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 CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The issues presented here strike at the core of the IDEA's stay-put provision and warrant this Court's review. On the first question, the circuits are split 4-3 over the extent of a school district's obligations under 20 U.S.C. § 1415(j) when a child's exact pre-dispute educational placement becomes unavailable. The District tries to paper over the split with a series of artificial and factual distinctions that have no bearing on the legal question actually at issue.

Nor does the District persuasively defend the D.C. Circuit's view that when the exact prior placement becomes unavailable, the school district has no stay-put obligations whatsoever. Nothing in the statute supports that disruptive result. And as amici explain, the harm caused by that rule is "extraordinarily significant" given the central role of the stay-put provision in IDEA litigation. COPAA Br. 17-18.

The second question presented—whether Section 1415(j)'s stay-put mandate applies during appeals—also warrants review. The District neither denies the circuit split nor provides any defense of the D.C. Circuit's outlier stance. If the Court grants review of the first question, it should address the second question as well.

ARGUMENT

I. THE FIRST QUESTION SHOULD BE GRANTED

A. The Circuit Split Is Real

The circuits are divided over how Section 1415(j)'s stay-put obligation applies when the student's then-current educational placement becomes unavailable. The Seventh, Ninth, and Eleventh Circuits hold that

the school district must replicate the student's pre-dispute placement "as closely as possible," while the D.C. Circuit joined the Fourth, Fifth, and Sixth Circuits in holding that the school district has no obligation in these circumstances. Pet. 13-20. The District's attempts (at 14-23) to deny that conflict fail.

1. Start with the Ninth Circuit's decision in *Ms. S. ex rel. G. v. Vashon Island School District*, 337 F.3d 1115 (9th Cir. 2003). As the District recognizes, *Ms. S.* held that when a child's then-current placement becomes unavailable and the school district cannot "'precisely replicate' [its] educational environment," the stay-put provision obligates the school district to "'approximate[] [it] as closely as possible.'" BIO 16 (quoting 337 F.3d at 1134). None of the District's responses to *Ms. S* hit the mark.

First, the District suggests that the Ninth Circuit did not actually believe what it said, claiming that the court "noted" that the stay-put provision was "inapt" but applied it anyway. BIO 16. That's wrong: Although the court observed that the stay-put provision was designed to "preserve the status quo," it made clear that the provision still plays an important role when "the status quo no longer exists" by requiring the school district to "approximate, as closely as possible, the old IEP." *Ms. S.*, 337 F.3d at 1133-34.

Second, the District claims that *Ms. S.* is distinguishable and "obsolete," because it dealt with student transfers to new school districts and Congress added a separate provision governing transfers in 2005. BIO 16-17 (citing 20 U.S.C. § 1414(d)(2)(C)). But Congress did not alter the statutory language in Section 1415(j)—the provision that the Ninth Circuit interpreted in *Ms. S.* and that applies here too. *Ms.*

S.'s interpretation of Section 1415(j) remains the law in the Ninth Circuit.

Accordingly, even after 2005, courts within the Ninth Circuit have continued applying the *Ms. S.* rule: When a student's then-current placement becomes unavailable, the "'stay-put [provision] requires that the student receive a placement that, as closely as possible, replicates the last placement.'" *K.K. v. William S. Hart Union High Sch. Dist.*, 2022 WL 2162016, at *4 (C.D. Cal. Apr. 20, 2022); *see id.* at *4-7 (citing *Ms. S.*, 337 F.3d at 1133-34; *Van Scoy ex rel. Van Scoy v. San Luis Coastal Unified Sch. Dist.*, 353 F. Supp. 2d 1083, 1086 (C.D. Cal. 2005)). Indeed, *K.K.* applied that rule in a case just like this one, requiring a school district to provide "comparable" residential services following the closure of the student's residential program. *Id.* at *2, *10; *see* Pet. 15.

The District claims the court in *K.K.* relied on its "equitable authority" prescribed in 20 U.S.C. § 1415(i)(2)(C)(iii), and "not the statutory directive" in Section 1415(j). BIO 22. That's wrong too: *K.K.* does not even mention Section 1415(i)(2)(C)(iii). Instead, it makes clear—again and again—that the plaintiff sought, and the court awarded, "injunctive relief pursuant to *the IDEA's stay put provision, 20 U.S.C. § 1415(j)*." 2022 WL 2162016, at *2 (emphasis added); *see id.* at *4-7, *10. Indeed, *K.K.* flatly contradicts the District's insistence that school districts have no stay-put obligations at all in these circumstances, as the court's determination that the plaintiff was entitled to a "comparable placement" rested on its analysis of

the defendant's "legal obligations under § 1415(j)." *Id.* at *6-7.[1]

2. The District's treatment of the Seventh and Eleventh Circuits fares no better. Those courts recognize that when a student's then-current placement becomes unavailable, the stay-put provision requires the school district to "provide educational services that approximate the student's old IEP as closely as possible." *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); *see L.J. ex rel. N.N.J. v. Sch. Bd. of Broward Cnty.*, 927 F.3d 1203, 1213 (11th Cir. 2019).

The District claims that "the stay-put provision was applicable" in *John M.* "because the parents disputed the [newly proposed] IEP," whereas "everyone in this case endorsed Braeden's IEP." BIO 17-18. This distinction goes nowhere. The stay-put provision applied there because the statute, by its terms, governs "the pendency of *any* proceedings conducted pursuant to [the IDEA]." 20 U.S.C. § 1415(j) (emphasis added); *see John M.*, 502 F.3d at 714. The provision's applicability does not depend on the nature of the dispute underlying those proceedings. The District effectively concedes this point by acknowledging that "the stay-put provision [also] applied" in *L.J.*, a case where the parties endorsed the IEP "'as written'" and the dispute

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[1] *K.K.* "assume[d]" that the plaintiff's stay-put motion should be analyzed within the "traditional preliminary injunction" framework, but it did so only because the plaintiff briefed it that way. 2022 WL 2162016, at *3 n.4. The court made clear that it was enforcing "compliance with the stay-put provision" and thus applying Section 1415(j)'s substantive standards. *Id.* at *6.

concerned "'implementation.'" BIO 18; *see L.J.*, 927 F.3d at 1213-14.

Beyond that, the District contends this case is "categorically different" because it involves an unavailable residential facility rather than a change in school district or grade level. BIO 17-20. But the *reason* the placement is unavailable does not affect the legal question, which (the District concedes) is whether the stay-put obligation applies when the child's "original placement" becomes "complete[ly] unavailabl[e]" through no "effort" of the school district. BIO 23. And even when a school district contends that it is "impossible to fully implement" a student's IEP due to the placement's unavailability, the school districts in these circuits still have an "'obligation'" to "'provide educational services that approximate the student's old IEP as closely as possible'" during the pendency of the IDEA proceedings. *L.J.*, 927 F.3d at 1213 (quoting *John M.*, 502 F.3d at 714-15). That rule squarely conflicts with the D.C. Circuit's holding that the stay-put provision does *not* require a school district to "implement[] [the] IEP 'as closely as possible'" when the then-current placement becomes unavailable. Pet. App. 13a-15a; *see* Pet. 17-19.

Finally, the District quibbles over the extent of the split, noting that Ms. Davis and commentators have treated the Fourth Circuit's position as both aligned with and contrary to the D.C. Circuit's position. BIO 14-15. But that's simply a product of the D.C. Circuit's alternative holdings in this case. The court's first holding—that Section 1415(j) does not apply "at all" when the school district does not "control" the placement's unavailability, Pet. App. 9a-13a—squarely conflicts with the Fourth Circuit's holding

that Section 1415(j) "makes no exception for cases in which the 'then-current educational placement' is not functionally available." *Wagner v. Bd. of Educ. of Montgomery Cnty.*, 335 F.3d 297, 301 (4th Cir. 2003). *Wagner*, however, went on to hold that the stay-put provision does not require the school district to do anything if "the then-current placement is functionally unavailable." *Id.* at 302. The Fourth Circuit thus ultimately ends up in the same place: If the then-current placement (or a sufficiently similar placement) is not available, the stay-put provision does not require the school district to provide a placement "as closely as possible." That rule conflicts with the rule applied in the Seventh, Ninth, and Eleventh Circuits.

B. The Decision Below Is Wrong

On the merits, Ms. Davis has explained that, properly interpreted, Section 1415(j) requires the school district to maintain a child's pre-dispute educational placement as closely as possible when the exact pre-dispute placement becomes unavailable. Pet. 20-26. The District's flawed defense of the D.C. Circuit's contrary view (at 23-29) only underscores the need for review.

1. The District briefly defends the D.C. Circuit's principal holding that the stay-put provision does not apply if the then-current educational placement becomes unavailable for reasons beyond the school district's "control." BIO 24-25; Pet. App. 9a-13a. Like the D.C. Circuit, the District claims that the stay-put provision is "designed" to prevent only a school district's "'unilateral'" attempt to change a student's placement. BIO 24. But Section 1415(j)'s text—which the District ignores—contains no such unavailability

exception. The District's position also disserves the stay-put provision's core purpose of minimizing educational disruption during IDEA disputes. Pet. 24-25.

The District confusingly suggests that Braeden's "educational placement" has not been "alter[ed]" at all and instead has "at all times remained, by necessity, [a residential center]." BIO 25. But as the District itself previously noted, the "'then-current educational placement'" referenced in the stay-put provision is the place where the student is "'actually enrolled'" when the IDEA dispute arises. Resp. C.A. Br. 26. Here, Braeden's educational placement was undeniably "alter[ed]" when he was discharged from CSAAC.

2. The District's defense of 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]" the pre-dispute IEP, Pet. App. 13a—fares no better. The District contends that the stay-put provision "is designed to preserve the educational status quo," and that requiring a placement that is "as close as possible" to the IEP-required placement "*alters* the status quo." BIO 25-26. But like the D.C. Circuit, the District fails to recognize that the unavailability *itself* alters the status quo—the question is what to do about it. Requiring the school district to provide a placement as close as possible to the pre-dispute placement does far more to preserve the status quo than the District's solution of doing nothing, which only maximizes the disruption. Pet. 25-26.

The District also blames Ms. Davis, claiming that she is demanding an "'alternative placement'" and that her argument "require[s] the child to be *moved* to a *novel* placement." BIO 25-26. That's not what is

happening here. It is the District, not Ms. Davis, that has consigned Braeden to a novel placement by leaving him in an educational environment that lacks the residential component of his IEP or anything resembling it. By contrast, Ms. Davis seeks to reduce the novelty and disruption caused by the unavailability by compelling the District to provide a placement that is as close as possible to what Section 1415(j) requires—the "then-current educational placement." That position does far less "violence to the statut[e]" (BIO 26) than the District's solution, which allows school districts to simply ignore Section 1415(j)'s mandate if perfect compliance is not possible.

Finally, the District claims that it has looked for residential centers and offered to provide some at-home educational programming. BIO 27-29. But the District does not even try to claim that its efforts come "as closely as possible" to maintaining the pre-dispute residential placement. And while the District suggests that parents and students might avoid the harmful consequences of its position by seeking a preliminary injunction to enforce the IDEA's FAPE guarantee, BIO 27, doing so is onerous and not comparable to Section 1415(j), which provides an automatic injunction and protects a child from academic disruption (above and beyond the IDEA's baseline FAPE guarantee). Pet. 28-29; COPAA Br. 9-11.

C. The Question Presented Is Important And Squarely Presented

1. The District does not dispute that the scope of the stay-put provision is a critical issue under the IDEA with an "extraordinarily significant" reach.

COPAA Br. 17-18; Pet. 26-27. Nor does the District deny that concerns about placement unavailability are especially acute for "students with the most severe disabilities," as "school districts often rely on private providers to serve such students." COPAA Br. 5. Under the D.C. Circuit's misguided interpretation of Section 1415(j), school districts are relieved of any stay-put obligation if that private placement becomes unavailable. *Id.* at 19; Pet. 29. That result undermines the effectiveness of the stay-put provision and shifts the school district's statutory burden onto the families of disabled children, forcing them to find and finance adequate educational placements during lengthy IDEA proceedings. Pet. 28-29.

This important question is ripe for this Court's review. Seven different circuits have weighed in. While the District seems to think that's not enough (BIO 34), a 4-3 split more than justifies certiorari. Equally unconvincing is the District's attempt to downplay the D.C. Circuit's decision by claiming that it has not been publicly cited enough to cause a "splash." *Id.* The IDEA has several mechanisms designed to steer litigation (including stay-put litigation) into state administrative proceedings, *see* 20 U.S.C. § 1415(e)-(g); *K.K.*, 2022 WL 2162016, at *6 n.10, so citation count is hardly a sound measure of the issue's importance. Better to heed the IDEA specialists who stress that, in practice, the scope of the stay-put provision "comes up frequently" and affects "a large and vulnerable population." COPAA Br. 3-5.

2. The District's purported "vehicle" objections are no reason to deny review. BIO 29-33. To be clear, the District does not contend that any of these objections would actually impede this Court's review

of the question presented. And even on their own terms, these arguments are unconvincing.

The District first suggests that this case is a "factual outlier," pointing to Braeden's size and the supposed "'unique[ness]'" of his IEP. BIO 29-30. But those facts have no bearing on the purely legal question presented, which turns entirely on the correct interpretation of Section 1415(j)'s stay-put obligation in the context of placement unavailability. In any event, the uniqueness of a student's IEP cannot possibly be a reason for denying review given that *all* IEPs—*individualized* education programs—are unique.

The District also suggests that Braeden is "unlikely" to get "any meaningful relief" from this appeal because he has been "categorically ineligible" for stay-put relief since 2022. BIO 30-31. That is wrong. As the D.C. Circuit recognized, "Braeden [is] eligible for special education and associated services under the IDEA until at least 2024 as a result of related litigation" awarding him compensatory education. Pet. App. 5a n.1. And as the District itself argues, "the availability of stay-put relief" runs with "the child's IDEA eligibility." BIO 31. Braeden is therefore eligible for stay-put relief.

Regardless, even after Braeden's current stay-put eligibility expires, Braeden will remain eligible for compensatory education for the period in which he was wrongly denied stay-put relief—November 2021 to present day. Pet. App. 17a-19a; *see Olu-Cole v. E.L. Haynes Pub. Charter Sch.*, 930 F.3d 519, 530-31 (D.C. Cir. 2019) (explaining that compensatory education is an available remedy for stay-put violations). Thus, if Braeden wins this appeal, he will be entitled to a substantial compensatory education award. This

Court's resolution of the first question presented is thus just as important to Ms. Davis and Braeden as it is to the countless other students enmeshed in IDEA proceedings.[2]

II. THE SECOND QUESTION SHOULD BE GRANTED

If the Court reviews the unavailability issue, it should also decide whether the stay-put provision's reference to "any proceedings" encompasses appeals. The District does not deny the circuit split on this question. Pet. 30-32. Nor does it deny that this question is exceptionally important. Pet. 33-34. And—most notably—the District does not defend the D.C. Circuit's outlier view that a school district's stay-put obligation terminates at the conclusion of district court proceedings and does not extend to appeals. *Andersen ex rel. Andersen v. District of Columbia*, 877 F.2d 1018, 1024 (D.C. Cir. 1989); *see* Pet. 32-33.

Instead, the District's only argument against review is that the question is premature because the lower courts did not reach it. BIO 34-35. But the issue will inevitably arise if Ms. Davis prevails on the first question presented, and the lower courts will be bound by the D.C. Circuit's *Andersen* holding. Because this is an important and "purely legal question" on which the circuits are split—and because requiring the lower courts in this case to address it would be a useless formality given *Andersen*—the question is "'appropriate for [this Court's] immediate resolution' notwithstanding that it was not addressed

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[2] The District's contention that "reimbursement" is foreclosed by an argument "unrelated to the stay-put provision" that the court below did not address, BIO 31-33, is a merits issue ranging beyond the question presented.

by the Court of Appeals." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (citation omitted).

The District also offers two reasons why this issue might not arise even if Ms. Davis prevails on the first question presented, BIO 35, but both are incorrect. The District first argues that Braeden is not entitled to a stay-put injunction, *id.*, which is mistaken and irrelevant for the reasons explained above. *See supra* at 10-11. The District also suggests that there may never be an appeal in this case, BIO 35, ignoring that this case already includes at least one appeal—the case that is currently before the Court. A ruling for Ms. Davis on the unavailability question will necessarily prompt this second question. This Court should therefore resolve both issues in one fell swoop.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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June 4, 2024