No. 23-936

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

BRIEF OF *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES AND ADVOCATES FOR JUSTICE AND EDUCATION, INC. IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Council of Parent Attorneys and Advocates (COPAA**)** is a not-for-profit national organization for parents of children with disabilities, their attorneys, and advocates. While COPAA does not represent children with disabilities directly, it does provide resources, training, and information for parents, advocates, and attorneys to assist in obtaining the free appropriate public education such children are entitled to under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*. COPAA's attorney members represent children in IDEA matters. COPAA also supports individuals with disabilities, their parents, and advocates in attempts to safeguard the civil rights guaranteed to those individuals under other federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §1983) (Section 1983); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504); and the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* (ADA).

COPAA's interest in this case is its deep commitment to ensuring that all children with disabilities have equal access. Because of COPAA's concern for the rights of students with disabilities

[1] Pursuant to Rule 37.6, the undersigned certifies that: (A) there is no party, or counsel for a party who authored the amicus brief in whole or in part; (B) there is no party or counsel for a party who contributed money that was intended to fund preparing or submitting the brief; and (C) no person or entity contributed money that was intended to fund preparing or submitting the brief, other than *Amici* and their members. Counsel of record for all parties received notice of *Amici*'s intent to file at least ten days prior to this brief's due date. *See* Sup. Ct. R. 37.2(a).

and their parents and the experience of its members in advocating for their rights, COPAA offers a unique perspective. COPAA has previously filed amicus briefs in the United States Supreme Court in *Perez v. Sturgis Public Schools,* 143 S. Ct. 859 (2023); *Endrew F. v. Douglas County School District RE-1*, 580 U.S. 386 (2017); *Fry v. Napoleon Community Schools*, 580 U.S. 154 (2017); *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009); *Winkelman v. Parma City School District*, 550 U.S. 516 (2007); *Board of Education of New York v. Tom F.*, 552 U.S. 1 (2007); *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006); and *Schaffer v. Weast*, 546 U.S. 49 (2005); and in numerous other cases in the United States Courts of Appeal.

Advocates for Justice and Education, Inc. (AJE) is a nonprofit, nonpartisan organization in the District of Columbia dedicated to ensuring that children and youth, particularly those who have disabilities and special health care needs (including young adults), receive access to appropriate education and health services. AJE seeks to empower families, youth, and the community to be effective advocates in this regard, serving families of early-intervention-aged children (birth-age 3), school-aged children (ages 4-12), and transition-aged youth (ages 13-26).

Serving as the DC Parent Training and Information Center, AJE helps families in the District to effectively navigate a complex educational system while advocating for themselves in seeking to secure rights under IDEA. Unfortunately, navigating the system can be extraordinarily difficult and time consuming, often leaving students with disabilities and special health care needs without all the support they need to succeed and thrive in school; AJE is

there to help parents help their children, and to make IDEA a reality for all.

AJE has been a moving force for almost three decades in advocating for appropriate education and health care services for students with disabilities in the District of Columbia, serving students who attend DC Public Schools (DCPS), as well as the growing number of students who attend one of the District's many public charter schools. Often, AJE helps families advocate for Individualized Educational Plans ("IEPs") that provide sufficient support for students to be successful and have their unique needs fully accommodated (as required by IDEA). Also quite often, AJE helps ensure that IEPs are followed. And as part of these efforts, AJE helps families of students with the most significant disabilities needing the most extensive support to be able to be placed in residential treatment facilities as part of receiving an appropriate education.

SUMMARY OF ARGUMENT

IDEA's stay put requirement is a unique statutory protection created by Congress to protect students with disabilities, operating as an automatic injunction to maintain a student in the "then-current educational placement." 20 U.S.C. § 1415(j). Approximately 15% of public school students in the United States receive special education and/or related services under the Individuals with Disabilities Education Act (IDEA). Congress expressly included a stay put provision in IDEA to help ensure students in special education receive a continuous free, public education (even when the parents or the school dispute whether the placement provides a free appropriate public education (FAPE)). It is a critical provision that has

been undermined by the D.C. Circuit's decision to the detriment of a large and vulnerable population. The Supreme Court should grant certiorari for three primary reasons.

First, the Court should grant certiorari to protect Congressional intent in framing IDEA, both as reflected in its text and its legislative history. The text supports Petitioner's interpretation of a broad stay put requirement without exceptions. The legislative history supports this broad interpretation as well. Congress intended stay put to be applied broadly and the D.C. Circuit has done the opposite. The Court should take the case and interpret IDEA the way it was intended and written to be interpreted.

Second, there is a clear Circuit split here. This issue is fully addressed in the Petition, however, so will not be a focus of this amicus brief except for one point regarding why the Circuit split is important for the Court to resolve. Unlike other statutes protecting individuals with disabilities, including the ADA, IDEA did not include an exception for undue hardship or undue burden. Every student in special education under IDEA has a right to a FAPE. That is the deal a jurisdiction makes when it accepts IDEA funds. Yet the D.C. Circuit's decision essentially creates an impossibility or impracticality defense to stay put, not even requiring an attempt to maintain the pre-dispute situation as closely as possible as the Seventh, Ninth, and Eleventh Circuits require.

Third, the case will impact every school district in the United States and millions of students who receive special education services. The import of the case cannot be overstated. Stay put comes up frequently in cases handled by COPAA members and

AJE-DC. It is the protection that ensures a school district cannot change an IEP at will, but instead must fully adjudicate a contested claim before a change to an IEP goes into effect. This decision will have its greatest impact on students with the most severe disabilities as school districts often rely on private providers to serve such students. Under this decision, the school district has no obligation to create or find a comparable program if the student's IEP provides for a private program and the private program expels or otherwise terminates a student. As a result, school districts may let children languish without any educational program at all during the due process proceedings that this Court has described as "ponderous." *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985).

ARGUMENT

I. THE 'STAY PUT' PROVISION WAS CRAFTED TO PROVIDE BROAD PROTECTIONS FOR STUDENTS, AND SO A NARROWED INTERPRETATION IS INCONSISTENT WITH THE CONGRESSIONAL INTENT UNDERLYING THE STATUTE

The statute at issue in this litigation states that, "[e]xcept as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency otherwise agree, the child shall remain in the then-current educational placement of the child . . ." 20 U.S.C. § 1415(j). For children attending school for the first time, the statute provided that the child "with the consent of the parents" shall "be placed in the public school program. *Id.* Subsection (k)(4), enacted after the Court's decision in *Honig v. Doe*,

484 U.S. 305 (1988), provides for placement in an alternative educational setting in narrow circumstances. Even for children who carry weapons, knowingly possess or use illegal drugs, or inflict serious bodily harm, Congress required an interim alternative setting so that the student received continuous education. See 20 U.S.C. § 1415(k)(1)(G).

In enacting IDEA[2], Congress specifically provided for continuous education when the parents and school districts were involved in due process proceedings disputing placement, which it did to remedy the long-standing problems of students with disabilities being excluded from school. When Congress first enacted the statute, it had "ample evidence" that legislation was needed to ensure that all children with disabilities "have available to them . . . a free appropriate public education . . . and to assure that the rights of" children with disabilities "and their parents or guardians are protected." *Honig, 484* U.S. at 309. The Supreme Court noted that "one out of every eight of these children were excluded from the public-school system altogether, §1400(b)(4); many others were simply 'warehoused' in special classes or were neglectfully shepherded through the system until they were old enough to drop out." *Id.* (citing H.R. Rep. No. 94-332, p. 2 (1975)). The stay put provision was enacted as a critical element of the due process rights of children and their parents.

The legislative history underlying the 'stay put' provision precludes a narrow interpretation, which

[2] The statute's first name was the Education of the Handicapped Act (EHA), Pub. L. 101-476 § 901(a), 104 Stat. 1141. But "for simplicity's sake – and to avoid 'acronym overload,'" this brief uses IDEA throughout to refer to both EHA and IDEA. *See Endrew F.*, 580 U.S. at 392, n.1.

would conflict with the Congressional intent behind the statute. As this Court has noted, when the Act containing the provision was passed in 1975, "congressional studies revealed that better than half of the Nation's 8 million disabled children were not receiving appropriate educational services." *Id.* at 309. Congress was acting at a time when legislative assurances of a FAPE for children with disabilities were "sorely needed." *Id.* The specific impetus for the Act was two federal court decisions that arose from the efforts of parents of children with disabilities to prevent the exclusion and/or expulsion of their children from public schools. S. Rep. No. 94-168, p. 6, citing *Mills v. Board of Education of District of Columbia*, 348 F.Supp. 866 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971). In response, Congress passed the Education for All Handicapped Children Act, 1975 Pub. L. No. 94-142 (EHA), which emphasized the need for a free appropriate public education and related services designed to meet the unique needs of children with disabilities.

From the outset, IDEA contained the 'stay put' provision in question. The stay put right is a critical part of IDEA; it was included in the first iteration of the Act. *See Honig,* 484 U.S. at 324. The Supreme Court noted in *Burlington* that, "[w]here as in the present case review of a contested IEP takes years to run its course – years critical to a child's development – important practical questions arise concerning interim placement of the child and financial responsibility for that placement." *Burlington*, 471 U.S. at 361.

Importantly, stay put "functions as an 'automatic' preliminary injunction, meaning that the moving

party need not show the traditionally required factors (e.g., irreparable harm) in order to obtain preliminary relief." *Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036 (9th Cir. 2009); *see also Drinker ex rel Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864 (3d Cir. 1996). As the Third Circuit has noted, this provision "impacts to some degree virtually every case involving an administrative challenge under IDEA. A child's placement during the course of administrative and judicial review typically has great significance for all concerned." *Susquenita Sch. Dist. v. Raelee S. by Heidi S.,* 96 F.3d 78, 82 (3d Cir. 1996).

Congressional intent to prevent the exclusion of children with disabilities from school was recognized by this Court when it stated, "[w]e think at least one purpose of [the predecessor of § 1415(j)] was to prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings." *Burlington*, 471 U.S. at 373. This Court further recognized such intent by noting that the predecessor to § 1415(j), "demonstrates a congressional intent to strip schools of the *unilateral* (emphasis in original) authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school." *Honig*, 484 U.S. at 306. A narrow interpretation of the 'stay put' provision would permit a school to exclude a child from a public education—precisely what Congress intended to prevent. Such interpretation contradicts the statute, which any resolution of the Circuit split should grapple with. And just as a school cannot affirmatively remove a child from the regular public school classroom pending completion of the review proceeding, a school cannot circumvent the purpose of the provision by outsourcing the "public school

classroom" for certain students to private providers and then abdicating responsibility when the contractor closes the classroom down.[3]

Congress similarly sought to avoid disruption to a child's education, as circuit courts have long emphasized. *See Joshua A.*, 559 F.3d at 1040 ("[T]he 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."); *Olu-Cole v. E.L. Haynes Public Charter School*, 930 F.3d 519, 529 (D.C. Cir. 2019) ("It also must be remembered that the stay-put provision reflects Congress's considered judgment that children with disabilities are substantially harmed by and must be protected against school policies of unilateral disruption and exclusion. That presumably is why the statutory stay-put scheme requires no additional showing of harm by the individual student."). As this case is at odds with these important circuit court decisions, certiorari is warranted to resolve this dispute.

The title, text, and purpose of the statute reveal that Congress intended to ensure a FAPE for *all* students. The Circuit decision effectively interprets Congress's intent as excluding the very children who would likely be most in need of IDEA's protections, in

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[3] For example, the Massachusetts Bureau of Special Education has ruled that, under specific facts, such as when there is no alternative placement available, a private residential school is the stay-put placement and cannot terminate the student although modifications to the program may be required. *In re Student & Quincy Public Schools & League School of Greater Boston*, 121 LRP 38442 (Nov. 18, 2021).

spite of all evidence to the contrary. To any extent that a school is unable to provide a FAPE or contract with a third party to provide a FAPE, it must, at its own effort and expense, develop a solution.

As noted by this Court, "[t]he Act was intended to give [disabled][4] children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives." *Burlington*, 471 U.S. at 372. The statute does not limit its application to only those students whose needs are easily met. Indeed, as further noted by this Court, "[Congress] required participating States to educate *all* (emphasis in original) disabled children, regardless of the severity of their disabilities, 20 U.S.C. § 1412(2)(C), and included within the definition of eligible children those children with serious emotional disturbances. § 1401(1)." *Honig*, 484 U.S. at 324. To that end, the legislative history rejects the exclusion of children with severe disabilities whose needs are not easily met.

Ultimately, the 'stay put' provision is an automatic injunction that does not require the typical showing of irreparable harm or balancing of the equities because Congress determined that disrupting the education of students with disabilities causes irreparable harm. *See Joshua A.*, 559 F.3d at 1040 ("The fact that the stay put provision requires no specific showing on the part of the moving party, and no balancing of the equities by the court, evidences Congress's sense that there is a heightened risk of irreparable harm inherent in the premature removal of a disabled child . . . "); *See also Andersen by*

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[4] The terms handicapped and disabled are considered interchangeable. *Dadian v. Vill. of Wilmette*, 269 F.3d 831, 837 (7th Cir. 2001).

Andersen v. District of Columbia, 877 F.2d 1018 (D.C. Cir. 1989) ("If the provision applies, injunctive relief is available without the traditional showing of irreparable harm.").

In contrast, other statutes protecting individuals with disabilities, accept undue burden or hardship as a defense against compliance with the statute.[5] It is clear that Congress could have incorporated an undue burden or hardship defense against compliance with IDEA, it knows how to do so. The fact that it did not evidences that Congress intended *all* children to have continuous education regardless of the burden or expense on the school district. Likewise, it evidences that Congress did not intend an unstated undue burden exception to a stay-put injunction either.

[5] For example, in the Americans with Disabilities Act, Congress established that employers do not have to make a reasonable accommodation if it would cause an "undue hardship" on the operations of the employer's business. *See* Americans with Disabilities Act, 42 U.S.C. § 12112(b)(5)(A) (also providing an "undue burden" exception relating to public accommodations). Likewise, the Telecommunications Act of 1996 includes a similar exception which requires products and services to be accessible to people with disabilities to the extent access is "readily achievable." *See* Telecommunications Act of 1996, 42 U.S.C. § 12181(9). Further, other statutes such as the Fair Housing Act and Section 504 of the Rehabilitation Act include similar limitations on the duty to accommodate relating to reasonableness or burden. *See* REASONABLE ACCOMMODATIONS, U.S. HOUSING AND URBAN DEVELOPMENT, https://www.hud.gov/program_offices/fair_housing_equal_opp/reasonable_accommodations_and_modifications. The point is clear, Congress knows how to include an exception to a statute requiring accessibility or accommodation in relation to individuals with disabilities and did not do so here.

Any decision opting for a narrow interpretation of the 'stay put' provision would also ignore the stated purposes of the statute. In 20 U.S.C. § 1400(d)(1)(A)-(C), Congress lists the broad purposes of IDEA as:

> (A) 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 and prepare them for further education, employment, and independent living; (B) to ensure that the rights of children with disabilities and parents of such children are protected; and (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities.

Federal courts "cannot interpret federal statutes to negate their own stated purposes," *King v. Burwell*, 576 U.S. 473, 492-93 (2015) (quoting *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 419-20 (1973)). Any decision respecting a narrow interpretation of the 'stay put' provision would be just that: an interpretation of IDEA that negates its own stated purposes of ensuring that all children with disabilities have available to them a free appropriate public education.

Furthermore, the statutory language has consistently been interpreted by this Court as intending to place the needs of the child first. *Honig*, 484 U.S. at 309 ("Congress sought 'to assure that all [disabled] children have available to them . . . a free appropriate public education . . . '"); *Burlington*, 471 U.S. at 373 ("We also note that [the predecessor of § 1415(j)] is located in a section detailing procedural

safeguards which are largely for the benefit of the parents and the child."). This intent aligns only with a broad interpretation of the protections of the 'stay put' provision.

The language of the statute and the legislative history behind the 'stay put' provision show that Congress required continuous placements for students during the ponderous administrative proceedings. Congress intended to prevent a school's unilateral removal of a child from school, to avoid disruption to a child's education, and to protect a child's right to a free appropriate public education. A narrow interpretation of the provision conflicts with this purpose, and thus this circuit split should be resolved in favor of a broad application of the provision.

II. THE D.C. CIRCUIT DECISION UNDERMINES IDEA BY CREATING AN IMPRACTICALITY EXCEPTION IN CONFLICT WITH OTHER CIRCUITS THAT SHOULD BE REJECTED

The legal issue at the center of this case is straightforward. The educational development of Petitioner's son Braeden hinges on his placement in a residential educational program. It is undisputed that his current IEP mandates a residential placement. The school district long acknowledged this and conceded this point throughout the litigation. After the prior residential educational program became unavailable, the school district conceded that it immediately acquired an absolute, non-delegable obligation to find him a new placement.

Strikingly, however, the D.C. Circuit effectively determined that a school district can elude this non-delegable obligation in perpetuity merely by making

efforts to find a residential educational program. Indeed, the logical extension of this position—that a school district need not provide adequate special education-related capacity or resources and can instead satisfy IDEA as long as it makes some effort to do so—is completely untenable and would immediately harm many students with disabilities. Here, at a minimum, the school district should have been required to fund interim residential care with services comparable to a residential educational program while it continues to search for a long-term placement.

Under IDEA, students with disabilities are guaranteed a FAPE. To achieve this, school districts must provide eligible students with an IEP. An IEP is the "*modus operandi*" of IDEA. *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 368 (1985). For some students, whose educational development requires placement in a residential educational program, an IEP obligates the school district to provide access to such a program, at no cost to the family. *See* 20 U.S.C. 1412(a)(1), 1412(a)(10)(B), 34 C.F.R. § 300.104.

Before a student's educational placement can be altered, IDEA allows parents to file administrative challenges. While such challenges are pending, students are entitled as of right to a "stay-put" injunction pursuant to 20 U.S.C. § 1415(j). The provision provides 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 . . . ." (emphasis added). Unlike other types of injunctions, which require a balancing of equitable factors, § 1415(j) "effectively provides for an

automatic statutory injunction upon a two-factor showing that (i) an administrative due process proceeding is 'pend[ing],' and (ii) the local educational agency is attempting to alter the student's 'then-current educational placement.'" *Olu-Cole v. E.L. Haynes Pub. Charter Sch.*, 930 F.3d 519, 527 (D.C. Cir. 2019) (quoting § 1415(j)).

Here, there is little question that the text of the two-part test in section 1415(j) was satisfied. There was a pending administrative due process proceeding, and the school district allowed a change in the student's placement; after the residential placement terminated the student, the school district did not locate or create a placement for the student but instead let him languish without the education required by his IEP. Instead of requiring the school district to follow IDEA and provide a placement in as similar a facility as possible, the D.C. Circuit essentially recognized an impossibility or impracticability defense to IDEA and the stay-put injunction by allowing the school district to continue its failure to provide the student with any residential placement.

A jurisdiction receiving IDEA funding, however, must make special education "available to all children with disabilities." *Fry*, 580 U.S. at 166–67 (citing § 1412(a)(1)(A)). As this Court has noted, "In accepting IDEA funding, States expressly agree to provide a FAPE to all children with disabilities." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 246 (2009) (citing § 1412(a)(1)(A)). "The IDEA offers federal funds to States in exchange for a commitment: to furnish a [FAPE] to all children with . . . disabilities." *Fry*, 580 U.S. at 158 (citations omitted). A jurisdiction's acceptance of IDEA funding confers upon an eligible child a "substantive right" to

a FAPE. *Id.* (citing *Smith v. Robinson*, 468 U.S. 992, 1010 (1984)).

There are no exceptions to IDEA. Unlike the ADA and Rehabilitation Act, where there are exceptions, there is no undue burden or undue hardship defense to IDEA. Instead, every student in special education in a district that receives IDEA funds is entitled to a FAPE no matter the cost. *See Florence Cnty. Sch. Dist. Four v. Carter By and Through Carter*, 510 U.S. 7, 16 (1993) (rejecting district's argument that the "burden on financially strapped local educational authorities" exempts a district from complying with IDEA).

In *Honig*, this Court was confronted with the question of whether there was an implicit exception to the stay put mandate for students who were dangerous. *Honig*, 484 U.S. at 308. This Court responded finding the statutory language "unequivocal" and barred schools "from changing that placement over the parent's objection until all review proceedings are completed." *Id.* at 324. However, this Court noted that the statute "allowed for interim placements where parents and school officials were able to agree on one." *Id.* at 324-25. The Court specifically found that "Congress very much wanted to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school." *Id.* Therefore, Congress enacted this provision to "deny school officials their former right to 'self-help,' and directed that in the future the removal of students could be accomplished only with the permission of the parents or, as a last resort, the courts." *Id.* at 323-24. In response to *Honig*, Congress amended the statute to provide for placement in alternative settings in certain rare instances. *See* 20 U.S.C. § 1415(k). But

Congress does not permit students to be left without any placement at all. Indeed, it had been well-recognized in the District of Columbia prior to this decision by the D.C. Circuit that there is no "defense of impossibility" that can relieve the District of its "obligations to provide a FAPE." *Schiff v. D.C.*, No. 18-CV-1382 (KBJ), 2019 WL 5683903, at *7 (D.D.C. Nov. 1, 2019) (citing *Brown v. D.C.*, No. 17-cv-348, 2019 WL 3423208, at *16–18 (D.D.C. July 8, 2019) (finding that an impossibility defense "should be rejected on both legal and factual bases" in the IDEA context)). This effective change in the law will cause significant hardship for District students in violation of federal law.

III. THIS CASE WILL SIGNIFICANTLY IMPACT IDEA AND THE MANY STUDENTS WITH AN IEP UNDER IDEA

This case is extraordinarily significant in its potential scope and the number of families it will touch. The reach is unequivocally national: for 2021-22, 7.3 million students ages 3-21—fifteen percent of all public school students in the United States—received special education and/or related services under IDEA. *See* INST. OF EDUC. SCI., REPORT ON THE CONDITION OF EDUCATION, 15 (2023), https://nces.ed.gov/pubs2023/2023144.pdf. The percentage in individual states ranges from eleven percent in Hawaii to *twenty percent* in states like New York and Pennsylvania. *See* INST. OF EDUC. SCI., STUDENTS WITH DISABILITIES, CONDITION OF EDUCATION, 2, (2023), https://nces.ed.gov/programs/coe/pdf/2023/cgg_508.pdf. Braeden may be the only child whose rights are addressed by the Circuit court's decision, but the rights of children across the entire nation are truly at issue.

Likewise, in its annual report on IDEA for 2022, the U.S. Department of Education indicated that 22,359 due process complaints were received nationally in 2019-20 relating to students ages 3-21 (there were also 5,341 written complaints and 10,406 mediation requests). *See* U.S. DEPT. OF EDUC., 44TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, xxxi (2022), https://sites.ed.gov/idea/files/44th-arc-for-idea.pdf. This case has the potential to impact the many students with disabilities who are pursuing due process hearings related to their IEPs. If the Court grants certiorari and rules that stay put is available in those circumstances when school districts have contracted with a third party it will provide a significant incentive for school districts to comply with an IEP in the first instance and not allow compliance to lapse. For example, school districts could require that private schools continue to serve students with disabilities until they have secured another placement rather than allowing them to expel students and thrust the students' care on their parents.

In contrast, allowing the D.C. Circuit decision to stand creates a perverse incentive where a school district, which has a non-delegable duty to provide a FAPE, is at far less legal risk if it contracts out this responsibility to private providers even if it knows they cannot meet demand. For example, a school district that had its own public residential educational program would certainly be subject to stay put if seeking to move a student out of a program it controls. If a school district wishes to reduce its burden, however, it could simply contract out that responsibility and then argue that there is nothing it can do when a private provider decides to no longer house or support a student with a disability.

IDEA exists to prevent this scenario, but it is essentially what happened in this case, and there is a danger that the D.C. Circuit decision incentivizes the same type of problematic conduct by school districts as occurred in this matter.

Ultimately, the D.C. Circuit decision allows school districts that contract out responsibilities to distance themselves from the core principles of IDEA. If the decision is allowed to stand or decided in favor of a narrow interpretation of stay put, districts will be able to shirk their responsibilities by simply hiding behind a third party that does not have the same obligations under IDEA. *See, e.g., K.K. v. Hart*, 2022 WL 2162016 at *6 (C.D. Cal. April 20, 2022) (defendant district attempted to argue that compliance with § 1415(j) was "impossible" because the district "ha[d] no control of the admission process and enrollment of these third-party residential treatment centers," with the court noting its concern that the district would not "even attempt to provide comparable services."). In such a case there is a significant erosion of accountability and impact on students' educational outcomes through permitting school districts to claim impossibility. Relatedly, contracting out services to third parties that lack the same strict requirements under IDEA may open avenues for unscrupulous practices and substandard service quality, harming the interests of students with disabilities and undermining accountability for the provision of special education services. For example, contracting out responsibilities and permitting the result reached by the D.C. Court may result in a lack of continuity in services by sidestepping the strict protections that IDEA affords. Preventing such a disruption in a child's education, an inarguable negative impact on students' educational progress, is a key goal of IDEA. *See Olu-Cole*, 930 F.3d

at 529 ("[C]hildren with disabilities are substantially harmed by and must be protected against . . . unilateral disruption . . ."). Allowing an evasion of compliance through contracting, as in this case, raises legal and ethical questions about the commitment of school districts to the principles of IDEA.

Congress has commanded school districts to provide continuous special education to students with disabilities, and this is duty is non-delegable. The District Court's interpretation, which allows for children to be denied the education required by their IEPs where there is no longer a private placement, is not supported by the statute or its legislative history.

CONCLUSION

Today, as it was in 1954 when the Supreme Court said it, "education is perhaps the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). School districts have non-delegable duties to comply with IDEA, follow an IEP, and provide a free, appropriate public education. These obligations help ensure that students with disabilities and their families are treated with fairness and dignity, receiving the full protection of a law intended for their benefit. The D.C. Circuit's decision significantly undermines the protections afforded by IDEA by decimating one of its most important procedural safeguards. The Court should grant certiorari and determine that stay put applies in situations where a school district fails to comply with an IEP, requiring them to make best efforts to maintain the current level of services, not throw up their hands and deny continuous education to a disabled student.

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