NO. 13-1547

IN THE
Supreme Court of the United States

RIDLEY SCHOOL DISTRICT,

Petitioner,

v.

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

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under the Individuals with Disabilities Education Act (IDEA), either a school district or the parents of a child with a disability may file a "due process" complaint to initiate administrative review of disputes concerning the child's educational program. After administrative review, the non-prevailing party may sue in federal or state court. *See* 20 U.S.C. § 1415(f)–(*i*). It is undisputed that this court review under IDEA includes appellate review, if any party seeks it.

The IDEA's stay-put provision states 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). The Department of Education's stay-put regulation provides that "during the pendency of any administrative or judicial proceeding regarding a due process complaint …, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement." 34 C.F.R. § 300.518(a).

The question presented is:

Whether "any proceedings" under the IDEA's stay-put provision and the Department of Education's stay-put regulation includes administrative, trial-court, and appellate proceedings, as the Third Circuit held below, or whether it includes administrative and trial-court proceedings, but excludes appellate proceedings, as Petitioner Ridley School District maintains.

TABLE OF CONTENTS

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

I. Statutory and regulatory background 2

A. Statutory text and structure 2

B. IDEA dispute resolution 4

C. The stay-put provision 4

II. Factual background 6

III. Decisions below 8

REASONS FOR DENYING THE WRIT 10

I. The claimed circuit split is non-existent or, at most, greatly exaggerated. 10

A. *Andersen* 11

B. Other appellate decisions 17

II. The Third Circuit's decision is correct. 19

A. The stay-put provision's text 19

B. The Department of Education's stay-put regulation 21

C. Ridley's Spending Clause diversion 23

D. The stay-put provision's purposes 27

III. Ridley's claim of importance provides no basis for review. 31

CONCLUSION 36

TABLE OF AUTHORITIES

CASES

Andersen by Andersen v. District of Columbia,
877 F.2d 1018 (D.C. Cir. 1989) 10, 13, 19

Arlington Central Sch. District Board of Education v. Murphy, 548 U.S. 291 (2006) 24, 25

Board of Education of Hendrick Hudson Central Sch. District, Westchester Cnty. v. Rowley,
458 U.S. 176 (1982) 3

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 12, 14

Christensen v. Harris Cty.,
529 U.S. 576 (2000) 12

Faranza K. v. Indiana Dep't of Educ.,
2009 WL 3642748 (N.D. Ind. Oct. 30, 2009) . . . 35

Flour Bluff Independent School District v. Katherine M., 91 F.3d 689 (5th Cir. 1996) . 18, 28

Fonseca v. Consolidated Rail Corp.,
246 F.3d 585 (6th Cir. 2001) 17

Forest Grove Sch. District v. T.A.,
557 U.S. 230 (2009) 25-26, 32

Gunner v. Welch,
749 F.3d 511 (6th Cir. 2014) 17

Honig v. Doe,
484 U.S. 305 (1988) 2, 25, 28

Joshua A. v. Rocklin Unified Sch. District,
559 F.3d 1036 (9th Cir. 2009) 10

Kari H. By & Through Dan H.
v. Franklin Special School District,
1997 WL 468326 (Aug. 12, 1997) 17, 32

Lundgren v. Mitchell,
440 F.3d 754 (6th Cir. 2006) 17

Nack v. Orange City Sch. District,
454 F.3d 604 (6th Cir. 2006) 5, 32

National Cable & Telecomms. Association v. Brand X Internet Services, 545 U.S. 967 (2005) . . . 12, 13

North Kitsap Sch. District v. K.W. ex rel. C.W.,
123 P.3d 469 (Wash. Ct. App. 2005) 18

Old Colony Trust Co. v. Commissioner of Internal Revenue, 301 U.S. 379 (1939) 21

P. v. Newington Board of Education,
546 F.3d 111 (2d Cir. 2008) 5, 32

Petersen v. Hastings Public Schools,
31 F.3d 705 (8th Cir. 1994) 5

Ridley Sch. District v. M.R. (Ridley I),
680 F.3d 260 (3d Cir. 2012) 6

Salley v. St. Tammany Parish Sch. Bd.,
1994 WL 14872134 (E.D. La. Apr. 18, 1994) . . 34

Sch. Committee of Town of Burlington, Mass. v. Department of Education of Mass.,
471 U.S. 359 (1985) 3, 29, 30, 34

Shaffer ex rel. Shaffer v. Weast,
546 U.S. 49 (2005) 3, 24

Special Sch. District No. 1 v. E.N.,
620 N.W.2d 65 (Minn. Ct. App. 2000) 18

U.S. v. Wooten,
689 F.3d 570 (6th Cir. 2012) 17

STATUTES

20 U.S.C. § 1400(c)(2)(A) 2

20 U.S.C. § 1400(c)(2)(B) 2

20 U.S.C. § 1400(d)(1)(A) 3

20 U.S.C. § 1412(a)(4) 3

20 U.S.C. § 1414(d)(1)(A)(i) 3

20 U.S.C. § 1414(d)(1)(B) 4

20 U.S.C. § 1415 5

20 U.S.C. § 1415(f) 28

20 U.S.C. § 1415(f)-(i) i

20 U.S.C. § 1415(f)(1)(A) 4

20 U.S.C. § 1415(f)(3) 4

20 U.S.C. § 1415(f)(3)(E)(i) 4

20 U.S.C. § 1415(g)(1) 4

20 U.S.C. § 1415(g)(2) 4, 28

20 U.S.C. § 1415(*i*)(2)(A) 4, 9, 18, 19

20 U.S.C. § 1415(*i*)(2)(C)(iii) 4

20 U.S.C. § 1415(*i*)(3)(B)(i)(I) 25, 35

20 U.S.C. § 1415(*i*)(3)(B)(i)(II) 35

20 U.S.C. § 1415(*i*)(3)(B)(i)(III) 35

20 U.S.C. § 1415(j) . . . . . i, 1, 5, 8, 19, 20, 22

P.L. 94-142, 89 Stat. 773 (Nov. 29, 1975) 2, 4

P.L. 101-476, 104 Stat. 1103 (Oct. 30, 1990) 3

La. C.C.P. art. 2083 A 20

42 Pa.C.S. § 763 20

REGULATIONS

34 C.F.R. 300.513(a) (1989) 11

34 C.F.R. § 300.514(c) 14

34 C.F.R. § 300.518(a) . . i, 5, 9, 11, 15, 17, 21, 22, 23

34 C.F.R. § 300.518(d) 5, 14, 17, 27, 36

64 Fed. Reg. 12,406 (Mar. 12, 1999) 5, 14

71 Fed. Reg. 46,540 (Aug. 14, 2006) 15

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H.R. Rep. No. 94-332 (1975) 2

MISCELLANEOUS

Black's Law Dictionary (rev. 4th ed. West 1968) . . 21

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STATEMENT OF THE CASE

The Individuals with Disabilities Education Act seeks to ensure through a series of substantive protections and procedural safeguards that children with disabilities thrive in our Nation's schools. When school officials and parents of children with disabilities cannot agree about the educational services that will best serve the child's needs, the Act authorizes both school officials and parents to seek an adjudication, first, in administrative proceedings and, after that, in state or federal court. No one disputes—and the parties here agree—that this review includes an appellate-court proceeding brought by the party that has lost in the lower court.

This case concerns the Act's "stay-put" provision, 20 U.S.C. § 1415(j). That provision seeks educational stability for children with disabilities by providing that, unless the parties agree otherwise, the child will remain in his or her current educational status until completion of the dispute proceedings, whether that status is the one favored by the school district or the one favored by the parents. The parties agree that the stay-put requirement lasts through all administrative proceedings and at least until a state or federal trial court rules on the dispute. And, the Third Circuit below—like all but one precedential decision in the 39-year history of the stay-put provision—held that the stay-put requirement lasts through completion of appellate proceedings, if any. It did so, like the courts before it, principally on the basis of the Act's text.

In this Court, Petitioner Ridley School District (Ridley) seeks review of the Third Circuit's ruling, arguing that it (1) deepens a circuit split; (2) is wrong

on the merits; and (3) presents "a question of exceptional importance." Pet. 22.

Each of these assertions is wrong. As noted, in the nearly four decades since the stay-put provision became law, only one precedential decision of any state or federal court has held that the provision does not cover appellate proceedings. Moreover, as explained below, that decision does not represent a genuine conflict and is likely to remain an outlier, if it is not abandoned outright in the future by the court that issued it. On the merits, the majority position is amply supported by the statutory text and, if that were not enough, by the Department of Education's stay-put regulation. Finally, Ridley's claim of "exceptional importance" is hyperbole. An issue that implicates only a small number of IDEA disputes and has been the subject of only five precedential decisions in nearly forty years cannot be that.

I. Statutory and regulatory background

A. Statutory text and structure

In 1975, Congress passed the Education for All Handicapped Children Act (EAHCA), P.L. 94-142, 89 Stat. 773 (Nov. 29, 1975). It found that children with disabilities "did not receive appropriate educational services" and "were excluded entirely from the public school system and from being educated with their peers." 20 U.S.C. § 1400(c)(2)(A)&(B); *see Honig v. Doe*, 484 U.S. 305, 309 (1988). Other children with disabilities "were simply 'warehoused' in special classes or were neglectfully shepherded through the system until they were old enough to drop out." *Id.* (quoting H.R. Rep. No. 94-332, at 2 (1975)). In 1990,

Congress updated EAHCA and renamed it the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, 104 Stat. 1103 (Oct. 30, 1990). IDEA, like EAHCA, "was intended to reverse [a] history of neglect," *Shaffer ex rel. Shaffer v. Weast*, 546 U.S. 49, 52 (2005), by providing funds to states "to ensure that all children with disabilities have available to them a free appropriate public education," or FAPE. 20 U.S.C. § 1400(d)(1)(A).

IDEA seeks to achieve FAPE by providing an individualized program "specially designed to meet the unique needs of the handicapped child, [and] supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 188-89 (1982). In exchange for receiving federal funds, states must provide an education "where possible in regular public schools, with the child participating as much as possible in the same activities as nonhandicapped children." *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369 (1985). IDEA also requires that children with disabilities be placed "in private schools at public expense where" achievement of a FAPE in a public school "is not possible." *Id.*

In seeking to achieve FAPE, school districts must design an individualized education program, or IEP, for each student with a disability. 20 U.S.C. § 1412(a)(4). An IEP is "a written statement for each child with a disability that is developed, reviewed, and revised… ." *Id.* § 1414(d)(1)(A)(i). IDEA envisions parents and educators working together as part of an

"IEP team," which seeks to craft the optimal IEP for each child. *Id.* § 1414(d)(1)(B).

B. IDEA dispute resolution

If parents and the school district do not agree on an IEP, or if parents do not believe that their child is receiving a FAPE, IDEA provides the right to "an impartial due process hearing" under the auspices of either the state or local educational agency (typically, the school district). *Id.* § 1415(f)(1)(A). A due process hearing may be initiated by either the school district or the parents. *Id.* The hearing is conducted by an impartial hearing officer who must be independent of the state agency and the school district. *Id.* § 1415(f)(3). The hearing officer's decision must be "based on a determination of whether the child received a free appropriate public education." *Id.* § 1415(f)(3)(E)(i). Where the hearing is conducted under the auspices of the school district, IDEA authorizes a further administrative appeal to the state agency. *Id.* § 1415(g)(1)&(2).

Either party—the school district or the parents—aggrieved by the final administrative decision may sue in state court or federal district court. *Id.* § 1415(*i*)(2)(A). The court "shall grant such relief as the court determines is appropriate." *Id.* § 1415(*i*)(2)(C)(iii). Either party may appeal an adverse ruling to an appellate court.

C. The stay-put provision

IDEA contains what is known as the "stay-put" provision, which was enacted in 1975 as part of the EAHCA. P.L. 94-142, § 615(e)(3), 89 Stat. 789. It provides that "during the pendency of any proceedings

conducted pursuant to [20 U.S.C. § 1415], unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child … until all such proceedings have been completed." 20 U.S.C. § 1415(j). The "then-current educational placement" generally constitutes what is set forth in the student's preexisting IEP (*see* Pet. 4), and includes "the setting in which the IEP is implemented, such as a regular classroom or a self-contained classroom." 64 Fed. Reg. 12,406, 12,616 (Mar. 12, 1999). *Id.* Thus, although a student's "then-current placement" may be at a location away from the public school—such as at a private school—generally that term refers to a particular program or services within the regular public school or in the public-school system. *See, e.g., P. v. Newington Bd. of Educ.*, 546 F.3d 111, 114-17 (2d Cir. 2008); *Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 608, 610 (6th Cir. 2006); *Petersen v. Hastings Public Schools*, 31 F.3d 705, 706 (8th Cir. 1994).

The Department of Education has issued a stay-put regulation providing that, absent the parties' agreement, the child must remain in his or her current placement "during the pendency of any administrative or judicial proceeding regarding a due process complaint." 34 C.F.R. § 300.518(a). Moreover, if, after an impartial due process hearing, the hearing officer "agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents for purposes of paragraph (a) of this section." *Id.* § 300.518(d).

II. Factual background

E.R. is a child with various learning disabilities and health problems. She attended elementary school in the Ridley School District for kindergarten in 2006-2007 and first grade in 2007-2008. Pet. App. 4a. She received special education, but her parents, Respondents M.R. and J.R., did not believe that Ridley was providing adequate instruction to compensate for their daughter's disabilities. *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 266 (3d Cir. 2012) (*Ridley I*). After about two years of attempted collaboration with school officials on a program that fit E.R.'s needs, the parents determined that Ridley had not developed an adequate IEP for E.R.'s upcoming second-grade year and, thus, was not the proper setting for E.R.'s education. *Id.* at 264-67. In August 2008, the parents informed Ridley that they were enrolling E.R. at Benchmark School, a private school that specializes in educating students with learning disabilities. *Id.* at 267.

In December 2008, the parents filed an IDEA due process complaint. *Id.* After a series of hearings and submissions, a hearing officer ruled that Ridley had provided a FAPE to E.R. for kindergarten, but agreed with her parents that Ridley had not provided a FAPE for part of first grade and had not offered a FAPE for second grade. Pet. App. 5a. The hearing officer agreed that Benchmark was a proper placement for E.R.'s second-grade education and ordered Ridley to pay E.R.'s educational costs for that year. *Ridley I*, 680 F.3d at 267. As Ridley acknowledges (Pet. 4, 7), at that point, Benchmark became E.R.'s then-current educational placement under IDEA. As Ridley also acknowledges (Pet. 7), at that point, Ridley

immediately became responsible to pay for E.R.'s education at Benchmark. But Ridley did not do so.

Ridley sought review of the hearing officer's decision in Pennsylvania state court, and the parents removed the case to federal district court. Pet. App. 37a. Thereafter, the district court reversed the decision of the hearing officer, finding that Ridley had provided a FAPE to E.R. for second grade. The parents appealed the district court's decision to the Third Circuit, which affirmed. Pet. App. 6a.

Meanwhile, during the pendency of *Ridley I*, E.R. remained at Benchmark. Because Ridley would not pay Benchmark's costs, the parents paid E.R.'s tuition, with the help of an income-based scholarship. *See* D.Ct. Doc. 27-1, at 2 (Oct. 2, 2012). Shortly after filing their appeal to the Third Circuit in *Ridley I*, the parents sent a written demand to Ridley for payment of E.R.'s Benchmark tuition. Pet. App. 6a. Referencing the stay-put provision, they requested payment of E.R.'s tuition from the date of the hearing officer's decision forward. *Id.* Ridley refused to pay (Pet. App. 6a), even the portion incurred through the district court's decision that Ridley now acknowledges it owes.[1]

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[1] At the time the parents demanded payment from Ridley, the great majority of tuition incurred for E.R.'s education were costs that Ridley now concedes it owes because they were incurred between the hearing officer's decision and the district court's ruling. In the end, the tuition incurred during the disputed period—that is, between the district court's ruling and the court of appeal's ruling in *Ridley I*—is about one-third of E.R.'s Benchmark

(continued...)

III. Decisions below

In response to Ridley's refusal to honor its stay-put obligation (*see* Pet. App. 6a), M.R. and J.R. filed the suit that is the subject of Ridley's petition to this Court. The parents claimed that after the hearing officer's decision had made Benchmark E.R.'s then-current placement, IDEA required Ridley to pay E.R.'s tuition through the completion of the *Ridley I* appeal to the Third Circuit. The district court agreed. Pet. App. 52a-64a.

Ridley appealed to the Third Circuit, claiming that the stay-put requirement did not include the appellate proceedings in *Ridley I*, but rather ended after the district court's reversal of the hearing officer's decision. The Third Circuit rejected that argument and affirmed.

First, relying on IDEA's text, the court held that the stay-put provision operated through the conclusion of E.R.'s appeal to the Third Circuit in *Ridley I*. The court explained that the provision, 20 U.S.C. § 1415(j), requires that a child with a disability remain in her then-current placement through "the pendency of *any* proceedings conducted pursuant to this section." *Id*. (emphasis in original). Pet. App. 27a. To read "any proceedings" to exclude an appeal would be an "unnatural reading of such expansive language." Pet. App. 27a. Further, the court observed, Congress provided that school districts or parents aggrieved by a hearing officer's decision may file "a "civil action … in

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[1](...continued)
tuition. *See* Pet. 9. Ridley still has not paid the remainder of that tuition, despite its concession of liability.

a district court of the United States," 20 U.S.C. § 1415(*i*)(2)(A), and it must have understood that "an appeal is part of a 'civil action.'" Pet. App. 27a.

The court then explained that even if IDEA's text left any ambiguity about the stay-put provision's coverage, it would have been required to defer to the Department of Education's stay-put regulation, which provides that, absent agreement among the parties, a child "must remain in his or her current educational placement 'during the pendency of *any* ... *judicial proceeding* regarding a due process complaint.'" Pet. App. 30a (quoting 34 C.F.R. § 300.518(a)) (emphasis and ellipsis in original). Having reviewed both the text and the regulation, the court concluded that "[e]very appropriate interpretive path thus leads us to the same conclusion." Pet. App. 30a.

The court of appeals also observed 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,'" Pet. App. 28a (internal citations omitted)—that is, "until there is a *final* ruling on placement," Pet. App. 29 a (emphasis in original). To conclude otherwise, the court said, could force parents of ordinary means to remove their children from a private-school placement—including in situations where the court of appeals ultimately concludes that the public school had not provided a FAPE—which undermines Congress's dual goals of stability for children with disabilities during IDEA's dispute-resolution process and that education for those children be both free and appropriate. Pet. App. 29a.

REASONS FOR DENYING THE WRIT

I. The claimed circuit split is non-existent or, at most, greatly exaggerated.

Ridley's claim of an entrenched circuit split, if a split exists at all, is greatly exaggerated. As Ridley explains (Pet. 12), there are thousands of public-school districts nationwide, where schools and students alike enjoy the benefits of the IDEA and its stay-put provision. And, yet, in the nearly forty years since the provision's 1975 enactment, only three courts of appeals have addressed the question presented in precedential decisions. In recent decisions, the Third Circuit below and the Ninth Circuit have held that the stay-put provision operates through proceedings in courts of appeals, *see* Pet. App. 1a; *Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036 (9th Cir. 2009), while a twenty-five-year-old decision of the D.C. Circuit held that the stay-put provision becomes ineffective after the district court rules. *See Andersen by Andersen v. Dist. of Columbia*, 877 F.2d 1018 (D.C. Cir. 1989). That is, it took fourteen years from enactment of the stay-put provision before any court of appeals entertained the issue, and another twenty-five years elapsed before two others had weighed in with precedential decisions.

Given this dearth of authority, the circuit split is tolerable, even if accepted on Ridley's terms, particularly because the recent cases have gotten the issue right. *See infra* 19-31. The petition thus presents a classic situation in which the question presented should percolate to see what, if anything, other courts have to say. Percolation would allow the Court at a later date, if need be, to determine both whether the D.C. Circuit's 25-year-old ruling remains an outlier

and whether the question presented remains one that arises rarely.

In any event, as we now show, *Andersen* is a wobbly decision on which to base a grant of certiorari and is ripe for reconsideration in the D.C. Circuit. Moreover, a Sixth Circuit decision, on which Ridley also relies in asserting a circuit split, is not precedential and should play no role in this Court's review decision.

A. *Andersen*

1. The D.C. Circuit reached its decision in *Andersen* without adequate briefing, which made no mention of the Department of Education's regulation that directly addresses (and, we maintain, answers) the question presented. That regulation—taken up in more detail below (at 21-23)—is entitled "Child's status during proceedings" and states that "during the pendency of *any* administrative or *judicial proceeding regarding a due process complaint* …, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement." 34 C.F.R. § 300.518(a) (emphasis added).[2]

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[2] When *Andersen* was decided the regulation was codified in substantially identical form at 34 C.F.R. 300.513(a) (1989). Ridley acknowledges that § 300.518(a) is on point, but claims that it seeks to parrot the statutory language. Pet. 21 n.5. As explained below (at 21-23), that is incorrect.

The appellants' opening brief in *Andersen*—which argued that the stay-put provision covers appellate proceedings—did little more than quote the stay-put

(continued...)

In turn, the D.C. Circuit in *Andersen* made no mention of the regulation. In our view, this omission means that no circuit split exists because *Andersen* decided a question different from the question before the Third Circuit below. Without addressing the on-point regulation, *Andersen* decided the meaning of the statutory stay-put provision de novo—that is, its ruling reflects only what it believed was the "better reading" of the statute. *Christensen v. Harris Cty.*, 529 U.S. 576, 585 (2000); *see National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005). But had the regulation been before the court, *Andersen* would have been required to address a different question: whether the agency's construction of the statute was reasonable (even if not the same interpretation the court would have reached in absence of a regulation). *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Put another way, "[b]efore a judicial construction of a statute, whether contained in a precedent or not, may trump an agency's, the court must hold that the statute

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[2](...continued)
provision and its legislative history. The appellees' brief was similarly truncated. The reply brief did not address stay-put at all. *See* Br. for Appellants at 27-29 (Jan. 30, 1989), Br. for Appellees at 30-32 (Mar. 1, 1989), and Reply Br. for Appellants (Mar. 15, 1989), in *Andersen v. Dist. of Columbia*, No. 88-7150 (D.C. Cir.). *Andersen* was decided along with three other appeals, Nos. 88-7158, 88-7159, and 88-7161. We have reviewed the briefs in those cases. They repeat the sparse discussion of the stay-put issue contained in the *Andersen* briefs and do not mention the Department of Education's stay-put regulation.

unambiguously requires the court's construction. [*Andersen*] did not do so." *Brand X*, 545 U.S. at 985.[3]

The situation that the D.C. Circuit would confront in a future case in which it considered § 300.518(a) is the same in principle as the situation confronted by this Court in *Brand X*, 545 U.S. 967. There, the Ninth Circuit below had treated as controlling one of its earlier precedents that had interpreted a statute *before* the issuance of a relevant agency regulation, *id.* at 979, even though by the time of the Ninth Circuit's decision a relevant regulation existed. *Id.* at 980. In rejecting the Ninth Circuit's approach, this Court held that no conflict exists between a court decision that interprets the statute one way in the absence of an agency regulation and a later decision deferring to the agency's contrary construction. The former reflects the "court's opinion as to the best reading of an ambiguous statute," *id.* at 983, but "the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes." *Id.*; *see* Pet. App. 30a (disagreeing with *Andersen*'s statutory construction, but also explaining that "[i]f we had considered § 1415(j) ambiguous on the issue of duration, we would have

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[3] *Andersen* did not hold that the "statute unambiguously require[d]" its ruling, which is evident from its statement that "although an appeal is part of a 'civil action [to which the stay-put provision extends],' Congress's focus *appears to have been* on the trial stage of proceedings" and from its reliance on what it viewed as the stay-put provision's overall purposes. *Andersen*, 877 F.2d at 1023-24 (emphasis added).

been obliged to give deference to this permissible construction by the agency.") (citing *Chevron,* 467 U.S. at 843).

Even if the failure of the adversary system described above does not wholly eviscerate the claimed circuit split, it seriously erodes *Andersen*'s persuasive value and suggests that *Andersen* will remain an outlier. Whether the significant omission in the decisional process in *Andersen* would allow a D.C. Circuit panel to revisit *Andersen* may be debatable—though we think the Court's decision in *Brand X* means that it could— but there is little doubt that if the stay-put issue were litigated again in the D.C. Circuit, *Andersen*'s (understandable) failure to address the relevant regulation would render the issue a prime candidate for reconsideration en banc.

2. Another regulation, 34 C.F.R. § 300.518(d), which *postdates* the D.C. Circuit's decision in *Andersen*, also undermines the authenticity of the claimed circuit split. Section 300.518(d) provides that

> [i]f the hearing officer in a due process hearing conducted by [a state or local administrative official] … agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents for purposes of paragraph (a) of this section.[4]

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[4] Section 300.518(d) was originally promulgated in 1999 as 34 C.F.R. § 300.514(c). *See* 64 Fed. Reg. 12,406, 12,452 (Mar. 12, 1999). It became 34 C.F.R. § 300.518(d) in 2006.

(continued...)

Under § 300.518(a), unless the parties otherwise agree, the child must remain in the then-current placement through the completion of all administrative and judicial proceedings. But because, under § 300.518(d), a parent-favorable administrative decision constitutes an agreement of the parties, that decision has the potential—as occurred below—to change the student's then-current placement, which thereafter remains constant, at least through the completion of "any … judicial proceeding." 34 C.F.R. § 300.518(a).[5]

A hypothetical application of § 300.518(d) helps explain why *Andersen* does not present a genuine circuit conflict. Suppose that the current public-school placement for Mary, as reflected in her IEP, is a special classroom for children with Mary's disability. Mary's parents believe that, with some classroom assistance, Mary would flourish in a "mainstream" setting—that is, in a public-school classroom with children who are not disabled. Mary's parents request a due process hearing, and the parents prevail administratively. As a result, because the "mainstream" setting has now been approved by the state or local adjudicatory system, it becomes Mary's current placement under § 300.518(d), and Mary is placed in that setting. The school district seeks judicial review in federal district

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[4](...continued)
See 71 Fed. Reg. 46,540, 46,797 (Aug. 14, 2006).

[5] The petition (at 4, 7) accurately describes § 300.518(d) and recognizes that it changed E.R.'s current placement, but the petition does not note that the regulation was promulgated after *Andersen*.

court and prevails. Mary's parents appeal to the court of appeals, which reverses the district court and reinstates the hearing officer's decision.

Under Ridley's view of the stay-put requirement, but *without* § 300.518(d) in effect (as was the case when *Andersen* was decided), Mary would have remained in the special classroom throughout the proceedings, providing Mary continuity until the ruling of the court of appeals, at which time her parents could have moved her to the "mainstream" classroom. However, with both Ridley's view of the stay-put requirement *and* § 300.518(d) in place, absent the parties' agreement, Mary would have ping-ponged two times between the two settings, assigned twice to the special classroom (under the IEP and after the district court's decision) and twice to the "mainstream" classroom (after the administrative decision and after the court of appeals' decision) during and as a result of the proceedings. (Under Respondents' view, Mary's placement would have changed only once, after her parents prevailed administratively.)

Had § 300.518(d) existed when *Andersen* was decided, it is more likely that the D.C. Circuit would have resolved the stay-put issue as did the Third Circuit below. As noted, given the purpose of the stay-put provision—continuity of placement—and the real-world effect of § 300.518(d), the D.C. Circuit probably would not have countenanced an interpretation of that provision that would authorize the additional discontinuity in a disabled student's placement described above. To be sure, had the D.C. Circuit been able to consider § 300.518(d), it is possible that *Andersen* would have been decided the same way. But

at this stage, the key point is that no genuine circuit split exists because § 300.518(d) is germane to the question presented, and all post-§ 300.518(d) appellate authority interprets "all proceedings" in the stay-put provision to include appellate proceedings.

B. Other appellate decisions

1. Ridley seeks to buttress its claim of a circuit split by relying on the Sixth Circuit's unpublished 1997 decision in *Kari H. By & Through Dan H. v. Franklin Special School District*, 1997 WL 468326, *6 (Aug. 12, 1997). *See* Pet. (i), 14. But "unpublished opinions are never controlling authority" in the Sixth Circuit, *Fonseca v. Consol. Rail Corp.*, 246 F.3d 585, 591 (6th Cir. 2001) (citations omitted), which has admonished district courts not to treat its unpublished decisions as precedential. *See id.*; *Gunner v. Welch*, 749 F.3d 511, 515 (6th Cir. 2014).

A Sixth Circuit panel is thus free to consider the question presented anew and reject (or ignore) the conclusion reached in *Kari H*. *See, e.g.*, *U.S. v. Wooten*, 689 F.3d 570, 578 n.4 (6th Cir. 2012) (rejecting prior unpublished decision); *Lundgren v. Mitchell*, 440 F.3d 754, 765 n.3 (6th Cir. 2006) (same). The Sixth Circuit's decision in *Kari H.* thus provides no basis for review.[6]

2. Ridley suggests that two state intermediate appellate court decisions also advance its cause for

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[6] The unpublished decision in *Kari H.* is unlikely to have any future persuasive value. Like the D.C. Circuit's decision in *Andersen*, it does not mention the Department of Education's stay-put regulation, 34 C.F.R. § 300.518(a), and it predates 34 C.F.R. § 300.518(d).

review. *See* Pet. 15 n.3 (citing *North Kitsap Sch. Dist. v. K.W. ex rel. C.W.*, 123 P.3d 469, 483 (Wash. Ct. App. 2005); *Special Sch. Dist. No. 1 v. E.N.*, 620 N.W.2d 65, 69-70 (Minn. Ct. App. 2000)). As Ridley acknowledges, however, those decisions "declined to follow [the D.C. Circuit's decision in] *Andersen*" and embraced the conclusion later reached below. Pet. 15 n.3. Thus, rather than deepening a conflict, those state-court rulings confirm *Andersen*'s status as a twenty-five-year-old outlier (even assuming, counterfactually, that *Andersen* forms part of an authentic and untarnished circuit conflict). In this regard, recall that the IDEA expressly provides concurrent jurisdiction in federal or state court. *See* 20 U.S.C. § 1415(*i*)(2)(A). Yet, only two state intermediate appellate courts have weighed in on the question presented, and, in the thirty-nine years since enactment of the stay-put provision, not a single state court of last resort has ever addressed the issue.[7]

* * *

In sum, what the petition posits as an "entrenched and expanding conflict" is hardly a conflict at all. Review should be denied for that reason alone.

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[7] Further solidifying *Andersen*'s outlier status is a decision the petition omits, *Flour Bluff Independent School District v. Katherine M.*, 91 F.3d 689, 695 (5th Cir. 1996), where the Fifth Circuit indicated in dicta that the stay-put provision covers appellate proceedings.

II. The Third Circuit's decision is correct

The Third Circuit's decision is correct, which provides another reason for the Court to stay its hand.

A. The stay-put provision's text

The Third Circuit correctly held that the statutory text amply supports its conclusion that the stay-put provision applies to appellate proceedings. Pet. App. 27a-28a. The provision says that, unless the parties otherwise agree, the child must remain in his or her then-current educational placement "during the pendency of any proceedings conducted pursuant to this section"—that is, "until all such proceedings have been completed." 20 U.S.C. § 1415(j). These "proceedings" include "a civil action" in a state court of competent jurisdiction or in a federal district court. *Id.* § 1415(*i*)(2)(A). And, as the Third Circuit observed, "an appeal is part of a 'civil action … in a district court of the United States.'" Pet. App. 27a-28a (quoting 20 U.S.C. § 1415(*i*)(2)(A)). *See also Andersen*, 877 F.2d at 1023 (acknowledging that "an appeal is part of a 'civil action'"). Moreover, in a judicial system like ours, in which appeals generally are taken as of right, excluding an appeal in a federal court of appeals from the term "any proceeding" is "an unnatural reading of such expansive language." Pet. App. 27a; *see* Pet. App. 60a.[8]

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[8] Ridley says that the Third Circuit's decision is "less tenable when applied to state court proceedings" because, Ridley suggests, appeals often are unavailable in state court. Pet. 19 n.4 (referring vaguely to "discretionary appellate jurisdiction in certain states"). Ridley's factual

(continued...)

Ridley argues that because the "proceedings" encompassed by § 1415(j) are those "*conducted pursuant to this section*," and because "this section" (§ 1415) refers to state administrative proceedings, state courts of general jurisdiction, and federal district court,

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[8](...continued)
premise is wrong. First, an appeal as of right is *always* available in IDEA cases, which invariably can be filed in, or removed to, federal court. In some state judiciaries, an appellate court may be the first-instance tribunal in IDEA cases. *See* 42 Pa.C.S. § 763. More to Ridley's point, as a general matter, forty-nine states provide for an appeal as of right in civil cases—forty-seven by constitution or statute and the other two by court rule— and only one does not. *See* Robertson, *The Right to Appeal*, 91 N.C. L. Rev. 1219, 1222 & n.8 (2013) (citations omitted). Ridley's mistaken assertion relies on a 1997 pamphlet that claims that four states—Louisiana, New Hampshire, Virginia, and West Virginia—do not have civil appeals as of right. Two of those states—New Hampshire and West Virginia—have, since 1997, embraced an appeal as of right. *See id.* And the pamphlet is wrong about Louisiana, which guarantees an appeal as of right from final decisions in civil cases. *See* La. C.C.P. art. 2083 A.

Even accepting Ridley's incorrect premise, its argument makes no sense. "Any proceeding" in the stay-put provision refers only to proceedings that actually exist. Thus, to be sure, in a situation in which a school district or a parent sues in a judicial system that does not authorize appeal, the stay-put requirement lasts only "until all … [available] proceedings have been completed." 20 U.S.C. § 1415(j). But this truism tells us nothing about whether "any proceeding" includes appellate proceedings when those proceedings exist (as they almost always do).

the stay-put provision's duration is limited to "proceedings" in those venues. Pet. 16 (emphasis added by Ridley).

But the language emphasized by Ridley underscores that the Third Circuit had it right. "'Pursuant to' is defined as 'acting or done in consequence or in prosecution (of anything); hence, agreeable; conformable; following; according.'" *Old Colony Trust Co. v. Comm'r of Internal Revenue*, 301 U.S. 379, 383 & n.3 (1939) (quoting *Webster's New International Dictionary, Unabridged* (2d ed. 1935)).[9] The appeal in this case, as in any IDEA case concerning a child's school placement, indisputably was taken as a "consequence of" § 1415. It was "agreeable to" and done "in accordance with" or "by reason of" § 1415. *Black's*, *supra*, at 1401. In short, the appeal was "pursuant to" § 1415 within the meaning of the stay-put provision.

B. The Department of Education's stay-put regulation

The Department of Education's stay-put regulation provides that, absent the parties' agreement, the child must remain in his or her current placement "during the pendency of any administrative or judicial proceeding regarding a due process complaint." 34 C.F.R. § 300.518(a). Ridley says that this regulation

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[9] *See also Black's Law Dictionary* 1401 (rev. 4th ed. West 1968) (edition contemporaneous with enactment of the stay-put provision) (pursuant: "in accordance with or by reason of something; … in accordance; agreeably; conformably; a carrying out or with effect; … acting or done in consequence or in prosecution of anything[.]")

should be ignored because it seeks only "to parrot the statute" and, thus, "is not entitled to deference." Pet. 21 n.5. That is incorrect. Assuming (incorrectly) that the statute leaves doubt about whether appellate proceedings are covered by § 1415(j), the regulation does exactly what a deference-inducing regulation is supposed to do: it reasonably resolves any ambiguity, as the Third Circuit explained. *See* Pet. App. 30a.

If resort to the regulation were necessary, it would resolve the question presented in two independently dispositive ways. First, while the statute says that the stay-put requirement lasts through the completion of "any proceedings," the regulation specifies that these "proceedings" include "*any … judicial* proceeding." 34 C.F.R. § 300.518(a) (emphasis added). In an attempt to create ambiguity in the regulation, Ridley acknowledges that "the phrase 'judicial proceeding' *could* encompass appellate court review." Pet. 21 n.5. But Ridley omits a key word: "any." Particularly in a world where civil appeals are exercised as of right, the notion that "any … judicial proceeding" means *only one type* of judicial proceeding cannot be correct. Simply put, "[t]he unbounded reference to 'any' judicial proceeding plainly extends the mandate through the conclusion of the appellate process." Pet. App. 30a.

Second, recall that the linchpin of Ridley's textual argument is that the stay-put provision's reference to "proceedings conducted *pursuant to* this section" covers only administrative and trial-court proceedings. *See* 20 U.S.C. § 1415(j) (emphasis added). As explained above (at 20-21), Ridley is wrong on that score. But if there were any statutory ambiguity, the regulation definitively would resolve it by confirming that a

judicial proceeding "pursuant to" §1415 is "any" judicial proceeding "*regarding* a due process complaint." 34 C.F.R. § 300.518(a) (emphasis added). "Regarding" means "concerning." *See Webster's Third New International Dictionary of the English Language Unabridged* 1911 (1971); *Oxford American Dictionary of Current English* 672 (1999). An appeal from a district-court decision in an IDEA case is a judicial proceeding *concerning* a due process complaint. Indeed, an appeal in an IDEA case concerns *only* the issues raised initially in a due process complaint.[10]

C. Ridley's Spending Clause diversion

Ridley claims that the court of appeals erred in interpreting the IDEA's stay-put provision because it supposedly failed to give Ridley the benefit of a clear-notice rule of statutory construction applicable in cases construing Spending Clause legislation. Pet. 17-19. That assertion—which Ridley raises for the first time here—is wrong, as we now explain. One preliminary point: for the reasons explained above (at

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[10] After acknowledging that § 300.518(a)'s reference to "any … judicial proceeding" could cover appellate proceedings, Ridley vaguely (and paradoxically) suggests that a stay-put regulation covering appellate proceedings might be an impermissible construction of the statute (without saying why). Pet. 21 n.5. That suggestion is wrong for the reasons already explained in the text. In any event, Ridley has forfeited any claim that the regulation is invalid. The district court relied on the regulation (Pet. App. 63a), and its meaning was briefed in the Third Circuit, but Ridley never suggested that the regulation was invalid because it is an impermissible construction of the statute.

19-23), even if a clear-notice rule applied, it would not matter here because the statute and regulation each clearly supports the result below.

In any event, Ridley's argument is badly misguided. Taken on Ridley's terms, before Spending Clause legislation may impose a "condition" on a state's receipt of federal funds, the statutory language must provide "clear notice regarding the liability at issue." Pet. 18 (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006)). But the stay-put provision does not impose a "liability" on states. The stay-put provision benefits children with disabilities by providing continuity pending disputes over their placement, but is *neutral* among the disputants: school districts and parents. When the then-current placement is favored by the school district, absent the parties' agreement, the stay-put provision keeps the child in that placement until the dispute runs its course, and when the then-current placement is favored by the parents, the stay-put provision keeps the child in that placement.

The Court confronted a similar situation in *Shaffer*, 546 U.S. 49, which held that the party instituting IDEA due-process proceedings—which, in *Shaffer*, was the parent—bears the burden of persuasion. The Court observed, however, that "the rule applies with equal effect to school districts: If they seek to challenge an IEP, they will in turn bear the burden." *Id.* at 62. Not

surprisingly, in conducting its statutory analysis, the Court made no mention of a clear-notice rule.[11]

Moreover, in some disputes, the school district will prefer the more expensive educational placement. *See* Pet. App. 8a. In that case, when the parents prefer the then-current placement, the stay-put provision, far from imposing a liability, will *save* the school district money, which is another illustration of the stay-put provision's neutrality. That situation is poles apart from *Arlington*, 548 U.S. 291, the principal case on which Ridley relies, where the statutory provision whose meaning was at issue, 20 U.S.C. § 1415(*i*)(3)(B)(i)(I), operates only in one direction, by obligating school districts to pay fees in IDEA suits.[12]

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[11] Similarly, in *Honig*, 484 U.S. 305, the only case in which this Court considered the breadth of the stay-put provision, the Court rejected a state's limiting interpretation of the provision and never suggested that the law's Spending Clause origin had any bearing on its statutory analysis.

[12] On rare occasion, the consequence of IDEA's stay-put provision is a remedy requiring a school district's out-of-pocket expenditure, such as payment of private-school tuition. As explained below (at 34), that remedy may or may not impose a net cost on the school district. In any event, the availability of that remedy has nothing to do with the stay-put provision, but rather reflects that IDEA authorizes that remedy in some circumstances. Ridley acknowledges, as it must, both that tuition reimbursement is an available IDEA remedy and that it was an appropriate remedy here. *See* Pet. 4-5; *see also Forest Grove Sch. Dist. v. T.A.*, 557 U.S.

(continued...)

Under the statute, the stay-put requirement either covers appellate proceedings or it doesn't. And, thus, even assuming (incorrectly) that school districts always favor less costly placements, a principle of construction requiring a clear statement of a condition that financially disadvantages a state or local government cannot yield a singular interpretation of the statute, because either outcome could benefit the school district financially, depending on the circumstances.

This reality is illustrated by a hypothetical. Assume two cases. In the first, the then-current placement—a "mainstream" classroom in the public school—is favored by a school district in Massachusetts. The parents favor a special-education classroom in the same school. A dispute ensues, and the school district prevails administratively, but loses in district court, which finds that the appropriate placement is the special-education classroom. Until that point, the stay-put requirement would have kept the child in the school district's placement—the "mainstream" classroom. The school district seeks review in the First Circuit. The school district argues that the stay-put requirement lasts until the court of appeals rules on the merits, and it seeks an order to that effect from the First Circuit. The school district argues that the Spending Clause's clear-notice requirement demands a ruling in its favor, and the First Circuit agrees.

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[12](...continued)
230, 246 (2009) (rejecting application of clear-notice rule and discussing longstanding propriety of reimbursement remedy under IDEA).

In the second case, involving an Iowa school district, the parties' positions on the merits are identical to those in the first case. But this time, the parents prevail administratively, at which point the then-current placement becomes the special-education classroom. *See* 34 C.F.R. § 300.518(d). The school district sues in federal court, which rules in favor of the school district. The parents appeal to the Eighth Circuit and seek a stay-put order from that court. The school district argues that the stay-put provision does *not* cover appellate proceedings and that the Spending Clause clear-notice rule demands a ruling in its favor. The Eighth Circuit agrees.

Voilà, a circuit split! Now, the issue arrives at this Court. And, assuming that the clear-notice rule applies and is case-dispositive (which is the only situation in which the clear-notice rule could matter), the question whether the stay-put provision covers appellate proceedings will depend not on the merits but on which of the two cases the Court considers. That (obviously) cannot be right. To repeat: The stay-put provision is a neutral rule that provides stability for children with disabilities while their parents and the schools resolve disputes about their education. It imposes no monetary condition on the states' receipt of federal funds, and courts must determine its meaning without resort to a clear-notice rule.

D. The stay-put provision's purposes

The stay-put provision serves two key purposes. First, it establishes a default rule that operates, when a dispute arises, to keep the child in his or her then-current placement. Otherwise, the child's placement pending the dispute's resolution could be unclear, and,

absent agreement, an adjudication on that question might be needed immediately. Second, and most importantly, "the stay-put provision is designed to ensure educational stability for children with disabilities until the dispute over their placement is resolved." Pet. App. 25a (emphasis added). Without it, in IDEA's multi-tiered administrative and judicial review process, absent the parties' agreement, a child could be whipsawed back and forth between placements depending on the outcome at each stage. *See Flour Bluff*, 91 F.3d at 695 ("One of the obvious purposes of the 'stay put' provision is to reduce the chance of a child being bounced from one school to another").

Ridley claims that stay-put's exclusive "well-established purpose" is "to prevent the 'unilateral exclusion of disabled children by *schools*'"—a purpose that Ridley says is no longer served once the trial court has ruled. Pet. 20 (internal quotation from *Honig*, 484 U.S. at 327). That assertion is wrong on at least two fronts. First, again, the stay-put provision is neutral, and so its purpose cannot be simply to prevent conduct by schools. When the then-current placement is favored by the school district, stay-put also favors the district, and the parents' preference takes a back seat while the dispute is pending. Second, as Ridley acknowledges (Pet. 4), even after an impartial due-process hearing officer has resolved the dispute, the stay-put requirement lives on at least through the end of the trial-court proceeding, even though, at that point, the school district's preference is not operating "unilaterally." *See* 20 U.S.C. § 1415(f), (g)(2) (procedures for "impartial due process hearing," including for hearing-officer independence).

Preventing conduct by schools could be described as *a* purpose of the stay-put provision. But, more accurately viewed, that is an *effect* of the stay-put provision in some cases: when, and only when, the then-current placement is favored by the parents, the provision prevents unilateral action by a school district. In all circumstances, however, the stay-put provision serves the same overriding purpose: continuity of placement until completion of the dispute-resolution process, a purpose advanced by the Third Circuit's decision regardless of which party favors the child's then-current placement.

Ridley also asserts that the Third Circuit's ruling conflicts with the IDEA's preference that children with disabilities be educated "where possible in regular public schools." Pet. 20 (quoting *Burlington*, 471 U.S. at 369). That assertion reflects a fundamental misunderstanding of the stay-put requirement. Again, stay-put is *neutral*. It does not favor (or disfavor) public schools or private schools, "regular" classrooms or special-education classrooms. Regardless of the outcome desired by the parents or by the school, stay-put favors *stability* for the child. *See* Pet. 25a. As the court of appeals explained, "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." Pet. App. 29a (quoting Pet. App. 61a n.10). *See Burlington*, 471 U.S. at 373 (the stay-put requirement "prevent[s] school officials from removing a child from the regular public school classroom over the parents'

objection pending completion of the review proceedings").

Ridley says that its position is consistent with IDEA policy because if parents of privately-placed students win on appeal, they still can seek tuition reimbursement under IDEA. Pet. 25. But that view misapprehends the stay-put requirement's purpose. As the Third Circuit observed (Pet. App. 29a), if the stay-put provision ceased to operate after a district court ruled that a private-school placement was not required, parents unable to afford a private school would have to remove their child from the private school pending appeal, *even in cases where the court of appeals later reversed*.

More fundamentally, stay-put is not about private-school placement. It applies to IDEA disputes generally, the vast majority of which do not concern private placements. *See infra* 32-33. Thus, in a dispute about whether a child should be in a "mainstream" or special-education classroom, if the stay-put provision did not cover appellate proceedings, and the appeals court ultimately reversed and reinstated the original placement, the result would be profound discontinuity in the child's placement and a loss of educational advantage that no amount of "compensatory" education could fully redress—a result at odds with the stay-put provision's purpose of stability and IDEA's fundamental promise that all children receive a free *and* appropriate public education. *See Burlington*, 471 U.S. at 372 ("The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives.").

III. Ridley's claim of importance provides no basis for review.

Ridley claims that the petition presents "a question of exceptional importance." Pet. 22. Charitably put, that is hyperbole. The legal question—whether the stay-put requirement covers all administrative and judicial proceedings except appellate proceedings—though impactful for the parties to this case, is not important generally, let alone exceptionally so. It has been the subject of just five precedential decisions in the last forty years, and, as noted earlier (at 18), though the IDEA expressly provides concurrent jurisdiction in state court, no state court of last resort has ever addressed the question.[13]

Ridley asserts that the Third Circuit's decision places a "significant financial burden" on school districts. Pet. 24. This argument is misguided. The stay-put requirement sometimes favors the school district's position and sometimes favors the parent's, and it can only cost a school district money—against its wishes—when the parents' favored placement is more costly *and* that placement is the child's then-current placement. In this regard, Ridley mistakenly assumes

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[13] Even Respondents did not choose to bring the issue to court. When Ridley refused to honor its stay-put obligation *entirely*—including the period through the end of the district-court proceedings that it now acknowledges the law required it to honor (Pet. 4, 7)—only then did Respondents file suit. Nor did Ridley appeal principally on the question it now claims is exceptionally important. Most of the issues it raised on appeal—though meritless—had nothing to do with the question it raises here. *See* Pet. App. 15a-26a.

that parents invariably will prefer segregated, more expensive services over a "mainstream" classroom (*see* Pet. 25), but that is incorrect. *See, e.g., P.*, 546 F.3d at 114-17; *Nack*, 454 F.3d at 608, 610; *Kari H.*, 1997 WL 468326, *2.

Ridley's amici similarly claim that the decision below will increase significantly the cost to public schools of private placements, but they cite only irrelevant statistics on the aggregate cost of IDEA-required due process hearings. *See* Amici Curiae Br. of National School Board Ass'n, et al. (NSBA Br.) at 17-18.

The relevant facts tell the true story. This Court has recognized that "the incidence of private-school placement at public expense is quite small." *Forest Grove*, 557 U.S. at 247 (citation omitted). Nationwide, only .18% of public-school students are in private schools at public expense. Winters & Greene, *Debunking a Special Education Myth*, Education Next (Spring2007), http://educationnext.org/debunking-a-special-education-myth/ (reproducing Department of Education data verbatim). *See id.* ("private placement is extremely rare.").

Even among school-aged students served by IDEA, only about 4% are in private placements, which includes placements supported by both public and private funds.[14] In 2004, only 1.48% of students with disabilities

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[14] U.S. Dep't of Educ., *34th Ann. Report to Congress on the Implementation of IDEA, 2012*, at 132, http://www2.ed.gov/about/reports/annual/osep/2012/parts-

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were in private schools at public expense. Winters & Green, *supra*. And, critically, as Ridley's lead amicus told this Court in *Forest Grove*, the "overwhelming majority of these private placements" are not disputed, but are "ones that school districts agreed were appropriate to ensure the child in question received the education mandated by IDEA." Br. Amici Curiae of NSBA et al. at 14, *Forest Grove School Dist. v. T.A.*, 557 U.S. 230 (2009) (No. 08-305), 2009 WL 598248, *14.[15]

Of the very few disputes, far fewer still will be the subject of judicial appeals, which are the only proceedings relevant here. And those rare appeals will involve stay-put-related costs for school districts only in the still-smaller category of appeals where the child's

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[14](...continued)
b-c/34th-idea-arc.pdf.

[15] In 2012, the per-child due process complaint rate among IDEA-served students was a tiny .26%. Consortium for Appropriate Dispute Resolution in Special Education, *IDEA Dispute Resolution Data Summary for: U.S. and Outlying Areas 2004-05 to 2011-12*, at 11 (2014), http://www.directionservice.org/cadre/pdf/Dispute%20Resolution%20Summary%20-%20USALL.pdf. Of those complaints, only 13% were fully adjudicated, with the vast majority withdrawn, dismissed, or informally resolved. *Id.* And of the small fraction of complaints adjudicated in 1999, 2000, and 2001, only 3.5%, 1.5%, and 3.3%, respectively, concerned disputes over private placements. *See* Schrag & Schrag, National Association of State Directors of Special Education, *National Dispute Resolution Use and Effectiveness Study,* at pt. 2, pp. 24-25 (2004), http://www.directionservice.org/cadre/effectiveness.cfm.

then-current placement is opposed by the district. Neither Ridley nor its amici have cited evidence even suggesting that this vanishingly small sliver of IDEA disputes is burdensome.[16]

Moreover, existing data show that, in some circumstances, private placements may not be more expensive than comparable public-school placements, in part because children in private placements tend to be expensive to educate in the public schools. Winters & Greene, *supra*. In any case, private placements cost at most .24% of overall public-school budgets, *id.*, and, again, because the vast majority of private placements are undisputed, "[t]he cost of family-driven private placement is certainly less." *Id*. Ridley and its amici have not even attempted to show otherwise.[17]

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[16] The petition implicates only costs that accrue during appellate proceedings. An appeal from a district court to a federal court of appeals decision lasts an average of 9.6 months. *See* U.S. Off. of Admin. Courts, Table B-4A, www.uscourts.gov/Statistics/JudicialBusiness/2013/statistical-tables-us-courts-appeals.aspx.

[17] Rather than citing hard data, Ridley's amici rely anecdotally on five private-placement cases. NSBA Br. 13-16. As far as we can tell, *none* of these cases concerned a school district's liability for costs imposed by the stay-put provision, let alone costs incurred during appellate proceedings. Indeed, in two, the then-current placement was the public school. *Burlington*, 471 U.S. at 371; *Salley v. St. Tammany Parish Sch. Bd.*, 1994 WL 148721, *1 (E.D. La. Apr. 18, 1994). In another, the school district initially agreed to, and later favored (while the parent opposed), the

(continued...)

Finally, Ridley claims that the Third Circuit's ruling will motivate parents "to prolong the judicial review process" by prosecuting frivolous appeals "with no likelihood of success." Pet. 24-25. This assertion makes no sense. Appellate lawyers cost money, and when lawyers represent parents contingent on payment under IDEA's fee-shifting provision, the parents must prevail before the lawyer is paid. *See* 20 U.S.C. § 1415(*i*)(3)(B)(i)(I). Moreover, a school district is entitled to fees against a lawyer who files or continues to pursue an IDEA claim that is "frivolous, unreasonable, or without foundation" or against a lawyer or parent who litigates with an improper purpose, such as "to cause unnecessary delay, or to needlessly increase the cost of litigation." *Id.* §1415(*i*)(3)(B)(i)(II)&(III). Under these circumstances, no rational lawyer or client (even the scheming ones imagined by Ridley) would file an appeal where there is "no likelihood of success."

More fundamentally, Ridley's assertion is based on a misunderstanding of the stay-put provision, which operates in favor of parents only when they agree with the child's then-current placement. In turn, that occurs during a parental appeal only in two situations: when (1) the child's then-current placement was at one time *also favored by the school* (as reflected in an IEP), or (2) an impartial hearing officer has ruled in the parents'

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[17](...continued)
child's placement in the allegedly more costly private residential school. *Faranza K. v. Indiana Dep't of Educ.*, 2009 WL 3642748, *1-*3 (N.D. Ind. Oct. 30, 2009). (The tuition amounts that amici claim were involved in *Faranza K.* appear nowhere in the court's opinion.)

favor at a due process hearing, *see* 34 C.F.R. § 300.518(d). An appeal taken under either of those circumstances cannot be considered frivolous.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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