert. denied*, 544 U.S. 928 (2005), *superseded by statute on other grounds*, 20 U.S.C. § 1414(d)(2)(C). There, an IEP dispute arose during a student's change in school districts, because the new school district did not have a program similar to the student's placement in the previous district. The court held that in these circumstances, Section 1415(j) required the new school district to provide "services that approximate, as closely as possible, the old IEP." *Id.* at 1133-34. This conclusion, the court reasoned, ensured that the school district would satisfy its IDEA obligations even though "the status quo no longer exist[ed]." *Id.* The court also relied on guidance from the Department of Education's Office of Special Education Programs (OSEP)—"the agency responsible for monitoring and administering the IDEA"—stating that "when a student transfers to a new district, and there is disagreement on appropriate placement, . . . 'the new district must provide services that approximate, as closely as possible, the old IEP.'" *Id.* (quoting Letter to Campbell, 213 Educ. for the Handicapped L. Rep. 265 (OSEP Sept. 16, 1989)).

Based on this precedent, district courts in the Ninth Circuit have recognized that Section 1415(j) requires school districts to "'provide the student with a similar placement which closely replicates the last agreed-upon and implemented placement'" if "there is a change in circumstances, such as the closure of a school." *K.K. v. William S. Hart Union High Sch. Dist.*, No. 22-cv-2398, 2022 WL 2162016, at *6 (C.D. Cal. Apr. 20, 2022) (citation omitted); *see Van Scoy ex rel. Van Scoy v. San Luis Coastal Unified Sch. Dist.*, 353 F. Supp. 2d 1083, 1086 (C.D. Cal. 2005) (ordering school district to provide additional services specified in last IEP).

In *K.K.*, for example, a student whose most recent IEP required residential services had her residential program close. 2022 WL 2162016, at *1. The school district offered home services, but both the hearing officer and the district court held that this was insufficient and that the stay-put provision required the district to provide "comparable" services to those required by her IEP. *Id.* at *2, *10. The district court explained that under *Ms. S* and other cases, school districts must replicate the pre-dispute placement "as closely as possible" when that placement is itself unavailable. *Id.* at *4. Moreover, the Court emphasized that the unavailability of K.K.'s prior residential center, and the school district's "difficulties locating a new placement for plaintiff," did not "excuse[] [the district's] legal obligations under § 1415(j)." *Id.* at *6 ("None of these arguments defeat Student's right, as a matter of law, to stay put, according to the terms of the agreed to IEP.").[1]

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[1] The D.C. Circuit suggested that the Ninth Circuit has held that Section 1415(j) does not apply when an educational

The Seventh Circuit has likewise held that Section 1415(j) requires school districts to implement a student's IEP "as closely as possible" when the pre-dispute placement becomes unavailable. *John M. ex rel. Christine M. v. Bd. of Educ. of Evanston Twp. High Sch. Dist. 202*, 502 F.3d 708, 714-15 (7th Cir. 2007). In *John M.*, a dispute about the student's IEP arose when he matriculated to high school from middle school. His then-current educational placement (at the middle school) was thus no longer available. *Id.* at 711-12. The court nevertheless concluded that in this situation, Section 1415(j) still required the school district to "provide educational services that approximate the student's old IEP as closely as possible." *Id.* at 714-15. This reading, the court explained, "respect[s] . . . the *purpose* of the stay-put provision" and ensures that school districts follow their IDEA obligations even when "the status quo no longer exists." *Id.* at 714 (citation omitted).

The Eleventh Circuit has adopted the Seventh Circuit's approach, agreeing that in circumstances in which it is "impossible to fully implement" an IEP, Section 1415(j) requires the school district to "'provide educational services that approximate the student's old IEP as closely as possible.'" *L.J. ex rel. N.N.J. v.*

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placement "changes due to circumstances beyond the school district's control." App. 11a (citing *N.D. v. Hawaii Dep't of Educ.*, 600 F.3d 1104, 1117 (9th Cir. 2010)). That is incorrect. *N.D.* involved four-day school weeks due to teacher furloughs, and the court "conclude[d] that there ha[d] not been a change in educational placement" at all, noting that, despite the furloughs, "[t]he children continue to attend the same school, have the same teachers, and stay in the same classes." 600 F.3d at 1116-17 & n.9. The court made clear that it was *not* deciding a case that involved "changes in educational placement." *Id.* at 1117 n.9.

Sch. Bd. of Broward Cnty., 927 F.3d 1203, 1213 (11th Cir. 2019) (quoting *John M.*, 502 F.3d at 714-15). This requirement serves in part to ensure that schools "implement stay-put IEPs to the fullest extent possible" and do not "simply give up" in the face of unavailability. *Id.*

2. By contrast, four circuits—now including the D.C. Circuit—have held that Section 1415(j) imposes no obligation on the school district whatsoever if a student's existing placement becomes unavailable for reasons outside the district's control.

The Fourth Circuit reached that conclusion in *Wagner v. Board of Education of Montgomery County*, 335 F.3d 297 (4th Cir. 2003). Like this case, *Wagner* also involved a unilateral decision by CSAAC to stop providing IEP-required services to a student in a way that changed that student's educational placement. The student's parents sought an injunction pursuant to Section 1415(j), and the district court ordered the school to find an alternative placement. The Fourth Circuit reversed in a divided decision. The majority acknowledged that Section 1415(j)'s stay-put obligation is "unequivocal[]" insofar as it "guarantees" an "automatic" "injunction that prohibits a school board from removing the child from his or her current placement during the pendency of the proceedings." *Id.* at 301. The court also acknowledged that Section 1415(j) "makes no exception for cases in which the 'then-current educational placement' is not functionally available." *Id.*

Nonetheless, the Fourth Circuit rejected stay-put relief. The court believed that Section 1415(j) is "totally prohibitory in nature," and the only "proper object for a 'stay put' injunction" is "the current placement, available or unavailable." *Id.* at 301-02.

Thus, "[w]hen presented with an application for a 'stay put' injunction," Section 1415(j) requires the court to "enter[] an order maintaining the child in the then-current education placement, whatever the status of that placement." *Id.* at 303. But if "the then-current placement is functionally unavailable" for reasons outside the school district's control, then the school district need not undertake any efforts to locate an "alternative interim placement." *Id.* at 302.

The Fifth Circuit reached a similar conclusion in *Weil v. Board of Elementary & Secondary Education*, 931 F.2d 1069 (5th Cir.), *cert. denied*, 502 U.S. 910 (1991). There, a student was transferred to a new school, over the objection of her parents, for reasons outside the school district's control. The Fifth Circuit rejected the parents' request for a stay-put injunction under Section 1415(j), pending IDEA proceedings regarding the quality of the new school. *Id.* at 1071-72. The court reasoned that "nothing substantive could have resulted" from a stay-put order because the prior educational placement was no longer available. *Id.* at 1072-73.

Likewise, the Sixth Circuit concluded in *Tilton ex rel. Richards v. Jefferson County Board of Education*, 705 F.2d 800 (6th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984), that Section 1415(j) imposed no obligation in a case where students were removed from their educational programs due to a loss of funding. The Sixth Circuit reasoned that Section 1415(j) does not apply when the change in placement "ar[ose] solely as a result of economic considerations." *Id.* at 805.

Below, the D.C. Circuit joined the Fourth, Fifth, and Sixth Circuit's by holding that Section 1415(j) does not apply "at all" if the child's then-current

placement is unavailable and the school district does not "control" the placement's unavailability. App. 9a-13a. In this context, the stay-put provision affords a child facing an abrupt change in educational placement no relief.

The D.C. Circuit then backstopped that harsh result with an alternative holding. The court reasoned that, even if the stay-put provision applies in this context, it does so only to the extent the district can place the student in a "similar" placement capable of "fully implement[ing]" the IEP. *Id.* at 13a. In other words, the school district must either maintain the current placement or place the child in a perfectly similar placement if it can find one. But if no perfectly similar placement is available, then the stay-put provision imposes no obligation at all.

In reaching that conclusion, the court expressly rejected the "as closely as possible" standard embraced by the Ninth, Seventh, and Eleventh Circuits. *Id.* at 14a. The court reasoned that Section 1415(j) is "solely a tool for maintaining the educational status quo," and declared that requiring the school district to provide a placement that is "as close[] as possible" to the IEP-required placement "would not maintain the status quo." *Id.* at 14a-15a. Thus, in the D.C. Circuit, if the then-current placement becomes unavailable and no similar placement is available, the school district has no obligation under Section 1415(j) to maintain the child's placement. For Braeden's case, that means the District has no obligation under Section 1415(j), because "no 'similar' placement"—i.e., a placement that "can fully implement [his] IEP"—"is available to him." *Id.* at 13a-14a.

3. The circuits are thus plainly divided over the meaning of Section 1415(j) when a student's then-current educational placement becomes unavailable. The Seventh, Ninth, and Eleventh Circuits require the school district to implement the IEP "as closely as possible"; the Fourth, Fifth, Sixth, and D.C. Circuits require nothing of the school district.

Had Braeden's case arisen in the Seventh, Ninth, or Eleventh Circuit, the outcome would have been different: The school district would have been forced to implement his IEP as closely as possible by securing a safe living environment and continuous behavioral support. Indeed, any doubt about that is dispelled by *K.K.*, which applied the Ninth Circuit's as-closely-as-possible rule to require a school district to provide around-the-clock residential care for a student while it searched for a new residential treatment facility after the prior one became unavailable. 2022 WL 2162016, at *10.

This circuit conflict has persisted for more than a decade, and warrants resolution by this Court. There is no reason for children to receive different levels of protection under Section 1415(j) based on the happenstance of geography. The IDEA's protections should be uniform across the country.

B. The D.C. Circuit's Decision Is Wrong

The need for this Court's intervention is especially acute because the D.C. Circuit's approach—like that embraced by the Fourth, Fifth, and Sixth Circuits—is incorrect. Contrary to those courts, Section 1415(j) requires a school district to maintain the child's pre-dispute educational placement as closely as possible, even when the exact pre-dispute placement is no longer available.

1. Section 1415(j)'s text is unambiguous and categorical: It declares that the child "shall remain" in his or her "then-current education placement" during the pendency of IDEA proceedings. 20 U.S.C. § 1415(j). The "shall remain" language is mandatory. *See Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171-72 (2016) ("'shall' is 'mandatory' and 'normally creates an obligation impervious to judicial discretion'" (citation omitted)). And Section 1415(j)'s heading confirms that it requires the "[m]aintenance of [the] current educational placement." 20 U.S.C. § 1415(j); *see Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 583 U.S. 366, 380 (2018) ("section headings" can "'supply cues' as to what Congress intended" (citation omitted)).

Thus, as everyone agrees, the provision plainly requires the school district to "maintain[] the child in the then-current education placement" during the pendency of the proceedings. *Wagner*, 335 F.3d at 303. Section 1415(j) is not narrowly limited to barring the school district from unilaterally changing the child's educational placement. On the contrary, it imposes a more general obligation on the district to ensure that the child "remain[s]" in the existing placement, thus ensuring its "[m]aintenance" while the IDEA dispute is resolved.

Inevitably, circumstances can arise in which a child's pre-dispute placement can no longer be perfectly maintained for reasons outside the school district's control. For example, the child might change schools, age out of an existing program, or—as in Braeden's case—be discharged from an externally-run residential treatment facility. Section 1415(j) does not "expressly contemplate that a placement might become unavailable" in such ways,

App. 14a, and thus does not expressly dictate how the stay-put injunction should be implemented in that circumstance. But ordinary remedial principles supply the relevant answer: A stay-put injunction must order the school district to satisfy the Section 1415(j) stay-put obligation by maintaining the existing educational placement as closely as possible.

This form of as-close-as-possible relief is standard operating procedure in contexts in which agencies cannot literally comply with mandatory statutory directives. In those situations—"even when full compliance may be unlikely" or "impossible"—the injunction compels the agency to "make[] serious, 'vigorous[]' attempts to fulfill its statutory responsibilities." *South Carolina v. United States*, 907 F.3d 742, 765 (4th Cir. 2018) (alteration in original) (citation omitted); *cf. Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (courts awarding injunctions have the power "to mould each decree to the necessities of the particular case" (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)).

This scenario often arises when government actors are unable to comply with statutory mandates or deadlines due to a lack of adequate funding or resources. Thus, when "resource limitations" made it "impossib[le]" for the Secretary of the Interior to satisfy a statutory deadline for certain critical habitat designations, the court ordered the agency to complete the designation "as soon as possible." *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1191-93 (10th Cir. 1999). Likewise, when resource and regulatory constraints made it impossible for the Department of Energy to satisfy a statutory deadline for removing plutonium from South Carolina, the court ordered the agency to complete the removal "in the most

expeditious way possible." *South Carolina*, 907 F.3d at 764-65 (citation omitted). And when insufficient congressional appropriations made it impossible for the Bureau of Indian Affairs to comply with statutory fund-allocation mandates, the court ordered the agency to "follow as closely as possible the allocation plan Congress designed." *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1348 (D.C. Cir. 1996); *see City of Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977) (ordering the FAA to allocate insufficiently appropriated funds "so as to preserve the [statutory] allocation formula" as much as possible).

The unifying thread running through these cases is the common-sense point that when full compliance with a statutory mandate cannot be achieved for reasons outside the agency's control, "the agency administering the statute is required to effectuate the original statutory scheme as much as possible." *City of Los Angeles*, 556 F.2d at 50; *see also, e.g.*, Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 Cal. L. Rev. 524, 580-83 (1982) (explaining that when "immediate compliance is physically impossible," the "logic of equity" instructs that "a court must order defendants to comply with violated statutes as immediately as feasible"). Courts do not permit agencies to shirk their statutory obligations merely because perfect compliance is impossible.

That principle is well-suited to the context of Section 1415(j). Congress recognized the importance of "a proper interim placement pending the resolution of disagreements over the IEP." *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 373 (1985). Indeed, such disagreements can "take[] years to run [their] course," *id.* at 361, and "[t]he

interruption or lack of the required special education and related services can result in a substantial setback to the child's development," 121 Cong. Rec. 37416 (1975) (statement of Sen. Williams). Section 1415(j) is thus specifically designed to serve as "a powerful protective measure to prevent disruption of the child's education throughout the dispute process." *Joshua A. ex rel. Jorge A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 1040 (9th Cir. 2009).

That design works only if the school district takes every measure available to prevent disruption—even when the child's exact pre-dispute educational placement is unavailable. In that circumstance, fulfilling the statute's goal of avoiding disruption means providing an "educational regime [that] produce[s] as closely as possible the overall educational experience enjoyed by the child under his previous IEP." *John M.*, 502 F.3d at 715. In this way, the school district is providing an educational placement that is "as close to maintaining the status quo as is feasible." Granada, *supra*, at 462.

2. The D.C. Circuit's contrary reasoning lacks merit. First, the court's belief that Section 1415(j) does not apply "at all" if the placement becomes unavailable for reasons beyond the school district's control has no basis in the statutory text. *See* App. 9a. Section 1415(j) provides that the child "shall remain" in the "then-current educational placement," subject to one "[e]xcept[ion]" not relevant here. 20 U.S.C. § 1415(j). This Court has repeatedly made clear that courts should not engraft atextual exceptions onto statutory text. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019). Indeed, it has even applied that principle in refusing to read other exceptions into Section 1415(j)'s

"unequivocal" language. *Honig v. Doe*, 484 U.S. 305, 323 (1988) (rejecting atextual "'dangerousness' exception" to stay-put requirement). The statutory text is unequivocal and "makes no exception for cases in which the 'then-current educational placement' is not functionally available." *Wagner*, 335 F.3d at 301.

The D.C. Circuit grounded its unavailability exception in its view that the statute "is intended to shield against a *school district's* unilateral attempt to change a student's placement." App. 12a. But that objective merely serves a more fundamental purpose: minimizing disruption of the child's education during the period in which an IDEA dispute is being adjudicated. That purpose makes it necessary to force school districts to maintain the child's pre-dispute educational placement as closely as possible, even if the placement cannot be maintained in full. The D.C. Circuit's evident belief that Section 1415(j) is of "limited utility," *id.*, is flatly at odds with that purpose. By relieving school districts of any stay-put obligations in this circumstance, the D.C. Circuit's interpretation will only perpetuate the disruption that Section 1415(j) is designed to prevent.

Second, the D.C. Circuit's alternative holding that Section 1415(j) imposes no obligations if the school district cannot locate a "similar" placement that "fully implement[s] a student's [pre-dispute] IEP" is equally misguided. App. 13a. According to the court, Section 1415(j) is "solely a tool for maintaining the educational status quo," and "only a shield to temporarily block *the District* from fundamentally changing a student's educational placement." *Id.* at 14a-15a (emphasis added). The court emphasized that requiring the school district to provide a placement that is "as close[] as possible" to the IEP-

required placement "would not maintain the status quo." *Id.*

The D.C. Circuit failed to recognize, however, that its own solution to the unavailability problem—refusing to order the school district to do anything at all—would *also* fail to maintain the status quo. Where maintaining the status quo is unachievable, the school district should be required to come as close as possible to maintaining a student's placement, just as agencies are often required to do when compliance with a statutory mandate is impossible. *See supra* at 22-23.

Nor did the D.C. Circuit acknowledge that its solution would have a far more destabilizing effect on the child's education, as it relieves the school district from having to implement *any* components of the IEP if it cannot implement *all* of them. The court thus lost sight of the reason for "maintaining the status quo" in the first place—to avoid the disruption that accompanies changes in the child's educational placement. The court provided no justification for interpreting the statute in a way that maximizes, rather than minimizes, the disruption.

C. The Question Presented Is Exceptionally Important

1. Whether Section 1415(j) applies when the pre-dispute placement is no longer fully available is undeniably important. The IDEA is a landmark piece of legislation that protects millions of students across the country. *See* U.S. Dept. of Educ., *A History of the Individuals with Disabilities in Education Act*, https://sites.ed.gov/idea/IDEA-History#1975 (last modified Feb. 16, 2024) (noting 7.1 million students were served under IDEA Part B in 2018-19 school

year). Section 1415(j) is an integral component of the statutory scheme, as its mandatory stay-put obligation generally applies "during the pendency of *any* proceedings conducted pursuant to [the IDEA]." 20 U.S.C. § 1415(j).

As a result, "[t]oday, the stay-put provision 'impacts to some degree virtually every case involving an administrative challenge under the IDEA.'" Michael A. Brey, *Autism, Burlington, and Change: Why It Is Time for a New Approach to the IDEA's Stay-Put Provision*, 101 Iowa L. Rev. 745, 747 (2016) (quoting *Susquenita Sch. Dist. v. Raelee S. ex rel. Heidi S.*, 96 F.3d 78, 82 (3d Cir. 1996)). And the scope of that provision in the context of an unavailable placement comes up with considerable frequency, as evidenced by the number of circuits that have addressed the issue. Such a broadly applicable provision demands a clear and nationally consistent interpretation.

This Court's intervention is especially warranted because the D.C. Circuit's interpretation will severely undermine Section 1415(j)'s effectiveness. As this Court has recognized, "administrative and judicial review under the [IDEA] is often 'ponderous.'" *Honig*, 484 U.S. at 322 (citation omitted). Indeed, in this case it took five months for the administrative hearing officer to issue a decision on Ms. Davis's complaint. *See* App. 47a-72a. Subsequent litigation if the hearing officer's decision is unfavorable can add years. *See, e.g.*, *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 290 F. Supp. 3d 1175 (D. Colo. 2018) (six years from filing of administrative complaint to ruling that student was entitled to relief); *see also Honig*, 484 U.S. at 322 ("this case . . . has taken seven years to reach us").

Congress enacted Section 1415(j) to ensure that, during this often lengthy process, students receive the educational services they need with minimal disruption to their pre-dispute placements. The concern animating this provision is well-founded, as even small delays in receiving necessary services can have a detrimental effect on educational progress. *See, e.g.,* Samantha C. Pownall, *Education Delayed Is Education Denied*, 63 N.Y. L. Sch. L. Rev. 95, 105-06 (2019) (explaining that child regressed while parent was attempting, without assistance, to find providers to deliver services specified in IEP, and that the parent almost lost her job); Rosemary Queenan, *Delay & Irreparable Harm: A Study of Exhaustion Through the Lens of the IDEA*, 99 N.C. L. Rev. 985, 1021-23 (2021) (describing harm to students, including regression, from delay in providing services necessary to ensure FAPE).

By creating an "unavailability" carve-out to Section 1415(j)'s stay-put requirement, the D.C. Circuit's rule allows school districts to evade their IDEA obligation to provide students with critical IEP-required services during the pendency of an IDEA dispute. Under the D.C. Circuit's rule, students like Braeden and their families are largely left to fend for themselves during what are often ponderous, years-long IDEA proceedings.

The D.C. Circuit tried to downplay the harmful consequences of its proposed rule, suggesting that a child in Braeden's situation "could seek traditional injunctive relief" against a school district under the standard (and quite stringent) four-factor test, instead of relying on Section 1415(j)'s automatic relief. App. 16a-17a. But preliminary injunctions under the usual four-factor test may be denied for lack

of irreparable harm, with courts believing that the harm caused by an improper placement can be remedied retrospectively through "compensatory education"—that is, the later provision of additional educational services designed to remedy deprivations in a child's education due to a FAPE denial. *See, e.g.*, *Trenton Pub. Sch. Dist. Bd. of Educ. v. A.C. ex rel. K.C.*, No. 23-cv-20295, 2023 WL 6294883, at *7 (D.N.J. Sept. 27, 2023), *appeal filed*, No. 23-2924 (3d Cir. Oct. 31, 2023).

The costly and burdensome (and often fruitless) process for obtaining preliminary relief is precisely what Section 1415(j) is designed to avoid. Moreover, compensatory education itself is often an inadequate remedy, as it is frequently difficult (if not impossible) to determine where the student would be if the student had received a FAPE and what services are necessary to put the student in that position. *See B.D. v. District of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016).

The D.C. Circuit's decision will have the hardest impact on families of limited means. As it stands, if the school district assigns control over a student's educational placement to a private institution and that placement becomes unavailable, it will fall to the child's family to identify and finance an alternative placement while IDEA proceedings plod along. Particularly for students who require extensive educational services, the financial burden will be enormous if not entirely infeasible. The IDEA assigns this financial obligation to school districts that receive federal funds. This Court's intervention is necessary to prevent school districts from shirking that obligation under the guise of a misguided "unavailability" exception to Section 1415(j).

2. This case is an ideal vehicle for resolving these issues. The relevant facts are undisputed, and the D.C. Circuit squarely rejected Ms. Davis's contention that Section 1415(j) requires the District to maintain Braeden's educational placement "as closely as possible." App. 16a. The Court should take this opportunity to resolve the circuit split and vindicate the stay-put provision's core goal of minimizing educational disruption to students enmeshed in IDEA disputes with their school districts.

II. THE COURT SHOULD ALSO DECIDE WHETHER THE STAY-PUT MANDATE APPLIES DURING APPEALS

The Court should also grant review to address a second question about the proper interpretation of Section 1415(j)—specifically, the duration of the District's stay-put obligation under that provision. Section 1415(j) directs that the child "shall remain in the then-current educational placement" "during the pendency of any proceedings conducted pursuant to this section [i.e., Section 1415]." The courts of appeals are split over whether the provision's reference to "any proceedings" encompasses appeals of adverse trial court decisions. It plainly does, yet the D.C. Circuit has held otherwise in a decision that contradicts Section 1415(j)'s clear text and purpose. If the Court grants review of the first question presented, it should review this important issue as well.

1. The Third and Ninth Circuits, along with at least two state appellate courts, have held that Section 1415(j)'s mandatory stay-put injunction "applies through the pendency of an IDEA dispute in the Court of Appeals." *M.R. v. Ridley Sch. Dist.*, 744

F.3d 112, 125-27 (3d Cir. 2014), *cert. denied*, 575 U.S. 1008 (2015); *see Joshua A.*, 559 F.3d at 1037-38; *Special Sch. Dist. No. 1 v. E.N.*, 620 N.W.2d 65, 69-70 (Minn. Ct. App. 2000); *N. Kitsap Sch. Dist. v. K.W. ex rel. C.W.*, 123 P.3d 469, 482 (Wash. Ct. App. 2005).

This interpretation tracks the statutory text, which provides that the stay-put provision applies "during the pendency of *any proceedings* conducted pursuant to this section [i.e., Section 1415]." 20 U.S.C. § 1415(j) (emphasis added). One such proceeding is a "civil action" filed in "any State court of competent jurisdiction or in a [federal] district court." *Id.* § 1415(i)(2)(A).

That "civil action" encompasses not only the district court proceedings, but also any appeal of an adverse decision to the court of appeals. *See* 28 U.S.C. § 1291. As a matter of ordinary usage, "an appeal is part of a 'civil action.'" *M.R.*, 744 F.3d at 125-26 (citation omitted); *cf., e.g.*, *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 582 U.S. 255, 258 (2017) (referring to case on appeal in this Court as "this civil action"); *Tolan v. Cotton*, 572 U.S. 650, 653 n.1 (2014) (same); *Lewis v. City of Chicago*, 560 U.S. 205, 209 (2010) (same). Because the appeal of an adverse district court decision is part of the civil action referenced in Section 1415(i)(2), it counts as a proceeding conducted "pursuant to" Section 1415. 20 U.S.C. § 1415(j). An appeal is therefore covered by the stay-put provision.

The Department of Education's implementing regulations confirm this result. As they explain, a school district's stay-put mandate remains in effect "during the pendency of *any* administrative or *judicial proceeding* regarding a due process complaint." 34 C.F.R. § 300.518(a) (emphasis added). That broad reference to "any . . . judicial proceeding"

means that the stay-put requirement applies "while a special education due process hearing or subsequent judicial proceedings *or appeals* are pending." Letter to Spindler, 18 IDELR 1038, 1039 (OSEP Apr. 21, 1992) (emphasis added); *see also* Letter to Hampden, 49 IDELR 197, 197 (OSEP Sept. 4, 2007) (describing stay-put obligations "pending any judicial appeals"). Indeed, the Department has directly told this Court that Section 1415(j) and its implementing regulations make clear that "the stay-put provision unambiguously applies during a judicial appeal in a civil action brought under Section 1415." U.S. Br. 13, *Ridley Sch. Dist. v. M.R.*, 575 U.S. 1008 (2015) (No. 13-1547), 2015 WL 1619420 (recommending against certiorari in case adopting Department's interpretation).

2. Contrary to Section 1415(j)'s plain text, the D.C. Circuit has held that a school district's stay-put obligation does not extend to appeals, but rather terminates at the conclusion of district court proceedings. *Andersen ex rel. Andersen v. District of Columbia*, 877 F.2d 1018, 1024 (D.C. Cir. 1989); *see K.P. v. District of Columbia*, 690 F. App'x 10, 11 (D.C. Cir. 2017) ("Under this Court's case law, a preliminary injunction issued under the stay-put provision lasts only until the trial court has resolved the case on the merits."). The court reached that holding based on its view of Section 1415(j)'s purpose, reasoning that (1) the stay-put mandate was designed to protect children only from "*unilateral* displacement *by school authorities*," and (2) "[o]nce a district court has rendered its decision approving a change in placement, that change is no longer the consequence of a unilateral decision by school authorities." *Andersen*, 877 F.2d at 1023-24.

That reasoning fails. While "'the unilateral exclusion of disabled children by schools'" may be "'*one* of [the stay-put provision's] purposes,'" it is not "the *only* purpose of the stay-put provision." *M.R.*, 744 F.3d at 127 (quoting *Honig*, 484 U.S. at 327). Rather, another "obvious purpose[]" of the stay-put provision is "to reduce the chance of a child being bounced around from one school to another, only to have the location changed again by an appellate court." *Flour Bluff Indep. Sch. Dist. v. Katherine M. ex rel. Lesa T.*, 91 F.3d 689, 695 (5th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997). As the Ninth Circuit has explained, "the stay put provision acts as a powerful protective measure to prevent disruption of the child's education throughout the dispute process. It is unlikely that Congress intended this protective measure to end suddenly and arbitrarily before the dispute is fully resolved." *Joshua A.*, 559 F.3d at 1040.

3. The duration of a school district's stay-put obligation is undeniably important. IDEA cases are regularly appealed. As explained above, it can take years and multiple rounds of appeals for students to obtain relief. *See, e.g.*, *Endrew F.*, 290 F. Supp. 3d at 1186 (granting student relief six years after administrative complaint was first brought, after appeals to both the Tenth Circuit and the Supreme Court). Students in the D.C. Circuit should receive full stay-put protection during this time, just like students elsewhere.

Moreover, in a situation where the stay-put placement is at a private school or requires out-of-pocket payment, parents may face an "untenable choice" between continuing to fund (at their own risk) a proper placement that the court of appeals may

vindicate, or removing their child from that placement even if they would ultimately have prevailed. *M.R.*, 744 F.3d at 126. Often, financial pressure will prevail, which runs directly counter to the IDEA's goal of providing stability for children during placement disputes. *See supra* at 23-25.

As with the first question presented, the resolution of this second question is particularly important for families of limited means. Especially where, as here, the student requires a residential placement—which involves intensive services and care, and is commensurately expensive—the costs of funding a stay-put placement that may later be affirmed can be prohibitive to families. This, in turn, would dissuade them from pursuing potentially meritorious appeals.

4. This case directly implicates whether Section 1415(j)'s stay-put obligation remains in effect throughout the duration of any appeal. Ms. Davis's complaint seeks a stay-put injunction that would require the district to provide Braeden with residential and behavioral support until all matters relating to Braeden's placement change have been resolved. *See* C.A. App. 127-28.

The courts below had no need to address whether the stay-put injunction should remain in effect through any appeal, because they (incorrectly) denied the injunction in the first place. But if this Court grants review of the first question presented and rules for Ms. Davis on that question, the district court will thus need to specify the duration of the injunction. And under the D.C. Circuit's binding precedent in *Andersen*, the court will be forced to declare that the injunction expires upon the conclusion of district

court proceedings adjudicating the parties' underlying FAPE dispute.

That result would plainly contravene Section 1415(j)'s text and purpose. To forestall that outcome, this Court should also grant review to consider whether *Andersen*'s atextual interpretation of the stay-put provision is correct. In doing so, the Court can use this case to resolve two circuit splits, ensure uniform application of Section 1415(j) across the country, and vindicate Congress's core goal of protecting children with disabilities throughout the IDEA dispute-resolution process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DIANA M. SAVIT
SAVIT & SZYMKOWICZ LLP
4520 East-West Highway
Suite 700
Bethesda, MD 20814

CHARLES A. MORAN
MORAN & ASSOCIATES
1100 H Street, NW
Suite 260
Washington, DC 20005

ROMAN MARTINEZ
Counsel of Record
BLAKE E. STAFFORD
RUTH HIRSCH
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
roman.martinez@lw.com

Counsel for Petitioner

February 23, 2024

APPENDIX

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UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

Anne DAVIS, ON BEHALF OF Braeden DAVIS, Appellant

v.

DISTRICT OF COLUMBIA, a Municipal Corporation, Appellee

No. 21-7134

Argued: January 24, 2023

Decided: August 15, 2023

Before Childs and Pan, Circuit Judges, and Rogers, Senior Circuit Judge.

Childs, Circuit Judge:

Anne Davis, acting on behalf of her son, Braeden Davis, a student who qualifies for special education services under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, appeals an order of the district court denying her motions for a temporary restraining order and a preliminary injunction pursuant to the IDEA's "stay-put" provision, *id.* § 1415(j). The stay-put provision provides that, "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree," a student "shall remain" in the student's "then-current educational placement." *Id.*

In 2021, the residential treatment center where Braeden received special educational services unilaterally discharged him. Since then, the District of Columbia (District) has been unable to locate a new residential placement, leaving Braeden without the educational services to which he is entitled. The District has offered Braeden in-home or virtual special education services until it identifies a new residential treatment center available to admit him.

Ms. Davis argued that the District's interim services proposal violates its statutory obligation to maintain Braeden's educational placement because in-home and virtual services do not provide Braeden an alternative therapeutic residential environment "as close[ly] as possible" to a residential facility. Davis Br. 30, 47, 53. The district court determined that the stay-put provision does not apply in these unique circumstances and declined to enter an injunction against the District. We affirm.

I.

The primary substantive guarantee of the IDEA is a "free appropriate public education" (FAPE) to all students with disabilities. 20 U.S.C. § 1412(a)(1)(A). The particulars of a student's special education program are devised by school officials in collaboration with parents and set forth in an "Individualized Education Program" (IEP), *id.* § 1414(d), which "serves as the 'primary vehicle' for providing each [student] with the promised FAPE," *Fry v. Napoleon Cmty. Schs.*, 580 U.S. 154, 158, 137 S.Ct. 743, 197 L.Ed.2d 46 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988)).

When an IEP is developed, the school district must provide the student with an "educational placement" capable of implementing that program. The statute provides that an appropriate placement is the student's "[l]east restrictive environment"—that is, the environment in which the student can be educated to "the maximum extent appropriate" with others who are not disabled. 20 U.S.C. § 1412(a)(5)(A); *see also Olu-Cole v. E.L. Haynes Pub. Charter Sch.*, 930 F.3d 519, 522–23 (D.C. Cir. 2019) (identifying integration as "[o]ne of the statute's key goals").

In addition to a student's substantive right to a FAPE, the IDEA provides certain procedural guarantees when disagreements over a student's educational placement arise. Disputes typically fall within one of three categories: the school proposes a change in a student's IEP that the student's parents believe fails to offer a FAPE, the school is attempting to expel a student for disciplinary reasons, or, as alleged in this case, the school and the parents agree on the content of a student's IEP, but the school fails to implement the IEP as written. Parents may request an impartial administrative due process hearing when such disputes arise, 20 U.S.C. § 1415(b)(6), (f)(1), and any party aggrieved by the hearing officer's decision may seek judicial review, *id.* § 1415(i)(2)(A); *see also Olu-Cole*, 930 F.3d at 523–24 (describing the IDEA's administrative dispute resolution process).

Central to this appeal is the IDEA's requirement that a student "shall remain in [the student's] then-current educational placement" until the dispute resolution process concludes. 20 U.S.C. § 1415(j) (entitled "Maintenance of current

educational placement"). While a FAPE claim centers on whether the school district has fulfilled its substantive obligation to provide an appropriate and individualized education to a student, Congress designed the stay-put provision with a limited operation and purpose: to prevent schools from unilaterally changing a student's educational placement while parents seek review and to ensure an uninterrupted continuity of education for disabled students pending administrative resolution. *Olu-Cole,* 930 F.3d at 523–24.

A parent is entitled to stay-put relief under § 1415(j) "upon a two-factor showing that (i) an administrative due process proceeding is pending, and (ii) the local educational agency is attempting to alter the student's then-current educational placement." *Olu-Cole*, 930 F.3d at 527 (internal quotation marks and alterations omitted); *see also Lunceford v. D.C. Bd. of Educ.*, 745 F.2d 1577, 1582 (D.C. Cir. 1984) (holding that an educational placement has not "change[d]" unless a "fundamental change in, or elimination of, a basic element" of the student's educational program has occurred).

If the two preconditions are met, the stay-put provision functions as an automatic statutory injunction, meaning parents need not meet the traditional four-part test for obtaining preliminary injunctive relief. *Olu-Cole*, 930 F.3d at 528; *Andersen ex rel. Andersen v. District of Columbia*, 877 F.2d 1018, 1023–24 (D.C. Cir. 1989) ("If the [stay-put] provision applies, injunctive relief is available without the traditional showing of irreparable harm.").

II.

Braeden Davis is a 23-year-old student with multiple disabilities, including autism spectrum disorder.[1] Braeden has a history of aggression toward others, self-injury, and property destruction, and he is easily triggered by a wide range of environmental sensory stimuli. Because of Braeden's disabilities, he is eligible for special education services under the IDEA.

Braeden's most recent IEP, issued in March 2021, identifies his "least restrictive environment" as a residential treatment center and specifies the IEP services he is entitled to receive. Given the severity of his disabilities, Braeden is "unable to attend school with general education peers" and requires instruction in a "highly structured educational and residential environment, with [one-to-one] supervision and a highly structured behavioral intervention program." March 2021 IEP at 27, J.A. 34. Braeden's IEP entitles him to the assistance of a dedicated aide for eight hours per day, specialized instruction for twenty-two-and-a-half hours per week, speech and language therapy for six hours per month, and occupational therapy and behavioral support services, each for twelve hours per month. *See id.* at 26, J.A. 33.

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[1] Braeden is above the age of majority, but the District and the D.C. Office of the State Superintendent of Education (OSSE) recognize Braeden as eligible for special education and associated services under the IDEA until at least 2024 as a result of related litigation not at issue here. Braeden was a "child" for purposes of the IDEA at the time this lawsuit was filed. *See* 20 U.S.C. § 1412(a)(1)(A) (covering "children" between ages three and twenty-one); 5-E D.C.M.R. § 3002.1(a) (covering "children" between ages three and twenty-two).

Beginning in August 2020, Braeden received his IDEA services at the Community Services for Autistic Adults and Children, a private residential treatment center in Maryland, and its affiliated school, the Community School of Maryland (together, CSAAC). On October 1, 2021, without input from Ms. Davis or the District, CSAAC notified the District that it planned to discharge Braeden at the end of that month because CSAAC was "no longer the appropriate placement for Braeden." Letter of October 1, 2021 from Scott Murtha, Director of Education of the Community School of Maryland, J.A. 91. CSAAC declined to reconsider its decision or to extend Braeden's residency to allow the District additional time to find a new placement. *See* Decl. of Katie Reda ¶ 33 (Nov. 8, 2021), J.A. 176–77.

After receiving CSAAC's discharge notice, Braeden's IEP team did not consider changing his IEP or whether such a change was appropriate. *See* Decl. of Nicholas Weiler ¶ 14 (Nov. 10, 2021), J.A. 183. Ms. Davis and the District agreed that it should continue to implement Braeden's IEP in his least restrictive environment, which is a residential treatment center. *See* Compl. ¶ 10, J.A. 118–19. The District began searching for a new residential placement and ultimately referred Braeden to nineteen alternative residential facilities. None accepted Braeden's application because they either lacked capacity, did not accept out-of-state referrals, were unable to meet Braeden's needs, or could not receive the District's referral due to Braeden's age. *See* Reda Decl. ¶¶ 13–32, J.A. 174–76.

With a dwindling list of prospects, locating a new residential facility before CSAAC discharged Braeden appeared unlikely. As a backstop, the District

authorized funding for Braeden to receive his IEP services at home through independent providers until a new placement is found.[2] The District also offered Braeden the option to receive his instruction virtually with the assistance of a virtual support aide in a "Communication Education and Support" classroom at Woodrow Wilson High School as an alternative to in-home services. Weiler Decl. ¶ 14, J.A. 183.

Three days before Braeden's expected discharge, Ms. Davis initiated administrative due process proceedings with OSSE, claiming that the District "refused to arrange for a safe and appropriate living arrangement or behavioral support comparable to those required by Braeden's then-current IEP." Admin. Compl. at 7, J.A. 104. Ms. Davis requested a stay-put injunction ordering the school district to keep Braeden "in a safe and appropriate location" and provide his IEP services while a new residential placement was sought. Alternatively, Ms. Davis requested that the school district be ordered to "create an environment capable of implementing Braeden's IEP." *Id.* at 10, J.A. 107.

On November 1, 2021, CSAAC discharged Braeden. Because no residential facility had accepted his application, Braeden was released to his parents and lost access to his special education program.

Ms. Davis immediately filed a complaint on behalf of Braeden against the District in the U.S. District

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[2] Shortly after issuing the initial interim services plan, the District amended its proposal to allow funding for an additional dedicated aide for eight hours per day during the school week. With that adjustment, the revised interim services plan authorized all of the services provided for in Braeden's March 2021 IEP. *See* Weiler Decl. ¶ 15, J.A. 183.

Court for the District of Columbia. Ms. Davis alleged that the District's interim services plan was insufficient, primarily because the District did not provide Braeden a "therapeutic residence" outside Ms. Davis's home or behavioral support sufficient to allow him to make progress on his IEP goals. Compl. ¶¶ 34–44, J.A. 123–24; *see also* Davis Br. 15–17.

Like the administrative complaint, the federal complaint alleged that the District failed to provide "reasonably comparable" interim services and thereby violated its statutory obligation to provide Braeden a FAPE as required by § 1412(a)(1)(A). Compl. ¶¶ 1, 35, 44, J.A. 117, 123, 124. Ms. Davis then moved for a temporary restraining order and a preliminary injunction pursuant to the IDEA's stay-put mandate, § 1415(j). The substantively identical motions sought an order requiring the District to "maintain Braeden's then-current educational placement" at a residential facility or to provide "truly comparable" interim services. Mot. Prelim. Inj. 12–13, ECF No. 7; Mot. TRO 12–13, ECF No. 6.[3]

The district court denied Ms. Davis's motions for stay-put relief. The district court determined that § 1415(j) did not apply because Braeden's residential placement became unavailable due to circumstances outside of the District's control, the District engaged in a "thorough and ongoing search" for a new

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[3] On November 10, 2021, the OSSE hearing officer concluded that Braeden's discharge from CSAAC was a "fundamental change in placement," Hearing Officer Determination (HOD) at 4 (Nov. 10, 2021), J.A. 187, but denied Ms. Davis's request for a stay-put injunction because Braeden's placement was "functionally unavailable due to the unilateral decision of CSAAC," *id.* at 6, J.A. 189 (citing *Wagner v. Bd. of Educ. of Montgomery Cnty.*, 335 F.3d 297, 302 (4th Cir. 2003)).

residential placement, and the District otherwise made all of Braeden's IEP services available to him at home. J.A. 230. Ms. Davis appeals.

III.

This court reviews the denial of a temporary restraining order and a preliminary injunction for abuse of discretion, but it reviews de novo a district court's interpretation of the IDEA. *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009).

On appeal, Ms. Davis maintains that, when a student's placement becomes unavailable, the IDEA's stay-put provision imposes an affirmative obligation on the District to replicate a student's then-current educational placement "as close[ly] as possible." Davis Br. 30, 47, 53. Ms. Davis acknowledges that the District began searching for a new residential placement soon after CSAAC announced its plan to discharge Braeden, and that the District issued referrals to nineteen potential residential treatment centers. But she believes that the District fell short of its statutory duty to maintain Braeden's residential placement because it did not provide Braeden interim housing or continuous behavioral support.

A.

Before addressing whether the relief sought is available to Ms. Davis under § 1415(j), we must determine whether the stay-put provision is implicated at all in this case. We hold it is not.

The stay-put mandate does not apply because *the District* did not effectuate a "fundamental change" in Braeden's educational placement by attempting to "alter" or "undo" the services to which he is entitled under his IEP. *See Olu-Cole*, 930 F.3d at 527; *see also*

Knight ex rel. Knight v. District of Columbia, 877 F.2d 1025, 1026–27 (D.C. Cir. 1989) (school district initiated a student's change in placement by proposing to enroll him in a public school instead of the private school he previously attended); *McKenzie v. Smith*, 771 F.2d 1527, 1533 (D.C. Cir. 1985) (school district triggered the stay-put mandate when it sought to transfer a student from a private day school to a public high school).[4]

Here, both parties agree that Braeden's IEP entitles him to receive education at a residential treatment center. Ms. Davis acknowledges that neither CSAAC's decision to end Braeden's residency nor the lack of available openings at the nineteen potential replacement facilities the District identified was attributable to any action taken by the District. And the district court found that the District has "indisputably engaged in a thorough and ongoing search for an appropriate placement." J.A. 226. Indeed, in seeking to place Braeden at a new residential facility, the District sought to implement Braeden's IEP as written by *maintaining* his then-

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[4] The term "educational placement" is varied in its interpretation across circuits. *See also Bd. of Educ. of Cmty. High Sch. Dist. No. 218 v. Ill. State Bd. of Educ.*, 103 F.3d 545, 548 (7th Cir. 1996) (observing that the term "falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP"); *see also Ventura de Paulino v. N.Y.C. Dep't of Educ.*, 959 F.3d 519, 526 (2d Cir. 2020) (defining "educational placement" as "the general type of educational program in which the child is placed," *i.e.*, "the classes, individualized attention, and additional services a child will receive"). Here, we need not determine whether Braeden's discharge from CSAAC was a fundamental change in his educational placement because the discharge was not within the District's control.

current placement, even though its efforts were ultimately futile. Although Braeden was removed from his least restrictive environment when CSAAC discharged him, based on the facts of this case, we hold that the stay-put provision is inapplicable because the residential component of Braeden's IEP became unavailable for reasons outside of the District's control.[5]

At least four circuits have concluded that the stay-put provision does not apply when a student's educational experience changes due to circumstances beyond the school district's control. *See Weil v. Bd. of Elementary & Secondary Educ.*, 931 F.2d 1069, 1073 (5th Cir. 1991) (holding that the stay-put provision did not apply when a student's educational placement unexpectedly changed due to a school closure "beyond the control" of the school district); *see also N.D. v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1117 (9th Cir. 2010) (holding that furloughs resulting in fewer school days did not trigger the stay-put provision even though the budget cuts might be the subject of a due process complaint for material failure to implement an IEP); *Tilton ex rel. Richards v. Jefferson Cnty. Bd. of Educ.*, 705 F.2d 800, 805 (6th Cir. 1983) (holding that the stay-put provision did not apply when facility

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[5] In her reply brief, and without elaborating on or providing any evidence in support of her claim, Ms. Davis contends for the first time on appeal that the District's ongoing good faith efforts to locate a different facility since Braeden's initial nineteen referrals were rejected are "questionable and disputed." Davis Reply Br. 11 n.5. Because the issue is not presented in this appeal, we do not reach the question of whether relief is available under the stay-put provision, or any other theory, had the District abandoned all reasonable efforts to seek out a new residential placement for Braeden.

that offered the only year-round treatment program for mentally handicapped children was closed due to budgetary reasons beyond the school district's control); *Wagner*, 335 F.3d at 302 ("[I]t is only the current placement, available or unavailable, that provides a proper object for a 'stay put' injunction."). Although the students' educational programs in those cases became unavailable for different reasons, and the opinions differ in whether to characterize such a loss as a change to the "then-current educational placement," those cases uniformly hold that the stay-put provision is inapplicable where a change is not instigated by the school district.

The limited utility of § 1415(j) also reinforces our decision. A stay-put injunction runs only against the school district because it is intended to shield against a *school district's* unilateral attempt to change a student's placement. *See Sch. Comm. of Town of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 371–74, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985) (Notwithstanding § 1415(j), a parent may change their child's educational placement "at their own financial risk."); *see also Honig*, 484 U.S. at 323, 108 S.Ct. 592 (The purpose of the stay-put provision is "to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students . . . from school."). Notably, entitlement to stay-put relief is not predicated on the provision of a FAPE. *Olu-Cole*, 930 F.3d at 524 ("To put it more simply, 'all handicapped children, regardless of whether their case is meritorious or not, are to remain in their current educational placement until the dispute with regard to their placement is ultimately resolved.'" (quoting *Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist.*, 386 F.3d 158, 161 (2d Cir. 2004))). In other

words, the IDEA's substantive guarantee is not necessarily realized through the procedural safeguard of § 1415(j).

Ms. Davis's request for stay-put relief rests entirely on the District's failure to materially implement Braeden's IEP due to a lack of similar placements. *See* Davis Br. 44 (arguing that Ms. Davis's interim proposal "came much closer to [Braeden's] IEP than the District's"). But facility unavailability did not cause Braeden's placement at CSAAC to end, even though the District may ultimately be responsible for failing to provide Braeden a FAPE. *See, e.g.*, *Weil,* 931 F.2d at 1073 (holding that placement unavailability does not trigger the stay-put provision).

B.

Even if § 1415(j) applies, Ms. Davis's requested relief is beyond the District's responsibility under that provision.

Knight does not lend support to Ms. Davis's broad assertion that § 1415(j) automatically entitles Braeden to an interim placement in an alternative setting that comes "as close as possible" to a residential treatment center. Davis Br. 47. In *Knight*, because the District did not raise the issue on appeal, this court assumed without deciding that a change in placement sufficient to trigger the stay-put provision occurred when a student's private school placement became unavailable. 877 F.2d at 1028–29. The school district nevertheless met its stay-put obligation by offering the student a "similar" public school placement. *Id.* *Knight* made clear that a placement is "similar" if it can fully implement a student's IEP. *Id.* at 1029.

Here, Ms. Davis and the District agree that residential services are a necessary component of Braeden's IEP and that no "similar" placement is available to him. In other words, Ms. Davis's proposed relief—a safe alternative living environment with continuous behavioral support—would not provide the "highly structured educational and residential environment" that Braeden's IEP requires. March 2021 IEP at 27, J.A. 34. A placement that "comes close" to implementing a student's IEP is not "similar" under the standard defined in *Knight*. To allow the stay-put relief Ms. Davis seeks would be a substantial extension of our holding in *Knight* because it would require the District to provide a new placement that implements an IEP "as closely as possible" when a "similar" placement is not available.

Any right to such relief must be grounded in the IDEA. The plain language of § 1415(j) does not expressly contemplate that a placement might become unavailable while administrative proceedings are pending. *See* 20 U.S.C. § 1415(j) (a student "shall remain" in their "then-current educational placement"). However, because a student cannot "remain" in an unavailable placement, placement availability is reasonably implied. Ms. Davis urges this court to reject this common-sense reading because Congress did not intend to write an "unavailability exception" into what is otherwise an unequivocal obligation to maintain a student's placement in all circumstances while the dispute resolution process is ongoing. Davis Br. 43. We disagree.

Ms. Davis's reading is inconsistent with the stay-put mandate's limited role and operation within the IDEA's overall statutory scheme. Section 1415(j) is

only a shield to temporarily block the District from fundamentally changing a student's educational placement; it is not a "sword to effectuate affirmative remedies." J.A. 228. The affirmative relief that Ms. Davis desires "goes beyond the 'prohibitory' nature of the statute," *Gross-Lee ex. rel. D.A.-G. v. District of Columbia*, No. 22-cv-1695, 2022 WL 3572457, at *14 (D.D.C. July 20, 2022) (quoting *Wagner*, 335 F.3d at 301), and it is incompatible with the automatic nature of relief available under § 1415(j). A stay-put injunction is solely a tool for maintaining the educational status quo, and ordering the District to provide Braeden a new placement that cannot, by definition, fully implement his IEP would not maintain the status quo. *See Olu-Cole*, 930 F.3d at 523 ("[T]he IDEA's 'stay put' provision strikes the balance heavily in favor of maintaining the educational status quo for students with disabilities until proceedings have concluded."); *see, e.g.*, *Wagner*, 335 F.3d at 301–02.

The stay-put mandate does not, as Ms. Davis contends, "do[ ] more than ensure educational continuity" by also guaranteeing that the educational placement in place during the dispute resolution process is one that "[a student's] parents helped to develop and with which they agree." Davis Reply Br. 23. By creating a mechanism to block school districts from changing a student's placement until placement disputes are resolved, Congress did not intend to clear a direct path to the district court for parents to challenge how "close" an interim placement comes to an unavailable placement compared to any number of dissimilar alternatives. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 59–60, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005) ("Congress could have required

that a child be given the educational placement that a parent requested during a dispute, but it did no such thing."); *see also Ventura de Paulino v. N.Y.C. Dep't of Educ.*, 959 F.3d 519, 534 (2d Cir. 2020) ("To hold otherwise would turn the stay-put provision on its head, by effectively eliminating the school district's authority to determine how pendency services should be provided."). Such a holding would transform this procedural safeguard into "a roving and unbounded implement for change" whenever a student's placement becomes unavailable. District Br. 23; *see also Gross-Lee*, 2022 WL 3572457, at *14 n.26 ("[F]ederal courts would be busy fielding emergency stay-put motions requesting new placements that would implement portions of an IEP."). We therefore decline Ms. Davis's invitation to extend the stay-put provision beyond the scope of its plain language and purpose.

Based on the circumstances of this case, we reject Ms. Davis's argument that the District must create an alternative placement that implements a student's IEP "as closely as possible" when a "similar" placement is unavailable.

C.

Finally, Ms. Davis wrongly assumes that, absent a stay-put injunction, Braeden will be left without a remedy while the District escapes its statutory obligation to provide him a FAPE. As both the administrative hearing officer, HOD at 6 n.2, J.A. 189, and the district court observed, J.A. 229, § 1415(j) allows the parties to agree on a temporary placement. Alternatively, and outside the parameters of the stay-put provision, Ms. Davis could seek traditional injunctive relief pursuant to the court's authority under 20 U.S.C. § 1415(i)(2)(C)(iii),

which broadly authorizes the court to "grant such relief as the court determines is appropriate." *See, e.g.*, *Wagner*, 335 F.3d at 303 ("The difference between section 1415(j) and section 1415(i)(2)[(C)](iii) is that any preliminary injunction entered under section 1415(i)(2)[(C)](iii) is by no means automatic."); *see also Honig*, 484 U.S. at 327, 108 S.Ct. 592 ("The stay-put provision in no way purports to limit or preempt the [equitable] authority conferred on courts.").

Moreover, if the administrative hearing officer or the district court ultimately find that the District has shirked its statutory duties to provide a FAPE, compensatory education or retroactive reimbursement may be warranted. *See Burlington*, 471 U.S. at 370, 105 S.Ct. 1996; *Olu-Cole*, 930 F.3d at 530. But we have no occasion to review the merits of Braeden's FAPE claim at this preliminary stage. That question should be litigated below in the first instance.

* * * *

To sum up, CSAAC's unilateral decision to discharge Braeden did not trigger the IDEA's stay-put mandate because the District did not refuse to provide a similar available placement. Neither the text of § 1415(j) nor our previous decisions applying the provision impose an affirmative duty on the District to provide an alternative residential environment when a student's then-current placement becomes unavailable for reasons outside the District's control. And Ms. Davis's attempt to bring a substantive challenge on behalf of her son by invoking the stay-put mandate is procedurally improper because § 1415(j) is not intended to afford parties affirmative relief, on the merits, in the form of an automatic injunction.

Accordingly, we affirm the district court's order denying the stay-put injunction.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANNE DAVIS, on behalf of Braeden Davis,	)	
Plaintiff,	)	**Civil Case No. 21-02884 (RJL)**
v.	)	
DISTRICT OF COLUMBIA,	)	
Defendant.	)	

MEMORANDUM OPINION

(November 19th, 2021) [Dkts. #6, #7]

Plaintiff Anne Davis ("plaintiff") brings this action on behalf of her son, Braeden Davis, against the District of Columbia (the "District") under the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* Compl. [Dkt. #1]. Plaintiff alleges the District deprived her son of a free appropriate public education ("FAPE") in violation of the IDEA by failing to maintain Braeden in a residential treatment facility ("RTC") after the RTC where he was living and receiving services discharged him on October 31, 2021. *Id.* ¶¶ 32-54, Prayer for Relief. Presently before the Court are plaintiffs Motion for Temporary Restraining Order [Dkt. #6] and Motion for Preliminary Injunction [Dkt. #7] (collectively "Pl.'s Mots.").[1] In these

[1] Plaintiff's motions are identical. Accordingly, I address them simultaneously here.

motions, plaintiff seeks emergency injunctive relief in the form of an Order under the "stay-put" provision of the IDEA, 20 U.S.C. § 1415(j), requiring the District to provide Braeden housing and personnel approximating the services he would receive at an RTC until a new appropriate residential facility is found that will accept Braeden. *See* Pl.'s Mots. at 12. Upon consideration of the parties' pleadings, relevant law, the entire record herein, and for the reasons stated below, I disagree with plaintiff's argument that the stay-put provision of the IDEA entitles her to such relief. Accordingly, I DENY plaintiff's motions.

BACKGROUND

Braeden is 21 years old and classified as "multiply disabled." Compl. ¶ 9. His conditions include autism spectrum disorder, attention deficit hyperactivity disorder, unilateral fluctuating hearing loss, and other learning disabilities. *Id.* As a result of his disability, District of Columbia Public Schools ("DCPS") and the Office of the State Superintendent of Education ("OSSE"), the agencies through which the District complies with its educational obligations, recognize Braeden as eligible for special education and associated services under the IDEA.[2] *Id.* ¶ 6. The specific educational services Braeden receives are determined by his individualized education plan ("IEP")—a comprehensive and individualized document that is routinely updated to ensure Braeden is on track to achieve his educational goals. *See* Ex. F to Pl.'s Mots.

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[2] As a result of related litigation not at issue here, Braeden will remain eligible under the IDEA until at least 2024. Compl. ¶ 21.

Braeden's last IEP was issued on March 29, 2021 ("March 29 IEP"). It concludes that, given the severity of Braeden's learning deficits, he is "unable to attend school with general education peers" and needs "a highly structured educational and residential environment, with 1:1 supervision and a highly structured behavioral intervention program."[3] *Id.* at 27. The March 29, IEP also provides for the following services:

- 1:1 dedicated aide for 8 hours per day
- Specialized instruction for 22.5 hours per week
- Speech/Language therapy for 6 hours per month
- Occupational therapy for 12 hours per month, and
- Behavioral support for 12 hours per month

Id. at 25–26.

Consistent with his IEP, Braeden had been living and receiving educational services at a private RTC—the Community Services for Autistic Adults and Children ("CSAAC")—since August 2020. On October 1, 2021, however, CSAAC informed the District and plaintiff that it was "no longer the appropriate placement for Braeden, and [was] unable to meet his needs." Ex. G to Pl.'s Mots.; Compl. ¶ 33. CSAAC reached this decision unilaterally without any input from the District, DCPS, OSSE, or members of

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[3] Defendant refers to this IEP as the "February 12, 2021 IEP" because, defendant contends, the underlying IEP meeting was held on February 12, 2021. *See* Def.'s Opp'n at 3. This is an immaterial semantic difference. Defendant does not contest the contents of the IEP or the fact that it was Braeden's most recent IEP prior to the initiation of this lawsuit. *See* Def.'s Opp'n at 3 n.4.

Braeden's IEP team. *See* Declaration of Katie Reda ("Reda Decl.") [Dkt. #14-1] ¶ 9. CSAAC stated it intended to discharge Braeden as of October 31, 2021, giving the parties a month to find a new RTC or otherwise determine how to proceed. Ex. G to Pl.'s Mots.; Compl. ¶ 33.

On October 6, representatives from DCPS, OSSE, and CSAAC met with plaintiff and plaintiff's counsel. *See* Compl. ¶ 49; Reda Decl. ¶ 9; Declaration of Nicholas Weiler ("Weiler Decl.") [Dkt. #14-2] ¶ 7. The parties discussed which RTCs could be viable candidates to replace CSAAC. Compl. ¶ 50; Reda Decl. ¶¶ 11–12. Because all OSSE-approved facilities had already rejected Braeden in the past—some on multiple occasions—the participants agreed to move forward by making referrals to residential programs outside of OSSE's approved list. Reda Decl. ¶ 12. Beginning the next day, OSSE began sending referrals to RTCs seeking a replacement facility. *Id.* ¶ 13. To date, OSSE has referred Braeden to 19 RTCs, all but one of which has rejected his application.[4] *Id.* ¶¶ 13–33.

Anticipating that a new RTC might not accept Braeden before he was discharged from CSAAC, plaintiff asked DCPS at the October 6 meeting to develop a plan to provide Braeden with interim services to avoid any gap in his education. Compl. ¶ 50. To that end, DCPS provided an "Interim Services Authorization" on October 21, 2021. Ex. C to Pl.'s Mots. This offer for interim services was then

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[4] As of the time of this Opinion, one RTC is still reviewing Braeden's application and he remains in consideration for that program.

updated on November 9, 2021.[5] Ex. 4 to Def.'s Opp'n [Dkt. #14-4]. Under the current updated version, the District authorizes the following services subject to certain per-hour and total-cost maximums:

- 1:1 dedicated aide for 8 hours per day
- Specialized instruction for 22.5 hours per week
- Speech/Language therapy for 10 hours per month
- Occupational therapy for 12 hours per month
- Behavioral support for 16 hours per month
- Counseling for 4 hours per month

Id.

Collectively, the Interim Services Authorization provides for up to $17,268.86 per month in services for Braeden and states that "these services may be re-authorized on a month-to-month basis until the student is accepted to an educational program that meet [sic] the student's needs as outlined in his IEP."[6] *Id.*

Despite multiple requests from the District to postpone Braeden's discharge date, CSAAC discharged Braeden on November 1, 2021. *See* Aff. of Ms. Anne Davis ("Pl.'s First Aff.") [Dkt. #11-1] ¶ 3. Since that time, he has not returned home. Second Aff. of Ms. Anne Davis ("Pl.'s Second Aff.") [Dkt. #17-3] ¶ 1. Instead, plaintiff and a series of private

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[5] The only material difference between the October 21 and November 9 authorizations is that the District added a 1:1 dedicated aide for 8 hours per day in the November 9 update.

[6] As an alternative to the Interim Services Authorization, the District has also offered Braeden attendance in a virtual learning program, including a virtual aide, through the Woodrow Wilson High School. Weiler Decl. ¶ 13.

aides have attended Braeden at a private hotel, providing round-the-clock care. *Id.* ¶¶ 8–10. Plaintiff estimates the cost of these housing and behavioral support accommodations amounts to $7,740.39 per week. Pl.'s First Aff. ¶¶ 3, 8.

The District has refused to cover these expenses, asserting that, according to its residential placement guidelines, it does not provide interim housing when a student is discharged from a residential placement. *See* Ex. 3 to Def.'s Opp'n [Dkt. #14-3] at 9. At oral argument, the District represented that, in the ordinary course, students in this situation return home until a new residential facility is located. Status Conf. Regarding Prelim. Inj. and Temp. Restraining Order, Rough Hearing Tr. at 24:9-13 (Nov. 8, 2021).

Unsatisfied with the District's response, plaintiff brought a due process complaint on October 28, 2021 alleging the District violated the IDEA by failing to provide an RTC or "truly comparable services" upon Braeden's discharge from CSAAC. Ex. 5 to Def.'s Opp'n [Dkt. #14-5] at 9. Plaintiff concurrently sought relief under the stay-put provision of the IDEA. Ex. 6 to Def.'s Opp'n [Dkt. #14-6] at 1.

While the due process proceeding was pending, on November 2, 2021, plaintiff sought relief in this Court by filing the instant complaint and, concurrently, seeking relief under the stay-put provision through the instant motions. *See generally* Compl.; Pl.'s Mots. On November 8, I heard initial argument on these motions. Two days later, the administrative hearing officer denied plaintiffs motion for relief under the stay-put provision. Ex. 6 to Def's Opp'n at 1. On November 16, I heard additional argument on plaintiff's motions, and I now resolve them herein.

ANALYSIS

Plaintiff moves for preliminary injunctive relief under the stay-put provision of the IDEA, which, as relevant here, states that

> [D]uring 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).

As the Supreme Court has explained, Congress intended the stay-put provision to "strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school." *Honig v. Doe,* 484 U.S. 305, 323 (1988). The effect of the provision is a statutory stay that maintains the status quo when parents and schools litigate changes to a child's special education program. *See Olu-Cole v. E.L. Haynes Pub. Charter Sch.,* 930 F.3d 519, 527 (D.C. Cir. 2019). Because this is a statutory stay, the traditional four-factor test for preliminary injunctions does not apply. *Id.* Instead, the stay-put provision "effectively provides for an automatic statutory injunction upon a two-factor showing that (i) an administrative due process proceeding is pending and (ii) the local educational agency is attempting to alter the student's then-current educational placement." *Id.*

Defendant does not dispute that the first factor is satisfied here as plaintiff has brought an underlying due process complaint regarding the same allegations presented in her complaint. *See* Ex. 5 to Def.'s Opp'n.

The parties disagree ardently, however, over the second factor—whether a change has occurred with respect to Braeden's educational placement that is sufficient to trigger the statutory stay. Pl.'s Mots. at 10–12; Def.'s Opp'n at 5–9. Courts typically address this factor through a two-step inquiry. First, they determine what comprised the child's "then-current educational placement." *G.B. v. District of Columbia,* 78 F. Supp. 3d 109, 112 (D.D.C. 2015). Second, they decide whether the local educational agency fundamentally changed that placement. *Id.; see also Lunceford v. District of Columbia Bd. of Educ.,* 745 F.2d 1577, 1581 (D.C. Cir. 1984) (holding plaintiffs "must identify, at a minimum, a *fundamental change* in, or elimination of a basic element of the education program in order for the change to qualify as a change in educational placement").

Although the IDEA does not define the term, the parties do not dispute that Braeden's March 29 IBP serves as the "dispositive factor" in determining his "then-current educational placement." Pl.'s Mots. at 10; Def.'s Opp'n at 5; *see also Johnson v. District of Columbia,* 839 F. Supp. 2d 173, 177 (D.D.C. 2012) ("Typically, the dispositive factor in deciding a child's current educational placement should be the IBP . . . actually functioning when the stay put is invoked."); *G.B.,* 78 F. Supp. 3d at 112; *see also Spilsbury v. District of Columbia,* 307 F. Supp. 2d 22, 25–26 (D.D.C. 2004) (holding last mutually agreeable IEP established student's "current educational placement"). Consistent with the March 29 IEP, I find that Braeden's then-current educational placement at the time this litigation ensued included a residential treatment facility with 1-on-l support services and significant behavioral intervention. *See*

Ex. F to Pl.'s Mots.; Ex. 6 to Def.'s Opp'n at 4 (hearing officer finding same). It also included the specific services listed in the March 29 IEP, including the services of a single 1-on-1 aide for 8 hours per day.[7] *See* Ex. F. to Pl.'s Mot.

Turning to the second issue, I must determine whether the changes that have occurred to Braeden's placement are fundamental changes, i.e. of the type and degree sufficient to trigger the statutory protection of the stay-put provision. *Lunceford,* 745 F.2d at 1581. The District argues that because plaintiff "takes exception to CSAAC's unilateral decision to end Braeden's enrollment" and not "a decision of the school system or the IEP team to change Braeden's educational placement," she has not shown a fundamental change. Def.'s Opp'n at 6. The unwritten premise of the District's argument is that unilateral changes outside of a local educational agency's control simply do not trigger the statute's stay-put provision. *See id.* The District does not

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[7] Plaintiff notes that an October 2020 IEP Amendment provided Braeden with an extra aide so that he received 2-on-1 care. *See* Pl.'s Mots. at 4. Nonetheless, plaintiff concedes that the March 29 IEP, which was issued six months *after* the October 2020 Amendment, only provides for a single aide for 8 hours per day. *See id.* (asserting the March 29 IEP provided "1:1 aide for 8 hours per day"). Because it is the last functioning IEP that serves as the decisive factor in this inquiry, I conclude that Braeden's then-current educational placement only required one aide for 8 hours per day. *See Johnson,* 839 F. Supp. 2d at 177; *Spilsbury,* 307 F. Supp. 2d at 25–26. To the extent Braeden nonetheless received additional behavioral support while attending CSAAC, *see* Ex. C to Pl.'s Reply [Dkt. #17-2], I find the District need not emulate these services on an interim basis for the same reasons the District need not emulate CSAAC's housing services. *See infra* at 11–15.

dispute that it maintains an obligation to identify a new RTC and to provide educational services outlined in the March 29 IEP,[8] but it contends that it lacks any duty to re-create CSAAC's housing and associated services, as these were unilaterally made unavailable through circumstances outside of the District's control and contrary to its repeated requests for reconsideration. *See id.* at 6–9.

Plaintiff disagrees, arguing that Braeden's discharge from CSAAC and the District's failure to subsequently provide comparable services constitutes a fundamental change warranting stay-put relief. Pl.'s Mots. at 3, 10-12. Relying primarily on our Circuit's decision in *Knight by Knight v. District of Columbia,* plaintiff contends that where a student's placement becomes unavailable, the District must provide an alternative placement on an interim basis regardless of the circumstances. *See* Pl.'s Reply at 4 (citing 877 F.2d 1025, 1028 (D.C. Cir. 1989). Where, as here, no RTC accepts the student, plaintiff contends the stay-put provision requires the District to emulate an RTC by "fund[ing] a comparable least restrictive environment with appropriate housing and personnel."[9] Pl.'s Reply at 10. Unfortunately for plaintiff, I agree with the District that the stay-put provision does not require such relief. How so?

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[8] The District's concession is well taken. "In order to provide a FAPE, after an IEP is designed, the District must . . . implement the IEP . . . in a school that can fulfill the requirements set forth in the IEP." *Johnson v. District of Columbia*, 962 F. Supp. 2d 263,268 (D.D.C. 2013).

[9] Both parties appear to accept that the Court is unable to order CSAAC to continue to house or provide services to Braeden. *See Lunceford,* 745 F.2d at 1580–81.

At the outset, I disagree with plaintiff's suggestion that our Circuit precedent controls.[10] The Court of Appeals has rarely opined on the stay-put provision, and, critically, it has never addressed the precise issue here—whether that provision imposes affirmative duties to create or approximate a residential facility on an interim basis where none is available due to circumstances entirely outside of the District's control.

It is true that our Circuit Court did indeed comment on the District's obligations under the stay-put provision in a manner favorable to plaintiff's case. *See Knight by Knight v. District of Columbia,* 877 F.2d 1025, 1029 (D.C. Cir. 1989) (noting that the District had an "obligation to provide a 'similar' placement, on an interim basis, when a child's prior placement is no longer available and a new and 'appropriate' placement has not yet been finally determined"); *McKenzie v. Smith,* 771 F.2d 1527, 1533 & n.3 (D.C.

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[10] In addition to our Circuit Court's precedent, plaintiff places significant reliance on *Schiff v. District of Columbia*, Civ. No. 18-1392, 2019 WL 5683903 (D.D.C. Nov. 1, 2019). The analogy fails. Not only does *Schiff* not interpret the stay-put provision at issue here, but its legal conclusions are limited to holding that the contractual defense of impossibility does not apply in the IDEA context. *Id.* at *7. Defendant here is not making any such argument, which limits *Schiff's* relevance to the present dispute. Moreover, *Schiff* is factually distinct as well. In that case, the District argued that it had no responsibility to implement the student's IEP—a position that "resulted in a total failure to provide any services prescribed by [the student's] IEP." *Id.* at *6. Here, by contrast, the District is not attempting to entirely forego its obligations to educate Braeden. It has indisputably engaged in a thorough and ongoing search for an appropriate placement and continues to provide the educational services outlined in Braeden's IEP in the interim.

Cir. 1985) (noting that where student's school was unavailable, "DCPS was obligated to locate and arrange a placement in a similar program"); *Lunceford,* 745 F.2d at 1580–81 (noting that, where a fundamental change occurs, "it appears that the District, in order to satisfy its statutory obligation, must provide [the student] other facilities-ones more closely resembling [the prior placement]—which would maintain his educational placement at least until hearings are completed"). In these cases, however, the District had successfully placed[11] the student in an interim school and the litigation focused on the adequacy of the new location as compared to the prior placement. *Knight,* 877 F.2d at 1029 (finding no violation of the stay-put provision in light of student's transfer from a private to public school); *Smith,* 771 F.2d at 1533 (finding public school inappropriate where student required a residential environment); *Lunceford,* 745 F.2d at 1582–83 (holding stay-put provision inapplicable because no fundamental change occurred in transferring student from one residential facility to another). Our Circuit was not confronted with, nor did it opine on, the District's obligations under the stay-put provision *where no similar interim school was available* despite good faith efforts to "locate and arrange a placement"

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[11] In *Smith,* the student never attended the proposed placement because his parents unilaterally placed him in a separate private facility. *See Smith,* 771 F.2d at 1530–31. Nonetheless, the stark factual contrast to the present case is evident. Far from a lack of interim options, there were numerous available facilities in *Smith* and the litigation focused on the relative appropriateness of these as compared to the student's prior placement, not on the unique question presented here—what to do where no facilities are available. *See id.* at 1531–32.

in such a facility. *Smith,* 771 F.2d at 1533. To hold that in such circumstances the District must create out of whole cloth a residential facility—or approximate one by compensating for housing and personnel expenses—would constitute a significant extension of *Knight* and its predecessors. As such, I conclude the *Knight* line of cases fails to dictate the outcome here and is best read for the proposition that, *where available,* the stay-put provision requires the District to place a student in an interim placement that is similar to its prior placement.[12]

Having determined the outcome here is not governed by Circuit precedent, I must assess in the first instance whether the statute is susceptible to plaintiff's novel interpretation. Turning first to the text, I find there is nothing to support plaintiff's position. The statute commands that a child "shall remain" in his or her current placement. 20 U.S.C. § l4l5(j). Such prohibitory language falls well short of prescribing the significant affirmative obligations that plaintiff seeks to read into it. *Wagner v. Board of Educ. of Montgomery Cty.,* 335 F.3d 297, 301 (4th Cir. 2003) ("By its terms, section 1415(j) does not impose any affirmative obligations on a school board; rather, it is totally prohibitory in nature."). In short, the provision's text demonstrates that it operates as a shield against school board action and not a sword intended to effectuate affirmative remedies. *See Honig,* 484 U.S. at 323 (holding that in enacting the

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[12] This more limited reading is consistent with our Circuit Court's more recent descriptions of the District's stay-put obligations. *See Olu-Cole v. E.L. Haynes Pub. Charter Sch.,* 930 F.3d 519, 527 (D.C. Cir. 2019) (describing stay-put relief as only available where "*the local educational agency* is attempting to alter the student's then-current educational placement").

stay-put provision, Congress intended to combat the specific ill of unilateral exclusion of disabled students by school boards); *Wagner,* 335 F.3d at 300 ("In a typical section 1415(j) case, the school board is attempting to remove the child, whether through expulsion or by other means, from his or her current placement and the parents are seeking to stop that action."); *Ventura de Paulino v. New York City Dep't of Educ.,* 959 F.3d 519, 534 (2d Cir. 2020). This is especially true where the unavailability of a student's placement occurs as a result of circumstances outside the school board's control. *See Tilton by Richards v. Jefferson Cty. Bd.,* 705 F.2d 800, 805 (6th Cir. 1983) (stay-put provision does not apply where a state or local agency "must discontinue a program or close a facility for purely budgetary reasons"); *Weil v. Bd. of Elementary & Secondary Educ.,* 931 F.2d 1069, 1073 (5th Cir. 1991) ("[I]f the change in 'educational placement' is necessitated by the closure of a facility for reasons beyond the control of the public agency, the stay-put provisions . . . do[es] not apply.").

The structure of Section 1415, read as a whole, not surprisingly confirms this interpretation. *See K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the Court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). In a nearby subsection, Congress provided hearing officers the ability to place a child in an "appropriate interim alternative educational setting" under certain circumstances, including when the public agency shows that "the current placement of such child is substantially likely to result in injury to the child or others." 20 U.S.C. § 1415(k)(2). The explicit authorization of a change in

placement on an interim basis here shows the drafters knew how to provide for such relief, where appropriate, and could have authorized such relief where a student's placement became unavailable. *See Wagner,* 335 F.3d at 302. Instead, they chose not to. Section 1415(j)'s silence on this front speaks volumes to the court's power, or lack thereof, to authorize similar interim alternative placements under the stay-put provision.

Congress did not, however, leave parents without an avenue to achieve uniquely tailored interim relief similar to what plaintiff seeks here. Section 1415(i)(2)(B)(iii) broadly empowers courts to "grant such relief as the court determines is appropriate," and plaintiffs are free to utilize this broad grant of authority to obtain, where appropriate, emergency alterations to a student's educational placement. *See Wagner,* 335 F.3d at 302. Unlike the stay-put provision, however, which operates as an automatic stay upon a comparably simple showing, immediate relief under section 1415(i)(2)(B)(iii) requires plaintiffs to satisfy the more onerous traditional preliminary injunction factors. *See Wagner,* 335 F.3d at 302. Viewed collectively with section 1415(j) and the larger goals of the IDEA, it is entirely logical that Congress would create a heavy presumption in favor of maintaining children in their current educational placements, yet also provide a "safety-valve" to ensure interim placements may be constructed where irreparable harm would imminently occur without immediate court intervention. *See Wagner,* 335 F.3d at 302–03; ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 24 (2012) (judicial interpretation requires consideration of "the entire text, in view of its

structure and of the physical and logical relation of its many parts"). To the extent plaintiff seeks a significant alteration of Braeden's placement in light of changed circumstances and to avoid imminent harm, her request for relief would have been best framed under section 1415(i)(2)(B)(iii).

Based on this reading of the statute, I find plaintiff is not entitled to the relief she seeks. Plaintiff's contention for a stay-put injunction rests entirely on the unavailability of the housing and personnel services CSAAC provided. For the reasons described above, the stay-put injunction cannot be used to require the District to re-create these aspects of a residential facility where, as here, they became unavailable through circumstances totally outside of the District's control, to date the District has engaged in a thorough and ongoing search for an appropriate replacement facility, and the District has made available to Braeden the full complement of other services outlined in his IEP on an interim basis.[13] Accordingly, I deny plaintiff's motions.

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[13] I need not address whether preliminary injunctive relief would be appropriate under the stay-put provision, 20 U.S.C. § Section 1415(i)(2)(B)(iii), or an alternative theory were the District to cease in the provision of these interim services. That question is not presented here.

CONCLUSION

For the foregoing reasons, the Court DENIES plaintiff's Motion for Temporary Restraining Order [Dkt. #6] and Motion for Preliminary Injunction [Dkt. #7]. An Order consistent with this decision accompanies this Memorandum Opinion.

s/ Richard J. Leon
RICHARD J. LEON
United States District Judge

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

No. 21-7134 **September Term, 2023**

1:21-cv-02884-RJL

Filed on: September 27, 2023

Anne Davis, On behalf of Braeden Davis,

Appellant

v.

District of Columbia, A Municipal Corporation,

Appellee

BEFORE: Childs and Pan, Circuit Judges; and Rogers, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for panel rehearing filed on September 14, 2023, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

[2023 WL 6319402]

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

No. 21-7134 **September Term, 2023**

1:21-cv-02884-RJL

Filed on: September 27, 2023

Anne Davis, On behalf of Braeden Davis,

Appellant

v.

District of Columbia, A Municipal Corporation,

Appellee

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges; and Rogers, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for panel rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Daniel J. Reidy
Deputy Clerk

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
1050 First Street, N.E., 3rd Floor
Washington, DC 20002

BRAEDEN T. DAVIS, by ANNE and BRANTLEY DAVIS, Attorneys in Fact, Petitioner, v. DISTRICT OF COLUMBIA PUBLIC SCHOOLS, And D.C. OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION, Respondents.	)	Hearing Officer: Peter Vaden Case No: 2021-0175 Date Issued: November 10, 2021

DECISION AND ORDER ON PETITIONER'S MOTION FOR STAY-PUT INJUNCTION

On October 28, 2021, Anne and Brantley Davis, the parents of, and attorneys-in-fact for, the adult student Braeden T. Davis (Student), filed their

request for a due process hearing under the Individuals with Disabilities Education Act (IDEA). This due process complaint arises out of the unilateral decision of Student's residential placement in Maryland to "discharge" Student, effective October 31, 2021. Concurrent with the filing of their due process complaint, the parents, by counsel, filed a motion for an "automatic stay-put injunction" pursuant to 20 U.S.C. § 1415(j) and the IDEA implementing regulations, 34 C.F.R. § 300.518.[1] On November 3, 2021, Respondents, District of Columbia Public Schools (DCPS) and D.C. Office of the State Superintendent of Education (OSSE), by counsel, filed a joint response in opposition to Petitioner's stay-put motion. On November 8, 2021, Petitioner, by counsel, submitted by email additional authority for the hearing officer's consideration. For the reasons below, I now deny Petitioner's request for a stay-put order.

Background

As alleged by the parents in the due process complaint, Student is an adult student with a Multiple Disabilities (MD) disability classification. His disabling conditions include Autism Spectrum Disorder (ASD), Other Health Impairment—Attention Deficit Hyperactivity Disorder, Specific Learning Disabilities and unilateral fluctuating hearing loss. Student's most recent DCPS individualized education program (IEP), completed on March 29, 2021, provides that Student is unable to attend school with general education peers due to the

[1] Petitioner also filed a motion for an expedited due process hearing which I deny this date by a separate decision and order.

need for "a highly structured educational and residential environment, with 1:1 supervision and a highly structured behavioral intervention program."

As alleged in the complaint, since August 2020, DCPS has placed Student at Community Services for Autistic Adults and Children (CSAAC) in suburban Maryland and its affiliated school, the Community School of Maryland. In August 2021, CSAAC notified DCPS that it was no longer the appropriate placement for Student and that Student would be discharged effective October 31, 2021. Since receiving notice that Student would be discharged, respondent OSSE has been seeking another residential treatment center (RTC) for Student. Pending securing Student's admission to another RTC, DCPS issued an interim services authorization to the parents, which authorizes special education and related services for Student, at the parents' home, but did not offer an aide or a therapeutic residential environment.

Petitioner alleges in the stay-put motion that Student's discharge from CSAAC is a fundamental change in placement, as it has removed Student from the least restrictive environment (LRE) that all agree is necessary for Student to benefit from special education services and DCPS has not offered comparable services for him. Petitioner contends that if an RTC placement is not immediately available, then DCPS or OSSE must approximate that environment as closely as it can.

In their joint response in opposition to Petitioner's motion for a stay-put injunction, DCPS and OSSE assert, (a) Student's discharge from CSAAC did not effect a change in placement but was a change in location; (b) DCPS has not violated the IDEA in responding to the Student's discharge from CSAAC by

authorizing interim services similar to the services identified by his IEP and (c) Petitioner's motion for a "Stay Put" order is moot as Student was involuntarily discharged from CSAAC against the wishes of both the parents and DCPS.

Analysis

The stay-put provision of the IDEA, 20 U.S.C. § 1400, *et seq.*, provides, in relevant part:

> Except as provided in subsection (k)(4), 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). This subsection provides that when parents of a disabled student challenge a change in his "educational placement," the agency must maintain the student in his current educational placement "through both administrative and judicial proceedings, including an appeal from an administrative decision following a due process hearing." *Douglas v. District of Columbia*, 4 F. Supp. 3d 1, 2 (D.D.C. 2013) (citing *Dist. of Columbia v. Vinyard*, 901 F.Supp.2d 77, 83 (D.D.C.2012)).

As U.S. District Judge Kollar-Kotelly explained in *Z.B. by & through Sanchez v. District of Columbia*, 382 F. Supp. 3d 32, 42 (D.D.C. 2019), *aff'd sub nom. Sanchez v. District of Columbia*, 815 F. App'x 559 (D.C. Cir. 2020),

> The IDEA does not define "educational placement." But, courts have interpreted educational placement to go beyond the specific

> location of the school at which the student is enrolled. [I]n order to constitute a change in educational placement, the change must "must identify, at a minimum, a fundamental change in, or elimination of a basic element of the education program." *Lunceford v. District of Columbia Bd. of Educ.*, 745 F.2d 1577, 1582 (D.C. Cir. 1984). Accordingly, a change in the location of the student's school will not constitute a change in educational placement unless it is accompanied by a fundamental change in or elimination from the student's education program.

Z.B., 382 F. Supp. 3d at 42 (citations and internal quotations omitted.)

Student's March 29, 2021 DCPS IEP provides, *inter alia*, that

> [Student] is unable to attend school with general education peers due to the need for a highly structured educational and residential environment, with 1:1 supervision and a highly structured behavioral intervention program.

Stay-Put Motion, Exhibit D. For purposes of this say-put motion, I find, based upon the March 29, 2021 IEP, that Student's current educational placement is a residential educational environment, with 1:1 supervision and a highly structured behavioral intervention program.

I find unpersuasive DCPS' and OSSE's defenses that Student's discharge from CSAAC did not effect a change in placement or that authorizing interim at-home services similar to the services identified by Student's IEP is not a fundamental change in, or elimination of a basic element of the "highly

structured educational and residential environment" prescribed in the DCPS March 29, 2021 IEP. Clearly, DCPS's interim services plan does not offer a highly-structured educational and residential environment, which, according to the IEP is Student's least restrictive environment.

Nor is Petitioner's stay-put motion moot because Student was involuntarily discharged from CSAAC against the wishes of both the parents and DCPS. A case, is "not moot so long as any single claim for relief remains viable, whether that claim was the primary or secondary relief originally sought." *Ramer v. Saxbe*, 522 F.2d 695, 704 (D.C.Cir.1975). In his motion, Petitioner seeks an injunction requiring DCPS and OSSE to maintain Student's current educational placement in a RTC or to provide "truly comparable services" until an RTC is found. Assuming it is correct that there is no placement for Student currently available at a suitable RTC, Petitioner's continuing claim for a stay-put placement at an RTC is no less viable.

The Fourth Circuit Court of Appeals' decision in *Wagner v. Bd. of Educ. of Montgomery Cty.*, 335 F.3d 297 (4th Cir. 2003) is instructive in this case. In *Wagner*, an autistic child was receiving at-home Lovaas therapy pursuant to an IEP prepared by the Maryland local education agency (LEA). Trouble arose when the Lovaas service provider identified in the IEP, Community Services for Autistic Adults and Children, stopped providing services to the child. The Maryland school board proposed a new IEP and the parents commenced due process proceedings, challenging the proposed IEP. While those proceedings were ongoing, the parents also sought a stay-put injunction in the U.S. District Court. The

District Court reasoned that because the child's current placement was unavailable due to the unwillingness of the service agency to provide services, the LEA was required to propose an alternative, equivalent placement to satisfy the IDEA's "stay put" provision.

Overturning the District Court, the Fourth Circuit held that the lower court erred in concluding that, upon a finding of unavailability of the then-current educational placement, it should, pursuant to the IDEA's stay-put provision, seek out alternative placements by ordering the LEA to propose such. The Circuit Court held that, in those cases where "the then-current placement is functionally unavailable," the parents may not benefit from a stay-put injunction under 20 U.S.C. § 1415(j). *Wagner* at 302.

In the present case, for purposes of this stay-put motion, I find that Student's current residential placement is functionally unavailable due to the unilateral decision of CSAAC, against the wishes of both the parents and DCPS, to discharge Student, effective October 31, 2021. Nor does Petitioner dispute that DCPS and OSSE have, to date, been unable to locate another appropriate RTC as required by Student's IEP. Following the persuasive authority of the *Wagner* decision, I find that because CSAAC or another appropriate RTC for Student is not immediately available, Petitioner is not entitled to a stay-put order to maintain Student in his then-current educational placement.[2]

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[2] In *Wagner,* the Fourth Circuit pronounced that "[i]n those cases where the then-current placement is functionally unavailable, the fact that parties such as the Wagners may not benefit from a [stay-put] injunction does not mean that they are

Order

Petitioner's Motion for an Automatic Stay-put Injunction is denied.

IT IS SO ORDERED.

Date: November 10, 2021 /s/ Peter B. Vaden
Hearing Officer

Hearing Officer Contact Information:

Peter B. Vaden
Peter.Vaden@dc.gov
Telephone: 434-923-4044

Copies by email to:

Charles Moran, Esq.; Diana M. Savit, Esq.
Quinne Harris-Lindsey, Esq.
Laurie Wilkerson, Esq.
Office of Dispute Resolution
OSSE Division of Specialized Education

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without remedy. First, [20 U.S.C. section 1415(j)] allows the parties to effect a change in placement simply by agreeing upon the new placement. See 20 U.S.C. § 1415(j) (providing that the child shall remain in the then-current educational placement 'unless the State or local educational agency and the parents otherwise agree'). Second, when agreement cannot be reached, a party may seek a preliminary injunction from the district court, changing the child's placement. Under section 1415(i)(2)(B)(iii), the district court is empowered '[i]n any action brought under this paragraph' to 'grant such relief as the court determines is appropriate.' *Id.* § 1415(i)(2)(B)(iii)."

Wagner v. Bd. of Educ. of Montgomery Cty., 335 F.3d 297, 302 (4th Cir. 2003).

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
1050 First Street, NE, 3rd Floor
Washington, DC 20002

STUDENT,[1] an Adult Student, by and through Attorneys-in-Fact,	)	Date Issued: March 25, 2022
Petitioner,	)	Hearing Officer: Peter Vaden
v.	)	Case No: 2021-0175
DISTRICT OF COLUMBIA PUBLIC SCHOOLS and	)	Online Video Conference Hearing
D.C. OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION,	)	Hearing Dates: March 7, 8 and 11, 2022
Respondents.	)	

HEARING OFFICER DETERMINATION

[1] Personal identification information is provided in Appendix A.

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (STUDENT), by his/her attorneys-in-fact (PARENTS) under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq*., and Title 5E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In his/her due process complaint, Student alleges that Respondents District of Columbia Public Schools (DCPS) and the D.C. Office of the State Superintendent of Education (OSSE) have denied him/her a free appropriate public education (FAPE) since receiving notice of Student's discharge by RESIDENTIAL TREATMENT CENTER 2 (RTC-2) on October 1, 2021.

Petitioner's Due Process Complaint, filed on October 28, 2021, named DCPS and OSSE as Respondents. The undersigned hearing officer was appointed on October 28, 2021. Also on October 28, 2021, Petitioner filed a motion for an expedited hearing and a motion for an "Automatic Stay Put Injunction." By orders issued November 11, 2021, I denied both motions. On November 9, 2021, OSSE filed a motion to be dismissed as a respondent party. I denied OSSE's motion by order issued November 17, 2021.

My final decision in this case was originally due by December 12, 2021 as to OSSE and by January 11, 2022 as to DCPS. By order issued December 8, 2021, I granted OSSE's motion to align the final decision dates for OSSE and DCPS. By orders issued January 3, 2022 and February 15, 2022, I granted the

respective continuance motions of DCPS and Petitioner to extend the final decision due date, ultimately to April 1, 2022.

Instead of holding a resolution session meeting, the parties agreed to try to resolve their dispute through mediation before an Office of Dispute Resolution (ODR) mediator. On February 7, 2022, ODR informed the hearing officer that those efforts had not produced a settlement.

On January 3, 2022, I convened a telephone prehearing conference with counsel to set the hearing date, identify the issues to be determined and address other prehearing concerns. Following the prehearing conference, I issued a written prehearing order.

On February 28, 2022, Petitioner filed a motion for partial summary disposition, which I denied by order issued March 4, 2022.

The due process hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on March 7, 8, and 11, 2022. With consent of the Petitioner, the due process hearing was held on line and recorded, using the Microsoft Teams video conference platform. FATHER and MOTHER appeared on line for the hearing and were represented by PETITIONER'S COUNSEL and PETITIONER'S COCOUNSEL. Respondent DCPS was represented by RESOLUTION SPECIALIST and by DCPS' COUNSEL. Respondent OSSE was represented by SPECIAL PROGRAMS MANAGER and by OSSE'S COUNSEL. Petitioner's Counsel and OSSE'S Counsel made opening statements. DCPS' Counsel waived making an opening.

Petitioner called as witnesses Mother, Father, Tutoring Manager, Special Programs Manager,

PRIVATE OCCUPATIONAL THERAPIST (OT), EDUCATIONAL CONSULTANT and SPECIAL EDUCATION ATTORNEY. DCPS called as witnesses RESOLUTION TEAM DIRECTOR and Resolution Specialist. OSSE called Special Programs Manager as its only witness. Petitioner's Exhibits P-1 through P-69 were admitted into evidence, with the exceptions of Exhibit P-22 which was withdrawn, and Exhibits P-4, P-10, P-16, P-49, P-50 and P-66 through P-68, to which I sustained OSSE's and/or DCPS' objections. DCPS' Exhibits DCPS-1, DCPS-2 (pages 35, 36, 37 and 39 through 50 only) and DCPS-4 through DCPS-18 were admitted into evidence, including Exhibits DCPS-2 and DCPS-6 admitted over Petitioner's objection. DCPS Exhibit 3 was withdrawn. OSSE's Exhibits OSSE-1 through OSSE-18 were all admitted into evidence over Petitioner's objection.

At the conclusion of Petitioner's case-in-chief, DCPS made an oral motion for a directed finding, in which OSSE joined. I denied the motion on the record.

After the taking of the evidence, counsel for DCPS requested leave to file written closings by March 18, 2022, which request I granted over Petitioner's objection. Petitioner, and DCPS and OSSE jointly, timely filed written closings.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The issues for determination in this case, as certified in the January 3, 2022 Prehearing Order, are:

A. Was the student's fall 2021 discharge from RTC-2 a change in placement within the meaning of the IDEA?

B. Did DCPS and/or OSSE violate IDEA and deny the student a FAPE by failing to respond appropriately to the student's discharge from RTC-2, including by failing to provide a placement comparable to the residential treatment center required by the student's IEP?

C. What services comparable to those specified in the student's IEP should be provided by DCPS and/or OSSE until the student is accepted by a new residential treatment center?

D. Should DCPS and/or OSSE be ordered to provide services comparable to those required by the student's IEP until a new residential treatment center is identified for him/her, or to develop a placement for the student if an existing residential center does not accept him/her within a reasonable time?

For relief, Petitioner requested that the hearing officer order DCPS or OSSE, as appropriate, to keep the student in a safe and appropriate location, and provide his/her IEP services while a new residential center is sought; alternatively, order DCPS or OSSE, as appropriate, to create an environment capable of implementing Student's IEP; and order DCPS or OSSE, as appropriate, to develop an interim plan to provide services comparable to those required by the student's IEP, in an appropriate and safe location, until a place can be secured for him/her in an appropriate residential center or an appropriate environment is created for him/her. Petitioner also

seeks an award of compensatory education for the denials of FAPE alleged in the complaint.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE adult, is a resident of the District of Columbia. At the time of the due process hearing, Student was living at his/her parents' home in the District. Testimony of Mother. Student is eligible for special education under the disability classification Multiple Disabilities (MD), based on a combination of concomitant Autism Spectrum Disorder (ASD) and Other Health Impairments (OHI) impairments. Exhibit P-19. As a result of decisions in prior due process cases, Student will remain eligible under the IDEA until at least 2024. Hearing Officer Notice.

2. Student's DCPS Individualized Education Program (IEP) was last reviewed on or about March 29, 2021 (March 2021 IEP). This IEP concluded that, given the severity of Student's disability challenges, Student is "unable to attend school with general education peers" and needs "a highly structured educational and residential environment, with 1:1 supervision and a highly structured behavioral intervention program." The March 2021 IEP also provided, *inter alia*, for the following services:

- 1:1 dedicated aide for 8 hours per day
- Specialized instruction for 22.5 hours per week
- Speech/Language therapy for 360 minutes per month

- Occupational therapy for 720 minutes per month
- Behavioral support services for 720 minutes per month

Exhibit P-19. In the Present Levels of Performance section of the Emotional, Social and Behavioral Development area of concern, the IEP states that because of aggressive and self-injurious behaviors, Student requires 2 dedicated staff to maintain his/her safety and the safety of others. *Id.*

3. For the 2019-2020 school year, Student was placed by OSSE at RTC-1, a residential treatment center that does not maintain an OSSE Certificate of Approval (COA), after no OSSE-approved residential school accepted Student for admission. On or about April 4, 2020, RTC-1 discharged Student because it had determined that it could no longer service him/her. Exhibit P-45 (Declaration of Special Programs Manager).

4. In August 2020, OSSE and DCPS secured a residential school placement for Student at RTC-2 in Maryland. Exhibit P-45. At RTC-2, Student initially shared a townhouse residence with two other students, each of whom had a dedicated aide. Student experienced verbal and physical aggression with the other students. After Student came down with the COVID-19 virus, RTC-2 moved Student to a townhouse by him/herself, assisted by two aides. During the day at RTC-2, there were 2 aides exclusively for Student. In the evening Student had a 1:1 aide. After COVID-19 restrictions were imposed, the Parents would take Student out in the community every Sunday for outings. Testimony of Mother.

5. On October 1, 2021, RTC-2 provided email notice to DCPS of its decision to discharge Student and proposed a discharge date of October 31, 2021. This was a unilateral RTC-2 decision. The discharge decision was not made by Student's IEP team, DCPS, or OSSE. On October 4, 2021, DCPS provided the notice of upcoming discharge to OSSE. Exhibit P-45.

6. Resolution Director contacted the director of RTC-2 to see if it would be possible for Student to remain at the residential center beyond October 31, 2021. The RTC-2 director said that their discharge date was firm. Testimony of Resolution Director. At the request of the parent, DCPS sent an email to the director on October 21, 2021, to request again that RTC-2 extend the discharge date. On October 25, 2021, the Director once again declined to extend the discharge date. Exhibit P-45.

7. On October 6, 2021, OSSE convened a virtual meeting with the Parents, DCPS and RTC-2 representatives to discuss possible ongoing residential placement locations for Student. Testimony of Resolution Director. At the meeting, the participants discussed the fact that OSSE-approved residential treatment centers, which serve students in the same age group and disability classification as Student, had all previously denied Student admission (some multiple times) and that it would be best to move forward with making referrals to residential programs outside of OSSE's approved list. Exhibit P-45.

8. On October 7, 2021, OSSE sent referrals for Student to 8 residential centers. None of these programs accepted Student. Since then, OSSE has continued to make referrals to or contact residential programs about placing Student. Altogether, since

October 2021, Special Programs Manager has contacted over 30 residential schools seeking a placement location for Student. Of these schools, at least 20 to 23 did follow-ups and Special Programs Manager sent them application packets for Student, including educational records. None of these programs has accepted Student. As of the due process hearing date none of the programs, to which referral packets were sent, was still reviewing Student for possible admission. Testimony of Special Programs Manager, Exhibit P-45. The Parents have also done whatever they could to identify an ongoing residential location for Student, without success. Testimony of Father.

9. The contacted residential programs have given various reasons for not accepting Student. These reasons included not accepting out-of-state students, lack of appropriate staff, the severity of Student's behaviors, the unsuitability for Student of dorm-style housing or roommates, Student's age and extended IDEA eligibility and the programs' unwillingness to provide IEP services through age 24. Testimony of Special Programs Manager.

10. OSSE continues to hold weekly placement meetings for Student to hear what placement options team members are looking at. Testimony of Special Programs Manager.

11. On November 1, 2021, the Parents picked up Student from RTC-2. The Parents were highly concerned about bring Student back to their home because of concerns for Student's safety and the impact on Student's sibling. As a short-term solution, the Parents housed Student, at their own expense, at a residential hotel (HOTEL 1) in Virginia beginning November 1, 2022, where Student remained for about

2 months. At Hotel 1, Student was at all times with a parent or a caregiver. Following several behavior incidents, including Student's pulling the hotel fire alarm 2 or 3 times, the Hotel 1 management required Student to leave. Testimony of Father.

12. After being "evicted" from Hotel 1, the Parents housed Student at Hotel 2, another residential hotel in Virginia. After 2-3 weeks, on or about January 17, 2022, following another fire alarm incident which involved a police response, the Hotel 2 management required Student to leave. From Hotel 2, the Parents took Student directly to DISTRICT HOSPITAL's emergency psychiatric unit, where Student remained for a week. Testimony of Father.

13. District Hospital staff attempted, without success, to find a healthcare facility that would admit Student for a short term stabilization period. Testimony of Mother. On January 24, 2022, District Hospital discharged Student to the Parents' care. Since then, Student has lived at the Parents' home. Testimony of Father, Exhibit P-38.

14. At the Parents' home, the Parents have set up a bed and television for Student in their basement in order to provide some separation from Student's sibling and the parents. On a typical day, Father gets Student up in the morning and starts with the learning set-up. Student's aide arrives around 10:00 a.m. Mother helps with the learning program and lunch. Father relieves Mother around 4:00 p.m. The aide leaves around 6:00 p.m. Father then stays with Student until Student goes to sleep. Testimony of Father, Testimony of Mother.

15. By the third week of October 2021, when it became evident that OSSE would not be able to

identify another residential treatment center for Student to move to, after he/she was discharged from RTC-2, DCPS developed an interim services authorization for Student. The October 21, 2021 authorization authorized the Parents to obtain interim independent services for Student, beginning November 1, 2021, to include:

> Tutoring – maximum of 22.5 hours per week, including weekends at $65.00 per hour
>
> Behavior support services – maximum of 4 hours per week, including weekends at $125 per hour
>
> Counseling – 4 hours per month at $90.00 per hour
>
> Speech-language pathology – 10 hours per month at $109.43 per hour
>
> Occupational therapy (OT) – 12 hours per month $130.38 per hour.

On November 9, 2021, DCPS revised the interim services authorization to add a provision for a Dedicated Aide – maximum of 8 hours per day at $40.00 per hour. Beginning December 1, 2022, maximum allowed costs were increased for Tutoring to $71.90 per hour and for Speech-Language Pathology to $114.10 per hour. Since November 2021, DCPS has renewed the independent services authorizations for Student on a month to-month basis. Testimony of Resolution Specialist, Exhibits DCPS-7, DCPS-8.

16. As of the due process hearing date, much of the DCPS authorized interim independent services for Student by DCPS remain unused. The Parents have used the OT hours, Dedicated Aide hours and a

small part of the Tutoring hours. According to Mother, without the support of a therapeutic residential environment, Student does not have the "bandwidth" to handle more services. Due to Student's behavioral challenges, driving Student to locations for more services is not practicable for the Parents. The Parents have not yet submitted a reimbursement request to DCPS for dedicated aide services. Testimony of Mother.

17. Tutoring Manager has set up a total of approximately 70.5 hours of tutoring services for Student since November 1, 2021 and has billed DCPS for those services. DCPS has not yet paid for the tutoring services. Testimony of Tutoring Manager. Private OT has provided occupational therapy services to Student and has billed DCPS monthly. DCPS has not yet paid Private OT's invoices. Testimony of Private OT.

18. On October 28, 2021, Resolution Director informed the Parents by email that Student could receive interim services through DCPS' "Virtual Academy" at CITY SCHOOL 1. Resolution Director wrote that in that setting, Student would receive online services in City School 1's virtual Communications and Education Support (CES) classroom, a virtual dedicated aide and related services as closely aligned to Student's IEP as possible. Exhibit P-28. Mother did not follow through on the Virtual Academy proposal because she considered that with Student's behavior challenges, streaming into a virtual classroom at City School 1 was not a viable solution. Testimony of Mother.

19. On November 2, 2021, while the instant due process case was pending, Petitioner sought relief in the U.S. District Court for the District of Columbia

(Case 1:21-cv-02884-RJL), seeking a Temporary Restraining Order and a Preliminary Injunction under the IDEA's stay-put provision, 20 U.S.C. § 1415(j). On November 19, 2020, U.S. District Judge Richard J. Leon issued an order denying Petitioner's motions. Exhibit DCPS-1.

CONCLUSIONS OF LAW

Based upon the above findings of fact and argument of counsel, as well as this hearing officer's own legal research, my conclusions of law are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, Student in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. For the issues in this case, Petitioner has the burden of persuasion. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

A. Was Student's fall 2021 discharge from RTC-2 a change in placement within the meaning of the IDEA?

On or about October 31, 2022, RTC-2 unilaterally discharged Student from its residential treatment

center. DCPS and OSSE both opposed the discharge. Petitioner apparently raised this issue—whether Student's discharge from RTC-2 amounted to a change in Student's educational placement—in support of his/her motion for a stay-put injunction. *See* 34 C.F.R. § 300.518(a). ("[D]uring the pendency of any administrative or judicial proceeding . . . unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.") Early on in this proceeding, I determined that Student was not entitled to a stay-put order. *See* Decision and Order on Petitioner's Motion for Stay-Put Injunction, November 10, 2021. In the U.S. District Court action, Case 1:21-cv-02884-RJL, U.S. District Judge Leon denied Petitioner's motion for a temporary restraining order and a preliminary injunction based on the IDEA's stay-put provision. Whether RTC-2's discharge of Student was a change in placement has no bearing of the remaining issues to be decided in this case and I decline to revisit the question.

B. Did DCPS and/or OSSE violate IDEA and deny Student a FAPE by failing to respond appropriately to the student's discharge from RTC-2, including by failing to provide a placement comparable to the residential treatment center required by the student's IEP?

Student's most recent DCPS IEP, updated on or about March 29, 2021 (the March 2021 IEP) provided, *inter alia*, that given the severity of Student's disability challenges, Student was "unable to attend school with general education peers" and needed "a

highly structured educational and residential environment, with 1:1 supervision and a highly structured behavioral intervention program." In the present levels of performance section of the IEP Emotional, Social, and Behavioral Development area of concern, the IEP team also noted that because of aggressive and self-injurious behaviors, Student "requires 2 dedicated staff to maintain [his/her] safety and the safety of others."

Since August 2020, DCPS and OSSE had placed Student at RTC-2, a residential treatment center in Maryland. The parents were apparently satisfied with this placement. However, on October 1, 2021, RTC-2 unilaterally notified DCPS that it intended to discharge Student from its program on October 31, 2021. When neither DCPS nor OSSE was able to dissuade RTC-2 from discharging Student, the Parents moved Student out of RTC-2 on November 1, 2021.

Since receiving RTC-2's October 1, 2021 discharge notice, DCPS and OSSE have not been able to secure Student's admission to another residential center. Petitioner contends that DCPS' and OSSE's failure to provide a comparable residential treatment center for Student after October 31, 2021 was a denial of FAPE. DCPS and OSSE maintain that since receiving RTC-2's October 1, 2021 discharge notice, the agencies have done everything they can to find another suitable residential treatment center for Student and their inability, to date, to provide a comparable placement is beyond their control.

Courts in this jurisdiction and in other judicial circuits have recognized that there may be situations in which implementation of a student's IEP, as written, has become impracticable or impossible.

See, e.g., *Brown v. Dist. of Columbia*, Case No. 117CV00348RDMGMH, 2019 WL 3423208, at *16 (D.D.C. July 8, 2019); *John M. v. Bd. of Educ. of Evanston Twp. High Sch. Dist. 202,* 502 F.3d 708, 715 (7th Cir. 2007); *Tindell v. Evansville-Vanderburgh Sch. Corp.*, No. 309CV00159SEBWGH, 2010 WL 557058, at *4 (S.D. Ind. Feb. 10, 2010); *Worthington City Sch. Dist. Bd. of Educ. v. Moore*, No. 2:20-CV-3155, 2020 WL 4000979, at *5 (S.D. Ohio July 15, 2020).

In certain situations, the school district's delay in implementing an IEP is not, ipso facto, a denial of FAPE. As the Second Circuit Court of Appeals explained in *D.D. ex rel. V.D. v. New York City Bd. of Educ.*, 465 F.3d 503 (2d Cir. 2006), *opinion amended on denial of reh'g*, 480 F.3d 138 (2d Cir. 2007), the hearing officer must make a specific inquiry into the causes of the delay:

> Plaintiffs' right to a free appropriate public education requires that their IEPs be implemented as soon as possible. "As soon as possible" is, by design, a flexible requirement. It permits some delay between when the IEP is developed and when the IEP is implemented. It does not impose a rigid, outside time frame for implementation. Moreover, the requirement necessitates a specific inquiry into the causes of the delay. Factors to be considered include, but are not limited to: (1) the length of the delay, (2) the reasons for the delay, including the availability of the mandated educational services, and (3) the steps taken to overcome whatever obstacles have delayed prompt implementation of the IEP.

D.D., *supra* at 513-14.

Since Student returned from RTC-2 on November 1, 2021, a period now approaching five months, DCPS and OSSE have not identified another residential treatment center for the student. The critical factor behind this delay in implementation is, of course, the unwillingness or inability of any identified residential treatment center to admit Student. The record is clear that DCPS and OSSE have worked diligently to overcome this obstacle. Altogether, beginning a few days after RTC-2 notified DCPS that it was discharging Student, OSSE reached out to over 30 residential schools, and sent follow-up application packets to at least 20 to 23 of those programs which responded. OSSE looked for residential programs outside of OSSE's list of approved schools because most of the OSSE-approved programs had already denied admission to Student in the past. Unfortunately, for various reasons, including Student's age and extended eligibility entitlement and his/her severe behavior challenges, none of the residential treatment centers which OSSE contacted has accepted Student for admission. OSSE's efforts to find a residential placement for Student are ongoing.

Taking account of the apparent lack of near-term availability of residential treatment centers for Student and the diligent efforts by OSSE to overcome that obstacle, I conclude that OSSE and DCPS have demonstrated that they have not failed to implement Student's IEP "as soon as possible." *See* 34 C.F.R. § 300.323(c)(2). *Cf. Schiff v. Dist. of Columbia*, No. 18-CV-1382 (KBJ), 2019 WL 5683903, at *8 (D.D.C. Nov. 1, 2019) ("District asked ten schools whether they would accept Mr. McDowell, which is

indeed 'prompt' and appropriate action given difficult circumstances.") I find that Petitioner has not met his/her burden of persuasion that OSSE or DCPS has failed to respond appropriately to Student's discharge from RTC-2 or that the agencies' inability, to date, to provide a placement for Student, comparable to the residential treatment center required by Student's March 2021 IEP, amounts to a denial of FAPE.

C. What services comparable to those specified in the student's IEP should be provided by DCPS and/or OSSE until the student is accepted by a new residential treatment center?

D. Should DCPS and/or OSSE be ordered to provide services comparable to those required by the student's IEP until a new residential treatment center is identified for him/her, or to develop a placement for the student if an existing residential center does not accept him/her within a reasonable time?

Petitioner contends that until the respondents identify another residential placement for Student they are obliged to provide services comparable to those specified in the March 2021 IEP. DCPS and OSSE argue, on brief, that the IDEA does not require either agency to provide comparable services while the Student is awaiting a location assignment to a new residential treatment center. I disagree with the respondents.

In *Brown v. Dist. of Columbia*, *supra*, U.S. Magistrate Judge G. Michael Harvey addressed the situation where according to DCPS, a student's incarceration in federal prison made implementation

of the student's IEP impracticable. Magistrate Judge Harvey pronounced that where implementation of a student's IEP has become impracticable or impossible, "the school district has an obligation to 'provide educational services that approximate the student's . . . IEP as closely as possible.'" *Brown* at *16, n. 18 (citing *John M.*, *supra*, 502 F.3d at 714-15.) Following the guidance in *Brown*, I find that in the present case, when it became impossible to implement without interruption Student's IEP requirement for a residential placement, DCPS was required to provide services that would approximate the other aspects of the March 2021 IEP "as closely as possible."

To its credit, when DCPS recognized that OSSE would not be able to identify another residential treatment center for Student in time for his/her October 31, 2021 discharge from RTC-2, DCPS promptly offered funding for the Parents to obtain "interim independent services" for Student, including tutoring, behavior support services, counseling, speech-language pathology and OT. On November 9, 2021, DCPS added a daytime dedicated aide to the independent services authorization. But, by providing funding for the Parents to obtain IEP services instead of providing services directly to Student, DCPS effectively shifted its burden of providing Student's FAPE to the parents.

Mother testified credibly that to ensure Student received some interim special education and related services after he/she returned from RTC-2, she has been laboring "24/7," providing services required by Student's IEP, including hiring providers, coordinating services, serving as a second aide, interpreting Student's speech for the teacher, and providing transportation. The IDEA places

responsibility for providing these services on DCPS, not the Parents. *See, e.g.*, *Matthew J. v. Massachusetts Dep't of Educ.*, 989 F. Supp. 380, 393 (D. Mass. 1998) (Local Education Agency unequivocally bears the responsibility for compliance with the IDEA, not the parents); *Stanley C. v. M.S.D. of SW. Allen Cty. Sch.*, 628 F. Supp. 2d 902, 949 (N.D. Ind. 2008) (Responsibility for ensuring that a disabled student receives a FAPE resides with the school district, not the parents); *Rizio v. Dist. of Columbia*, No. CV 21-0597 (ABJ), 2022 WL 59391, at *7 (D.D.C. Jan. 6, 2022) (IDEA places obligation to offer a FAPE on the District, not on parents.) I conclude that DCPS denied Student a FAPE after October 31, 2021 by not, itself, providing the student services that would approximate the March 2021 IEP "as closely as possible."

Under District of Columbia law, OSSE is responsible for identifying and paying the costs for a residential treatment center for Student to attend. *See* D.C. Code § 38–2561.03(a), (c). But pending Student's admission to another residential facility, DCPS as Student's LEA, not OSSE, is charged with providing IEP services to Student. I find that OSSE cannot be held responsible for DCPS' failure, after October 31, 2021, to provide services to Student to approximate the March 2021 IEP. *Cf. Chavez ex rel. M.C. v. New Mexico Public Educ. Dept.*, 621 F.3d 1275, 1283 (10th Cir. 2010) (Absent a determination that SEA was providing direct services to student, SEA was not responsible for the matters covered by due process hearings.)

Remedy

In this decision, I have found that DCPS has denied Student a FAPE by not providing him/her

appropriate services to approximate the March 2021 IEP following Student's discharge from RTC-2. When a hearing officer finds that a school district has failed to provide a student with a FAPE, he has "broad discretion" to fashion an appropriate remedy. *See, e.g.*, *Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C.Cir.2015), citing *Florence County School District Four v. Carter*, 510 U.S. 7, 15–16, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993). Following the guidance in *Brown v. Dist. of Columbia*, *supra*, for so long as it remains impossible or impracticable for OSSE to place Student in an appropriate residential center, I will order DCPS to ensure that Student is provided some form of a special education day program, reasonably calculated to approximate the other requirements of Student's IEP as closely as possible.

I deny Petitioner's request that DCPS be ordered to "develop a placement" if an existing residential center does not accept Student within a reasonable time. DCPS and OSSE must continue their diligent efforts to find an appropriate location of services for Student. But the IDEA does not require that DCPS or OSSE start a new residential treatment center to implement Student's IEP. *Cf., Schiff*, *supra* at 8. (IDEA does not require "perfect compliance" in providing services to implement a child's IEP.)

The Parents also seek reimbursement from DCPS for their expenses to house student in residential hotels after Student returned from RTC-2 and for other expenses they have incurred. To the extent that DCPS has not authorized funding for special education and related services required by the March 2021 IEP, including a dedicated aide for 8 hours per day during the school day, DCPS must reimburse the

Parents for their expenses for those services specified in the IEP. With regard to hotel expenses, Petitioner has not cited, and I am not aware of any authority for requiring DCPS to pay for Student's residential hotel lodging after he/she returned to the District of Columbia.

Finally, it appears that OSSE has exhausted all of the residential placement possibilities for Student known to the agency. OSSE's nonpublic placement expert, Special Programs Manager, testified that there are currently no residential centers, which she has contacted, which are reviewing Student's admission packet. According to Educational Consultant, who qualified as an expert in special education needs of adult students, there are independent educational consultants who specialize in identifying residential treatment center options for hard-to-place adults, such as Student. Under my authority pursuant to 34 C.F.R. § 300.502(d)[2], I will order DCPS, in coordination with OSSE, to fund an Independent Educational Evaluation of Student by a qualified educational consultant to assess Student's residential treatment center requirements, to investigate potentially suitable residential programs not yet contacted by OSSE and to make recommendations to DCPS and OSSE as to specific residential facilities that would consider Student's application and be able to offer an appropriate residential setting and provide the services required by Student's IEP.

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[2] Requests for evaluations by hearing officers. If a hearing officer requests an independent educational evaluation as part of a hearing on a due process complaint, the cost of the evaluation must be at public expense. 34 C.F.R. § 300.502(d)

In the due process complaint, Petitioner also requested an award of compensatory education for Student. "[A]n award of compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *B.D. v. District of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016) (internal quotations and citations omitted.) Educational Consultant, who also qualified as Petitioner's compensatory education expert, recommended that Student's need for compensatory education be evaluated only after Student is successfully placed at another residential treatment facility. I find that recommendation to be well-founded and I will deny without prejudice Petitioner's request for compensatory education.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

1. Within 21 school days of the date of this decision, until such time as DCPS/OSSE, secure a placement for Student at a residential treatment center, DCPS shall ensure that Student is provided a temporary year-round special education day program to approximate as closely as possible the other requirements of the March 2021 IEP, as may be amended from time to time, including without limitation a highly structured educational environment with 1:1 supervision, a highly structured behavioral intervention program; a 1:1 dedicated aide for 8 hours per school day; specialized instruction for 22.5 hours per week; speech/language therapy for 360

minutes per month; occupational therapy for 720 minutes per month; behavioral support services for 720 minutes per month and school transportation. DCPS shall consider the Parents' views in selecting an appropriate location for these services, which may be, without limitation, a DCPS or other public facility, a nonpublic day school, another private entity or, with the Parents' consent, the Parents' home. If reasonably required to maintain Student's safety or the safety of others, DCPS must ensure that Student is provided a 1:2 student to staff ratio during all times in the day education program. To the extent that providing the temporary setting requires modification of Student's IEP, DCPS shall ensure that Student's IEP team is convened to review and revise the IEP as appropriate;

2. To the extent DCPS has not already authorized funding for such services, upon receipt of documentation which DCPS may reasonably require, DCPS shall promptly reimburse the Parents their reasonable costs for special education and related services required by the March 2021 IEP, which they have obtained for Student after October 31, 2021, including without limitation tutoring services, OT services, dedicated aides and Student's transportation to and from such services;

3. Within 21 school days of the date of this decision, subject to obtaining Petitioner's consent, DCPS, in consultation with OSSE shall procure an Independent Education Evaluation (IEE) by a qualified educational consultant, who is experienced in placing students with severe behavioral disabilities in residential treatment

facilities, to assess Student's residential facility needs, make residential treatment centers inquiries on Student's behalf and make recommendations to DCPS and OSSE on residential centers that would be able to provide the services required by Student's IEP and would be willing to consider Student for admission. In the event that OSSE identifies a suitable residential center location for Student in the meantime, DCPS may truncate performance of this IEE requirement;

4. Petitioner's request for compensatory education for the denial of FAPE found in this decision is denied without prejudice to his/her right to renew the request for compensatory education from DCPS after Student is placed in a residential treatment facility;

5. Petitioner's claims against OSSE herein are dismissed and OSSE is dismissed as party respondent, without relieving OSSE of its ongoing responsibility for identifying and paying the costs for a residential treatment center for Student to attend and

6. All other relief requested by the Petitioner herein is denied.

Date: March 25, 2022 s/ Peter B. Vaden
Peter B. Vaden,
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state

court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

cc: Counsel of Record
Office of Dispute Resolution
OSSE – SPED
DCPS Resolution Team
Nicholas.Weiler@k12.dc.gov
Josh.Wayne@k12.dc.gov

APPENDIX A

[omitted]

20 U.S.C. § 1415

§ 1415. Procedural safeguards

* * *

(b) Types of procedures

The procedures required by this section shall include the following:

(1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

(2)(A) Procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents, which surrogate shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child. In the case of—.

(i) a child who is a ward of the State, such surrogate may alternatively be appointed by the judge overseeing the child's care provided that the surrogate meets the requirements of this paragraph; and

(ii) an unaccompanied homeless youth as defined in section 11434a(6) of title 42, the local educational agency shall appoint a surrogate in accordance with this paragraph.

(B) The State shall make reasonable efforts to ensure the assignment of a surrogate not more than 30 days after there is a determination by the agency that the child needs a surrogate.

(3) Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency—

(A) proposes to initiate or change; or

(B) refuses to initiate or change,

the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

(4) Procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so.

(5) An opportunity for mediation, in accordance with subsection (e).

(6) An opportunity for any party to present a complaint—

(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and

(B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this subchapter, in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D)

shall apply to the timeline described in this subparagraph.

(7)(A) Procedures that require either party, or the attorney representing a party, to provide due process complaint notice in accordance with subsection (c)(2) (which shall remain confidential)—

(i) to the other party, in the complaint filed under paragraph (6), and forward a copy of such notice to the State educational agency; and

(ii) that shall include—

(I) the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;

(II) in the case of a homeless child or youth (within the meaning of section 11434a(2) of title 42), available contact information for the child and the name of the school the child is attending;

(III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(IV) a proposed resolution of the problem to the extent known and available to the party at the time.

(B) A requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements of subparagraph (A)(ii).

(8) Procedures that require the State educational agency to develop a model form to assist parents in filing a complaint and due process complaint

notice in accordance with paragraphs (6) and (7), respectively.

* * *

(f) Impartial due process hearing

(1) In general

(A) Hearing

Whenever a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(B) Resolution session

(i) Preliminary meeting

Prior to the opportunity for an impartial due process hearing under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint—

(I) within 15 days of receiving notice of the parents' complaint;

(II) which shall include a representative of the agency who has decisionmaking authority on behalf of such agency;

(III) which may not include an attorney of the local educational agency unless the parent is accompanied by an attorney; and

(IV) where the parents of the child discuss their complaint, and the facts that form the

basis of the complaint, and the local educational agency is provided the opportunity to resolve the complaint,

unless the parents and the local educational agency agree in writing to waive such meeting, or agree to use the mediation process described in subsection (e).

(ii) Hearing

If the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this subchapter shall commence.

(iii) Written settlement agreement

In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i), the parties shall execute a legally binding agreement that is—

(I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(II) enforceable in any State court of competent jurisdiction or in a district court of the United States.

(iv) Review period

If the parties execute an agreement pursuant to clause (iii), a party may void such agreement within 3 business days of the agreement's execution.

(2) Disclosure of evaluations and recommendations

(A) In general

Not less than 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date, and recommendations based on the offering party's evaluations, that the party intends to use at the hearing.

(B) Failure to disclose

A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) Limitations on hearing

(A) Person conducting hearing

A hearing officer conducting a hearing pursuant to paragraph (1)(A) shall, at a minimum—

(i) not be—

(I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or

(II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) possess knowledge of, and the ability to understand, the provisions of this chapter, Federal and State regulations pertaining to this chapter, and legal interpretations of this chapter by Federal and State courts;

(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(B) Subject matter of hearing

The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.

(C) Timeline for requesting hearing

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

(D) Exceptions to the timeline

The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to—

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

(E) Decision of hearing officer

(i) In general

Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

(iii) Rule of construction

Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

(F) Rule of construction

Nothing in this paragraph shall be construed to affect the right of a parent to file a complaint with the State educational agency.

* * *

(i) Administrative procedures

(1) In general

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2).

(B) Decision made at appeal

A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2).

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

(B) Limitation

The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this subchapter, in such time as the State law allows.

(C) Additional requirements

In any action brought under this paragraph, the court—

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees

(i) In general

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—

(I) to a prevailing party who is the parent of a child with a disability;

(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after

the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(ii) Rule of construction

Nothing in this subparagraph shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

(C) Determination of amount of attorneys' fees

Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services

(i) In general

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if—

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an

administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) IEP Team meetings

Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e).

(iii) Opportunity to resolve complaints

A meeting conducted pursuant to subsection (f)(1)(B)(i) shall not be considered—

(I) a meeting convened as a result of an administrative hearing or judicial action; or

(II) an administrative hearing or judicial action for purposes of this paragraph.

(E) Exception to prohibition on attorneys' fees and related costs

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees

Except as provided in subparagraph (G), whenever the court finds that—

(i) the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint described in subsection (b)(7)(A),

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees

The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j) Maintenance of current educational placement

Except as provided in subsection (k)(4), 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, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

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