No. 13-

In The
Supreme Court of the United States

RIDLEY SCHOOL DISTRICT,

Petitioner,

v.

M.R.; J.R., PARENTS OF MINOR CHILD E.R.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Disputes between parents and school districts about the appropriateness of a child's educational program under the Individuals with Disabilities Education Act are resolved, in the first instance, through an "impartial due process hearing" before a state or local educational agency. 20 U.S.C. § 1415(f). After exhaustion of administrative appeals, the aggrieved party may file a "civil action" in "any State court of competent jurisdiction or in a district court of the United States." *Id.* § 1415(*i*)(2).

The Act contains a "stay-put" provision: a "child shall remain in the then-current educational placement" "during the pendency of any proceedings conducted pursuant to this section" and "until all such proceedings have been completed." 20 U.S.C. § 1415(j). If the child's "then-current" placement is in a private school, the school district bears the cost of that private placement until the "proceedings" covered by the stay-put provision are completed.

The question presented is:

Whether operation of the stay-put provision (and the school district's accompanying payment obligation) terminates upon entry of a final judgment by a state or federal trial court in favor of the school district, as the D.C. and Sixth Circuits have held, or whether it continues until completion of any subsequent appeal of that judgment, as the Third and Ninth Circuits have held.

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Petitioner Ridley School District respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-34a) is reported at 744 F.3d 112. The opinion of the district court (App., *infra*, 35a-64a) is unreported, but is available at 2012 WL 3279230.

JURISDICTION

The court of appeals entered its judgment on February 20, 2014. On May 9, 2014, Justice Alito extended the time for filing a petition for a writ of certiorari to and including June 20, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced at App., *infra*, 68a-102a.

STATEMENT OF THE CASE

A. Statutory Framework

1. The Individuals with Disabilities Education Act (IDEA) trades federal education funding for a State's promise to provide a "free appropriate public education" to children with disabilities. 20 U.S.C. § 1400(d)(1)(A); *see id.* § 1412(a). As a condition of accepting that federal funding, States must "compl[y] with extensive [federally defined] goals and procedures." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295 (2006) (citation omitted).

The "core" of the IDEA is "the cooperative process that it establishes between parents and schools." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005). The shared goal is development and annual revision of an "individualized education program" (IEP), which "sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to

meet those objectives." *Honig v. Doe*, 484 U.S. 305, 311 (1988); *see also* 20 U.S.C. § 1400(d).

2. When parents and school districts fail to agree on an IEP, either may pursue relief "through the carefully tailored administrative and judicial mechanism set out in the statute." *Smith v. Robinson*, 468 U.S. 992, 1009 (1984). That process—"designed to further the congressional goal of ensuring full educational opportunity without overburdening the local school districts and state educational agencies," *id.* at 1020 (citation omitted)—consists of three potential layers of dispute resolution.

First, parents or a school district can bring a complaint before a "local educational agency" or a "State educational agency," as state law prescribes, for adjudication in an "impartial due process hearing." 20 U.S.C. § 1415(b)(6), (f)(1)(A). During that hearing, parties have the right to be accompanied and advised by counsel, to present evidence, and to compel the attendance of and examine witnesses. *Id.* § 1415(h). A hearing officer then issues a decision resolving the allegations raised in the complaint, based on "whether the child received a free appropriate public education." *Id.* § 1415(f)(3)(E).

Second, if the local (as opposed to State) educational agency conducts the due process hearing, "any party aggrieved by the findings and decision rendered in such a hearing may appeal *** to the State educational agency." 20 U.S.C. § 1415(g)(1). The parties are again entitled to be accompanied and advised by counsel and to present evidence, including witness testimony. *Id.* § 1415(h). The officer

conducting the review then renders "an independent decision." *Id.* § 1415(g)(2).

Third, the non-prevailing party in the state administrative hearing process may "bring a civil action with respect to the complaint presented *** in any State court of competent jurisdiction or in a district court of the United States." 20 U.S.C. § 1415(*i*)(2)(A). That state or federal trial court "shall receive the records of the administrative proceedings"; "shall hear additional evidence at the request of a party"; and, "basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." *Id.* § 1415(*i*)(2)(C).

3. While these dispute-resolution proceedings are ongoing, the IDEA's "stay-put" provision governs the placement of the child: "[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 *** until all such proceedings have been completed." 20 U.S.C. § 1415(j).

Generally, the "then-current educational placement of the child" is the child's preexisting IEP placement at the time the administrative review process is initiated. *See, e.g., Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 763 (6th Cir. 2001). If a state educational agency endorses a different placement preferred by the parents, however, that becomes the then-current educational placement under the stay-put provision. *See* 34 C.F.R. § 300.518(d).

When the then-current educational placement is a private school, an "important practical question[] arise[s] concerning *** [the] financial responsibility for that placement." *School Comm. of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 361 (1985). Because the school district is obligated under the IDEA to provide a "*free* appropriate public education" to children with disabilities, 20 U.S.C. § 1400(d)(1)(A) (emphasis added), it must cover the costs of an agreed-upon, State-endorsed, or court-ordered private placement. By contrast, "parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk." *Burlington*, 471 U.S. at 373-374. They "'are entitled to reimbursement *only* if [an agency or] court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act.'" *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 246 (2009) (citation omitted); *see also id.* at 244 n.11.

This Court has never addressed whether the stay-put provision—and the school district's accompanying obligation to pay for a private school placement—persists *after* a trial court resolves an IEP dispute in the school district's favor. If so, a prevailing school district must continue to finance the child's then-current private school placement for the duration of the parent's appeal, even if the school district again prevails in that appeal. If not, the parents would bear the risk of payment for

maintaining their preferred private school placement during any appeal they choose to pursue.[1]

B. Factual and Procedural History

1. E.R., a minor, attended kindergarten and first grade within Ridley, a public school district. During that time, her parents met with school personnel on several occasions to assess E.R.'s academic performance and, ultimately, to develop an agreed-upon IEP. App., *infra*, 4a; *see also Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 264-266 (3d Cir. 2012). E.R.'s grades "improved dramatically in a short period of time" following implementation of the IEP toward the end of her first-grade year, and the school district offered to provide additional special education in an updated IEP for her second-grade year. 680 F.3d at 266-267. Before E.R. entered second grade in fall 2008, however, her parents informed Ridley that the proposed IEP did not provide the "intensive multi-sensory approach to reading" that they believed was appropriate, *id.* at 267, and enrolled her at the Benchmark School, a private school that "specializes in educating students with learning disabilities," App., *infra*, 4a.

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[1] If the parents ultimately prevail in an appeal, they would be eligible for reimbursement for the period pending appeal under a separate provision of the IDEA, 20 U.S.C. § 1415(*i*)(2)(C)(iii). *See Burlington*, 471 U.S. at 369-370 (discussing reimbursement under that provision, then codified at 20 U.S.C. § 1415(e)(2) (1984)). So termination of the stay-put payment obligation would place ultimate payment responsibility for that period on the parents only when the trial court's ruling in favor of the school district is affirmed on appeal.

E.R.'s parents also filed a complaint with the Pennsylvania Department of Education (the relevant state agency). App., *infra*, 4a. In April 2009, a hearing officer found (among other things) that the IEP proposed for E.R.'s second-grade education was inadequate, and ordered Ridley to reimburse E.R.'s parents for the costs of educating her at the Benchmark School during that school year. *Id.* at 5a-6a. That decision also had the effect of making the Benchmark School E.R.'s then-current educational placement. *Id.* at 11a-13a.

Ridley challenged that administrative decision by filing a civil action in Pennsylvania state court, and E.R.'s parents removed to federal district court. App., *infra*, 6a, 37a. Nearly two years later, in February 2011, the district court reversed the hearing officer's decision and entered final judgment in Ridley's favor. *Ridley Sch. Dist. v. M.R.*, No. 09-cv-2503, 2011 WL 499966 (E.D. Pa. Feb. 14, 2011). The court found that the "un-refuted record reflects that after numerous suggestions by Parents regarding the IEP, and several revisions which Parents approved," the proposed IEP contained several elements reasonably calculated to enable E.R. to receive educational benefits—including multi-sensory learning. *Id.* at *15. The court thus concluded that the school district had "offered E.R. an appropriate IEP *** for the coming second grade year." *Id.*

E.R.'s parents appealed. In May 2012, 37 months after the hearing officer's decision in favor of the private placement and 15 months after the district court's contrary judgment, the Third Circuit affirmed. App., *infra*, 6a. The court of appeals explained that the hearing officer's conclusions about

the adequacy of the proposed IEP were "made in conclusory fashion, without elaboration, in a footnote," and thus were "not well-explained or well-supported." *Ridley Sch. Dist.*, 680 F.3d at 275. Consistent with the district court's finding, the court of appeals held that Ridley had offered E.R. specially designed multi-sensory instruction in compliance with the IDEA, and that nothing in the Act permitted E.R.'s parents "to choose the specific program" for inclusion in an IEP. *Id.* at 277-279.

The Third Circuit denied the parents' petition for rehearing.

2. While their appeal was pending in the Third Circuit, E.R.'s parents kept E.R. enrolled at the Benchmark School not only for the completion of fourth grade (her third year there), but also for her fifth-grade year commencing six months after the district court's judgment in Ridley's favor. App., *infra*, 6a n.4.

The parents also filed a separate action in federal district court seeking payment for that private placement from the date of the hearing officer's decision (April 2009) "through the exhaustion of [the ongoing judicial] appeals." Compl. ¶ 41, No. 11-cv-2503 (Mar. 29, 2011) (ECF No. 1). Given the approach taken by other courts of appeals and district courts within the Third Circuit, however, the parents acknowledged that Ridley's financial obligation under the stay-put provision may have ceased with the district court's judgment validating the proposed IEP. *Id.* ¶ 40.

The district court granted the parents' motion for judgment on the pleadings. App., *infra*, 37a, 65a-

66a. In pertinent part, the district court concluded that "the stay-put provision applies during the pendency of a federal appeal." *Id.* at 59a. The court, however, noted a split among federal courts on the scope of the stay-put provision's application, *see id.* at 55a-58a, and expressed its "frustration" with that interpretation of the IDEA because it required a "prevailing [school] *** to compensate Parents *** through to potentially the completion of litigation in the Supreme Court," *id.* at 63a-64a.

With the appeal of the IEP's merits completed, the parties stipulated that "E.R.'s placement at the Benchmark School, including transportation, from April 21, 2009 through the exhaustion of all appeals from the decision of the Administrative Hearing Officer, totaled $57,658.38." Stipulation, No. 11-cv-2235 (Sept. 14, 2012) (ECF No. 26). In August 2012, the district court entered judgment for that sum. App., *infra*, 67a. More than one-third of that total cost was incurred while the parents pressed their appeal of the district court's judgment in Ridley's favor.

3. The Third Circuit affirmed. It acknowledged an existing conflict among three other federal courts of appeals and at least one state appellate court on whether the stay-put provision applied to appeals from a final trial court judgment in a school district's favor. App., *infra*, 26a-27a.[2] Parting explicitly with

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[2] *Compare Andersen by Andersen v. District of Columbia*, 877 F.2d 1018, 1023-1024 (D.C. Cir. 1989), *and Kari H. by & Through Dan H. v. Franklin Special Sch. Dist.*, 125 F.3d 855 (table), 1997 WL 468326, at *6 (6th Cir. 1997), *with Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036 (9th Cir. 2009), *and*

the D.C. and Sixth Circuits, the court of appeals stated that the "statutory language and the 'protective purposes' of the stay put provision" imply that "Congress intended stay-put placement to remain in effect through the final resolution of the dispute," including judicial appellate review. App., *infra*, 27a (citation omitted).

In its view, Congress's use of the phrase "*any* proceeding[] conducted pursuant to" Section 1415 "reasonably" swept in "all phases of federal proceedings that begin with a district court filing," even though "Congress did not explicitly articulate that an appeal is a 'proceeding' under § 1415." App., *infra*, 27a (citation omitted). Such an express statement was not required, the court believed, because "it seem[ed] intuitive" that "district court review would necessarily include an appeal to a circuit court." *Id.* at 27a-28a (citation omitted). That result, the court of appeals further stated, was consistent with the stay-put provision's goal of preserving the *status quo* until a placement dispute is "ultimately resolved," *id.* at 28a, as well as the language of the Department of Education's implementing regulation, *id.* at 30a (citing 34 C.F.R. § 300.518(a)). Accordingly, the court of appeals held that the "reimbursement period runs *** through the date of the appellate decision in May 2012." *Id.* at 33a n.15.

The court of appeals recognized "the financial burden [its] decision will impose on school districts."

North Kitsap Sch. Dist. v. K.W. ex rel. C.W., 123 P.3d 469, 483 (Wash. Ct. App. 2005).

App., *infra*, 33a. It also noted the "incongruity of the ultimately prevailing party having to pay for a now-rejected placement," acknowledging that "[d]espite two judicial determinations that Ridley did not deny E.R. a [free appropriate public education], the school district will be assessed the cost of her private school education for a substantial period of time." *Id.* The court of appeals nonetheless deemed that result an "unavoidable consequence." *Id.*

REASONS FOR GRANTING THE WRIT

This case presents the important question of whether a school district is obligated under the IDEA to continue funding the private school placement of parents' choosing pending appeal even after a trial court has ruled in the school district's favor. The IDEA's stay-put provision states that a "child shall remain in the then-current educational placement" for the duration of "any proceedings conducted pursuant to" Section 1415. 20 U.S.C. § 1415(j). If the "then-current educational placement" is a private school, the school district bears the cost for that placement. Respondents, the district court, and the court of appeals all have recognized that the circuits are split on whether the "proceedings" covered by the stay-put provision—limited to an administrative agency hearing, 20 U.S.C. § 1415(f), an agency appeal, *id.* § 1415(g), and a "civil action *** brought in any State court of competent jurisdiction or in a district court of the United States," *id.* § 1415(*i*)(2)(A)—include a judicial appeal.

Hewing to the statutory text, the D.C. and Sixth Circuits have read the stay-put provision to cover only those proceedings expressly delineated within

Section 1415 and not the period pending an appeal from the district court's judgment. By contrast, the Ninth Circuit and now the Third Circuit have read into Section 1415 an obligation that school districts continue to bear the cost of the parents' decision to place their child in a private school pending their appeal of a trial court's ruling in the school district's favor—even if that ruling is affirmed.

That entrenched and expanding conflict, covering over 7,000 school districts, warrants this Court's review. Geographical happenstance should not dictate whether state and local governments must bear the heavy financial burden of funding a private educational placement that both a trial and appellate court have ruled unnecessary.

I. THE COURTS OF APPEALS ARE IN OPEN AND DIRECT CONFLICT OVER WHETHER THE STAY-PUT PROVISION APPLIES TO JUDICIAL APPEALS

A. The D.C. And Sixth Circuits Hold That The Stay-Put Provision Does Not Extend To Appeals

The D.C. Circuit has long held that the stay-put provision, and its accompanying payment obligation for private school placements, does not apply to the appeal of a trial court's judgment in the school district's favor. *See Andersen by Andersen v. District of Columbia*, 877 F.2d 1018, 1023-1024 (D.C. Cir. 1989). In *Andersen*, parents contested IEPs under Section 1415 and enrolled their children in private schools at the school district's expense. When the school district prevailed before the district court,

which approved the IEPs, the parents sought, pursuant to the stay-put provision, an injunction requiring the school district to pay for their children's continuing private school education while they appealed to the D.C. Circuit. *Id.* at 1020.

After affirming the district court on the merits, the D.C. Circuit held that the stay-put provision applies only through "the trial stage of proceedings" and therefore denied the parents payment for the period of appellate review. *Andersen*, 877 F.2d at 1023. The D.C. Circuit explained that Section 1415 "speaks of only three types of proceedings"—"due process hearings, state administrative review where available, and civil actions for review brought 'in any State court of competent jurisdiction or in a district court of the United States'"—none of which is an appeal from a trial court judgment. *Id.* (quoting 20 U.S.C. § 1415(e)(2) (1988), now codified at 20 U.S.C. § 1415(*i*)(2)(A)). The D.C. Circuit further pointed out that Section 1415's only other reference to court proceedings "authorize[ed] 'the court' to hear additional evidence," thus demonstrating Congress's focus "on the trial stage of proceedings." *Id.*

The D.C. Circuit also cautioned that reading the "literal language" of the stay-put provision more broadly would "run counter" to its purpose of "protect[ing] children from *unilateral* displacement *by school authorities*." *Andersen*, 877 F.2d at 1023-1024 (citing *Honig*, 484 U.S. at 322-324, 326-328). "Once a district court has rendered its decision approving a change in placement," the D.C. Circuit observed, "that change is no longer the consequence of a unilateral decision." *Id.* at 1024. Given the authority of district courts to authorize emergency

shifts in placement, the D.C. Circuit reasoned, it would make little sense if "a placement change could take effect only after the conclusion of all appeals, including applications for certiorari." *Id.* Accordingly, the D.C. Circuit concluded that "[o]nce a district court has resolved the issue of appropriate placement, the child is entitled to an injunction only outside the stay-put provision, i.e., by establishing the usual grounds for such relief." *Id.*

The Sixth Circuit has recognized the same limit on the scope of the stay-put provision. *See Kari H. by & Through Dan H. v. Franklin Special Sch. Dist.*, 125 F.3d 855 (table), 1997 WL 468326, at *6 (6th Cir. 1997) ("IDEA's 'stay-put' provision does not apply to appeals beyond the district court level."). In *Kari*, the Sixth Circuit explained that Section 1415's three-tiered review structure did not include judicial appeals and that "[i]f Congress wanted the [stay-put] provision to apply during appeals to the circuit courts, it certainly could have said so." *Id.* The Sixth Circuit also noted that parents were not without recourse: they "could have sought an injunction under the traditional test for *** relief, and did not do so." *Id.*

B. The Third And Ninth Circuits Hold That The Stay-Put Provision Extends To Appeals

In 2009, the Ninth Circuit expressly rejected *Andersen* and extended the stay-put provision to appeals. *See Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 1040 (9th Cir. 2009). In *Joshua A.*, like in the other circuit cases, the Ninth Circuit affirmed the district court judgment finding the

school district's IEP to be appropriate. *See Joshua A. v. Rocklin Unified Sch. Dist.*, 319 F. App'x 692 (9th Cir. 2009). But it still awarded payment for the child's "current educational placement" in a private school during the parents' appeal. The Ninth Circuit stated that Congress's "presume[d]" awareness that federal district court judgments in Section 1415 civil actions could be appealed meant that Congress had in fact extended the stay-put provision to judicial appeals. 559 F.3d at 1038. It rejected as "unpersuasive" *Andersen*'s reliance on the stay-put provision's purpose of protecting parents against a school district's *unilateral* placement decisions, *id.* at 1039, in favor of eliminating the financial risk to parents of keeping their child in private school pending their own appeal, *id.* at 1040.[3]

As described above (pp. 9-10, *supra*), by expressly joining the Ninth Circuit and rejecting the position of the D.C. and Sixth Circuits, the Third Circuit's decision below deepens the existing conflict. *See* App., *infra*, 26a-27a (noting that circuits "are split" and "agree[ing] with the Ninth Circuit" that stay-put provision "applies through the pendency of an IDEA dispute in the Court of Appeals"). In light of the well-developed court of appeals decisions on both

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[3] Two state appellate courts also have declined to follow *Andersen*. *See North Kitsap Sch. Dist. v. K.W. ex rel. C.W.*, 123 P.3d 469, 483 (Wash. Ct. App. 2005) ("Thus, we read the intent of the IDEA to allow parents the right to a 'stay put' order throughout the *entire* process, including any appeals."); *Special Sch. Dist. No. 1 v. E.N.*, 620 N.W.2d 65, 69-70 (Minn. Ct. App. 2000) (stay-put provision and payment obligation continued throughout proceedings in intermediate court of appeals).

sides of the question presented, now spanning 25 years, this issue is ripe for review.

II. THE DECISION BELOW IS INCORRECT

The Third Circuit construed Section 1415 as extending the stay-put payment obligation (itself a judicial construct) beyond the "proceedings" delineated therein to judicial appeals. Particularly in light of federalism concerns, that sweeping construction—burdening public school districts' budgets—cannot stand.

1. By its own terms, the stay-put provision applies only "during the pendency of any proceedings *conducted pursuant to this section*." 20 U.S.C. § 1415(j) (emphasis added). The only "proceedings" that are "conducted pursuant to" Section 1415 are (i) an "impartial due process hearing" conducted by a state educational agency or a local educational agency, *id.* § 1415(f); (ii) an "appeal" to a state educational agency, where the due process hearing is conducted locally, *id.* § 1415(g); and (iii) a "civil action" challenging the state educational agency decision either "in any State court of competent jurisdiction or in a district court of the United States," *id.* § 1415(*i*)(2). Critically absent from this comprehensive scheme is any mention of further judicial appeals, as even the Third Circuit acknowledged. *See* App., *infra*, 27a ("Congress did not explicitly articulate that an appeal is a 'proceeding' under § 1415.") (citation and quotation marks omitted). However one reads the statute, an appeal from a civil action in district court is simply no longer an action "in a district court of the United States."

Section 1415's "procedural provisions reinforce" that Congress was focused on trial court proceedings. *Dolan v. United States*, 560 U.S. 605, 612 (2010). For example, the statute requires the reviewing "court" to "hear additional evidence at the request of a party," 20 U.S.C. § 1415(*i*)(2)(C)(ii)—a task traditionally reserved for trial courts, not courts of appeals. *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986). It also sets forth other trial-court specific guidance, including time limitations for initiating civil actions, 20 U.S.C. § 1415(*i*)(2)(B), and the "preponderance of the evidence" standard of proof, *id.* § 1415(*i*)(2)(C)(iii). And it prohibits an award of attorney's fees when, in addition to other criteria, a settlement offer is "made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure," 20 U.S.C. § 1415(*i*)(3)(D)(i)(I)—a condition that has no relevance to appeals at all.

2. Those textual points alone should have ended the inquiry. To the extent any ambiguity remains, however, the clear statement rule compels the same result. That is because interpretation of the stay-put provision must be "guided by the fact that Congress enacted the IDEA pursuant to the Spending Clause." *Arlington Cent.*, 548 U.S. at 295.

The "IDEA is frequently described as a model of cooperative federalism." *Schaffer*, 546 U.S. at 52 (citation and quotation marks omitted). Congress's "intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped." *Board of Educ. of Hendrick Hudson Cent. Dist. v. Rowley*, 458 U.S. 176, 208 (1982); *see also Barbier v. Connolly*, 113

U.S. 27, 31 (1884) (recognizing that education falls within States' traditional police powers). Consequently, "[t]he obligation to provide special education and related services is expressly phrased as a 'conditio[n]' for a state to receive funds under the Act," not a congressional command. *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891 n.8 (1984) (second alteration in original).

Under the Spending Clause, any condition imposed upon a State based on the receipt of federal funds must be textually "unambiguous[]," so that a state official contemplating acceptance of IDEA funds would have "clear notice regarding the liability at issue." *Arlington Cent.,* 548 U.S. at 296 (citation and quotation marks omitted). That rule applies with special force where, as here, Congress alters the "usual constitutional balance between the States and the Federal Government" by legislating in an area "traditionally regulated by the States." *Gregory v. Ashcroft*, 501 U.S. 452, 460-461 (1991) (citation and internal quotation marks omitted).

In agreeing that the district court "reasonably construed" the stay-put provision to encompass appellate review, App., *infra*, 27a, the Third Circuit applied too lenient a standard. Because Section 1415 does not provide the requisite clear notice to state officials of the "broad[]" and "expansive" obligation to fund private school placements during parents' appeal of a district court judgment in the school district's favor, *id.*, the Third Circuit impermissibly altered the bargain struck in the IDEA.

In particular, the Third Circuit extended the stay-put provision to appeals because, at least in federal court, parties may seek further judicial

review of an adverse district court judgment disposing of a "civil action." *See* App., *infra*, 28a ("By giving *** the right to appeal the ALJ's decision to the district court, § 1415 also made it possible *** to appeal the dispute to this circuit court.") (quoting *Joshua A.*, 559 F.3d at 1038). But the general availability of appellate review does not resolve whether Congress intended to cover such appellate proceedings under the stay-put provision. And it is no basis for overriding the statutory text as written, particularly when this Court has emphasized that Section 1415 should be strictly construed to comport with the Spending Clause. *Arlington Cent.*, 548 U.S. at 297 (rejecting argument that "costs" should include expert fees by virtue of "ordinary usage").[4]

3. Beyond the text of Section 1415, the statute is "designed to further the congressional goal of ensuring full educational opportunity without overburdening the local school districts and state

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[4] Reading Section 1415 to cover appellate court review becomes even less tenable when applied to state court proceedings. Although the federal court system generally allows for one appeal as of right in civil cases, there is no similar guarantee of appellate court review when state courts adjudicate IDEA disputes. *See* Victor E. Flango & Carol R. Flango, National Center for State Courts, *A Taxonomy of Appellate Court Organization*, 3 CASELOAD HIGHLIGHTS, no. 1, 1997, at 2-3, http://cdm16501.contentdm.oclc.org/cdm/ref/collection/appellate/id/88 (describing discretionary appellate jurisdiction in certain states). Thus, contrary to the Third Circuit's "intuit[ion]," the statutory reference to a "civil action *** in any State court of competent jurisdiction," 20 U.S.C. § 1415(*i*)(2)(A), does not "necessarily" embrace a separate appellate proceeding. App., *infra*, 27a-28a.

educational agencies." *Smith*, 468 U.S. at 1020 (citation omitted). The IDEA's dispute-resolution scheme thus does not pursue any single policy preference "at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987). Because the court of appeals gave dispositive weight to what it deemed the "protective purposes" of the stay-put provision, App.. *infra*, 27a, resolution of the circuit conflict is crucial to restoring the "careful balance" of competing policy preferences that Congress wrote into the statute, *Smith*, 468 U.S. at 1021.

The Third Circuit, moreover, misconceives the well-established purpose of the stay-put provision: to prevent "unilateral exclusion of disabled children by *schools*." *Honig*, 484 U.S. at 327. By virtue of a trial court judgment validating the school district's proposed IEP, the trial court—not the school district unilaterally—has cut off public funding of the private school placement based on a comprehensive and independent review of the dispute. *See Andersen*, 877 F.2d at 1024 ("Once 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.").

The Third Circuit's ruling similarly creates tension with another core statutory purpose of the IDEA: mainstreaming children with disabilities by educating them "where possible in regular public schools." *Burlington*, 471 U.S. at 369. "[P]lacement in private schools at public expense" is appropriate under the statute only where public school placement "is not possible." *Id.* Given that parents who make the unilateral decision to send their children to private school are not entitled to reimbursement if

that placement ultimately turns out to be unnecessary, *see Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 13-15 (1993); *Burlington*, 471 U.S. 369-370, it makes little sense to require payment after a district court has determined the private school placement to be unnecessary.[5]

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[5] The Department of Education's regulation reflecting the stay-put provision—requiring a child to remain in the current educational placement "during the pendency of any administrative or judicial proceeding," 34 C.F.R. § 300.518(a)—does not alter the provision's proper interpretation. Although the phrase "judicial proceeding" *could* encompass appellate court review, the Third Circuit does not suggest that the Department has so construed its regulation (even assuming *arguendo* such a construction could be consistent with the statute) or that the Department has taken issue with the longstanding contrary interpretations of the D.C. and Sixth Circuits. *See* App., *infra*, 30a; *see also Auer v. Robbins*, 519 U.S. 452, 462 (1997) (granting deference to agency view of its regulation only where it "reflect[s] the agency's fair and considered judgment on the matter in question"); *Andersen*, 877 F.2d at 1023 (deeming use of identical phrase in legislative history as "do[ing] nothing to establish that the judicial proceedings contemplated extend beyond the trial court stage"). Indeed, when proposing the regulation in 1976, the Department explained that it "elected to incorporate these [due process] procedures," including the stay-put provision, "substantially verbatim into the proposed regulations." 41 Fed. Reg. 56,966, 56,971 (Dec. 30, 1976); *id.* at 56,990-56,991 (proposing provision at 45 C.F.R. § 121a.413); *see* 45 C.F.R. § 121a.513 (1977) (codifying current Section 300.518(a)). A regulation seeking to parrot the statute is not entitled to deference.

III. THE APPLICATION OF THE STAY-PUT PROVISION IS AN IMPORTANT AND RECURRING QUESTION

1. Whether the IDEA's stay-put provision extends to judicial appeals is a question of exceptional importance. The IDEA affects millions of schoolchildren for whom parents and school districts must develop an IEP. *See Schaffer*, 546 U.S. at 52-53. When that collaborative effort breaks down, as it unfortunately often does, parents and school districts must resolve their "claims through the carefully tailored administrative and judicial mechanism set out in the statute." *Smith*, 468 U.S. at 1009. Because that process "takes years to run its course—years critical to the 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.

As a result, this Court has intervened on multiple occasions to decide questions regarding the bounds of reimbursement and scope of the stay-put provision,[6] as well as to resolve procedural and

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[6] *See Forest Grove Sch. Dist.*, 557 U.S. 230 (Section 1415(*i*)(2)(C) authorizes reimbursement for private special education services when public school fails to provide free appropriate education and private school placement is appropriate, regardless of whether child previously received special education services through public school); *Florence Cnty.*, 510 U.S. 7 (court may order reimbursement for parents who unilaterally withdraw child from public school providing inappropriate education under IDEA and place child in private school providing education not meeting all Section 1401(a)(18) requirements but otherwise proper under IDEA); *Honig*, 484

financial questions that arise in the context of Section 1415 proceedings.[7] In doing so, this Court steadfastly has refused to take liberties with Section 1415's text, asking Congress on more than one occasion to satisfy its burden of providing States with the necessary clear statement of obligations under the IDEA.[8]

This Court's review is again necessary to provide needed uniformity in defining the outer limits of payment obligations when a district court validates a school district's proposed IEP, the parents seek appeal of that judgment, and that judgment is

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U.S. 305 (stay-put provision has no exception for dangerousness); *Burlington*, 471 U.S. 359 (clarifying reimbursement authority under stay-put provision when parents unilaterally change educational placement).

[7] *See Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007) (parents have enforceable rights under IDEA and can represent themselves in Section 1415 due process hearings); *Arlington Cent.*, 548 U.S. 291 (Section 1415(*i*)(3)(B)'s provision award of attorney's fees as part of costs does not include expert fees); *Schaffer*, 546 U.S. 49 (burden of proof in Section 1415(f) hearing on party seeking relief); *Rowley*, 458 U.S. 176 (setting standard for assessing whether IEP provides a "free appropriate public education" in Section 1415 civil action).

[8] *See, e.g., Smith*, 468 U.S. at 1020 (stating that omission of attorney's fees provision in IDEA was purposeful), *superseded in part by* 20 U.S.C. § 1415(*i*)(3)(B)-(G) (authorizing award of attorney's fees in certain circumstances); *Honig*, 484 U.S. at 323 (declining to "read a 'dangerousness' exception into the stay-put provision"), *superseded by* 20 U.S.C. § 1415(j), (k)(1)(G) (enacting dangerousness exception); *Dellmuth v. Muth*, 491 U.S. 223, 232 (1989) (holding that IDEA does not abrogate State's sovereign immunity), *superseded by* 20 U.S.C. § 1403 (abrogating state sovereign immunity).

ultimately affirmed—all while the parents keep their child in a private school of their choosing. The question of whether the stay-put provision applies to judicial appeals has been contested for at least 25 years, with the Third Circuit decision below widening an entrenched circuit conflict. Four federal courts of appeals (as well as two state appellate courts)—governing approximately 7,000 (or 40% of) school districts in the United States[9]—have considered and decided the question presented. It is now this Court's turn.

2. The stay-put provision places a significant financial burden on state and local governments, beyond the already "expensive affair" of litigating a due process complaint. *Schaffer*, 546 U.S. at 59. In this case, for example, the cost of tuition, transportation, books and fees, and guided study at E.R.'s (unnecessary) private-school placement totaled nearly $60,000—more than a third of which was incurred while E.R.'s parents appealed the federal district court's judgment validating the school district's proposed IEP and thus reflects the amount at issue here. *See* p. 9, *supra*.

The extra strain placed on school district budgets by the Third Circuit's extension of the stay-put provision to appellate court proceedings is exacerbated by the skewed incentives such a broad construction provides to parents to prolong the

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[9] *See* Patrick Keaton, Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., Selected Statistics from the Common Core of Data: School Year 2011-12, at 7-8 (2013), http://nces.ed.gov/pubs2013/2013441.pdf.

judicial review process. If private school constitutes the child's current educational placement—as it did here by virtue of the state administrative hearing officer's conclusory ruling—the school district must foot the bill for that educational placement for as long as the parents choose to litigate, even where both courts rule in the school district's favor and even for the most well-to-do parents. In that scenario, parents have an incentive to appeal even with no likelihood of success. That renders the multiple court judgments upholding the school district's proposed IEP somewhat of an "empty victory." *Burlington*, 471 U.S. at 370.

Of course, a trial court judgment in favor of the school district might not be upheld on appeal. In that scenario, Ridley does not dispute that the parents would be entitled to payment for the period pending appeal under a separate IDEA provision. *See* note 1, *supra*. But where public education is concerned, postponing the placement that the trial court found appropriate comes with its own costs—both to a child's development and to a school district's limited budget. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170-171 (1974) (recognizing "competing considerations underlying all questions of finality"). Limiting the reach of the stay-put provision best reflects Congress's judgment that two layers of administrative review and one layer of judicial review outside the agency are a sufficient basis for the school district to implement its thoroughly-vetted IEP and mainstream the child in a public school environment, even if parents opt for further litigation. *See Burlington*, 471 U.S. at 369-370.

To the extent special circumstances warrant a different result pending appeal, nothing in the IDEA precludes parents from seeking appropriate equitable relief, such as a stay pending appeal, "outside the stay-put provision." *Andersen*, 877 F.2d at 1024; *see* FED. R. CIV. P. 62; FED. R. APP. P. 8. Application of the ordinary procedural rules after a trial court's adjudication not only serves comity interests paramount in a statutory scheme touted as a model of cooperative federalism, but it also restores Congress's balance of protecting educational opportunities without overburdening school districts.

3. Finally, this case is an ideal vehicle to resolve the circuit split over the question presented. The parties stipulated below to the types and amounts of costs at issue during the relevant period. *See* p. 9, *supra*. Resolution of the question presented in Ridley's favor will indisputably limit its financial liability with respect to E.R.'s private school placement to the duration of the district court litigation, while providing clear guidance to similarly situated parents and school districts nationwide. Accordingly, the Court's disposition will be material in this and other cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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June 20, 2014

APPENDIX

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-4137

M.R.; J.R., PARENTS OF MINOR CHILD E.R.

v.

RIDLEY SCHOOL DISTRICT,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(District Court No. 2-11-cv-02235)
District Judge: Honorable Mitchell S. Goldberg

Argued October 17, 2013

Before: RENDELL, JORDAN and LIPEZ*, Circuit Judges

(Opinion filed: February 20, 2014)

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Counsel for Appellees

OPINION

LIPEZ, Circuit Judge:

The "stay-put" provision of the Individuals with Disabilities Education Act ("IDEA") states that a disabled child shall remain in his or her current

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* Honorable Kermit V. Lipez, Senior United States Circuit Judge for the Court of Appeals for the First Circuit, sitting by designation.

educational setting during the pendency of proceedings to resolve a dispute over the child's placement. *See* 20 U.S.C. § 1415(j). This case requires us to decide two issues of first impression in this Circuit concerning the obligation of school districts to pay for private school education during that interim period: (1) whether parents are eligible for reimbursement for private school costs if they do not file a claim seeking payment until *after* a court has ruled in favor of the school district, and (2) whether the right to interim funding, if applicable, extends through the time of a judicial appeal.

The district court answered both questions in the affirmative. It thus held that defendant Ridley School District ("Ridley") must reimburse the plaintiff parents for the cost of roughly three years of their daughter's private school tuition notwithstanding judicial findings disagreeing with the hearing officer—rendered before the parents sought payment—that Ridley had complied with the IDEA by offering the child a free, appropriate education in its own schools.

For the reasons that follow, we affirm the district court's judgment.

I.

This court has previously described in detail the dispute between Ridley and the plaintiffs—M.R. and J.R.—over the educational placement of plaintiffs' daughter, E.R. *See Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 264–67 (3d Cir. 2012) ("*Ridley I*"). We briefly review here the factual and procedural

background pertinent to the legal issues now before us.

E.R. attended kindergarten and first grade at Grace Park Elementary School in the Ridley School District during the 2006-2007 and 2007-2008 school years, receiving special services to address her learning disabilities and health-related problems. During the summer after first grade, plaintiffs concluded that the public school was not meeting their daughter's needs, and they enrolled her at a private school, Benchmark, that specializes in educating students with learning disabilities. Plaintiffs subsequently filed a complaint with the Pennsylvania Department of Education claiming, inter alia, that Ridley had violated the IDEA and the Rehabilitation Act by failing to provide E.R. with a suitable Individualized Education Program ("IEP"), thereby denying her the "free appropriate public education" ("FAPE") required by those laws.[1] *See* 20

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[1] The IDEA requires school districts to develop IEPs for children with disabilities to specify how they will be provided with a FAPE. *See* 20 U.S.C. § 1414 (detailing the framework for evaluating a child and creating an IEP). The statute describes a FAPE as "special education and related services" that—

> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under [20 U.S.C.

U.S.C. § 1412(a)(1)(A); 29 U.S.C. § 794.[2] Among other remedies, plaintiffs sought reimbursement for the cost of sending E.R. to Benchmark for second grade.[3]

On April 21, 2009, an administrative hearing officer found that Ridley had committed no violations during E.R.'s kindergarten year, but that E.R. was denied a FAPE for part of first grade and all of second grade. The hearing officer awarded compensatory education for the 2007-2008 school year (when E.R. attended first grade at the public school) and ordered Ridley to reimburse the plaintiffs for the tuition and transportation costs associated with E.R.'s enrollment at Benchmark in 2008-2009.[4]

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§ 1414(d)].

20 U.S.C. § 1401(9).

[2] Section 794, more familiarly known as Section 504 of the Rehabilitation Act, prohibits discrimination in public schools—among other federally funded programs—on the basis of disability. *See* 29 U.S.C. § 794(b)(2)(B); *see also* 34 C.F.R. § 104.33(a). We explained in *Ridley I* that "§ 504's 'negative prohibition' is similar to the IDEA's 'affirmative duty'" and also requires schools that receive federal financial assistance to provide qualified students with a FAPE. *See* 680 F.3d at 280 (quoting *W.B. v. Matula,* 67 F.3d 484, 492 (3d Cir.1995), *abrogated on other grounds by A.W. v. Jersey City Pub. Schs.,* 486 F.3d 791, 793 (3d Cir.2007)).

[3] In moving E.R. to private school without the school district's acquiescence, the parents were initially responsible for her tuition and other costs. At issue in this case is the extent, if any, of the school district's reimbursement obligation.

[4] E.R. remained at Benchmark for third, fourth and fifth grades as the case progressed through the courts, and her

Nearly two years later, in February 2011, a federal district court reversed the hearing officer's placement assessment, finding that Ridley's proposed IEP was adequate and, hence, that the school district had offered E.R. a FAPE in the local public school. This court affirmed the district court's ruling on May 17, 2012. *See Ridley I*, 680 F.3d at 283.

Meanwhile, in March 2011, after filing their appeal from the district court's judgment, plaintiffs sent a letter to the school district requesting payment for E.R.'s Benchmark costs from the date of the hearing officer's decision forward—at that point, from April 2009 through spring 2011—pursuant to the IDEA's stay-put provision. *See infra* Section II (describing 20 U.S.C. § 1415(j) and related authority). When the school district declined to pay, plaintiffs responded with this action claiming that the IDEA required Ridley to finance E.R.'s private placement until all appeals had concluded in the previous litigation over the adequacy of her IEP.

Ridley denied responsibility for the Benchmark expenses on both procedural and substantive grounds. The school district asserted that the demand for interim tuition was barred at the threshold because it was untimely. This argument relied on three theories: res judicata, the compulsory counterclaim requirement of Federal Rule of Civil Procedure 13, and the statute of limitations. Ridley

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parents paid her tuition.

also contended that plaintiffs were not entitled to relief because, by the time of their second IDEA lawsuit, the district court had already held that Ridley had properly designated the local public school as E.R.'s appropriate placement. The school district argued, in effect, that its validated placement determination had become the baseline for determining the parents' entitlement to a remedy and, accordingly, the IDEA did not provide for recovery of the private school costs.

On cross-motions for judgment on the pleadings, the district court ruled in favor of plaintiffs. The court rejected each of Ridley's timeliness contentions and concluded that the IDEA's stay-put provision entitled the parents to reimbursement for the costs they incurred to send E.R. to Benchmark for the entire period they had requested. The costs at issue—$57,658.38, as stipulated by the parties—covered the approximately three years from the hearing officer's decision in April 2009 through proceedings in the court of appeals (which had by then concluded with this court's 2012 decision affirming the district court's judgment).

This appeal followed. Ridley again challenges both the timeliness of plaintiffs' reimbursement claim and the legal basis for the award. Our review of the district court's judgment on the pleadings is de novo. *See Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 259 n.25 (3d Cir. 2010).

II.

The premise of the IDEA is that parents and

schools working together to design an IEP is the ideal way to reach the statute's goal of a FAPE for every child. *See Ridley I*, 680 F.3d at 269; *see also Schaffer v. Weast*, 546 U.S. 49, 53 (2005). Congress anticipated, however, that "the collaborative process" may at times break down. *Ridley I*, 680 F.3d at 269. Hence, the Act allows either party to respond to a stalemate in the discussions by requesting an impartial due process hearing before a state or local administrative officer. *See* 20 U.S.C. § 1415(f); *Sch. Comm. of Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 368–69 (1985) ("*Burlington*"); *Ridley I*, 680 F.3d at 269. A variety of disputes may arise concerning placement. For example, the parents may argue for removing the child from public school because they believe the services are inadequate. Or the school district might argue for the same result, over the parents' objection, because it considers the child too disruptive to be in a regular school setting. Alternatively, either party could be advocating *for* public-school placement—with the school district insisting that an expensive specialized private school is unnecessary or the parents insisting that participation in a regular classroom is essential for their child's development. *See generally Honig v. Doe*, 484 U.S. 305, 323-26 (1988) (discussing school system's limited authority to exclude disabled students); *Burlington*, 471 U.S. at 373 (stating that one purpose of the stay-put provision "was to prevent school officials from removing a child from the regular classroom over the parents' objection pending completion of the review proceedings"); *id.* at 369-70 (discussing whether parents are entitled to reimbursement for private school tuition); *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 861-63 (3d Cir. 1996)

(addressing parents' objection to school district's plan to move child from a placement outside the district to a local public school).

The parties have the right to seek state or federal court review of the administrative decision, 20 U.S.C. § 1415(i)(2)(A), and—under the provision at issue in this case—the child has the right to remain in his or her "then-current educational placement" during the pendency of the dispute resolution proceedings, *id.* § 1415(j). Section 1415(j) states, in pertinent part:

> [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 . . . .[5]

This provision, known as the IDEA's "stay-put rule," serves "in essence, as an automatic preliminary injunction," *Drinker*, 78 F.3d at 864, reflecting Congress's conclusion that a child with a disability is best served by maintaining her educational status quo until the disagreement over her IEP is resolved, *Pardini v. Allegheny Interm. Unit*, 420 F.3d 181, 190 (3d Cir. 2005); *Drinker*, 78 F.3d at 864. "'Once a court ascertains the student's current educational placement, the movants are entitled to an order

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[5] The stay-put provision was previously codified at 20 U.S.C. § 1415(e)(3). Its language did not change when it was moved.

[maintaining that placement] without satisfaction of the usual prerequisites to injunctive relief.'" *Drinker*, 78 F.3d at 864 (quoting *Woods v. N.J. Dep't of Educ.*, No. 93-5123, 20 Indiv. Disabilities Educ. L. Rep. (LRP Publications) 439, 440 (3d Cir. Sept. 17, 1993)); *see also Pardini*, 420 F.3d at 188 ("Congress has already balanced the competing harms as well as the competing equities"); *Zvi D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982) ("The statute substitutes an absolute rule in favor of the status quo for the court's discretionary consideration of the factors . . . .").

The stay-put rule thus requires that the child's placement under the IDEA at the time a disagreement arises between the parents and the school district—what the statute terms the "then-current educational placement"—be protected while the dispute is pending. To determine that placement, this court has looked to the IEP "actually functioning when the 'stay put' is invoked." *Drinker*, 78 F.3d at 867 (citing *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625-26 (6th Cir. 1990)); *see also Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78, 83 (3d Cir. 1996) ("*Raelee S.*"). The operative placement could be either a public school or a private school that the local district was financing to satisfy the requirement that every child be given a *free*, appropriate education. *See, e.g.*, *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 12 (1993) ("Congress intended that IDEA's promise of a 'free appropriate public education' for disabled children would normally be met by an IEP's provision for education in the regular public schools or in private schools chosen jointly by school officials and parents."); *Raelee S.*, 96 F.3d at 86 (noting that providing a FAPE may involve

"'placement in private schools at public expense'" (quoting Burlington, 471 U.S. at 369)).[6]

The stay-put provision's protective purpose means that "it is often invoked by a child's parents in order to maintain a placement where the parents disagree with a change proposed by the school district." *See Raelee S.*, 96 F.3d at 83. During "the pendency" of the dispute process, the child is entitled to remain in her IEP-specified educational setting.[7] *See* 20 U.S.C. § 1415(j). Where the parents seek a *change* in placement, however, and unilaterally move their child from an IEP-specified program to their desired alternative setting, the stay-put rule does not immediately come into play. *Raelee S.*, 96 F.3d at 83. In such circumstances, the parents will be responsible for the costs of the child's new placement—at least initially.

The new placement can become the educational setting protected by the stay-put rule if the parents and "the State or local educational agency" agree to the change. *See* 20 U.S.C. § 1415(j). Also, importantly, a decision favorable to the parents during the administrative review process "must be

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[6] If the dispute concerns a child who is applying for initial admission to a public school, the child "shall, with the consent of the parents, be placed in the public school program" until the dispute resolution proceedings have concluded. *See* 20 U.S.C. § 1415(j); *see also* 34 C.F.R. § 300.518(b).

[7] We have referred to this educational setting as the child's "pendent placement"—a term of art drawn from the language of § 1415(j). *See Raelee S.*, 96 F.3d at 80 n.1.

treated as an agreement between the State and the parents," 34 C.F.R. § 300.518(d); *see also Burlington*, 471 U.S. at 372 (noting that an administrative decision in favor of the parents and private school placement "would seem to constitute agreement by the State to the change of placement"); *Raelee S.*, 96 F.3d at 83 (citing *Burlington*).[8] Accordingly, an administrative ruling validating the parents' decision to move their child from an IEP-specified public school to a private school will, in essence, make the child's enrollment at the private school her "then-current educational placement" for purposes of the stay-put rule. Having been endorsed by the State, the move to private school is no longer the parents' unilateral action, and the child is entitled to "stay put" at the private school for the duration of the dispute resolution proceedings. *See Raelee S.*, 96 F.3d at 83-84.

Although § 1415(j) does not specify which party pays when a child's pendent placement becomes a private school based on an administrative decision, the school district's obligation to do so is well established by case law. *See Raelee S.*, 96 F.3d at 84, 86. Hence, the school district is obliged to fund a

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[8] In *Raelee S.*, this court declined to decide whether a decision in favor of the parents by a hearing officer—as opposed to an administrative appellate panel—"would constitute agreement by the state for purposes of pendent placement and tuition reimbursement." *See* 96 F.3d at 85 n.8. The subsequently enacted Department of Education regulation addressing pendent placement explicitly includes a hearing officer's decision within the scope of the pendent-placement protection, and we now do likewise. *See* 34 C.F.R. § 300.518(d).

private placement if it was either the educational setting prescribed by the current IEP or is subsequently designated by a hearing officer or administrative appeal official as the appropriate setting to meet a child's needs. In this case, the stay-put provision became effective in April 2009, when the hearing officer determined that Ridley had denied E.R. a FAPE and concluded that Benchmark was her appropriate educational setting. E.R. could thus "stay put" at Benchmark at the school district's expense while the court proceedings were pending. Because E.R. was entitled to reimbursement for her costs at Benchmark beginning in April 2009, the parents could have requested that Ridley reimburse any tuition they already had paid for the remaining portion of the 2008-2009 school year and also could have asked the school district to reimburse the Benchmark costs in the following years (or pay those amounts as they became due).

At issue in this case is whether the school district's financial responsibility dissolves if the parents do not request reimbursement for their out-of-pocket private school costs until after an administrative decision in their favor has been reversed by a court upon further review. Ridley emphasizes that the remedial subsection of the IDEA provision that authorizes "[a]ny party aggrieved" by the administrative ruling to file a civil action allows a court to grant only "such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(A),

(i)(2)(C)(iii).[9] The school district maintains that it was inappropriate in this case to award reimbursement for private schooling that the district court had found unnecessary by the time the request for payment was made. Ridley argues that the court ruling returned E.R.'s placement to Grace Park Elementary School with respect to the school district's funding obligation, eliminating the justification for any interim reimbursement. Ridley further asserts that, even if we conclude that interim reimbursement is required under the IDEA, any obligation for interim funding does not include the period of the appeal to the Third Circuit.

Before confronting those merits arguments, we address Ridley's procedural claims.

III.

Ridley asserts that E.R.'s parents should have demanded tuition reimbursement for their daughter's pendent placement as part of the relief they requested through counterclaims in the earlier action, which was filed by the school district to challenge the hearing officer's ruling. Ridley offers a trio of rationales to support its contention that plaintiffs' request for reimbursement should be

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[9] A civil action may be brought with "respect to the [administrative] complaint," 20 U.S.C. § 1415(i)(2)(A), and complaints may be filed "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," *id*. § 1415(b)(2)(B)(6)(A).

denied as untimely. We find none of them persuasive.

A. Res judicata

Ridley argues that plaintiffs, having failed to assert their claim for reimbursement in the earlier IDEA lawsuit between the same parties, may not do so in this subsequent action under the principles of res judicata, or claim preclusion. To rely on the affirmative defense of res judicata, a party must establish three elements: (1) a final judgment on the merits in a prior proceeding that involved (2) the same parties or their privies and (3) the same "cause of action." *See, e.g.*, *Duhaney v. Att'y Gen.*, 621 F.3d 340, 347 (3d Cir. 2010); *Sheridan*, 609 F.3d at 260 (explaining that "the central purpose of the [res judicata] doctrine [is] to require a plaintiff to present all claims arising out [of] the same occurrence in a single suit" (third alteration in original) (internal quotation mark omitted)). The first two elements are not disputed. In examining the similarity of the claims (the third element), we focus on "whether the acts complained of [are] the same, whether the material facts alleged in each suit [are] the same and whether the witnesses and documentation required to prove such allegations [are] the same." *United States v. Athlone Indus., Inc.*, 746 F.2d 977, 984 (3d Cir. 1984).

We agree with the district court that the reimbursement claim in this case differs materially from the issues addressed in *Ridley I*. Although both cases concern the rights of E.R. and her parents under the IDEA, the similarity ends there. *Ridley I*

focused on the substance of an appropriate education for E.R., while the current case is a payment dispute over E.R.'s stay-put expenses. The former was fact-intensive, requiring the courts to review testimony and documentary evidence about E.R.'s needs and the school district's plans for meeting them, while the latter is centered on the legal question of financial responsibility and the undisputed fact that a hearing officer ruled in plaintiffs' favor.[10] That the cases are related does not erase these significant differences between the causes of action at issue. Indeed, this court previously has recognized, albeit in the different context of collateral-order review, that "resolution of [pendent-placement and tuition-reimbursement rights] is completely separate from the merits issues which focus on the adequacy of the proposed IEP." *Raelee S.*, 96 F.3d at 81 n.4 (allowing appeal of pendent-placement ruling as a collateral order subject to review under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)); *see also A.D. v. Haw. Dep't of Educ.*, 727 F.3d 911, 913 (9th Cir. 2013) (holding that a stay-put order "resolves an important issue completely separate from the merits of the child's ultimate placement").

We therefore conclude that the res judicata doctrine does not bar this action.

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[10] The second action theoretically also involves fact-finding on the cost of E.R.'s pendent placement at Benchmark, but the parties have stipulated to the amount at issue. Moreover, evidence proving tuition and transportations costs is plainly distinct from the evidence needed for the merits issues in *Ridley I*.

B. The Compulsory Counterclaim Rule

Federal Rule of Civil Procedure 13(a) requires a party to assert as a counterclaim any cause of action that is available against the opposing party that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." The failure to plead a compulsory counterclaim bars a later independent action on that claim. *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974); *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, 882 (5th Cir.1998); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1417, at 147 (3d ed. 2010).

The inquiry to determine if a claim is compulsory under Rule 13(a) is "whether the counterclaim 'bears a logical relationship to an opposing party's claim.'" *Transamerica Occidental Life Ins. Co. v. Aviation Office of Am., Inc.*, 292 F.3d 384, 389 (3d Cir. 2002) (quoting *Xerox Corp. v. SCM Corp.*, 576 F.2d 1057, 1059 (3d Cir. 1978)). This court has stated that a logical relationship exists "where separate trials on each of the[ ] respective claims would involve a substantial duplication of effort and time by the parties and the courts." *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631, 634 (3d Cir. 1961); *see also Transamerica*, 292 F.3d at 389-90. The compulsory counterclaim inquiry thus requires essentially the same comparison between claims as the res judicata analysis. *See Transamerica*, 292 F.3d at 391 (noting "the close connection between Rule 13(a) and the doctrine of claim preclusion").

As discussed above, despite a relationship between the two lawsuits, there is no meaningful overlap between the facts and law underlying the different claims at issue. *Cf. Ross v. Bd. of Educ.*, 486 F.3d 279, 283-84 (7th Cir. 2007) (holding that current claims under Americans with Disabilities Act, Rehabilitation Act, and 42 U.S.C. § 1983 were compulsory counterclaims in a prior suit where both lawsuits "deal with [the school district's] placement decisions, the services it offered [the plaintiff], and its response to her disability"). Plaintiffs were therefore not compelled to advance their pendent-placement reimbursement demand by means of a counterclaim.

Moreover, as the district court observed, Rule 13(a) "effectively operates as a waiver," *M.R. v. Ridley Sch. Dist.*, No. 11–2235, 2012 WL 3279230, at *7 (Aug. 13, 2012) (*Ridley II*), and this court previously has expressed doubt that "parents can lose their stay put protection except by affirmative agreement to give it up," *Drinker*, 78 F.3d at 868. E.R.'s parents did not explicitly agree to forgo their child's stay-put rights. Hence, as in *Drinker*, "even assuming that in a proper case the stay put provision can be waived, we find nothing in the record here that leads us to believe this is such a case." *Id*.

Accordingly, Rule 13(a) does not foreclose this independent action seeking reimbursement for E.R.'s interim placement expenses. We emphasize, however, that our conclusion that neither res judicata nor Federal Rule of Civil Procedure 13(a) bars the instant action does not mean that claims for stay-put reimbursement should not be brought in the same civil action with substantive IDEA claims, such as

those addressing the child's placement or the provision of a FAPE. We hold only that, in the context of this case, plaintiffs were permitted to bring them separately.

C. Statute of Limitations

Ridley argues that plaintiffs' claim is barred by the IDEA provision requiring "[a]ny party aggrieved" by a hearing officer's decision to file suit within ninety days of that decision. *See* 20 U.S.C. § 1415(i)(2)(A), (B). As the district court concluded, that statutory limitations period does not by its terms apply to plaintiffs' stay-put reimbursement claim. Although the parents did seek reversal of the hearing officer's decision on certain issues,[11] they had prevailed on the issue of E.R.'s placement at Benchmark for second grade. That favorable decision included an award of E.R.'s tuition and transportation costs for 2008-2009 and, under the stay-put provision, made Benchmark E.R.'s pendent placement going forward with the right to interim tuition reimbursement.[12] Hence, the parents were

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[11] Their pleading in response to Ridley's Petition for Review alleged, inter alia, that the hearing officer had erred in finding that Ridley did not deny E.R. a FAPE for the 2006-2007 school year and in finding that she was not improperly denied extended programming for the summer of 2007.

[12] After the courts reversed the hearing officer's ruling that E.R.'s IEP for the 2007-2008 and 2008-2009 school years was inadequate, plaintiffs were no longer entitled to reimbursement for the costs of E.R.'s second grade year at Benchmark (2008-2009) based on the school district's failure to provide her a FAPE. At issue in this case is whether the stay-put provision

not aggrieved by the hearing officer's decision on the issue raised in this case. Ridley points to no other applicable limitations period, and we therefore reject its statute-of-limitations defense to plaintiffs' claim.

IV.

Ridley's challenge on the merits also focuses on issues of timing. Its primary argument is that E.R.'s parents are not entitled to *any* reimbursement under § 1415(j) because they filed their claim for payment too late, i.e., after the administrative ruling in their favor was reversed by the district court. The school district further argues that, even if the parents may recover some of the private school costs, the covered period ended with the district court's entry of judgment rather than at the time of the appeals court's decision. Both contentions require us to consider aspects of the stay-put right that this court has not previously addressed.

Ridley's assertion that plaintiffs' right to reimbursement expired when the district court overturned the hearing officer's decision necessarily depends on two assumptions about how the stay-put scheme works. First, the school district maintains that the reimbursement right does not ripen until a

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gives them a separate basis to recoup a portion of their costs for that year (from the date of the hearing officer's decision in April 2009 through the end of the school year), as well as the costs for E.R.'s enrollment at Benchmark through the date of this court's decision in May 2012 (i.e., for the entire 2009-2010 and 2010-2011 school years and for most of the 2011-2012 school year).

claim seeking payment is presented to the court. Second, Ridley contends that once the district court ruled that Ridley had offered E.R. a FAPE in its public schools, Benchmark was no longer E.R.'s pendent placement. In Ridley's view, the parents failed to seek payment while the private school was designated as E.R.'s pendent placement and, hence, their potential right to reimbursement never ripened into an entitlement.

We consider below Ridley's two assumptions: (1) that the right to reimbursement ripens only when parents file a claim with the court seeking payment, and (2) that E.R.'s relevant educational placement had returned to the public school by the time her parents filed their claim. We then address Ridley's argument that the stay-put financing obligation lasts only until judgment at the district court.

A. When Does the Right to Reimbursement Accrue?

Ridley argues that the IDEA does not automatically provide for reimbursement for the cost of private schooling during the stay-put period and that parents must make an affirmative request to the court for that remedy. As support, the school district cites the IDEA's remedial provision, 20 U.S.C. § 1415(i)(2)(C)(iii), which states that a court "shall grant such relief as [it] determines is appropriate." Ridley infers from that statutory language that parents have no entitlement to stay-put reimbursement until a court rules that it is "appropriate."

We reject this interpretation as inconsistent with the IDEA's stay-put guarantee and this court's prior case law. The stay-put provision—titled "Maintenance of current educational placement"—directs that "the child *shall* remain in the then-current educational placement" throughout the pendency of any proceedings conducted to resolve a dispute over the provision of a FAPE. 20 U.S.C. § 1415(j) (emphasis added). Ridley does not dispute that the hearing officer's decision in this case had the effect of switching E.R.'s pendent placement from the public school recommended by her IEP to the private Benchmark School. As noted above, *see supra* Section II, we have expressly held that financing goes hand-in-hand with pendent private-school placement:

> It is undisputed that once there is a state agreement with respect to pendent placement, *a fortiori*, financial responsibility on the part of the local school district follows. Thus, from the point of the [state administrative] decision forward . . . [the student's] pendent placement, by agreement of the state, is the private school and [the school district] is obligated to pay for that placement.

Raelee S., 96 F.3d at 84; *see also Bd. of Educ. v. Schutz*, 290 F.3d 476, 484 (2d Cir. 2002) (holding that "once the parents' challenge [to a proposed IEP] succeeds . . . , consent to the private placement is implied by law, and the requirements of § 1415(j) become the responsibility of the school district").

We have thus recognized that the stay-put

provision itself impliedly, and necessarily, deems reimbursement for the costs of pendent placement in a private school an "appropriate" remedy. *See Raelee S.*, 96 F.3d at 87 ("Without interim financial support, a parent's 'choice' to have his child remain in what the state has determined to be an appropriate private school placement amounts to no choice at all."). There is no separate requirement of a court finding of appropriateness; rather, the obligation arises automatically from a determination that the private school is the protected status quo during the period in which the dispute resolution process is ongoing. Indeed, Ridley admitted as much before the district court in this case when it acknowledged that the court would have been "obliged" to order reimbursement if the parents had sought the funds through a timely counterclaim. *Ridley II*, 2012 WL 3279230, at *8 n.8. We think it pointless to insist on a formal demand for interim tuition reimbursement when there is no viable response to that demand.

Hence, plaintiffs secured the right to reimbursement when the hearing officer ruled in their favor in April 2009. We must now consider whether that right survived the subsequent district court ruling in favor of the school district.

B. The Current Educational Placement

Ridley contends that any reimbursement entitlement the parents may have had under § 1415(j) dissolved in February 2011, when the district court reversed the hearing officer's decision. The school district argues that the court ruling "rendered the hearing officer's decision inoperative"

and reinstated the public school as E.R.'s stay-put placement, making the parents ineligible for private-school reimbursement at the time they requested payment from the school district in March 2011. At that point, according to Ridley's theory, the parents' unilateral decision to send E.R. to Benchmark no longer had the state imprimatur that made reimbursement appropriate. Ridley's position thus depends on whether the district court's ruling in fact recalibrated the stay-put assessment.

This court observed in *Drinker* that "'the dispositive factor in deciding a child's "current educational placement" should be the Individualized Education Program . . . actually functioning when the "stay put" is invoked.'" 78 F.3d at 867 (quoting *Woods*, 20 Indiv. Disabilities Educ. L. Rep. at 440). According to Ridley, plaintiffs did not invoke the stay-put until after the district court determined that the school district's IEP was appropriate and, hence, the original IEP, "placing the student in the school district, is the one now 'actually functioning.'"

Ridley's argument lacks support in the law. The operative placement is not determined by the date the parents seek reimbursement for stay-put expenses, but by the date the dispute between the parents and the school district "'first arises'" and proceedings conducted pursuant to the IDEA begin. *Id*. (quoting *Thomas*, 918 F.2d at 625). At the latest, the pertinent proceedings in this case began with the parents' filing of their due process complaint in December 2008, at which point E.R.'s current placement was the public school. *See A.D.*, 727 F.3d at 915 ("[A] stay-put placement is effective from the

date a student requests an administrative due process hearing."); *D.F. v. Collingswood Borough Bd. of Educ.*, 694 F.3d 488, 492 (3d Cir. 2012) ("By filing the [due process] petition, A.C. triggered the IDEA's 'stay-put' requirement."). As described above, however, E.R.'s operative placement switched by law to the private Benchmark School when the administrative hearing officer agreed with the parents that Ridley had not offered the child a FAPE in the public school.

Nothing in the statute or this circuit's law provides a basis for changing E.R.'s stay-put placement back to the public school during the pendency of the dispute process, notwithstanding the school district's successful appeal of the administrative decision. To the contrary, § 1415(j) states that the child shall remain in the current educational placement "until *all* [IDEA] proceedings have been completed" (emphasis added). We cannot conclude that Congress intended a placement based on an agreement with "the State or local educational agency" to be less secure than one based on an IEP. *Id.* Indeed, any other conclusion would be at odds with our expressly stated understanding that the stay-put provision is designed to ensure educational stability for children with disabilities until the dispute over their placement is resolved, "'*regardless of whether their case is meritorious or not*.'" *Drinker*, 78 F.3d at 864 (quoting *Woods*, 20 Indiv. Disabilities Educ. L. Rep. at 440) (emphasis added); *see also A.D.*, 727 F.3d at 914 (stating that "a student who requests an administrative due process hearing is entitled to remain in his educational placement regardless of the strength of his case or the likelihood he will be

harmed by a change in placement"); *Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 1040 (9th Cir. 2009) ("[T]he stay put provision acts as a powerful protective measure to prevent disruption of the child's education throughout the dispute process."); *Mackey v. Bd. of Educ.*, 386 F.3d 158, 160-61 (2d Cir. 2004) (quoting the Drinker language above).

Thus, under the statute and this court's precedent, E.R.'s pendent placement under § 1415(j) remained the Benchmark School through at least the conclusion of the proceedings in the district court, and the school district's correlative obligation to pay for her schooling there also remained intact. The only remaining question is whether Ridley's financial responsibility extended through final judgment in the appeals court.

C. The Duration of the School District's Reimbursement Obligation

Ridley asserts that its responsibility to finance E.R.'s pendent placement at Benchmark terminated, at the latest, when the district court ruled in favor of the school district on plaintiffs' IDEA claim. This court previously has held that § 1415(j) requires a school district to pay for a private school that is a pendent placement through the date of a district court's final order in an IDEA case. *See Drinker*, 78 F.3d at 867. The court has not, however, addressed whether the stay-put provision also applies through the pendency of an IDEA dispute in the Court of Appeals. The only two circuits to have decided the issue in published opinions are split. *Compare*

Joshua A., 559 F.3d at 1038-40 (holding that stay-put obligation extends through appeals decision), *with Andersen v. Dist. of Columbia*, 877 F.2d 1018, 1023-24 (D.C. Cir. 1989) (holding that Congress did not intend stay-put financing to cover federal appellate review). *See also Kari H. v. Franklin Special Sch. Dist.*, 125 F.3d 855 (6th Cir. 1997) (table), 1997 WL 468326, at *6 (Nos. 96–5066, 5178) (Aug. 12, 1997) (following *Andersen*); *N. Kitsap Sch. Dist. v. K.W.*, 123 P.3d 469, 483 (Wash. App. Ct. 2005) (holding that stay-put period extends "throughout the *entire* process, including any appeals").

Having now considered the question, we agree with the Ninth Circuit—and the district court in this case—that the statutory language and the "protective purposes" of the stay-put provision lead to the conclusion that Congress intended stay-put placement to remain in effect through the final resolution of the dispute. *Ridley II*, 2012 WL 3279230, at *11. The statute's text is broadly written to encompass "the pendency of *any* proceedings conducted pursuant to this section." 20 U.S.C. § 1415(j) (emphasis added). Narrowing the provision's scope to exclude the appellate process strikes us as an unnatural reading of such expansive language. The "proceedings" specifically covered by § 1415 include civil actions in "a district court of the United States." *Id.* § 1415(i)(2)(A). The district court reasonably construed that reference to include all phases of the federal proceedings that begin with a district court filing: "Although Congress did not explicitly articulate that an appeal is a 'proceeding' under § 1415, it seems intuitive that an appeal is part of a 'civil action . . . in a district court of the

United States.' . . . In drafting § 1415(j), Congress surely understood that district court review would necessarily include an appeal to a circuit court." *Ridley II*, 2012 WL 3279230, at *11; *see also Joshua A.*, 559 F.3d at 1038 ("By giving Joshua the right to appeal the ALJ's decision to the district court, § 1415 also made it possible for Joshua to appeal the dispute to this circuit court.").

Even if we had doubts about the clarity of the language itself, we would nonetheless adopt the same construction because that "reading . . . 'best accords with the overall purposes of the statute.'" *Nugent v. Ashcroft*, 367 F.3d 162, 170 (3d Cir. 2004) (quoting *Moskal v. United States*, 498 U.S. 103, 116-17 (1990)), *overruled on other grounds by Al-Sharif v. U.S. Citizenship & Immigration Servs.*, 734 F.3d 207 (3d Cir. 2013) (en banc)); *see also Long v. Tommy Hilfiger U.S.A., Inc.*, 671 F.3d 371, 375 (3d Cir. 2012) (noting that, in addition to language and context, we "consider the 'overall object and policy of the statute, and avoid constructions that produce odd or absurd results or that are inconsistent with common sense'" (quoting *Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 539 F.3d 199, 210 (3d Cir. 2008))). We have stated consistently that the stay-put provision is designed to preserve the status quo "'until the dispute with regard to [the child's] placement is ultimately resolved.'" *Drinker*, 78 F.3d at 864 (quoting *Woods*, 20 Indiv. Disabilities Educ. L. Rep. at 440); *see also, e.g.*, *Pardini*, 420 F.3d at 190; *J.O. v. Orange Twp. Bd. of Educ.*, 287 F.3d 267, 272 (3d Cir. 2002). We cannot sensibly find that a FAPE dispute is "ultimately resolved" before proceedings have run their course through a final, unappealed decision by

an administrative body or an appellate judicial decision. *See Joshua A.*, 559 F.3d at 1040 ("It is unlikely that Congress intended the protective measure to end suddenly and arbitrarily before the dispute is fully resolved.").

Moreover, the rationale that underlies a school district's obligation to finance a child's pendent placement remains compelling through the appellate process. If we concluded that stay-put protection terminates while an appeal is pending, the parents of a child with disabilities would be faced with the untenable choice of removing their child from a setting the appeals court might find appropriate or risking the burden of private school costs they cannot afford for the period of the appeal. *See, e.g., Joshua A.*, 559 F.3d at 1040; *Raelee S.*, 96 F.3d at 86-87. In addition,

> cutting off stay-put protection after district court review has potential negative consequences in other factual scenarios besides private school placement. For instance, the stay-put provision could have been invoked during the pendency of an appeal to maintain a child's special services within the school district or to maintain a child's placement in a mainstream rather than a self-contained classroom.

Ridley II, 2012 WL 3279230, at *12 n.10. The broad reading of § 1415(j) thus aligns with the statute's important mission to guarantee educational stability for all children with disabilities until there is a *final* ruling on placement.

The wisdom of this reading of § 1415(j) is reinforced by the Department of Education's implementing regulation, which states explicitly that the child must remain in his or her current educational placement "during the pendency of "*any* . . . *judicial proceeding* regarding a due process complaint." 34 C.F.R. § 300.518(a) (emphasis added). The unbounded reference to "any" judicial proceeding plainly extends the mandate through the conclusion of the appellate process, and the agency's view of the statute's reach thus mirrors our own. If we had considered § 1415(j) ambiguous on the issue of duration, we would have been obliged to give deference to this permissible construction by the agency. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Castillo v. Att'y Gen.*, 729 F.3d 296, 302 (3d Cir. 2013). Every appropriate interpretive path thus leads us to the same conclusion.

The D.C. Circuit in *Andersen* adopted the contrary interpretation based on a view of the IDEA's purpose that we believe is unjustifiably limited. The *Andersen* court focused on the Supreme Court's decision in *Honig v. Doe*, where the issue was whether school districts may be excused from the stay-put requirement when a child's continuing presence in the classroom poses a danger to himself or others. *See Honig*, 484 U.S. at 323; *Andersen*, 877 F.2d at 1023–24. In rejecting such an exception,[13]

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[13] The IDEA does allow certain temporary exceptions to the pendent-placement provision, including for students carrying a weapon to school, using or selling drugs at school, or inflicting serious bodily injury on others. *See* 20 U.S.C. § 1415(k)(1)(G);

the Supreme Court observed that "one of the purposes 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,'" *Honig*, 484 U.S. at 327 (quoting *Burlington*, 471 U.S. at 373). The Court emphasized the incompatibility of the asserted unilateral authority to exclude students perceived as dangerous with the IDEA's goals, *see id.* at 323, 327, and pointed out that school officials faced with a safety issue could, among other steps, seek court intervention under the IDEA if "parents of a truly dangerous child adamantly refuse to permit any change in placement," *id*. at 326.

The D.C. Circuit appeared to treat *Honig* as establishing a single goal for the stay-put provision, *i.e.*, "to protect children from *unilateral* displacement *by school authorities*." 877 F.2d at 1024. The court thus reasoned that the automatic stay-put injunction is no longer justified once a district court has decided in favor of a proposal by school officials to transfer a student: "Once 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; the issuance of an automatic injunction perpetuating the prior placement would not serve the section's purpose." 877 F.2d at 1024. Based on this assumption about

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see also Honig, 484 U.S. at 325 & n.8 (citing a Department of Education position that a ten-day suspension "does not amount to a 'change in placement' prohibited by § 1415[(j)]").

the role of § 1415(j), the *Andersen* court held that, after a court has endorsed the school district's educational plan for a disabled child, the child's parents may prevent a change in placement consistent with the court ruling only by satisfying the standard requirements for injunctive relief. *Id.*

In our view, there is a flaw in the D.C. Circuit's reasoning. The Supreme Court has not declared protection from unilateral action by school officials to be the *only* purpose of the stay-put provision. Rather, the Court identified it in *Honig* as "*one* of [the section's] purposes." 484 U.S. at 327 (emphasis added); *see also id.* (describing "the unilateral exclusion of disabled children by schools" as "*one* of the evils Congress sought to remedy" (emphasis in first phrase omitted) (emphasis in second phrase added)); *Burlington*, 471 U.S. at 373 ("We think *at least one purpose* 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." (emphasis added)). As we have just explained, the pendent-placement requirement also reflects a concern about the continuity of a child's placement generally. *See A.D.*, 727 F.3d at 916 ("[T]he purpose of the stay-put provision . . . is to protect students from changes to their educational programs when there is a dispute over the lawfulness of the changes."); *K.W.*, 123 P.3d at 482 ("[T]he holding in *Andersen* does not follow the general policy behind IDEA, which is to keep from disturbing the child throughout the statutory process designed to resolve disputes between the school district and the child's parents or guardians over where the child can receive

the appropriate educational opportunities."). The D.C. Circuit's limited perspective in *Andersen* undermines its conclusion that the stay-put protection, which triggers the school district's reimbursement obligation, does not extend through the period of an appeal.[14]

V.

We are not insensitive to the financial burden our decision will impose on school districts, *see Raelee S*, 96 F.3d at 87, or the seeming incongruity of the ultimately prevailing party having to pay for a now-rejected placement. Despite two judicial determinations that Ridley did not deny E.R. a FAPE, the school district will be assessed the cost of her private school education for a substantial period of time.[15] It is impossible, however, to protect a child's educational status quo without sometimes taxing school districts for private education costs that ultimately will be deemed unnecessary by a court. We see this not as "an absurd result," *Ridley II*, 2012 WL 3279230, at *13, but as an unavoidable consequence of the balance Congress struck to ensure

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[14] The plaintiffs in this case did not seek Supreme Court review of the appeals court ruling in *Ridley I,* and we therefore do not address whether stay-put protection encompasses such proceedings.

[15] As noted above, the reimbursement period runs from the date of the administrative hearing officer's decision in April 2009—i.e., shortly before the end of the 2008–2009 school year—through the date of the appellate decision in May 2012.

stability for a vulnerable group of children.

Affirmed.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

M.R. and J.R., Parents of minor child, E.R.	:	**CIVIL ACTION**
Plaintiffs,	:	
	:	
v.	:	**NO. 11-2235**
	:	
RIDLEY SCHOOL DISTRICT,	:	
Defendant.	:	
	:	

Goldberg, J. **August 13, 2012**

Memorandum Opinion

This matter arises under the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. § 1401 et seq., and requires us to interpret what is commonly referred to as the stay-put provision of that Act, § 1415(j).

The dispute between the parties initially and primarily involved allegations by Plaintiffs, M.R. and J.R. (hereinafter "Parents"), that Defendant, Ridley School District (hereinafter "Ridley"), had violated the IDEA in failing to timely identify their daughter, E.R., as a child with a disability. Parents also claimed that Ridley had not developed an appropriate individualized education program ("IEP") for E.R.

and had engaged in discrimination by failing to comply with E.R.'s § 504 health plan.[1] In disagreeing with the Administrative Hearing Officer's conclusions, we resolved the IDEA and § 504 issues in Ridley's favor. Ridley Sch. Dist. v. M.R., 2011 WL 499966 (E.D. Pa. Feb. 14, 2011) (hereinafter "Ridley I"). Parents appealed and the United States Court of Appeals for the Third Circuit recently affirmed this ruling. Ridley Sch. Dist. v. M.R., 680 F.3d 260 (3d Cir. 2012).

Presently before the Court is Parents' claim that Ridley has failed to fund the pendent placement of E.R. pursuant to § 1415(j) of the IDEA. Under this subsection, Parents seek payment for tuition and transportation costs from April 21, 2009 (the date of the Administrative Hearing Officer's ruling) through the exhaustion of their appeal in Ridley I. This dispute comes before us through cross motions for judgment on the pleadings, and raises the following issues:

- Whether Parents timely raised their request for stay-put compensation;
- Whether an unfavorable district court decision on the merits of Parents' underlying IDEA claim precludes stay-put relief; and
- If stay-put relief is warranted, whether Parents are entitled to have E.R.'s private school placement funded by Ridley during

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[1] § 504 of the Rehabilitation Act prohibits discrimination in federally-funded programs, including public schools, on the basis of disability. 29 U.S.C. § 794.

the pendency of their federal appeal.

For the reasons set forth below, we will grant Parents' motion and deny Ridley's motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

E.R. is a special needs student who attended the Ridley School District through first grade (2007-2008). After first grade, having rejected Ridley's recommended placement for the 2008-2009 school year, Parents removed E.R. from Ridley and enrolled her in the Benchmark School (hereinafter, "Benchmark"), a private school that specializes in teaching students with learning disabilities.

On December 4, 2008, Parents filed a due process complaint with the Pennsylvania Department of Education, which primarily challenged Ridley's IEP. On April 21, 2009, following a multi-day hearing, the Administrative Hearing Officer ruled, inter alia, that Ridley failed to provide an appropriate educational program for E.R. for the 2008-2009 school year, and was thus required to reimburse Parents for tuition at the Benchmark School for that year. The Hearing Officer also awarded Parents compensatory education for the 2007-2008 school year.

Ridley filed a petition for review in the Pennsylvania Commonwealth Court pursuant to 20 U.S.C. § 1415(i)(2), and Parents subsequently removed the action to this Court. Parents properly

treated Ridley's petition as a complaint,[2] and filed an answer and counterclaims, which alleged that: (1) Ridley had violated the IDEA in failing to provide a free and appropriate education for E.R. in the 2006-2007 academic year; (2) Ridley had violated § 504 of the Rehabilitation Act; (3) Ridley had violated the Americans with Disabilities Act; and (4) Parents were entitled to attorneys' fees and costs on the Hearing Officer's decision and their counterclaims if they prevailed. Parents' responsive pleading did not assert a counterclaim for funding of E.R.'s private school placement under the stay-put provision.

The parties subsequently filed cross motions for judgment on the administrative record. On February 14, 2011, we granted Ridley's motion, denied Parents' motion and entered judgment in favor of Ridley. Ridley Sch. Dist., 2011 WL 499966. On February 15, 2011, Parents filed a notice of appeal to the Third Circuit. As noted above, the Third Circuit affirmed our ruling on May 17, 2012. Ridley Sch. Dist., 680 F.3d at 260.

After filing their appeal, and through correspondence dated March 17, 2011, Parents requested that Ridley provide compensation for E.R.'s placement at the Benchmark School pursuant to § 1415(j) of the IDEA. Ridley responded shortly thereafter, declining Parents' request. Parents subsequently filed the instant lawsuit on March 29,

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[2] A federal action brought pursuant to the IDEA is "properly characterized as an original 'civil action,' not an 'appeal.'" Jonathan H. v. Souderton Area Sch. Dist., 562 F.3d 527, 529 (3d Cir. 2009).

2011. In their complaint, Parents seek a declaration that Ridley is obligated to reimburse them for E.R.'s tuition and travel to Benchmark from the date of the Hearing Officer's decision through the exhaustion of appeals. The cross motions for judgment on the pleadings currently before the Court were filed on May 4, 2011 and June 10, 2011.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure Rule 12(c), judgment on the pleadings "will not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." Rosenau v. Unifund Corp., 539 F.3d 218, 221 (3d Cir. 2008) (quoting Jablonski v. Pan Am. World Airways, Inc., 863 F.2d 289, 290 (3d Cir. 1988) (internal quotation marks omitted)). When ruling on a Rule 12(c) motion, the court must view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the non-moving party.[3] Jablonski, 863 F.2d at 290-91.

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[3] We note that where, as here, a moving party asserts that the complaint fails to state a claim upon which relief may be granted, the court applies the same standards to its review as those applied in a Rule 12(b)(6) motion. See Turbe v. Gov't of Virgin Islands, 938 F.2d 427, 428 (3d Cir. 1991). However, because Ridley's motion does not challenge the sufficiency of Parents' complaint, the standard of review is identical for both Parents' and Ridley's motions.

III. DISCUSSION

A. 20 U.S.C. § 1415(j) – Statutory and Precedential Background

The IDEA mandates that children with disabilities have access to "free appropriate public education" ("FAPE"). 20 U.S.C. § 1400(d)(1)(A). To provide FAPE, school districts are obligated to design and administer a program of individualized instruction that is set forth in an individualized education program, or IEP. Id. § 1414(d). The IEP must be "'reasonably calculated' to enable the child to receive 'meaningful education benefits' in light of the student's intellectual potential.'" Shore Regional High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004) (quoting Polk v. Cent. Susquehanna Interm. Unit 16, 853 F.2d 171, 181 (3d Cir. 1988)).

Compliance with the IDEA is monitored by federal review and through procedural safeguards provided to disabled children and their parents. Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78, 82 (3d Cir. 1996). These safeguards are intended to "guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." Honig v. Doe, 484 U.S. 305-311-12 (1988). Procedural safeguards include, but are not limited to: the right to challenge the identification, evaluation or educational placement of a child, or the provision of FAPE by filing a due process complaint; the right to an impartial due process hearing on that complaint; the right to bring an action seeking state or federal judicial review of the administrative decision; and the

right of the child to remain in his or her current educational placement during the pendency of such proceedings. 20 U.S.C. § 1415(b)(6), (f), (i)(2), (j).

The pendent placement safeguard—or stay-put provision—currently at issue provides, in relevant part, that: "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 . . . until all such proceedings have been completed." Id. § 1415(j). The United States Supreme Court has described this language as "unequivocal," in that it plainly states that "the child *shall* remain in the then current educational placement." Honig, 484 U.S. at 323 (internal quotation marks omitted). The provision functions, in essence, as an automatic preliminary injunction. Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996) (citing Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982)). "Once a court ascertains the student's current educational placement, the movants are entitled to an order without satisfaction of the usual prerequisites to injunctive relief." Id.

In determining what constitutes the student's current placement, courts generally look to the operative placement actually functioning at the time the dispute arose—that is, the placement indicated in the IEP. Id. at 867. However, where, as here, parents have removed their child from a placement and a hearing officer agrees that the change of placement is appropriate, that change of placement "must be treated as an agreement between the State and the parents" for purposes of the stay-put

provision.[4] 34 C.F.R. § 300.518(d); see also Raelee S., 96 F.3d at 84, 86 (finding that special appeals panel's ruling in favor of parents must be treated as an agreement of the state and noting that "[w]hile parents who reject a proposed IEP bear the initial expenses of a unilateral placement, the school district's financial responsibility should begin when there is an administrative or judicial decision vindicating the parents' position."). Although § 1415(j) does not address which party bears the cost of maintaining the pendent placement, the Third Circuit has held that the provision "requires a school district to pay for a private pendent placement at least through the date of a district court's final order in an IDEA case." J.E. ex rel. J.E. v. Boyertown Area Sch. Dist., 2011 WL 5838479, at *3 (3d Cir. Nov. 21, 2011) (citing Drinker, 78 F.3d at 867 (internal quotation marks omitted)).

The Third Circuit has also noted that the stay-put provision "represents Congress' policy choice that all handicapped children, regardless of whether their case is meritorious or not, are to remain in their current educational placement until the dispute with

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[4] Based on our review of precedent regarding § 1415(j), it appears that the case before us may differ somewhat from other cases in which the stay-put provision is implicated. Here, Parents advocated for change of E.R.'s placement, and then removed her from the school district. It was not until the Hearing Officer's decision in their favor that Parents sought stay-put relief. In other factual scenarios, parents immediately invoke § 1415(j) upon disagreeing with a change of placement—whether it be a new school or a different classroom setting—recommended by a school district. See e.g., Drinker, 78 F.3d at 859. Regardless, the same principles apply to both scenarios.

regard to their placement is ultimately resolved." Drinker, 78 F.3d at 864. Importantly, the purpose of the provision is to prevent disruption of the child's education by preserving the status quo during disputes about the child's placement, L.Y. ex rel. J.Y. v. Bayonne Bd. of Educ., 384 Fed. Appx. 58, 62 (3d Cir. 2010); Ringwood Bd. of Educ. v. K.H.J., 469 F. Supp. 2d 267, 270 (D.N.J. 2006) (citing N. Kitsap Sch. Dist. v. K.W., 123 P.3d 469, 482 (Wash. Ct. App. 2005)), and to "strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school." Honig, 484 U.S. at 323. Parents cannot "lose their stay put protection except by affirmative agreement to give it up." Drinker, 78 F.3d at 868 (in addressing whether parents had waived their stay-put right, the court stated that it found no cases that have interpreted the stay-put provision as being waiveable except by parents' explicit agreement).

B. The Parties' Respective Positions

Parents argue that the Hearing Officer's April 21, 2009 decision in their favor established the Benchmark School as E.R.'s pendent placement, which, by operation of law, triggered Ridley's stay-put obligations. Parents contend that Ridley is thus liable for the cost of E.R.'s tuition and transportation from the date of the Hearing Officer's decision through the exhaustion of their appeals. (Pls.' Br. in Support of Pls.' Mot for Judgment on the Pleadings 3-6.)

Ridley counters that Parents did not timely raise their claim for pendent placement, arguing that such

a claim is barred by res judicata and the statute of limitations, and should have been raised as a compulsory counterclaim under FED. R. CIV. P. 13 in Ridley I. Ridley also contends that it would be inappropriate under the IDEA to award Parents relief in light of the fact that this Court determined that Parents were not entitled to relief on the merits.[5] Lastly, Ridley argues that the current educational placement should be deemed to be Ridley School District given the Parents' request for stay-put relief occurred after this Court's finding that Ridley did not violate the IDEA. (Def.'s Br. in Opp'n 5-9.)

Parents respond that res judicata does not apply because the current complaint is not based on the same cause of action as Ridley I. Parents further argue that their stay-put claim was not a compulsory counterclaim because such claim was not available at the time they filed their answer and counterclaims in the previous suit. Specifically, Parents contend that there was no dispute over the pendent placement at the time Ridley I was filed, and it was not until Ridley refused to honor its obligation to fund the placement that Parents' stay-put claim became viable. Finally, Parents assert that the statute of limitations referenced by Ridley does not apply to their claim. (Pls.' Br. in Opp'n 8-15.)

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[5] Briefing on this issue was received prior to the Third Circuit's opinion. Presumably, Ridley would point to the Third Circuit decision as further support for their position.

C. Parents' Claim Is Not Barred by the Doctrine of Res Judicata.

Res judicata, or claim preclusion, bars a party from bringing a second suit against the same adversary based on the same cause of action as the first suit. Duhaney v. Att'y. Gen. of the U.S., 621 F.3d 340, 347 (3d Cir. 2010). A party seeking to invoke res judicata as a defense must establish three elements: "(1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same cause of action." Id. (internal quotation marks omitted). "The doctrine of res judicata bars not only claims that were brought in a previous action, but also claims that could have been brought." In re Mullarkey, 536 F.3d 215, 225 (3d Cir. 2008).

Here, the first two elements of res judicata have been satisfied: a final judgment on the merits was entered in Ridley I; and both cases involve the same parties. Therefore, we need only address whether this case and Ridley I involve the same cause of action.

Whether two lawsuits are based on the same cause of action turns on the "essential similarity of the underlying events giving rise to the various legal claims." Duhaney, 621 F.3d at 348 (quoting Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 963 (3d Cir. 1991) (internal quotation marks omitted)). The focal point of this analysis is "whether the acts complained of [are] the same, whether the material facts alleged in each suit [are] the same and whether the witnesses and documentation required to prove such allegations [are] the same." United States v. Athlone

Indus., Inc., 746 F.2d 977, 984 (3d Cir. 1984). An examination of these factors leads us to conclude that res judicata does not preclude Parents' request for stay-put compensation.

First, the acts complained of in the two suits are different. In Ridley I, Parents were dissatisfied with the disability services provided to E.R., and a hearing on this issue challenged whether E.R. was provided with FAPE. Thereafter, pursuant to § 1415(i)(2)(A), Ridley challenged the Hearing Officer's conclusions that the IEP was deficient. Conversely, in the case currently before the Court, Parents are challenging Ridley's act of refusing to honor its stay-put obligations under § 1415(j), a separate provision of the IDEA. While the theory of recovery in both cases is generally premised upon the IDEA, the two suits rely upon different provisions of that statute, require two distinct analyses. See Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78, 81 n.4 (3d Cir. 1996) (stating that "resolution of [a pendent placement issue] is completely separate from the merits issues which focus on the adequacy of the proposed IEP").

Second, the facts in question in the two cases are different. Ridley I involved events from Spring 2007 through April 2009, the educational evaluation of E.R., the assistance provided by Ridely during the 2007-208 school year, the IEP provided for the 2008-2009 school year, the subsequent due process complaint filed by Parents and the Hearing Officer's decision regarding these issues. The present case does not entail an examination of any of these facts, but seeks only to enforce Parents' rights under the IDEA's stay-put provision.

Lastly, the evidence necessary to maintain the instant action is different than the evidence that was required in Ridley I. The witnesses and documents to support a § 1415(j) claim seem to be minimal and, under the present facts, entail the Hearing Officer's decision in favor of Parents, tuition bills from the private placement and evidence related to transportation costs. At oral argument, counsel for Ridley implicitly acknowledged this point when he agreed that the only evidence necessary to obtain stay-put relief was the Hearing Officer's ruling in Parents' favor.[6] On the other hand, Ridley I involved numerous witnesses who testified regarding Ridley's evaluation of E.R.,[7] the IEP designed for E.R. and the

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[6] THE COURT: What would [Parents] have to show me in order to get the stay put compensation? I think it could be just a hearing officer's ruling in [their] favor and a subsequent proceeding in front of me. I mean, if we look at the language, before you answer, it says during the pendency of any proceeding conducted pursuant to this section. Unless there's an agreement, the child should remain in [the] then current placement.

MR. REILLY: Right. You –

THE COURT: [They've] got available [the] hearing officer ruling and [they've] got [Ridley's] appeal to me. What more would [they] need, according to you, to have me say [they're] entitled to it?

MR. REILLY: Well, I don't think [they] need anything else, Your Honor. . . .

(Oral argument Apr. 4, 2012, p. 12.)

[7] The witnesses included, but were not limited to: Parents, E.R.'s kindergarten teacher, E.R.'s first grade teacher, E.R.'s

services provided to her, exhibits used during the due process hearing and the Hearing Officer's decision.

Because the acts complained of, and the material facts and witnesses in the two lawsuits are not the same, we conclude that res judicata does not bar Parents' request for stay-put compensation.

D. Parents' Claim Is Not Barred by the Compulsory Counterclaim Rule.

Federal Rule of Civil Procedure 13(a) requires that a pleader assert as a counterclaim any claim that the pleader has against the opposing party that is mature at the time of the pleading and "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." FED. R. CIV. P. 13(a)(1)(A); Am. Packaging Corp. v. Golden Valley Microwave Foods, Inc., 1995 WL 262522, at *3 (E.D. Pa. May 1, 1995). The purpose of this rule is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." S. Constr. Co. v. Pickard, 371 U.S. 57, 60 (1962). Accordingly, the Third Circuit has instructed that the term "transaction or occurrence" be construed liberally to promote judicial economy. Transamerica Occidental Life Ins. Co. v. Aviation Office of America, Inc., 292 F.3d 384, 390 (3d Cir. 2002).

"For a claim to qualify as a compulsory counterclaim, there need not be precise identity of issues and facts between the claim and the

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resource room teacher, Ridley's Director of Special Education and Ridley's school psychologist.

counterclaim; rather, the relevant inquiry is whether the counterclaim 'bears a logical relationship to an opposing party's claim.'" Id. at 389 (quoting Xerox Corp. v. SMC Corp., 576 F.2d 1057, 1059 (3d Cir. 1978)). A logical relationship exists "where separate trials on each of [the] respective claims would involve a substantial duplication of effort and time by the parties and the courts." Vukich v. Nationwide Mut. Ins. Co., 68 Fed. Appx. 317, 319 (3d Cir. 2003); see also Bondach v. Faust, 2011 WL 31919917, at *4-5 (E.D. Pa. Sept. 7, 2011) (applying the logical relationship test). "Such a duplication is likely to occur when claims involve the same factual issues, the same factual and legal issues, or are offshoots of the same basic controversy between the parties." Transamerica, 292 F.3d at 390. "Failure to assert a compulsory counterclaim before the related claim proceeds to judgment results in the barring of the counterclaim." Stanton v. City of Phila., 2011 WL 710481, at *4 (E.D. Pa. Mar. 1, 2011) (quoting James E. McFadden, Inc. v. Bechtel Power Corp., 1986 WL 4195, at *3 (E.D. Pa. Apr. 3, 1986) (internal quotation marks omitted)).

Because the compulsory counterclaim rule effectively operates as a waiver, we find at the outset that the rule is inapplicable here. See 6 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1417 (3d ed. 2010) (noting that, while it is not precisely clear on what authority Rule 13(a)'s compulsory counterclaim bar is based, several courts have relied on theories of "waiver" or "estoppel" as the basis for precluding a second suit on the omitted counterclaim). The Third Circuit has ruled that parents cannot waive their

stay-put protection except by affirmative agreement. Drinker v. Colonial Sch. Dist., 78 F.3d 859, 868 (3d Cir. 1996). Because there is no evidence that Parents and Ridley agreed that Benchmark would not be E.R.'s pendent placement for purposes of § 1415(j), Parents did not waive that protection.

In any event, we find that Parents' stay-put claim was not a compulsory counterclaim that needed to be raised in the prior suit. The dispute over Parents' right to stay-put compensation was not mature at the time the pleadings were filed in Ridley I and thus the claim cannot be compulsory. While Parents' right to compensation existed when Ridley I was filed, it was not until Ridley refused to honor its stay-put obligation that Parents' instant claim arose. Further, in comparing the two lawsuits, we conclude that Parents' current claim is not logically related to the claims raised by Ridley in the prior suit. Separate proceedings on the FAPE claims and the stay-put claims would not involve a substantial duplication of effort and time by the parties and the Court because the claims do not involve the same factual or legal issues. As discussed previously, the factual issues in Ridley I focused on events revolving around FAPE, which led to the Hearing Officer's decision and this Court's subsequent review of that decision. The factual issues in the instant matter involve whether Parents are entitled to stay-put compensation. In addition, the legal issues are distinct as the two actions rely upon different provisions of the IDEA.

E. Parents' Claim is Not Barred by the Statute of Limitations.

Ridley also asserts that Parents' claim is barred by the statute of limitations set forth in 20 U.S.C. § 1415(i)(2)(B), which requires a party to bring a civil action within 90 days of the date of a hearing officer's decision. The right to bring a civil action under § 1415(i)(2) lies with "any party aggrieved by the findings and decisions" of a hearing officer. 20 U.S.C. § 1415(i)(2)(A).

Relying on the statute of limitations provision, Ridley argues that, because the instant action was not filed within 90 days of the Hearing Officer's decision, Parents' claim is time barred. (Def.'s Br. in Support of Def.'s Mot. For Judgment on the Pleadings 8-9.) Parents counter that § 1415(i)(2)(B) only applies to actions by a "party aggrieved by the findings and decisions" of a hearing officer, which is not the case here. Specifically, Parents contend that because the Hearing Officer's decision created an agreement establishing Benchmark as E.R.'s pendent placement, they were not aggrieved by the decision, and the 90-day statute of limitations does not apply to their claim. (Pls.' Reply Br. 1-2.)

We agree with Parents that the statute of limitations in § 1415(i)(2)(B) does not apply to their stay-put claim. At the due process hearing, the Hearing Officer found in favor of Parents with regard to most of their claims. Importantly, the Hearing Officer concluded that Ridley failed to provide an appropriate educational program for E.R. for the 2008-2009 school year, which by operation of law, created an agreement between Parents and Ridley

that Benchmark was E.R.'s pendent placement. Because Parents were not aggrieved by the Hearing Officer's decision on this issue, Parents were not subject to the 90-day statute of limitations.

F. Parents Are Entitled to Judgment on Their Claim, Including Reimbursement for Tuition Paid During the District Court Proceedings and During the Pendency of Their Appeal.

Having determined that Parents' stay-put claim is not barred under the various defenses asserted by Ridley, we next turn to the merits of their claim.

1. E.R.'s Pendent Placement is Benchmark.

As previously discussed, the stay-put provision essentially functions as an automatic preliminary injunction. Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996). Once a court determines a student's current educational placement, the party requesting stay-put relief is "entitled to an order without satisfaction of the usual prerequisites to injunctive relief." Id.

Here, the parties dispute which school is E.R.'s current placement for purposes of Parents' claim. Parents urge that Benchmark is E.R.'s pendent placement because the Hearing Officer's decision in their favor created a change of placement agreement with the state. (Pls.' Br. in Support of Pls.' Mot. For Judgment on the Pleadings 3-5.) Ridley counters that Ridley School District should be deemed E.R.'s placement given that Parents' request for stay-put

protection occurred after this Court's finding that Ridley did not violate the IDEA. (Def.'s Br. in Opp'n 5.)

We agree with Parents that Benchmark is E.R.'s pendent placement. Precedent dictates that Ridley's stay-put obligations began once there was state agreement with respect to E.R.'s placement—that is, when the Hearing Officer issued her decision in Parents' favor. See Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78, 84 (3d Cir. 1996) ("It is undisputed that once there is state agreement with respect to pendent placement, *a fortiori*, financial responsibility on the part of the local school district follows.") At oral argument, Ridley acknowledged the creation of this agreement at the time of the Hearing Officer's decision, but contended that Parents were required to affirmatively seek stay-put relief.[8] (Oral Argument

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[8] Ridley also conceded that, had the stay-put claim been raised as a counterclaim in Ridley I, Parents would have been entitled to stay-put compensation:

> THE COURT: . . . [H]ad the parents filed the counterclaim [for stay-put protection], as you say they should have, on June 30th, '09, would you agree that you owe them money under the stay put provision?
>
> MR. REILLY: Yes.
>
> THE COURT: Okay.
>
> MR. REILLY: If the parents had filed the counter -- if the parents had field a timely counterclaim in the first proceeding then, under [Susquenita School District v. Raelee S., 96 F.3d 78, 82 (3d Cir. 1996)], they could have requested you to require the district to pay the interim tuition. They would have requested of you and had you have us

Apr. 4, 2012, pp. 6-7.) We do not read § 1415(j) to require parents to request compensation in order for their stay-put protection to begin. Ridley's interpretation of the provision does not comport with its plain language, which instructs that "the child *shall* remain in [her] then-current educational placement" during the pendency of proceedings. See 20 U.S.C. § 1415(j) (emphasis added). Nor is Ridley's position consistent with the underlying policy of the provision, which is to preserve the status quo during disputes regardless of whether parents will ultimately be meritorious. L.Y. ex rel. J.Y. v. Bayonne Bd. of Educ., 384 Fed. Appx. 58, 62 (3d Cir. 2010). Once an agreement was created, Ridley was required to honor it. Parents' failure to request funding until after this Court ruled against them does not obviate Ridley's obligation.

2. Stay-Put Protection Extends to Appeal.

The remaining issue concerns whether stay-put protection continues through the completion of the appeals process. While the Third Circuit has not yet decided this issue, that court has observed that it is a "difficult question" to resolve. J.E. ex rel. J.E. v. Boyertown Area Sch. Dist., 452 Fed. Appx. 172, 176 n.2 (3d Cir. 2011). We agree, particularly in light of

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> respond but you would have been within your rights to grant it under [Raelee S.].
>
> . . .
>
> MR. REILLY: . . . I believe, under [Raelee S.], ultimately, you would have been obliged to give it to them because that's what [Raelee S.] says.

(Oral Argument Apr. 4, 2012, pp. 6-7.)

the factual scenario before us.

As noted previously, the stay-put provision provides, in relevant part, that: "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 . . . until all such proceedings have been completed." 20 U.S.C. § 1415(j). It is well-established that § 1415(j) "requires a school district to pay for a private pendent placement at least through the date of a district court's final order." J.E., 452 Fed. Appx. At 176. However, there is a split in authority among the federal circuits, as well as district courts in this circuit, regarding whether the stay-put provision applies during the pendency of appeals.

a. Relevant Case Law

The D.C. Circuit, Sixth Circuit, and district courts in Delaware and the Eastern District of Pennsylvania have held that a school district need not continue to fund a student's pendent placement beyond district court review. See Andersen v. Dist. of Columbia, 877 F.2d 1018 (D.C. Cir. 1989); Kari H. v. Franklin Special Sch. Dist., 1997 WL 468326 (6th Cir. Aug. 12, 1997) (unpublished opinion); Bd. of Educ. of the Appoquinimink Sch. Dist. v. Johnson, 2008 WL 5043472 (D. Del. Nov. 25, 2008); J.E. v. Boyertown Area Sch. Dist., 807 F. Supp. 2d 236 (E.D. Pa. 2011).

Conversely, the Ninth Circuit and a New Jersey district court have ruled that a school district's stay-put obligation extends through appeal to a circuit

court. See Joshua A. v. Rocklin Unified Sch. Dist., 559 F.3d 1036 (9th Cir. 2009); Ringwood Bd. of Educ. v. K.H.J., 469 F. Supp. 2d 267 (D.N.J. 2006). We review these varying opinions below.

In Andersen v. Dist. of Columbia, 877 F.2d 1018 (D.C. Cir. 1989), the D.C. Circuit denied a request to apply § 1415(j) on appeal. In reaching this decision, the court found that the statutory language at issue demonstrated that Congress did not anticipate the continuation of stay-put relief through appellate review. The court noted that, although an appeal is part of a "civil action," Congress did not explicitly include such review as a proceeding under § 1415 and was instead focused on the trial stage of proceedings when it enacted the stay-put provision. Andersen, 877 F.2d at 1023.

Turning to the policies of the provision, the D.C. Circuit also concluded that application of § 1415(j) beyond district court review would run counter to the provision's purpose of preventing school districts from unilaterally changing the educational placement of students pending completion of the dispute process. Id. at 1023-24 (citing Honig v. Doe, 484 U.S. 305, 323 (1988)). The court reasoned that, once a district court rules, a school district's action is no longer unilateral, but carries judicial approval. Consequently, the "automatic injunction perpetuating the prior placement would not serve the section's purpose." Id. at 1024. The Sixth circuit and the District of Delaware and Eastern District of Pennsylvania cases noted above reached the same conclusion for substantially the same reasons. See Kari H., 1997 WL 468326 (unpublished opinion); Johnson, 2008 WL 5043472; Boyertown Area Sch.

Dist., 807 F. Supp. 2d at 236.

A different outcome was reached by the United States Court of Appeals for the Ninth Circuit in Joshua A. v. Rocklin Unified Sch. Dist., 559 F.3d 1036 (9th Cir. 2009). There, the court held that the stay-put provision applies during the pendency of an appeal. In examining the statutory language of the IDEA, the court determined that a plain reading of the text supports application of § 1415(j) on appeal. The court reasoned that, because Congress provided the parties with the option for district court review, it was presumably aware that the parties would be entitled to seek an appeal from a district court ruling. Joshua A., 559 F.3d at 1038. In addition, the court relied upon a Department of Education regulation, requiring that the current educational placement be maintained "during the pendency of *any* . . . judicial proceeding," in reaching its decision. Id. (citing 34 C.F.R. § 300.518(a)).

The Ninth Circuit also focused upon the policy considerations of § 1415(j). First, it rejected the policy analysis articulated in Andersen, finding that the D.C. Circuit's reliance on Honig v. Doe, 484 U.S. 305 (1988), was misplaced. Specifically, the Ninth Circuit opined that, while Honig did mention that Congress was aware of the need to prevent school districts from unilaterally changing a student's placement, that issue was "a tangential policy argument" in that Honig involved a potentially dangerous disabled student and the placement issues that arose from that particular situation. Id. at 1038-39. Because the facts before the court did not involve any similar exigency, it found Andersen's reliance on Honig's policy rationale unpersuasive.

In further distinguishing Andersen, the Ninth Circuit emphasized that the policy considerations, in fact, favor application of § 1415(j) during appeal. The court noted that the stay-put provision "acts as a powerful protective measure to prevent disruption of the child's education throughout the dispute process" and that "[i]t is unlikely that Congress intended this protective measure to end suddenly and arbitrarily before the dispute is fully resolved." Id. at 1040. Relying on similar reasoning, the District of New Jersey court reached the same conclusion. See Ringwood Bd. of Educ. v. K.H.J., 469 F. Supp. 2d 267, 270 (D.N.J. 2006).

b. Statutory Construction

Tasked with interpreting the scope of the stay-put provision, we first examine the statutory language. In re Phila. Newspapers, LLC, 599 F.3d 298, 304 (3d Cir. 2010). It is well-settled that the initial step in interpreting a statute is to determine "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." Valansi v. Ashcroft, 278 F.3d 203, 209 (3d Cir. 2002) (quoting Marshak v. Treadwell, 240 F.3d 184, 192 (3d Cir. 2001) (internal citations omitted)). Where the language of the statute is clear, our inquiry is complete. In re Phila. Newspapers, LLC, 599 F.3d at 304. However, if the language is ambiguous—that is, "reasonably susceptible of different interpretations"—we must attempt to discern Congress' intent. Dobrek v Phelan, 419 F.3d 259, 264 (3d Cir. 2005) (quoting Nat'l R.R. Passenger Corp. v. Atchinson Topeka & Santa Fe Ry. Co., 470 U.S. 451, 473 n.27 (1985)).

Courts traditionally examine "the legislative history and the atmosphere in which the statute was enacted" to determine congressional intent. United States v. Gregg, 226 F.3d 253, 257 (3d Cir. 2000). Courts should also "look to the reading [of the language] that 'best accords with the overall purposes of the statute.'" United States v. Introcaso, 506 F.3d 260, 267 (3d Cir. 2007) (quoting Nugent v. Ashcroft, 367 F.3d 162, 170 (3d Cir. 2004)). Additionally, where, as here, the statute at issue is within the scope of an agency's rulemaking and lawmaking authority, that agency's reasonable interpretation should be deferred to in resolving the ambiguity. Mehboob v. Att'y Gen. of the United States, 549 F.3d 272, 275 (3d Cir. 2008); see also Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

c. Analysis

With the above principles in mind, and after careful examination of the statutory language, the pruposes of § 1415(j) and the Department of Education regulations, we conclude that the stay-put provision applies during the pendency of a federal appeal.

First, we agree with the Ninth Circuit that the plain language of the stay-put provision contemplates an appeal to a circuit court. Section 1415(j) mandates that a child shall remain in his or her current educational placement "during the pendency of any proceedings conducted pursuant to this section." The "section" referred to, § 1415, articulates four kinds of proceedings: (1) mediation; (2) due process hearings; (3) state administrative review; and

(4) civil actions for review "in any State court of competent jurisdiction or in a district court of the United States." 20 U.S.C. § 1415(e), (f), (g), (i). Although Congress did not explicitly articulate that an appeal is a "proceeding" under § 1415, it seems intuitive that an appeal is part of a "civil action . . . in a district court of the United States." Indeed, 28 U.S.C. § 1291, specifically states that "the courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." In drafting § 1415(j), Congress surely understood that district court review would necessarily include an appeal to a circuit court. As such, reading the language at issue in its ordinary sense, we find it clear that the stay-put provision applies during appellate review.[9]

Even if the language of § 1415(j) does not unambiguously extend stay-put protection through appeal, our reading is nevertheless in accord with the provision's protective purposes. While cutting off stay-put compensation at the district court level arguably achieves § 1415(j)'s purpose to prevent unilateral exclusion of disabled students by school districts, that is just one goal of the provision. See Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 373 (1985) ("We think *at least* one purpose of

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[9] Although the Ninth Circuit did not reach the issue of whether stay-put protection extends to Supreme Court review, for the same reasons stated herein, we conclude that the language of the provision also encompasses such proceedings. While an appeal to the Supreme Court is not an appeal of right, Congress presumably knew that a civil action brought in federal court could ultimately be reviewed by the Supreme Court.

[the stay-put provision] 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.") (emphasis added). The broader policy goal of § 1415(j) is the desire not to disturb a student's educational placement until the statutorily-mandated dispute process has concluded. L.Y. ex rel. J.Y. v. Bayonne Bd. of Educ., 384 Fed. Appx. 58, 62 (3d Cir. 2010); Ringwood Bd. of Educ. v. K.H.J., 469 F. Supp. 2d 267, 270 (D.N.J. 2006) (citing N. Kitsap Sch. Dist. v. K.W., 123 P.3d 469, 482 (Wash. Ct. App. 2005)). This purpose would not be achieved by limiting stay-put relief to district court review.

Indeed, refusing to enforce the stay-put provision after a district court ruling and during the appeals process could force parents to choose between maintaining their child in a private school at their own cost—which may or may not be within their financial means—or placing their child back into an educational setting which, depending on the outcome of appeal, could potentially fail to meet minimum legal standards.[10] The Third Circuit noted this dilemma in Susquenita School District v. Raelee S., where the court stated that, "[w]ithout interim financial support [provided through a motion for stay

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[10] We also note that cutting off stay-put protection after district court review has potential negative consequences in other factual scenarios besides private school placement. For instance, the stay-put provision could have been invoked during the pendency of an appeal to maintain a child's special services within the school district or to maintain a child's placement in a mainstream rather than a self-contained classroom.

put], a parent's 'choice' to have his child remain in what the state has determined to be an appropriate . . . placement amounts to no choice at all. The prospect of reimbursement at the end of the litigation turnpike is of little consolation to a parent who cannot pay the toll at the outset." 96 F.3d at 87.

This undesirably outcome could have been reached under the circumstances of the present case. If Parents had not been able to afford E.R.'s private school placement, they would have been confronted with the decision to place E.R. back in the Ridley School District even though our decision was subject to reversal on appellate review. This predicament runs counter to the Third Circuit's view that § 1415(j) represents "Congress' policy choice that 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." Pardini v. Allegheny Interm. Unit, 420 F.3d 181, 190 (3d Cir. 2005) (emphasis added) (citing Drinker, 78 F.3d at 864).

Ultimately, we agree with the court in Joshua A. that the "automatic" nature of a stay-put order evidences "Congress's sense that there is a heightened risk of irreparable harm inherent in the premature removal of a disabled child to a potentially inappropriate educational setting" and thus any risk, financial or otherwise, should be placed on the school district, not the parents or child. 559 F.3d at 1040. While we understand that the Third Circuit has declined to address the issue of whether § 1415(j) applies during a federal appeal, we believe the policy concerns consistently articulated by that court

support the conclusion that Congress did not intend stay-put protection to end suddenly before the dispute is finally resolved. See Raelee S., 96 F.3d at 83.

Lastly, our reading also comports with the Department of Education's reasonable interpretation of the provision. In implementing § 1415(j), the Department of Education has mandated that a child's placement be maintained "during the pendency of *any* . . . judicial proceeding regarding a due process complaint," not just district court proceedings. See 34 C.F.R. § 300.518(a) (emphasis added). The broad language used by the Department of Education, noting that the placement be maintained during "any" judicial proceeding, supports our decision that the stay-put provision extends through appeal.

In reaching this conclusion, we have grappled mightily with the practical, or perhaps impractical, implications of our decision. Although Parents may disagree, we do not view this case as one where a school district turned a blind eye to the disabilities of one of their students. Rather, Ridley provided significant services to E.R. and was prepared to continue to do so had E.R. remained in the school district. Ridley has also expended substantial resources defending the FAPE provided to E.R., which has now been challenged through three levels of review. Ridley's position has been deemed to be correct by the Third Circuit, and absent a reversal by the United States Supreme Court, the sufficiency of Ridley's FAPE will be the law of the case. To now apply the stay-put provision through appeal creates a situation where the prevailing party is nonetheless required to compensate Parents from April 21, 2009

(the date of the Hearing Officer's decision) through to potentially the completion of litigation in the Supreme Court. As noted by the district court in Boyertown, this type of outcome could appear to have created an absurd result. J.E. v. Boyertown Area Sch. Dist., 807 F. Supp. 2d at 240.

Having expressed our frustration, we rule as we do because we are compelled to do so by the statutory language. Rectifying the dilemma created here, where Ridley, the prevailing party is still obligated to compensate Parents, is, in our view, best left to Congress.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

M.R. and J.R., Parents of minor child, E.R.	:	**CIVIL ACTION**
Plaintiffs,	:	
	:	
v.	:	**NO. 11-2235**
	:	
RIDLEY SCHOOL DISTRICT,	:	
Defendant.	:	
	:	

ORDER

AND NOW, this 13th day of August, 2012, upon consideration of the "Motion of M.R. and J.R. Parents of Minor Child E.R., for Judgment on the Pleadings" (Doc. No. 8) and the responses and replies thereto; "Defendant Ridley School District's Motion for Judgment on the Pleadings" (Doc. No. 15) and the responses and replies thereto; and for reasons stated in the accompanying Memorandum Opinion, it is hereby **ORDERED** that:

1. M.R. and J.R.'s Motion for Judgment on the Pleadings is **GRANTED**, such that:
   - Defendant Ridley School District shall pay the costs of E.R.'s placement at the Benchmark School, including transportation, from April 21, 2009 through the exhaustion of all appeals

from the decision of the Administrative Hearing Officer;

- Counsel for the parties are directed to confer and attempt to reach a stipulation as to the amounts due within thirty (30) days from the date of this Order. Counsel may request a hearing if a stipulation cannot be reached;
- Any petition for counsel fees shall be submitted after entry of a final order determining the amounts due for the pendent placement.

2. Ridley School District's Motion for Judgment on the Pleadings is **DENIED**.

WHEREFORE, judgment is entered in favor of M.R. and J.R. and against Ridley School District.

BY THE COURT:

/s/ Mitchell S. Goldberg

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MITCHELL S. GOLDBERG, J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

M.R. and J.R., Parents of minor child, E.R.	:	**CIVIL ACTION**
Plaintiffs,	:	
	:	
v.	:	**NO. 11-2235**
	:	
RIDLEY SCHOOL DISTRICT,	:	
Defendant.	:	
	:	

ORDER

AND NOW, this 1st day of October, 2012, it is hereby **ORDERED** that the parties' Stipulation (Doc. No. 26) is **APPROVED and ADOPTED**. It is **FURTHER ORDERED** that judgment is entered in favor of M.R. and J.R. and against Ridley School District in the amount of $57,658.38, exclusive of any petition for counsel fees.

BY THE COURT:

/s/ Mitchell S. Goldberg

MITCHELL S. GOLDBERG, J.

United States Code

Title 20. Education

Chapter 33. Education of individuals with Disabilities

Subchapter II. Assistance for Education of All Children with Disabilities

§ 1415. Procedural safeguards

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

(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.

(c) Notification requirements

(1) Content of prior written notice

The notice required by subsection (b)(3) shall include—

(A) a description of the action proposed or refused by the agency;

(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by

which a copy of a description of the procedural safeguards can be obtained;

(D) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;

(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and

(F) a description of the factors that are relevant to the agency's proposal or refusal.

(2) Due process complaint notice

(A) Complaint

The due process complaint notice required under subsection (b)(7)(A) shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements of subsection (b)(7)(A).

(B) Response to complaint

(i) Local educational agency response

(I) In general

If the local educational agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint notice, such local educational agency shall, within 10 days of receiving the complaint, send to the parent a response that shall include—

(aa) an explanation of why the agency proposed or refused to take the action raised in the complaint;

(bb) a description of other options that the IEP Team considered and the reasons why those options were rejected;

(cc) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

(dd) a description of the factors that are relevant to the agency's proposal or refusal.

(II) Sufficiency

A response filed by a local educational agency pursuant to subclause (I) shall not be construed to preclude such local educational agency from asserting that the parent's due process complaint notice was insufficient where appropriate.

(ii) Other party response

Except as provided in clause (i), the non-complaining party shall, within 10 days of receiving the complaint, send to the complaint a response that specifically addresses the issues raised in the complaint.

(C) Timing

The party providing a hearing officer notification under subparagraph (A) shall provide the notification within 15 days of receiving the complaint.

(D) Determination

Within 5 days of receipt of the notification provided under subparagraph (C), the hearing officer shall make a determination on the face of the notice of whether the notification meets the requirements of subsection (b)(7)(A), and shall immediately notify the parties in writing of such determination.

(E) Amended complaint notice

(i) In general

A party may amend its due process complaint notice only if—

(I) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subsection (f)(1)(B); or

(II) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.

(ii) Applicable timeline

The applicable timeline for a due process hearing under this subchapter shall recommence at the time the party files an amended notice, including the timeline under subsection (f)(1)(B).

(d) Procedural safeguards notice

(1) In general

(A) Copy to parents

A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only 1 time a year, except that a copy also shall be given to the parents—

(i) upon initial referral or parental request for evaluation;

(ii) upon the first occurrence of the filing of a complaint under subsection (b)(6); and

(iii) upon request by a parent.

(B) Internet website

A local educational agency may place a current copy of the procedural safeguards notice on its Internet website if such website exists.

(2) Contents

The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents (unless it clearly is not feasible to do so) and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to—

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) the opportunity to present and resolve complaints, including—

(i) the time period in which to make a complaint;

(ii) the opportunity for the agency to resolve the complaint; and

(iii) the availability of mediation;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(J) State-level appeals (if applicable in that State);

(K) civil actions, including the time period in which to file such actions; and

(L) attorneys' fees.

(e) Mediation

(1) In general

Any State educational agency or local educational agency that receives assistance under this subchapter shall ensure that procedures are established and implemented to allow parties to disputes involving any matter, including matters arising prior to the filing of a complaint pursuant to subsection (b)(6), to resolve such disputes through a mediation process.

(2) Requirements

Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process—

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this subchapter; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) OPPORTUNITY TO MEET WITH A DISINTERESTED PARTY.— A local educational agency or a State agency may establish procedures to offer to parents and schools that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with—

(i) a parent training and information center or community parent resource center in the State established under section 1471 or 1472 of this title; or

(ii) an appropriate alternative dispute resolution entity,

to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) LIST OF QUALIFIED MEDIATORS.— The State shall maintain a list of individuals who are qualified mediators and knowledgeable in

laws and regulations relating to the provision of special education and related services.

(D) COSTS.— The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) SCHEDULING AND LOCATION.— Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) WRITTEN AGREEMENT.— In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution and that—

(i) states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;

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

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

(G) MEDIATION DISCUSSIONS.— Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.

(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.

(g) Appeal

(1) In general

If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency.

(2) Impartial review and independent decision

The State educational agency shall conduct an impartial review of the findings and decision appealed under paragraph (1). The officer conducting such review shall make an independent decision upon completion of such review.

(h) Safeguards

Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded—

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions, which findings and decisions—

(A) shall be made available to the public consistent with the requirements of section 1417(b) of this title (relating to the confidentiality of data, information, and records); and

(B) shall be transmitted to the advisory panel established pursuant to section 1412(a)(21) of this title.

(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.

(k) Placement in alternative educational setting

(1) Authority of school personnel

(A) Case-by-case determination

School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in

placement for a child with a disability who violates a code of student conduct.

(B) Authority

School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).

(C) Additional authority

If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 1412(a)(1) of this title although it may be provided in an interim alternative educational setting.

(D) Services

A child with a disability who is removed from the child's current placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or subparagraph (C) shall—

(i) continue to receive educational services, as provided in section 1412(a)(1) of this title, so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(E) Manifestation determination

(i) In general

Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

(ii) Manifestation

If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

(F) Determination that behavior was a manifestation

If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall—

(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in subparagraph (C) or (G);

(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the

modification of the behavioral intervention plan.

(G) Special circumstances

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child—

(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

(iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

(H) Notification

Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards accorded under this section.

(2) Determination of setting

The interim alternative educational setting in subparagraphs (C) and (G) of paragraph (1) shall be determined by the IEP Team.

(3) Appeal

(A) In general

The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.

(B) Authority of hearing officer

(i) In general

A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A).

(ii) Change of placement order

In making the determination under clause (i), the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may—

(I) return a child with a disability to the placement from which the child was removed; or

(II) order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current

placement of such child is substantially likely to result in injury to the child or to others.

(4) Placement during appeals

When an appeal under paragraph (3) has been requested by either the parent or the local educational agency—

(A) the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(C), whichever occurs first, unless the parent and the State or local educational agency agree otherwise; and

(B) the State or local educational agency shall arrange for an expedited hearing, which shall occur within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing.

(5) Protections for children not yet eligible for special education and related services

(A) In general

A child who has not been determined to be eligible for special education and related services under this subchapter and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for in this subchapter if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) Basis of knowledge

A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred—

(i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(ii) the parent of the child has requested an evaluation of the child pursuant to section 1414(a)(1)(B) of this title; or

(iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

(C) Exception

A local educational agency shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation of the child pursuant to section 1414 of this title or has refused services under this subchapter or the child has been evaluated and it was determined that the child was not a child with a disability under this subchapter.

(D) Conditions that apply if no basis of knowledge

(i) In general

If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B) or (C)) prior to taking disciplinary measures against the child, the child may be subjected to disciplinary measures applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).

(ii) Limitations

If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under this subsection, the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with this subchapter, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

(6) Referral to and action by law enforcement and judicial authorities

(A) Rule of construction

Nothing in this subchapter shall be construed to prohibit an agency from reporting a crime

committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(B) Transmittal of records

An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

(7) Definitions

In this subsection:

(A) Controlled substance

The term "controlled substance" means a drug or other substance identified under schedule I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(B) Illegal drug

The term "illegal drug" means a controlled substance but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act [21 U.S.C. 801 et seq.] or under any other provision of Federal law.

(C) Weapon

The term "weapon" has the meaning given the term "dangerous weapon" under section 930(g)(2) of title 18.

(D) Serious bodily injury

The term "serious bodily injury" has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18.

(*l*) Rule of construction

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

(m) Transfer of parental rights at age of majority

(1) In general

A State that receives amounts from a grant under this subchapter may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law)—

(A) the agency shall provide any notice required by this section to both the individual and the parents;

(B) all other rights accorded to parents under this subchapter transfer to the child;

(C) the agency shall notify the individual and the parents of the transfer of rights; and

(D) all rights accorded to parents under this subchapter transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

(2) Special rule

If, under State law, a child with a disability who has reached the age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this subchapter.

(n) Electronic mail

A parent of a child with a disability may elect to receive notices required under this section by an electronic mail (e-mail) communication, if the agency makes such option available.

(*o*) Separate complaint

Nothing in this section shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process

complaint already filed.