No. _____

In The
Supreme Court of the United States

N.E., BY AND THROUGH HIS PARENTS
C.E. AND P.E.; C.E.; AND P.E.,

Petitioners,

v.

SEATTLE SCHOOL DISTRICT,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The "stay-put" provision of the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(j), relevantly provides that "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child." The question presented is:

Whether an educational setting constitutes a child's "then-current educational placement" simply because it is the placement listed in an individualized education program (IEP) drafted by the school district, when the parents objected to the portion of the IEP listing that placement, and the child never actually attended that placement.

PARTIES TO THE PROCEEDING

N.E., by and through his parents C.E. and P.E.; C.E.; and P.E., were plaintiffs-appellants in the proceedings below.

The Seattle School District was the defendant-appellee in the proceedings below.

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The opinion of the court of appeals is reported at 842 F.3d 1093. It is reprinted in the appendix (App.) at 1-35. The opinion of the district court is reported at 2015 WL 12564236. It is reprinted at App. 36-46.

JURISDICTION

The court of appeals entered judgment on November 17, 2016, and denied rehearing *en banc* on January 26, 2017. App. 47. The petition is filed within 90 days of the latter date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The "stay-put" provision of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(j), provides:

> 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.

STATEMENT OF THE CASE

This case involves application of the stay-put provision of the IDEA, 20 U.S.C. § 1415(j). During the pendency of proceedings under the statute, the stay-put provision requires that a disabled child "shall remain in the then-current educational placement of the child" absent an agreement with the parents to the contrary. *Id.* A divided panel of the Ninth Circuit held that the "then-current educational placement" of Petitioner N.E. was a self-contained classroom – that is, a program in which he would be taught exclusively with other students with disabilities – even though his parents objected to the self-contained setting and he had never actually attended such a program. The panel majority thus "applie[d] the IDEA's 'stay-put' provision to allow N.E. to be placed in an entirely new learning environment, more restrictive than any in which he had previously been enrolled, over his parents' objection." App. 12 (Berzon, J., dissenting).

1. The IDEA requires states that accept federal funds under the statute to ensure that a "free appropriate public education" (often abbreviated FAPE) in the "least restrictive environment" is available to all children with disabilities. 20 U.S.C. § 1412(a)(1), (5). The "'primary vehicle' for providing each child with the promised FAPE," *Fry v. Napoleon Community Sch.*, 137 S. Ct. 743, 749 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988)), is the "individualized education program" (often abbreviated IEP). See 20 U.S.C. §§ 1412(a)(4), 1414(d). An IEP must be in effect for each disabled child at the beginning of each school

year. 20 U.S.C. § 1414(d)(2)(A). The individualized education program must include, among other things, "a statement of the special education and related services and supplementary aids and services" that the child will receive, as well as of the "program modifications or supports for school personnel that will be provided for the child." 20 U.S.C. § 1414(d)(1)(A)(IV). It must also include "an explanation of the extent, if any, to which the child will not participate with nondisabled children" at school. 20 U.S.C. § 1414(d)(1)(A)(V). The individualized education program is developed by an "IEP team," which must include the child's parents along with school officials. 20 U.S.C. § 1414(d)(1)(B). The team must review the IEP at least once per year. 20 U.S.C. § 1414(d)(4).

Parents are under no obligation to agree to an IEP proposed by the school district. If the parents disagree, they may file a due process complaint. See 20 U.S.C. § 1415(b)(6)(A) (state must provide "[a]n opportunity for any party to present a complaint" regarding "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"). The filing of a complaint triggers a series of procedural steps, including: a preliminary meeting, 20 U.S.C. § 1415(f)(1)(B)(i); possible mediation, 20 U.S.C. § 1415(e); an "impartial due process hearing" conducted by the state or local educational agency, 20 U.S.C. § 1415(f); a possible state administrative appeal, 20 U.S.C. § 1415(g); and judicial review, 20 U.S.C.

§ 1415(i)(3)(A). See generally *Fry*, 137 S. Ct. at 749 (describing these steps).

Because this extensive "review process" can be "ponderous," *School Committee of Town of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 370 (1985), Congress provided that the child will remain in his or her current placement while proceedings are pending. The relevant subsection of the IDEA is known as the "stay-put provision." It states, with an exception not pertinent here, 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." 20 U.S.C. § 1415(j).

2. N.E. "is a very bright, imaginative, confident, creative student." C.A. Excerpts of Record 109. As the dissenting judge below noted, he "has scored in the 99th percentile in reading and 85th percentile in mathematics on his last standardized test." App. 12 n.1 (Berzon, J., dissenting). N.E. "'qualifies for special education services . . . due to an ADHD diagnosis,' and because he needs 'specially designed instruction in Social Emotional' development." *Id.* at 12. During the 2014-2015 school year, N.E. attended the third grade in the Bellevue School District in Washington State. App. 3. "Until the final month of that school year, and in prior school years, N.E. spent most of his instructional time in general education classes. His most recent IEP reflecting that arrangement dates from December 2014." *Id.*

In May 2015, with just a few weeks to go in N.E.'s third-grade year, the Bellevue School District convened a new IEP meeting to address what they asserted were increasing behavioral problems. *Id.*[1] At that meeting, school officials proposed to assign N.E. to a new, more restrictive placement for his fourth-grade year: "a self-contained, special education class for students with behavioral and emotional disorders." *Id.* at 3. N.E.'s parents "objected to that proposal and wrote 'disagree' on the front sheet of the proposed IEP." *Id.* For the remaining weeks of his third-grade year, the parents did agree to send N.E. to a different elementary school within Bellevue, where he would receive individualized instruction from "a teacher and a paraeducator." *Id.* The court of appeals referred to that interim setting as an "individual class." *Id.* (Because "their trust in the school had been strained" by a disputed short-term expulsion of their child, the parents did not want N.E. to return to the same elementary school. *Id.* at 14 (Berzon, J., dissenting).)

After the meeting, the Bellevue School District provided the parents with the text of a proposed IEP, under which N.E. would spend the remainder of his third-grade year in the individual class and move to the self-contained program at the beginning of his fourth-grade year. App. 3-4. N.E.'s parents never agreed to that proposed IEP, although they did allow

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[1] N.E.'s parents strongly dispute the district's assessment on this point. See App. 13, 14 n.3 (Berzon, J., dissenting) (describing the dispute). Because of the procedural posture of this case, no tribunal has yet weighed in on this factual dispute.

N.E. to finish third grade in the individual class. *Id.* at 4. N.E. never attended a self-contained class in Bellevue.

During the summer of 2015, before his fourth-grade year began, N.E. and his parents moved to Seattle. *Id.* at 2. When school officials there convened a meeting to transfer N.E.'s IEP, the parents provided the district with two clinical evaluations – one from N.E.'s treating psychologist, and one from an independent educational evaluation funded by the Bellevue School District. See 20 U.S.C. § 1415(b)(1) (requiring that parents have the opportunity "to obtain an independent educational evaluation of the child"); 34 C.F.R. § 300.502(b) (giving parents the right to obtain an independent educational evaluation at public expense in certain circumstances). Both evaluations "recommend[ed] against N.E.'s placement in a self-contained classroom." App. 16 (Berzon, J., dissenting).

The IEP transfer meeting was held on September 3, 2015, six days before the September 9 date on which school was scheduled to start in Seattle that year. *Id.* At the meeting, school officials "proposed placing N.E. in a self-contained classroom like the one adopted by the Bellevue School District in the May 2015 IEP." *Id.* at 16-17. N.E.'s parents once again objected to that proposal. *Id.* at 17. They requested that the district either assign N.E. to an individual class or assign him to his neighborhood school as a "resource student" (*i.e.*, a student who spends most of his time in mainstream classes but is pulled out to receive special resources and services for some portion of the day). C.A. Excerpts of

Record 195. But in a written notice issued on September 8 – the day before school was scheduled to start – the district rejected those requests. *Id.* The district instead confirmed its offer of a self-contained program. *Id.*

3. On September 9, the day after they received the district's written notice – and before Seattle schools had opened for the year[2] – N.E.'s parents filed a due process complaint. C.A. Excerpts of Record 91-94. At the same time, the parents filed a stay-put motion; they argued that the December 2014 individualized education program – the last IEP agreed upon by the parents and school officials – provided the baseline for determining N.E.'s "then-current educational placement" under 20 U.S.C. § 1415(j). See App. 40. Because that IEP assigned N.E. to the general classroom, the parents argued that he should stay in the general classroom pending the conclusion of proceedings. *Id.*

The case was assigned to a state administrative law judge, who determined that the self-contained class – which N.E. had never attended, and to which his parents had consistently objected – was the "then-current educational placement." App. 5. The ALJ concluded that the proposed May 2015 IEP constituted the relevant baseline; because that proposed IEP provided

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[2] Although Seattle schools were scheduled to open on September 9, 2015, they remained closed until September 17 due to a teachers' strike. Paige Cornwell, *School Year Begins for Seattle Students: 'Better Than Sitting Bored at Home,'* SEATTLE TIMES, Sept. 17, 2015, http://www.seattletimes.com/seattle-news/education/seattle-students-go-back-to-school-by-the-numbers/.

that N.E. would be taught in "separate classes," the ALJ decided that "separate classes were the Student's 'stay put' placement." *Id.* at 41.

Petitioners sought review in the District Court for the Western District of Washington, along with an immediate stay-put injunction to require the district to educate N.E. in general classes. *Id.* The district court denied relief. *Id.* at 46. Although N.E.'s parents had never agreed to it, the court concluded that the proposed May 2015 IEP had been "implemented" when N.E. attended individual classes for the last few weeks of his third-grade year. *Id.* at 44. Thus, the court held that the proposed May 2015 IEP was the "stay-put" baseline. *Id.* at 45-46. And because that proposed IEP provided that N.E. would be assigned to a self-contained class in his fourth-grade year "after a transition period in individual classes" at the end of third grade, *id.* at 44, the district court held that the self-contained class was N.E.'s "then-current educational placement" even though he had never attended it. *Id.* at 44-46.

A divided panel of the Ninth Circuit affirmed. *Id.* at 11. The majority concluded that the proposed May 2015 IEP had two "stages": "Stage one" was the "individual class setting" in which N.E. finished his third-grade year, *id.* at 8, and "stage two" was the "self-contained placement" scheduled to begin with his fourth-grade year, *id.* at 9. The majority concluded that the proposed May 2015 IEP was at least "partially implemented" when N.E. attended the individual class at the end of third grade, and it held that "a partially implemented, multi-stage IEP, as a whole, is a student's

then-current educational placement." *Id.* at 9. The majority also noted that the proposed May 2015 IEP listed September 1 as the date on which the self-contained class would begin. *Id.* Even though school had not yet started on September 9, when N.E.'s parents filed the due process complaint – and N.E. had not yet even had a chance to start the self-contained program – the majority concluded that the self-contained class had, as a matter of law, become his current placement on September 1. *Id.* at 9-10.

Judge Berzon dissented. *Id.* at 12. She lamented that the majority's decision "allow[ed] N.E. to be placed in an entirely new learning environment, more restrictive than any in which he had previously been enrolled, over his parents' objection." *Id.* "The 'stay-put' provision," she concluded, "was designed precisely to preclude transferring students to new, more restrictive environments while their parents challenge the transfer." *Id.* Because "N.E. had never experienced the self-contained classroom program the 2015 IEP proposed," Judge Berzon argued that the majority erred in treating that program as the then-current educational placement: "A child cannot 'stay-put' in a program in which he never took part; the 'then-current educational placement' cannot be an educational setting the child has never experienced." *Id.* at 28. She concluded that: "The majority's approach simply cannot be

reconciled with the text of the statute or its purposes." *Id.* at 35.[3]

[3] While the appeal of the denial of the stay-put order was pending in the court of appeals, Petitioners' then-counsel moved for a continuance in the underlying administrative due process proceedings. Counsel explained that they had insufficient time to prepare for both the appellate argument and the due process hearing and that the parents lacked the resources to pay for counsel to litigate in both fora simultaneously. D. Ct. Dkt. 28 at 6-7. The ALJ ordered that the continuance would be denied unless, among other things: "(1) The Parents agree to cap their reimbursement request in the due process proceeding as of May 12, 2016; [and] (2) The Parents agree to request dismissal with prejudice of this [due process] proceeding if the Ninth Circuit rules against the Parents on the merits of their stay-put claim." *Id.* at 7-8 (citation omitted). Petitioners acquiesced to those conditions, and the ALJ agreed to continue the due process case until after the Ninth Circuit's decision. *Id.* at 12-13. Between September 9, 2015, and May 12, 2016, Petitioners incurred approximately $10,000 in educational expenses, including tuition at the Concordia Lutheran School, where N.E. was educated for part of that time. On November 23, 2016, following the panel's decision, and over the objection of Petitioners' counsel, the ALJ dismissed the due process case. *Id.* at 16. Should this Court grant *certiorari* and reverse, Petitioners intend to move to reopen the due process case. Even if the ALJ does not grant that motion, Petitioners would still, on remand from this Court, have a live claim seeking reimbursement for educational expenses incurred during the stay-put period. See *Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036 (9th Cir. 2009) (allowing reimbursement for expenses incurred during stay-put period even though underlying FAPE claim rejected). See also *Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 453 (2d Cir. 2015) (parents entitled to reimbursement for expenses incurred during stay-put period even if they lose their underlying FAPE claim), cert. denied, 136 S. Ct. 2022 (2016); *M.R. v. Ridley Sch. Dist.*, 744 F.3d 112, 124-25 (3d Cir. 2014) (same), cert. denied, 135 S. Ct. 2309 (2015); *Mackey ex rel. Thomas M. v. Bd. of Educ. for Arlington*

The court denied a petition for rehearing *en banc*. *Id.* at 47.

REASONS FOR GRANTING THE PETITION

The stay-put provision is a crucial component of the procedural safeguards that Congress extended to disabled children and their parents in the IDEA. See *Honig*, 484 U.S. at 324-25. But the circuits exist in a state of perpetual confusion regarding an essential question in applying that provision: What constitutes a child's "then-current educational placement," 20 U.S.C. § 1415(j)? One court of appeals has stated that "[n]either the statute nor the legislative history provides guidance for a reviewing court on how to identify the then current educational placement." *Drinker by Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 865 n.13 (3d Cir. 1996). And, as another has explained, "[j]udicial construction of the term 'educational placement' has generally failed to provide significant clarification." *AW ex rel. Wilson v. Fairfax Cty. Sch. Bd.*, 372 F.3d 674, 679 (4th Cir. 2004).

As detailed below, the circuits have adopted conflicting tests for determining what constitutes the then-current educational placement. This conflict, over a key provision of "an 'ambitious' piece of legislation" protecting disabled children, *Endrew F. ex rel. Joseph*

Cent. Sch. Dist., 386 F.3d 158, 160-61 (2d Cir. 2004) (same); *Monticello Sch. Dist. No. 25 v. George L. on Behalf of Brock L.*, 102 F.3d 895, 905 (7th Cir. 1996) (same).

F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017) (quoting *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 179 (1982)), demands this Court's review. That is particularly so because the Ninth Circuit's approach stands as an outlier. The Ninth Circuit held that a self-contained program was the "then-current educational placement" even though N.E.'s parents had objected to the placement, N.E. had never actually attended the placement, and the placement was "more restrictive than any in which he had previously been enrolled." App. 12 (Berzon, J., dissenting below). Under the rules adopted in *any* of the Second, Third, Sixth, Seventh, or Tenth Circuits, the self-contained program would not have been deemed N.E.'s then-current placement. The conflict in the circuits thus determined the outcome of this case.

A. The Circuits are Divided Over the Proper Analysis for Determining a Disabled Child's Then-Current Educational Placement

By holding that a self-contained class was N.E.'s "then-current educational placement," the Ninth Circuit exacerbated a conflict among the courts of appeals. Although five other circuits have applied a variety of different approaches to the question of what constitutes a child's current placement, under *none* of those approaches would that placement have been the self-contained class. Rather, under the various tests applied by the Second, Third, Sixth, Seventh, and Tenth Circuits, a setting cannot constitute a proper

stay-put placement unless it is *both* the setting that the school and parents most recently agreed on in an IEP *and* a setting the child had actually attended. Because N.E.'s parents objected to the self-contained class, and N.E. never attended that setting, this case would have come out differently in any of the other circuits that have addressed the question presented.

1. The Third Circuit: The "Operative Placement Actually Functioning at the Time"

The Third Circuit has taken a functional approach to determining the "then-current educational placement." It has held that the stay-put placement is "the operative placement actually functioning at the time" the dispute between the parents and the school district arose. *Drinker*, 78 F.3d at 867. See also *D.M. v. New Jersey Dep't of Educ.*, 801 F.3d 205, 215 (3d Cir. 2015) (concluding that "a change in the child's educational placement 'should be given an expansive reading' " and looking "to the IEP of the child that is 'actually functioning when the stay-put is invoked' ") (quoting, *inter alia*, *Drinker*, 78 F.3d at 867); *R.B. v. Mastery Charter Sch.*, 532 F. App'x 136, 140 (3d Cir. 2013) ("The educational placement is thus defined as the IEP 'actually functioning when the stay-put is invoked.' ") (quoting *Drinker*, 78 F.3d at 867), cert. denied, 134 S. Ct. 1280 (2014).

The Third Circuit has applied its functional approach to hold that, even if a particular school or setting is listed in a child's IEP, it does not constitute the

"then-current educational placement" if the child has not yet begun to attend it. See *L.Y. ex rel. J.Y. v. Bayonne Bd. of Educ.*, 384 F. App'x 58, 62 (3d Cir. 2010). The child in *L.Y.* had attended a public charter school in Hoboken, New Jersey, from 2002 to 2009 pursuant to an IEP. *Id.* at 59. In June 2009, the parents and the public charter school agreed on a new IEP, which would place the child in a private school when classes resumed the next fall. *Id.* During the summer break, the board of education in Bayonne, where the child lived (and which would be required to pay for the private placement under state law) filed a due process complaint objecting to the new IEP. *Id.* at 59-60, 62. The parents argued that because the new private school was the placement listed in the last agreed-upon IEP, the child must be placed there during the pendency of due process proceedings. *Id.* at 60. The Third Circuit disagreed. The court held that, as the dispute arose during the summer break, "the June 9, 2009 IEP had not been implemented in any true sense." *Id.* at 61. The public charter school thus remained the child's then-current educational placement, "inasmuch as J.Y. never attended the Community School [the new private school] and never received instruction under the June 9, 2009 IEP." *Id.* at 62.

Had the Ninth Circuit here applied the functional approach adopted by the Third Circuit, it could not have held that the self-contained class was N.E.'s "then-current educational placement." Just as in *L.Y.*, the hearing request here "occurred during the summer – before N.E. physically enrolled in a self-contained

class." App. 11. Just as with the private-school placement in *L.Y.*, the placement in a self-contained class here appeared in an IEP, but that IEP "had not been implemented in any true sense." *L.Y.*, 384 F. App'x at 61. And unlike in *L.Y.*, here the parents actually *objected* to the placement that appeared in the IEP. Cf. *J.F. v. Byram Twp. Bd. of Educ.*, 629 F. App'x 235, 237-38 (3d Cir. 2015) (when student changes school districts within a school year, new district must hew "as closely as possible" to the "last *agreed-upon* IEP") (emphasis added; internal quotation marks omitted). Under the Third Circuit's approach, the self-contained class would not have been N.E.'s stay-put placement. The Ninth Circuit's decision thus directly conflicts with the Third Circuit's jurisprudence.

2. The Sixth and Seventh Circuits: The Last Agreed-Upon Placement the Child Has Attended

The Sixth Circuit had previously adopted a functional test like that applied by the Third Circuit. See *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 626 (6th Cir. 1990) (concluding that "then-current educational placement" refers "to the operative placement actually functioning at the time the dispute first arises"). But the Sixth Circuit recently abandoned that approach. See *N.W. ex rel. J.W. v. Boone Cty. Bd. of Educ.*, 763 F.3d 611, 617 (6th Cir. 2014). The *N.W.* court reasoned that the functional test interpreted the statutory language according to its "ordinary meaning," but that the "plain-meaning approach" was no longer

appropriate given subsequent Department of Education regulations that, in the court's view, defined "placement" to require school-district approval. *Id.* at 617 & n.3. The Sixth Circuit held that the stay-put setting consisted of "the last agreed-upon" placement. *Id.* at 618.

But the Sixth Circuit emphasized that the stay-put placement must be one that the student had actually attended in the past, because "it is logically dubious to stay in a school that you have never attended." *Id.* In *N.W.*, therefore, the court concluded that the plaintiff child's "then-current educational placement" was not New Haven Elementary (a placement proposed by the school district, but to which the parents had not agreed), nor was it Applied Behavioral Services (a school in which the parents had unilaterally placed the child), but was instead St. Rita's School for the Deaf (the school the child had attended under the most recently agreed-upon IEP). See *id.* St. Rita's was "the last agreed-upon school that N.W. attended." *Id.* Had the Ninth Circuit here applied the Sixth Circuit's approach in *N.W.*, it could not have held that the self-contained classroom was the stay-put placement. That placement was neither agreed upon by the parents nor one that N.E. had ever actually attended.

Like the Sixth Circuit, the Seventh Circuit has held that "the last educational plan agreed upon by the parents and the professional educators" is "the appropriate basis for stay-put relief." *John M. v. Bd. of Educ. of Evanston Twp. High Sch. Dist. 202*, 502 F.3d 708, 715 (7th Cir. 2007). And it has held that when, as here, a

child has changed school districts since the drafting of the most recent IEP, the new district must "produce as closely as possible the overall educational experience enjoyed by the child under his previous IEP." *Id.* See also *Casey K. ex rel. Norman K. v. St. Anne Community High Sch. Dist. No. 302*, 400 F.3d 508, 511 (7th Cir.) (stay-put provision applies when student changes school districts within a state), cert. denied, 546 U.S. 821 (2005). According to the Seventh Circuit, courts identifying the stay-put placement should be especially wary of "[s]uggestions for methodological change that would dilute the statute's policy of 'mainstreaming' disabled children to the 'maximum extent appropriate.'" *John M.*, 502 F.3d at 715 (quoting 20 U.S.C. § 1412(a)(5)(A)).

Had it applied the Seventh Circuit's approach, the Ninth Circuit could not have held that a self-contained class was the stay-put placement. N.E.'s parents had never agreed to placement in a self-contained class, such a class formed no part of "the educational experience" N.E. had actually "enjoyed" in the past, *id.*, and a class made up exclusively of disabled children is the antithesis of mainstreaming.

3. The Second and Tenth Circuits: A Variable Approach

The Second and Tenth Circuits have applied more variable standards. But those circuits, too, would not have held that the self-contained class was N.E.'s

"then-current educational placement." The Second Circuit has described the relevant test as follows:

> To determine a child's "then-current educational placement," a court typically looks to: (1) "the placement described in the child's most recently implemented IEP"; (2) "the operative placement actually functioning at the time when the stay put provision of the IDEA was invoked"; or (3) "the placement at the time of the previously implemented IEP."

Doe, 790 F.3d at 452 (citation omitted). Applying this test, the Second Circuit recently held that a placement set forth in an IEP was not a child's stay-put placement when the parents had not agreed to it and the child had never actually attended it. See *Dervishi v. Stamford Bd. of Educ.*, 653 F. App'x 55, 58 (2d Cir. 2016) ("The district court erred in concluding that the IEP created in August 2010 constituted the current placement for purposes of the stay-put obligation because it was never implemented or agreed to by the parents."). Rather, the court held that the child's "then-existing educational placement" was a "home program that the school district had agreed to fund for the previous school year." *Id.* Although the school board had "only agreed to fund T.D.'s home program on a temporary basis," the Second Circuit held that the program became the then-current educational placement once it began. *Id.* The court reasoned that, "because 'the Board's obligation to fund stay-put placement is rooted in statute, not contract,' the parties' intent as to the duration of T.D.'s home program does not alter the Board's

reimbursement obligation under the stay-put provision." *Id.* (quoting *Doe*, 790 F.3d at 453).

Had the Ninth Circuit applied the same analysis as the Second Circuit did in *Dervishi*, it could not have held that a self-contained class was N.E.'s stay-put placement. The portion of the IEP prescribing the self-contained class "was never implemented or agreed to by the parents." *Id.* Under the Second Circuit's analysis, the stay-put setting would likely have been the individual class set forth in stage one of N.E.'s May 2015 IEP – a placement that N.E. did actually attend, and one to which his parents agreed temporarily. Although the parents and school district agreed to the individual-class setting "on a temporary basis" only, the Second Circuit would have disregarded the durational limitation of that agreement, "because 'the Board's obligation to fund stay-put placement is rooted in statute, not contract.'" *Id.* (quoting *Doe*, 790 F.3d at 453).[4]

The Tenth Circuit has also adopted a variable approach to determining the then-current educational placement. It has "recognized that in some cases 'the dispositive factor is the IEP in place when the stay-put provision is invoked,' while in others, 'a fact-driven approach' is appropriate whereby educational placement is defined as 'something more than the actual school attended by the child and something less than the

[4] Not all circuits would agree that the temporary placement constituted the stay-put baseline. See *Verhoeven v. Brunswick Sch. Comm.*, 207 F.3d 1, 10 (1st Cir. 1999) (stating that "[t]he policy behind section 1415(j) supports an interpretation of 'current educational placement' that excludes temporary placements").

child's ultimate educational goals.'" *Smith v. Cheyenne Mountain Sch. Dist. 12*, 652 F. App'x 697, 700 (10th Cir. 2016) (quoting *Erickson v. Albuquerque Pub. Sch.*, 199 F.3d 1116, 1121 (10th Cir. 1999)). The Tenth Circuit recently applied this analysis to hold that a child's then-current educational placement was the one that was listed in the child's most recent IEP and that the child had actually attended in the previous school year. See *id.* at 700-701. Had the Ninth Circuit applied the same analysis, it could not have held that the self-contained class was N.E.'s stay-put placement. N.E. had never actually attended a self-contained class.

4. The Ninth Circuit: A Formalist Approach

The approach taken by the Ninth Circuit here conflicts with *each* of the various approaches taken by the Second, Third, Sixth, Seventh, and Tenth Circuits. The Ninth Circuit took a purely formalistic approach. The court held that once a child attends the placement listed for the first stage of an IEP that has several temporal stages, any setting listed for any subsequent stage becomes the stay-put placement when the time specified for that stage in the IEP arrives. See App. 9 (holding that "a partially implemented, multi-stage IEP, as a whole, is a student's then-current educational placement"); *id.* at 11 (stating that "the IEP was implemented, and stage two was always the intended setting in which N.E. would begin the 2015-16 school year"). As the foregoing discussion demonstrates, however, none of the other circuits that have decided the question presented have taken that approach. And none of

them would have reached the Ninth Circuit's conclusion. Rather, because N.E. had never attended the self-contained class prescribed in the second stage of his IEP, and his parents had consistently objected to it, those circuits would have concluded that the self-contained class was not N.E.'s then-current educational placement. That conflict demands this Court's intervention.

B. The Ninth Circuit's Holding is Incorrect

The IDEA's stay-put provision requires that, absent an agreement between the school and the parents, a disabled child "shall remain in the then-current educational placement of the child" pending the conclusion of proceedings under the statute. 20 U.S.C. § 1415(j). As this Court has explained, that provision aims to bar "the unilateral exclusion of disabled children by schools," *Honig*, 484 U.S. at 327, and thus to "prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings," *Burlington*, 471 U.S. at 373.

The statute does not define "then-current educational placement." But reading that phrase to refer to an educational setting that a child has never attended – and to which his parents have objected – is inconsistent with both the text and the purpose of the stay-put provision. "Current" generally refers to something that is "now going on" or "now in progress." WEBSTER'S NEW WORLD COLLEGE DICTIONARY (4th ed. 2002). See

App. 29 (Berzon, J., dissenting) ("'[C]urrent' suggests continuity, not disruption."). A placement that a student has never attended is not one that is yet going on or in progress. As the Sixth Circuit explained, "it is logically dubious to stay in a school that you have never attended." *N.W.*, 763 F.3d at 618. Or, as the dissenting judge below put it, "A child cannot 'stay-put' in a program in which he never took part; the 'then-current educational placement' cannot be an educational setting the child has never experienced." App. 28 (Berzon, J., dissenting).

Defining the "current" placement according to an IEP to which the parents objected would give sanction to precisely the sort of "unilateral" school district action, *Honig*, 484 U.S. at 327 – action taken "over the parents' objection," *Burlington*, 471 U.S. at 373 – that the stay-put provision was designed to prevent. "Parents and guardians play a significant role in the IEP process." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005). As this Court has recently emphasized, the IDEA's "procedures emphasize collaboration among parents and educators." *Endrew F.*, 137 S. Ct. at 994. See also *Rowley*, 458 U.S. at 205-206 (concluding that "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process as it did upon the measurement of the resulting IEP against a substantive standard") (citation omitted); 34 C.F.R. § 300.116(a)(1) (directing that "[t]he placement decision" must be "made by a group of persons, *including the parents*")

(emphasis added). See generally *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 527 (2007) (detailing the important role of parents in the IDEA scheme).

The stay-put provision is crucial to ensuring that parents have a say in their child's placement. By "maintain[ing] the educational status quo while the parties' dispute is being resolved," *Doe*, 790 F.3d at 452 (internal quotation marks omitted), that provision ensures that a school district cannot change a child's placement over the parents' objection until a neutral hearing officer, and possibly a reviewing court, has a chance to weigh in. See *Honig*, 484 U.S. at 323-24. But the protections the stay-put provision accords to parents could be readily evaded if a school district could simply insert a new educational setting into an IEP over the parents' objection and then treat that new setting as the "then-current educational placement." That, of course, is what the Ninth Circuit permitted here.

Another "obvious purpose[]" of the stay-put provision is to promote stability in a child's educational placement – "to reduce the chance of a child being bounced from one school to another, only to have the location changed again by an appellate court." *Flour Bluff Indep. Sch. Dist. v. Katherine M. by Lesa T.*, 91 F.3d 689, 695 (5th Cir. 1996), cert. denied, 519 U.S. 1111 (1997). See also *M.R.*, 744 F.3d at 124-25 (stating that "the stay-put provision is designed to ensure educational stability for children with disabilities until the dispute over their placement is resolved"). By holding

that N.E. must attend the self-contained classroom while his parents' challenge to that placement proceeded through the administrative and judicial process, the Ninth Circuit's ruling threatens to "fundamentally disrupt" the stability the statute commands – and to do so multiple times over. App. 25 (Berzon, J., dissenting). Moving to the self-contained classroom – a setting that N.E. has never previously attended – would be the first disruption. And the challenge to that new placement, "if successful, could result in a second disruption, returning N.E. to the general educational setting his parents seek. In the meantime, N.E. would have been educated for a long period in an inappropriate setting, in isolation from his peers." *Id.* All of these consequences would be avoided by interpreting "then-current educational placement" according to its ordinary meaning, as the most recent placement actually experienced by the student.

In addition, the structure of the statute refutes the suggestion that the not-yet implemented terms of an IEP, rather than the actual educational experience of the child, define the stay-put placement. As the dissenting judge below explained, "[h]ad Congress intended a prospective IEP to govern the Act's stay-put provision, as opposed to an operational placement, it could have employed the term 'individualized educational program'" in that provision. App. 20 (Berzon, J., dissenting) (internal quotation marks omitted). But "[b]y using the term 'placement,' not 'Individualized Education Program,' in the stay-put provision, the

IDEA evidences the intent not to tether the stay-put placement to a program planned for the future." *Id.*

When N.E.'s parents filed their due process complaint on September 9, 2015, N.E. had never attended a self-contained classroom. His parents immediately objected to the portion of the May 2015 proposed IEP that provided for the self-contained setting. App. 3 ("Plaintiffs objected to that proposal and wrote 'disagree' on the front sheet of the proposed IEP."). They challenged that placement in their September 9 complaint – filed well within the IDEA's two-year statute of limitations[5] and only one day after the Seattle School District made clear that it intended to pursue the self-contained classroom placement. See C.A. Excerpts of Record 195. Because N.E. had never attended a self-contained class, and his parents had objected to that setting, the Ninth Circuit erred by treating it as the stay-put placement.

The Ninth Circuit accorded talismanic significance to the September 1 date on which the May 2015 proposed IEP provided that the second stage – with the self-contained class – would begin. App. 9. Because N.E.'s parents filed their due process complaint after that date, the court concluded that stage two had

[5] See 20 U.S.C. § 1415(f)(3)(C); Wash. Admin. Code § 392-172A-05080(2). The Ninth Circuit specifically disavowed any conclusion "that Plaintiffs' request for a due process hearing was untimely." App. 10. See also *id.* at 10 n.5 ("We cannot fault Plaintiffs for not having objected to stage one before allowing N.E. to attend the individual class for the last few weeks of the 2014-15 school year.").

already commenced, and the self-contained class thus became the stay-put placement. See *id.* at 10-11 & n.5. But it is uncontested that the school year in Seattle was not scheduled to begin until September 9, 2015. See *id.* at 16 & n.5 (Berzon, J., dissenting). That date was thus the earliest date on which N.E. could have, even in theory, begun stage two of the IEP. Rather than permit N.E. to begin that stage by attending the self-contained class, N.E.'s parents filed their due process complaint on September 9 – just one day after the Seattle School District confirmed that it refused to assign N.E. to another setting. See C.A. Excerpts of Record 195. In the event, stage two could not have begun until September 17, because the Seattle schools were closed until then due to a teachers' strike. See n.2, *supra*. N.E.'s parents thus filed their due process complaint before N.E. ever attended – and, indeed, before he ever had a chance to attend – the self-contained class. The Ninth Circuit erred in concluding that the self-contained class was his then-current educational placement.

In any event, this case does not turn on the date on which the Seattle schools opened in the fall of 2015. The crucial point is this: The self-contained classroom setting, which the Ninth Circuit held to be the stay-put placement, is a setting to which N.E.'s parents had consistently objected and one that N.E. had never attended. As the dissenting judge summarized below, the Ninth Circuit's ruling "confines N.E. to the most restrictive placement contained in any of his IEPs, removes him almost entirely from the general education

setting, and places him in a setting in which he was never previously enrolled." App. 35 (Berzon, J., dissenting). Considering the text and purpose of the stay-put provision, the Ninth Circuit erred in concluding that the self-contained classroom was N.E.'s "then-current educational placement."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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842 F.3d 1093
United States Court of Appeals,
Ninth Circuit.

N.E., by and through his parents C.E. and P.E.; C.E.; and P.E., Plaintiffs-Appellants,
v.
Seattle School District, Defendant-Appellee.

No. 15-35910
|
Argued and Submitted May 5, 2016
Seattle, Washington
|
Filed November 17, 2016

Appeal from the United States District Court for the Western District of Washington, James L. Robart, District Judge, Presiding, D.C. No. 2:15-cv-01659-JLR

Attorneys and Law Firms

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David T. Hokit (argued), Curran Law Firm P.S., Kent, Washington, for Defendant-Appellee.

Before: Susan P. Graber, Marsha S. Berzon, and Mary H. Murguia, Circuit Judges.

Dissent by Judge Berzon

OPINION

GRABER, Circuit Judge:

Plaintiff N.E. is a child with a disability who, in accordance with the Individuals with Disabilities Education Act ("IDEA"), has received a series of Individualized Education Programs ("IEP"). In May 2015, three-and-a-half weeks before the 2014-15 school year ended, the Bellevue School District produced an IEP for N.E. that encompassed two stages: The first stage would begin immediately and the second would begin at the start of the 2015-16 school year. N.E.'s parents, Plaintiffs C.E. and P.E., allowed their son to finish the school year in accordance with the first stage of the IEP but did not agree to the second stage. Over the summer, the family moved to Seattle. Just before the start of the 2015-16 school year, Defendant Seattle School District proposed a class setting for N.E. that was similar to the second stage of the May 2015 IEP. Plaintiffs objected and sought a "stay-put" placement.

The pivotal issue is what "educational placement" was "then-current," 20 U.S.C. § 1415(j), after N.E.'s family moved to Seattle in the summer of 2015 but before the 2015-16 school year began. Plaintiffs contend that the "then-current educational placement" must be the educational setting in which N.E. was enrolled either before his May 2015 IEP or, in the alternative, during the first stage of the May 2015 IEP. Defendant counters that the "then-current educational placement" for the 2015-16 school year is the setting described in the second stage of the May 2015 IEP. We

agree with Defendant and, accordingly, affirm the district court's denial of injunctive relief.

The relevant facts in this case are not disputed. N.E. was in the third grade at Newport Heights Elementary School in the Bellevue School District for most of the 2014-15 school year. Until the final month of that school year, and in prior school years, N.E. spent most of his instructional time in general education classes. His most recent IEP reflecting that arrangement dates from December 2014.

During the 2014-15 school year, Bellevue School District officials reported that N.E. exhibited very serious behavioral problems on a regular basis. As a result, the school district began to consider changes. An IEP meeting occurred on May 26, 2015, at which Bellevue School District officials proposed a new IEP that placed N.E. in a self-contained, special education class for students with behavioral and emotional disorders ("self-contained class"). Plaintiffs objected to that proposal and wrote "disagree" on the front sheet of the proposed IEP. Bellevue officials and Plaintiffs also discussed where to place N.E. for the remainder of the school year. Bellevue and Plaintiffs agreed that N.E. would finish the final few weeks of the 2014-15 school year at a different school. At that school, he would spend most of the day in a one-on-two educational setting with a teacher and a paraeducator, but with no other students ("individual class").

One day later, on May 27, 2015, the Bellevue School District produced the May 2015 IEP. The IEP

incorporated two stages: During stage one, N.E. would finish the end of the 2014-15 school year in the agreed-upon individual class; during stage two, for the 2015-16 school year and beginning on September 1, 2015, N.E. would be placed in a self-contained class. Plaintiffs received that IEP approximately one week later, along with a prior written notice[1] notifying Plaintiffs that the Bellevue School District intended to alter N.E.'s educational placement and that the individual class would serve as a transition to the self-contained class. Plaintiffs did not file an administrative due process challenge to the May 2015 IEP and, instead, allowed N.E. to attend the individual class until the end of the school year on June 22, 2015.

Plaintiffs moved to Seattle in the summer of 2015 and contacted the Seattle School District to enroll N.E. Plaintiffs requested an individual class setting similar

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[1] Pursuant to the procedural requirements of the IDEA, school districts must provide parents with "[w]ritten prior notice . . . whenever the local educational agency proposes to initiate or change or refuses to initiate or change . . . the identification, evaluation, or educational placement of the child." 20 U.S.C. § 1415(b)(3)(A).

In addition to making the arguments discussed in text, Plaintiffs argue that Bellevue School District committed a procedural error, in violation of the IDEA, by sending the written notice after the school district had already implemented stage one of the May 2015 IEP. They argue that this error prevents the May 2015 IEP from serving as the stay-put placement. But that argument was waived; Plaintiffs raised it only in a motion for reconsideration, which does not suffice to preserve the issue for appeal. *Hendricks & Lewis PLLC v. Clinton*, 766 F.3d 991, 998 (9th Cir. 2014).

to the one in which N.E. had completed the prior school year.[2] The school district, however, reviewed N.E.'s records and proposed placing him in a self-contained class similar to the one embodied in stage two of the May 2015 IEP. Plaintiffs objected on September 9, 2015, and filed an administrative due process challenge. Plaintiffs also filed a "stay-put" motion, pursuant to 20 U.S.C. § 1415(j), arguing that N.E.'s stay-put placement was the general education class described in the December 2014 IEP. Defendant resisted the stay-put motion and argued that the self-contained class described in the May 2015 IEP was N.E.'s stay-put placement.[3]

An administrative law judge agreed with Defendant and determined that the self-contained class was N.E.'s stay-put placement. Plaintiffs appealed that decision and filed a motion with the district court seeking

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[2] The dissent argues that a general education class with full-time paraeducator support (the December 2014 IEP) should be considered N.E.'s stay-put placement, and it dismisses the individual class (stage one of the May 2015 IEP) as "understood by all concerned as temporary or interim," and "not reflect[ing] any considered judgment, at any point, that the temporary placement is suitable for the long-term educational development of the child." Dissent at 22-23. But N.E.'s parents, citing the recommendations of two psychologists, *requested an individual class setting* when they first contacted the Seattle School District. In other words, Plaintiffs initially sought a more isolated, not a less isolated, environment for N.E. Had the Seattle School District acceded immediately to Plaintiffs' wishes, N.E. would not have been placed in a general education class.

[3] Plaintiffs do not argue that Defendant's proposal differed meaningfully from the second stage of the May 2015 IEP.

a temporary restraining order and a preliminary injunction. The motion sought an order requiring Defendant to place N.E. in a general education class pending the outcome of the due process challenge. The district court denied Plaintiffs' motion on the ground that they had not established a likelihood of success on the merits. Plaintiffs timely appeal.

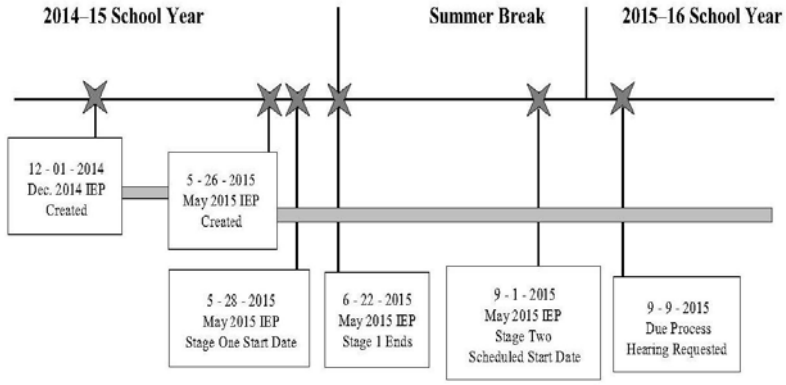
We review the denial of a preliminary injunction for abuse of discretion. *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 874 (9th Cir. 2000). But we review legal questions, such as the meaning of a statute, de novo. *Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1046 (9th Cir. 1999).

The pertinent portion of the IDEA provides:

> [D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall *remain in the then-current educational placement* of the child. . . .

20 U.S.C. § 1415(j) (emphasis added). The IDEA does not define "then-current educational placement." The reading most consistent with the ordinary meaning of the phrase suggests that the "then-current educational placement" refers to the educational setting in which the student is actually enrolled at the time the parents request a due process hearing to challenge a proposed change in the child's educational placement. But two conceptual difficulties complicate the analysis. First,

during the hiatus between school years, it is artificial to refer to remaining in a then-current placement; literally, there is none. Second, when an IEP contains two stages, determining the "then-current educational placement" requires one to look either backward or forward.[4] Here is a graphic representation of the situation:



Our caselaw assists us in resolving the conundrum. We have defined "educational placement" as "the general educational program of the student." *N.D. v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1116 (9th Cir. 2010). More specifically, we have, in a series of cases, "interpreted 'current educational placement' to mean 'the placement set forth in the child's last implemented IEP.'" *K.D. ex rel. C.L. v. Dep't of Educ.*, 665 F.3d 1110, 1117-18 (9th Cir. 2011); *N.D.*, 600 F.3d at 1114; *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 911 (9th Cir. 2009); *Johnson ex rel. Johnson v. Special Educ.*

[4] It is our view that the change of school districts, in this case, does not affect the analysis.

Hearing Office, 287 F.3d 1176, 1180 (9th Cir. 2002) (per curiam). Although the statute refers to "educational placement," not to "IEP," the purpose of an IEP is to embody the services and educational placement or placements that are planned for the child. *See Timothy O. v. Paso Robles Unified Sch. Dist.* 822 F.3d 1105, 1111-12 (9th Cir. 2016) (describing the creation and elements of an IEP).

That rule does not fully resolve the dispute here, though, because the parties disagree about the status of N.E.'s "*then-current* educational placement." Plaintiffs contend that a multi-stage IEP should be viewed as containing several discrete "educational placements" and that any unrealized stage within such an IEP should be seen as an unimplemented "educational placement" that cannot serve as the stay-put placement. Thus, Plaintiffs argue, because stage two of the May 2015 IEP was never implemented, it cannot be considered the "then-current educational placement." That conclusion, according to Plaintiffs, leaves only two options as permissible stay-put placements: the individual class setting described in stage one of the May 2015 IEP or the general education setting that preceded the May 2015 IEP. Because the individual class setting was considered short-term at the time the parties created the May 2015 IEP, Plaintiffs claim that the earlier general education setting is the most appropriate stay-put placement. Defendant counters that the May 2015 IEP, as a whole, was N.E.'s "then-current educational placement" and that no legal authority

precludes a multi-stage IEP or an IEP that spans a summer break.

We agree with Defendant that a partially implemented, multi-stage IEP, as a whole, is a student's then-current educational placement. A multi-stage IEP *could* be structured as several distinct IEPs, but it need not be. For example, some of our past cases assume that a single IEP may contain several phases. *See, e.g.*, *T.B. ex rel. Brenneise v. San Diego Unified Sch. Dist.*, 806 F.3d 451, 462-63 (9th Cir. 2015) (describing a procedural defect in a multi-stage IEP, but not criticizing the IEP for having several stages), *cert. denied*, ___ U.S. ___, 136 S.Ct. 1679, 194 L.Ed.2d 769 (2016). Plaintiffs' reading of the statute would allow students and their families to challenge the second half of any two-stage IEP when the transition occurs during a school break and would permit repeated challenges at every stage of a multi-stage IEP. We do not think that Congress intended that result.

Additionally, by the time N.E.'s parents filed their due process challenge, the second stage of the May 2015 IEP had already been scheduled to start. As noted, the May 2015 IEP provided that stage two – the self-contained placement – would begin on September 1, 2015, while N.E.'s parents did not request a due process hearing until September 9, 2015. Under Plaintiffs' view, parents who disagree with a new IEP could wait until it is scheduled to take effect, pull their child out of school, and then request a due process hearing after the effective date of the new IEP. The new IEP would

not be "implemented" because the child is not physically present in the new setting. By this logic, the parents could then avail themselves of the stay-put mechanism to enforce the terms of a preferred old IEP during the course of the new school year while their due process challenge is litigated. Once again, we do not think that Congress intended such a result because it would undermine the cooperative process envisioned by the IDEA.

We do not suggest that Plaintiffs' request for a due process hearing was untimely; the issue here does not pertain to a statute of limitations. Rather, the question simply is how to identify the status quo when a timely challenge occurs. For example, had a one-stage IEP been completed on August 31, for a single year, had N.E. begun school on September 1, and had his parents brought their challenge a week later, the challenge plainly would have been timely; but, just as plainly, the "stay-put" placement would have been the current (as of September 1) placement.

In short, the December 2014 IEP was superseded. The May 2015 IEP encompassed both the individual class and the self-contained class stages. Plaintiffs did not challenge the May 2015 IEP despite having had months to do so before the scheduled implementation of its second phase in September 2015.[5] The May 2015

[5] We cannot fault Plaintiffs for not having objected to stage one before allowing N.E. to attend the individual class for the last few weeks of the 2014-15 school year. But we view as critical the fact that Plaintiffs never challenged the May 2015 IEP at any point before the new school year was set to begin. Had Plaintiffs

IEP had already been implemented (and the scheduled start date for stage two had already passed) by the time Plaintiffs requested a due process hearing and, thus, was N.E.'s "then-current educational placement."

The remaining question is whether the fact that the hearing request occurred during the summer – before N.E. physically enrolled in a self-contained class like the one described in stage two of the May 2015 IEP – forces us to view stage one as the stay-put placement. We think not, for two reasons. First, and more importantly, the IEP was implemented, and stage two was always the intended setting in which N.E. would begin the 2015-16 school year, effective September 1 (before N.E.'s parents requested a due process hearing). Second, we commonly think of education as forward-looking; we refer to a child who has completed fourth grade and is about to enter fifth grade as a "rising fifth grader." The status quo at the time of the hearing request was the anticipated entry into the self-contained program. Stage two of the May 2015 IEP, therefore, was N.E.'s stay-put placement.

AFFIRMED.

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done so, they likely would have been entitled to a stay-put order under the terms of the December 2014 IEP that they could have presented to the Seattle School District upon transferring there.

BERZON, Circuit Judge, Dissenting:

I respectfully, but emphatically, dissent.

The majority applies the IDEA's "stay-put" provision to allow N.E. to be placed in an entirely new learning environment, more restrictive than any in which he had previously been enrolled, over his parents' objection. The "stay-put" provision was designed precisely to preclude transferring students to new, more restrictive environments while their parents challenge the transfer. None of the majority's explanations for refusing to enforce the statute's promise that children will remain in the existing placement while challenges go forward are persuasive, and each would open a large gap in the IDEA's "stay-put" assurance.

I.

The majority opinion is short on facts. The facts matter in this case. I therefore fill in the gaps.

N.E. is an "intelligent child, [who] performs well when he desires to be engaged." Overall, he was, as of the spring of 2015, "very strong academically.[1] He loves to read. He has a great knowledge base." He "qualifies for special education services . . . due to an ADHD diagnosis," and because he needs "specially designed instruction in Social Emotional" development.

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[1] N.E. has scored in the 99th percentile in reading and 85th percentile in mathematics on his last standardized test.

N.E. was enrolled as a student in the Bellevue School District from kindergarten through third grade. He received special education services throughout his time there. During the 2014-15 school year, as in earlier years, N.E. received the majority of his instruction "mainstreamed" – that is, in a classroom with other children of his grade – with full time, one-on-one support from a paraeducator. This instructional setting, with associated services, was set forth most recently in his December 2014 Individualized Education Program ("IEP").

N.E. had a difficult third grade year; the parties dispute the reasons for the difficulties. In May 2015, Bellevue School District conducted a reevaluation of N.E.'s special educational needs. N.E.'s IEP team met on May 26, 2015 to discuss the reevaluation and to adopt an IEP for the 2015-16 school year. At that meeting, the Bellevue School District determined that N.E.'s educational needs had changed and proposed that N.E.'s placement be altered, to a self-contained classroom program for emotionally and behaviorally disordered students (the Cascade Program), for the 2015-16 school year. N.E.'s parents rejected the proposed placement at the IEP team meeting, writing "disagree" on the draft IEP.[2]

[2] That draft was blank on one page on which a proposed placement was to be listed. The District had indicated its intention to fill in that page with the proposed self-contained classroom program. The parents therefore wrote "disagree" on the cover page of the draft.

Just before the May IEP meeting, the school emergency expelled N.E., due to alleged escalating aggressive behaviors at school.[3] At the time of the meeting, N.E. was still expelled and several weeks remained in the school year. After the full IEP team dispersed, N.E.'s parents met with their attorney, the principal, the Special Education Supervisor, and the district's attorney to discuss N.E.'s return to school following the emergency expulsion.

N.E.'s parents did not want N.E. to return to Newport Heights Elementary, as their trust in the school had been strained by the emergency expulsion. They requested that the district pay for a private school for the approximately three weeks remaining in the school year. After the district declined the request, N.E.'s parents and the district agreed that N.E. would attend a different public elementary school for those final days, where he would receive individualized instruction

[3] An "emergency expulsion" in Washington public schools is a denial of attendance for no more than ten days, imposed while a student poses a danger or risk of substantial disruption. *See* Wash. Rev. Code 28A.600.015; Wash. Admin. Code 392-400-295. A student who is emergency expelled does not have the right to remain in school while challenging the disciplinary action. *See* Wash. Admin. Code 392-400-295. This state law accords with the IDEA, which allows school authorities to remove a child with disabilities who violates a code of student conduct from the classroom, to the extent they would do so for children without disabilities, for up to ten days. *See* 20 U.S.C. § 1415(k)(1)(B).

> The school asserted that N.E. had gotten into a fight with his younger brother while waiting to be picked up after school. N.E.'s parents maintain that the Bellevue School District "fabricated" this incident because of hostility to N.E.

from a certified teacher with support from a full-time paraeducator. N.E. began attending that individual classroom program two days later.

This short-term solution was not mentioned at all in the text of the May 2015 IEP. Instead, the narrative stated that "[N.E.] will be served in the Cascade program, which has therapeutic social-emotional and behavior supports." A grid in the IEP, though, includes, under "Special Education and Related Services," the short-term solution the parents and the principal had arrived at, as well as the year-long self-contained classroom setting, to begin the following fall, discussed at the IEP meeting – that is, the Cascade placement to which the parents had already noted their objection.

Consistent with this sequence of events and with the Prior Written Notice,[4] both school personnel and N.E.'s parents consistently described this individual class thereafter as a "temporary" or "interim" program. The Special Education Supervisor for the Bellevue School District described this placement as a "temporary program to finish out the remaining few weeks of

[4] The Prior Written Notice sent to N.E.'s parents along with the final IEP stated as N.E.'s "current placement" "his neighborhood school with resource room support, 1:1 para[educator], and Behavior Intervention Plan." The "proposed or refused action" was "a change of placement to the Cascade Program." Under "Any other factors that are relevant to the action," the District explained that "[t]o assist with transition to the [C]ascade program . . . the team discussed that for the remainder of this school year, [N.E.] would receive 1:1 instruction provided by a certificated teacher and supported by a paraeducator in an *interim* setting at another elementary school." (emphasis added).

the school year," in an "interim setting." Likewise, the Seattle School District later described the program as a "temporary measure," taken because "the decision to move him to a self-contained program came near the end of the school year." N.E.'s mother also repeatedly described the individual class program as "interim."

At the time N.E.'s parents received the Prior Written Notice, they knew the family would be moving from Bellevue to Seattle during the summer, and that it was the Seattle School District that would be responsible for deciding N.E.'s 2015-16 placement. Moreover, an Independent Educational Evaluation funded by the Bellevue School District was pending at the time of the May 2015 IEP meeting. N.E.'s parents expected the results of that evaluation to inform the Seattle School District's placement decision for the next school year.

In August, N.E.'s family moved to Seattle and enrolled N.E. in the Seattle School District. The Seattle School District scheduled a Transfer Review IEP meeting with the family for September 3, before the school year started.[5] At the IEP meeting, N.E.'s parents provided the District with a letter from N.E.'s treating psychologist and the report from the then-completed Independent Educational Evaluation, both recommending against N.E.'s placement in a self-contained classroom. Nonetheless, after considering the relevant materials, the Seattle School District proposed placing

[5] The Seattle School District's "Transfer Review IEP" for N.E. lists the dates of the proposed placement as September 9, 2015 to May 25, 2016, indicating that the school year started on September 9.

N.E. in a self-contained classroom like the one adopted by the Bellevue School District in the May 2015 IEP. N.E.'s parents rejected the Seattle School District's proposal at the September 3 meeting and filed their due process complaint less than one week later, on September 9.

II

A.

Against this background, I turn to the question whether, as the majority holds, the statute permitted the Seattle School District immediately to place N.E., who had been "mainstreamed" in Bellevue except for the three week end-of-year agreed-upon program, in a self-contained special education classroom. I am convinced that doing so while the parents were challenging that restrictive placement violated the IDEA's "stay-put" provision.

I begin with the statute:

(i) Section 1415(j), titled "Maintenance of current educational *placement*," states:

> [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, 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.

20 U.S.C. § 1415(j) (emphasis added). Notably, § 1415(j) uses the term "then-current educational placement," not "Individualized Education Program," as the benchmark.

Throughout the statute, the term "placement" refers to a child's on-the-ground educational experience, not the content of a document. *See, e.g.*, 20 U.S.C. §§ 1414(e); 1415(d)(2); (k)(1); (k)(3). For example, Section 1415(k)(1)(B) authorizes school personnel in exigent circumstances temporarily to remove a child who violates the code of student conduct from their "current placement" to an interim alternative setting. *Id.* § 1415(k)(1)(B). Section 1415(k)(1)(C) further provides that a school can only in narrow circumstances order a "change of placement" exceeding 10 days.[6] *Id.* § 1415(k)(1)(C). Section 1415(k)(3) provides a mechanism for a parent to challenge such a "decision regarding placement." *Id.* § 1415(k)(3). These provisions indicate parents may challenge individual *placements* without regard to whether or how they are set forth in an IEP, and so confirm that as used throughout the

[6] N.E.'s temporary placement in the individual classroom was not made by the District pursuant to § 1415(k). Instead, the school district and N.E.'s parents agreed to place N.E. in the individual classroom as a temporary measure after his emergency expulsion, because N.E.'s parents preferred he not return to Newport Heights Elementary School for the remaining few weeks of the school year.

statute, "placement" refers to the child's actual educational experience.

The phrase "then-current educational placement," then, refers to an educational setting actually experienced by the student. "Because the term connotes preservation of the status quo, it refers to the operative placement actually functioning at the time. . . ." *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625-26 (6th Cir. 1990); *cf. N.W. ex rel. J.W. v. Boone Cty. Bd. of Educ.*, 763 F.3d 611, 617 (6th Cir. 2014) (explaining that any such operative placement cannot be one in which the parents unilaterally place their child); 34 C.F.R. § 300.116 (describing how educational placements are determined). Consistently with this understanding, Section 1415(j) is commonly referred to as the "stay-put" provision.

(ii) The IDEA separately defines "Individualized Education Program." An "Individualized Education Program" ("IEP") is "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section." 20 U.S.C. § 1414(d)(1)(A). An IEP sets out a child's present educational performance and measurable annual goals, describes how progress toward those goals will be measured, and explains the special education and related services the child will receive in the future. *Id.*

The term "Individualized Education Program" ("IEP") appears in various sections of the statute. *See, e.g.*, 20 U.S.C. § 1415(c)(1)(E); (f)(1)(B)(i); (k)(1)(D)(i); (k)(1)(E)(i). The term helps describe the role of the

team responsible for establishing a child's education program; the child's documented learning goals; and the documents administrators must review when determining if a child's behavior is a manifestation of their disability. As these uses and the definition indicate, an IEP is a "statement" – a document. It is not the operational, on-the-ground educational setting experienced by the child.

(iii) The distinct uses of the terms "placement" and "Individualized Educational Program" throughout the IDEA confirm that the terms refer to distinct concepts. As the Sixth Circuit observed in *Cincinnati Bd. of Educ.*, 918 F.2d at 625, "[h]ad Congress intended a prospective IEP to govern the Act's stay-put provision, as opposed to an operational placement, it could have employed the term 'individualized educational program' which it had already defined." By using the term "placement," not "Individualized Education Program," in the stay-put provision, the IDEA evidences the intent *not* to tether the stay-put placement to a program planned for the future.[7] Instead, the "then-current educational placement of the child" is the educational

[7] Our precedents are not to the contrary. Some refer to an *implemented* IEP as the touchstone for the "stay-put" requirement. But those cases state only that the then-current educational placement "is *typically* the placement described in the child's most recently implemented IEP," not that it always is. *Johnson ex rel. Johnson v. Special Educ. Hearing Office*, 287 F.3d 1176, 1180 (9th Cir. 2002) (per curiam) (emphasis added); *see also L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 911 (9th Cir. 2009). None of those cases held that the child's stay-put placement was an educational setting the child never before experienced. *See Johnson*, 287 F.3d at 1178-81; *Capistrano*, 556 F.3d at

program to which the child was accustomed at the time a proposed new, never-implemented program is under challenge.

B.

My reading of the statutory language and structure reflects the role of the "stay-put" provision in the statutory scheme.

The IDEA was first enacted in 1975 in response to evidence that disabled children were not receiving adequate educational services and that many children were "excluded entirely from the public school system and [would] not go through the educational process with their peers." Pub. L. No. 94-142, § 3(b)(4), 89 Stat. 773, (1975) (codified at 20 U.S.C. § 1401 note (1976) (Congressional Findings)).[8] The IDEA prevents the unnecessary exclusion of children with special educational needs from the classrooms attended by nondisabled children ("general education classrooms"), by requiring that school districts provide to special needs children the least restrictive education setting

911-13; *K.D. ex rel. C.L. v. Dep't of Educ.*, 665 F.3d 1110, 1117-21 (9th Cir. 2011); *N.D. v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1116 (9th Cir. 2010). Use of the shorthand term "last implemented IEP" in that line of cases thus did not encompass situations in which a future educational placement projected in an IEP never occurred.

[8] The Act was originally entitled the Education for All Handicapped Children Act of 1975. It was amended in 1990 and renamed the "Individuals with Disabilities Education Act." Pub. L. No. 101-476, 104 Stat. 1103 (1990). I refer to both versions of the statute as "IDEA."

practical. 20 U.S.C. § 1412(a)(1), (5); *Honig v. Doe*, 484 U.S. 305, 309-11, 324, 325 n.8, 327, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988), *partially superseded by statute on other grounds*, Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 615(k), 111 Stat. 37 (1997). Toward that end, the IDEA provides both a substantive guarantee that all children with disabilities will receive a free appropriate public education, 20 U.S.C. § 1412(a)(1), and procedural safeguards to ensure that result. Among those safeguards are provisions that require meaningful parent participation in all aspects of the child's education, including the right to challenge in impartial proceedings official school action. 20 U.S.C. § 1415(f)(1)(A); *see Honig*, 484 U.S. at 312, 108 S.Ct. 592.

The statute's stay-put provision complements both the substantive concern with avoiding restrictive educational environments if possible and the assurance that parents may meaningfully participate in deciding on their children's educational placement. Enacted "to prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings," *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 373, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985); *see also K.D.*, 665 F.3d at 1120, the stay-put provision "meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students. . . ." *Honig*, 484 U.S. at

323, 108 S.Ct. 592. By doing so, the stay-put requirement eliminated the "heightened risk of irreparable harm inherent in the premature removal of a disabled child to a potentially inappropriate educational setting." *Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 1040 (9th Cir. 2009). Tying the stay-put provision to an actual educational setting experienced by the child – *not* a planned future placement included in an IEP statement – avoids that result.

C.

Here, at the time N.E.'s parents brought their due process challenge on September 9, 2015, the summer break was just concluding, the 2015-16 school year was about to begin (apparently that day), and the new school district had just announced N.E.'s assignment for the coming year. In this circumstance, the IDEA's promise that parents can preserve the status quo while challenging school district actions most sensibly requires us to look for stay-put purposes to the general education classroom (with accommodations).

The two other candidates for the "stay-put" benchmark are the individual class, the stop-gap educational setting agreed to by his parents and understood by all concerned as temporary or interim, and the Cascade Program, which N.E. had *never* attended.

As to the first, the school district and N.E.'s parents agreed that N.E. would be in the individual class for approximately three weeks, to finish the school year. As both parties now recognize, "[t]he policy

behind [the stay-put provision] supports an interpretation of 'current educational placement' that excludes temporary placements. . . ." *Verhoeven v. Brunswick Sch. Comm.*, 207 F.3d 1, 10 (1st Cir. 1999). Such placements do not reflect any considered judgment, at any point, that the temporary placement is suitable for the long-term educational development of the child. In situations like this one, where the school district and the child's family do not agree to extend a temporary placement, the stay-put provision requires placing the student "in the last placement that the parents and the educational authority agreed to be appropriate." *Id.*

As to the Cascade Program, it was certainly not the "then-current educational placement" at the time N.E.'s parents challenged the Seattle District's proposed placement. N.E. had never been taught in an isolated special education classroom. To place him in one would fundamentally alter his educational experience, without his parents' consent and before the proceedings designed to prevent the "heightened risk of irreparable harm inherent in the premature removal of a disabled child to a potentially inappropriate educational setting," *Joshua A.*, 559 F.3d at 1040, could go forward.

The third alternative, placement in the general education classroom with full-time paraeducator support, is the setting in which N.E. received instruction for all but the last few weeks of the prior school year, as well as in prior years. The May 2015 IEP identifies this setting and associated services as N.E.'s "current placement at his neighborhood school." Placing N.E. in

that general education setting while his parents bring their due process challenge would fulfill the statutory "stay-put" purpose of ensuring that schools cannot unilaterally exclude children from the general educational setting. *See Honig*, 484 U.S. at 323, 108 S.Ct. 592. And it would provide stability for N.E. in his educational experience, to the degree possible given the change in school districts.

The alternative embraced by the majority – allowing Seattle to move N.E. *for the first time* to a self-contained classroom for emotionally and behaviorally disordered children – would, in contrast, fundamentally disrupt N.E.'s education. Yet, the challenge to the IEP, if successful, could result in a second disruption, returning N.E. to the general educational setting his parents seek. In the meantime, N.E. would have been educated for a long period in an inappropriate setting, in isolation from his peers. Section 1415(j) is designed to preclude precisely such disruption and such potentially long term harm to students with disabilities.

III.

The majority disagrees with my application of the IDEA "stay-put" requirement to this case. It does not contest that "then-current educational placement" ordinarily refers to the actual educational setting in which a student is enrolled. But it insists that for several reasons, the usual understanding does not apply here, and that, instead, the "stay-put" baseline is the

self-contained classroom setting *which N.E. had never actually experienced*.

First, the majority maintains that the May 2015 IEP contained two stages, one of which was implemented, and that the "then-current educational placement" therefore became the never-implemented, longterm part of the IEP. Second, the majority sees significance in the timing of N.E.'s parents due process challenge – during the summer break. *Maj. Op.*, pp. 1095-96. Third, the majority indicates that N.E.'s parents brought the stay-put problem on themselves by filing their challenge to the Cascade Program when they did. Finally, the majority suggests that N.E.'s alleged disruptive behavior in the spring of 2015 justified the transfer. None of these circumstances supports the majority's conclusion that "a partially implemented, multi-stage IEP, as a whole, is a student's then-current educational placement," and that the self-contained classroom is therefore N.E.'s stay-put placement. *Maj. Op.*, p. 1097. I take in turn each of the specific circumstances of this case on which the majority relies.

A.

The majority characterizes the May 2015 IEP as a partially implemented, multi-stage IEP. In fact, the May 2015 IEP proposed only one continuing placement, the self-contained classroom program. On both the Prior Written Notice and in the IEP, the district stated that it was proposing a new placement for N.E.

in the Cascade Program, a self-contained classroom. The Prior Written Notice specifically referred to the individual class as an "interim" setting and did not propose the individual class as a new placement. Instead, it noted that "to assist with [N.E.'s] transition to the cascade program at the beginning of the year," for the remainder of the current school year N.E. "would receive 1:1 instruction provided by a certificated teacher and supported by a paraeducator in an interim setting at another elementary school." The IEP itself included the three-week interim program in the matrix of services, but it did not elsewhere describe the program. All concerned parties understood the individual classroom program to be a stop-gap measure that was distinct from the placement proposal made at the May IEP meeting. *See* pp. 1100, *supra*. The manner in which these documents present, and the participants in the IEP decision understood, the two programs indicates that the proposed placement was the self-contained program; the one-on-one setting was a temporary, agreed-upon measure to close out the last weeks of the school year.

In the end, though, on my reading of the statute, the dispute over whether the IEP is a two-stage educational program or a one-stage, full-year program with a temporary, stop-gap placement ultimately does not matter. The "stayput" provision, as I have explained, focuses not on what is contained in the IEP document but on the child's actual educational experience.

Here, N.E. had never experienced the self-contained classroom program the 2015 IEP proposed. A child cannot "stay-put" in a program in which he never took part; the "then-current educational placement" cannot be an educational setting the child has never experienced. From the child's point of view, moving him to an entirely new kind of educational experience, one that exists only on paper, is precisely the sort of fundamental disruption the "stay-put" provision was designed to prevent.

Moreover, permitting the school district to implement an entirely new educational program while the parents are properly challenging it allows the unilateral school district decisionmaking the IDEA does not permit. "The preservation of the status quo [is meant to] ensure[ ] that the student remains in the last placement that the parents and the educational authority agreed to be appropriate." *Verhoeven*, 207 F.3d at 10.

B.

Like the majority's concern with the nature of the IEP, the circumstance that the summer break intervened does not require departure from the stay-put provision's mandate to preserve the status quo. Even if "we commonly think of education as forward-looking," *Maj. Op.*, p. 1098, the focus of the stay-put requirement is static – to *preserve* an existing educational placement until any challenge to a newly proposed one is resolved. An entirely new, future placement, never experienced by the child, is not what one would call the

"current" one in ordinary language; "current" suggests continuity, not disruption.[9] As between (1) the educational placement in place at the time the IEP was devised and for the entirety of N.E.'s prior education, and (2) an educational program N.E. had never experienced, the former, most recent one (except for the three-week stop gap) has to be the "then-current" one for purposes of a provision designed to preserve the status quo and prevent disruption. Further, if school districts could unilaterally and fundamentally change a child's educational placement over the summer break because there is no "then-current" educational placement during that period, the IDEA's commitment to parental involvement in devising educational programs for disabled children would be severely undermined.

C.

The majority also faults N.E.'s parents for filing their due process challenge when they did, suggesting the result might be different had the challenge been lodged earlier. But the parents filed their challenge when they did for a practical reason: N.E.'s parents did not know the Seattle School District would propose the self-contained classroom placement proposed by the

[9] The majority notes that we might refer to a child who is about to enter fifth grade as a "rising fifth grader." But we do not refer to that child as a "fifth grader," precisely because they have not yet started fifth grade.

Bellevue School District until the IEP meeting on September 3.

Having moved from one district to another over the summer, N.E.'s parents knew that the Seattle School District would decide N.E.'s placement for the 2015-16 school year. The statute requires that "[a]t the beginning of each school year, each local educational agency . . . shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program." 20 U.S.C. § 1414(d)(2)(A).[10] Given the Independent Educational Evaluation report and the psychologist's letter recommending against the self-contained classroom placement, N.E.'s parents had good reason to anticipate that the Seattle School

[10] The statute also contains a section that deals with student transfers between school districts that take place within an academic year. That section provides: "In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State Law." 20 U.S.C. § 1414(d)(2)(C). Since N.E. did not transfer districts within the same academic year, this section does not govern his case. The Seattle School District nonetheless described N.E.'s new proposed IEP as a "Transfer Review" IEP, so it may have been under the impression that this provision applied. Whether under § 1414(d)(2)(A) or § 1414(d)(2)(C), it was clear to both school officials and N.E.'s parents that the Seattle School District had an obligation to adopt an IEP for N.E. for the beginning of that school year.

District might not propose the self-contained classroom placement in adopting the new IEP. A due process challenge against the Seattle School District before September 1 would have been premature.

The majority's focus on the September 1 date is misplaced for another reason. The Bellevue School District listed September 1 on the May IEP as the start date for the self-contained classroom placement, but the date did not correspond to the actual start of the school year in Seattle. As noted, school had not yet begun in Seattle on September 1. Because the stay-put provision requires attention to a child's actual educational experience, a projected start date in a document should not obscure the on-the-ground reality.

The majority's critique of the timing of N.E.'s parents' due process challenge leads to untoward practical consequences if accepted. The majority faults N.E.'s parents for not challenging what they call "stage one" of the IEP, a challenge which would have been meaningful only had it been brought before that stage finished. But N.E.'s parents *agreed* with the stage one placement, as an available interim measure. There is nothing in the statute requiring parents to object to a short, interim, emergency placement to which they agree so that they can challenge a later, long-term, entirely different, placement they oppose, while still benefitting from IDEA's stay-put provision.

Moreover, under the majority's reasoning, for the general education setting to become the "stay-put" placement, N.E.'s parents would have had to file their

due process challenge before stage one began. But it would have been impossible for N.E.'s parents to do so here, as they did not receive the statutorily-mandated prior written notice until a week or ten days *after* N.E. began attending the interim individual class.[11] That notice was the first time in which the interim, agreed-upon setting and the self-contained classroom placement were bundled into a single IEP. Under the majority's approach, N.E.'s parents were effectively locked into both stages of the IEP by the time they saw the IEP document.

Even assuming that the parents received sufficient notice in the May meetings that the two programs would thereafter be inextricably linked – and I do not think they did – it would take some time for the parents to bring a due process challenge. N.E. began attending the interim program only two days after the IEP meeting. To bring a due process challenge, parents must: find and contact a competent lawyer; set up an appointment; discuss their options with the lawyer and probably between themselves; draft and file a complaint; and then assert their child's stay-put right.

Indeed, even in a situation in which parents *do* receive timely prior written notice of an IEP containing a short-term interim placement and a new placement,

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[11] The majority is correct that N.E.'s parents waived their argument that the entire May 2015 IEP is invalid because they did not receive timely prior written notice. That does not, however, change the fact that, given the tardiness of the notice, N.E.'s parents could not have filed a challenge and brought a stay-put motion before the stage one placement began.

it is quite possible that they would not be able to file a complaint to challenge the IEP before the first stage is implemented. The statute requires roughly ten days' notice prior to implementation of a proposed change. *See Letter to Winston*, 213 IDELR 102, p. 3 (Office of Special Educ. Programs 1987). Filing a due process complaint will likely often take more than ten days.

Under the majority's rule, any time an emergency placement is proposed for rapid implementation and is attached to a longer placement in an IEP, the parents' only feasible option is to challenge both the interim and new placement before the interim placement begins. Otherwise, they will be stuck with implementation of the unacceptable stage of the IEP while the challenge proceeds. And doing so is likely to be difficult, given the time necessary to mount a challenge.

D.

Finally, moving N.E. to a restrictive environment during the pendency of the due process proceedings was not necessary to address any concern about N.E.'s allegedly aggressive and violent behavior. The IDEA provides procedures for addressing behavioral problems and safety concerns short of such unilateral action.

First, the Act provides that an IEP team "consider the use of positive behavioral interventions and supports" when a child's behavior "impedes the child's learning or that of others." 20 U.S.C. § 1414(d)(3)(B)(I). Next, when a child with a disability violates a code of

student conduct, the Act authorizes school personnel to remove that child to an alternative educational setting, or to suspend the student, for up to 10 days, to the extent such discipline would be applied to children without disabilities. 20 U.S.C. § 1415(k)(1)(B).[12] If, after school personnel remove a child from their current placement pursuant to that authority, the IEP team determines that the problem behavior is a manifestation of the child's disability, the Act directs the IEP team to "conduct a functional behavioral assessment, and implement a behavioral intervention plan," or to review and modify an existing behavioral intervention plan to address the child's problem behavior. *Id.* § 1415(k)(1)(F). Finally, school authorities can remove a child with a disability to an alternative setting for up to 45 days when that child has a weapon, possesses or uses illegal drugs, or injures another person at school. *Id.* § 1415(k)(1)(G). If N.E.'s problem behavior recurred while he was placed in a general education classroom, these provisions would provide the Seattle School District with lawful, effective means of addressing those problems and preserving classroom safety.

* * *

In short, although the circumstances of this case do introduce some complexity into applying the IDEA's stay-put requirement, these circumstances do not change my conclusion that N.E.'s stay-put placement is the general educational setting with individual

[12] N.E.'s "emergency expulsion" before his temporary placement in the individual class conformed with this statutory authorization.

paraeducator support he had experienced for almost all his student life.

IV.

The majority's approach simply cannot be reconciled with the text of the statute or its purposes. It confines N.E. to the most restrictive placement contained in any of his IEPs, removes him almost entirely from the general education setting, and places him in a setting in which he was never previously enrolled. The majority's approach has the practical potential broadly to preclude relief to parents and their children with special educational needs. I respectfully dissent.

2015 WL 12564236
Only the Westlaw citation is currently available.
United States District Court,
W.D. Washington,
at Seattle.

N.E., et al., Plaintiffs,
v.
Seattle School District, Defendant.

CASE NO. C15-1659JLR
|
Signed 10/27/2015

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ORDER DENYING PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

JAMES L. ROBART, United States District Judge

I. INTRODUCTION

Before the court is Plaintiffs N.E. ("the Student") and his parents', C.E. and P.E. ("the Parents"), motion for a temporary restraining order and a preliminary injunction. (Mot. (Dkt. # 2).) This case is an appeal

from an administrative law judge's ("ALJ") decision regarding the Student's "stay put" placement under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*. (*See* Compl. (Dkt. # 1); Hruska Decl. (Dkt. # 3) ¶ 7, Ex. 7 ("ALJ Decision")); 20 U.S.C. §§ 1415(i)(2)(A), (j); *A.D. ex rel. L.D. v. Haw. Dep't of Educ.*, 727 F.3d 911, 913-14 (9th Cir. 2013) (holding that an administrative "stay put" order is "appealable under the collateral order doctrine"). Plaintiffs ask the court to reverse the ALJ's decision and order Defendant Seattle School District ("the SSD") to place the Student in a general education setting consistent with a December 2014 individualized education program ("IEP") pending the outcome of Plaintiffs' due process challenge to SSD's proposed placement. (*See* Compl.; Mot. at 1-2); 20 U.S.C. §§ 1412(a)(4), 1414(d), 1415(j). The present motion seeks a temporary restraining order ("TRO") and a preliminary injunction to that effect. (*See* Mot. at 1-2.) The court has reviewed the submissions of the parties', the balance of the record, and the relevant law, and has heard oral argument. Being fully advised, the court DENIES Plaintiffs' motion.[1]

II. BACKGROUND

The Student is a male child who was in third grade at Newport Heights Elementary School in the Bellevue School District ("the BSD") for most of the 2014-15

[1] Because this motion turns on a legal issue and the relevant facts are undisputed, the court resolves both Plaintiffs' request for a TRO and their request for a preliminary injunction at this time. *See infra* Parts III.A., C.

school year. (*See* ALJ Decision at 2.) During most of that year and in the prior years, the Student's IEP placed him in general education classes with paraeducator support ("general classes") for the majority of the school day. (*See id.*; C.E. Decl. (Dkt. # 4) ¶ 1.) The most recent IEP reflecting that arrangement dates from December 2014 ("the December 2014 IEP"). (*See* ALJ Decision at 2; C.E. Decl. ¶ 2, Ex. 1 ("12/14 IEP").)

The Student had substantial difficulties during the 2014-15 school year. (*See* ALJ Decision at 2; C.E. Decl. ¶ 3.) School officials reported that the Student exhibited serious behavioral problems on a regular basis throughout that year, and as a result, the BSD began considering changes. (*See* ALJ Decision at 2; Hruska Decl. ¶ 5, Ex. 4 at 10-13 ("Landwehr Decl.") ¶¶ 2-5.) An IEP meeting occurred on May 26, 2015, at which relevant BSD officials and teachers and the Parents were present along with their respective counsel. (*See* ALJ Decision at 2; Landwehr Decl. ¶ 5.) At this meeting, the BSD proposed a new IEP that would place the Student in separate, specialized classes for students with behavioral and emotional disorders ("separate classes"). (*See id.*; C.E. Decl. ¶ 3.) The Parents objected to this proposal, writing "disagree" on the front sheet of the proposed IEP. (*See* ALJ Decision at 2; C.E. Decl. ¶ 3; Landwehr Decl. ¶ 5.)

BSD officials and the Parents also discussed where to place the Student for the remainder of the school year. (*See* ALJ Decision at 2.) Such a discussion was necessary because at that time the Student was subject to an emergency expulsion and the Parents did

not feel comfortable with the Student returning to Newport Heights Elementary. (*See id.*; Landwehr Decl. ¶ 6.) The BSD and the Parents agreed that the Student would finish the final weeks of the 2014-15 school year at a different school. At that school, he would spend the majority of the day in a one-on-two setting involving the Student, a teacher, and a paraeducator, and no other students ("individual classes"). (*See* ALJ Decision at 2; C.E. Decl. ¶ 4; Landwehr Decl. ¶ 6.)

One day later, on May 27, 2015, the BSD produced a final IEP for the Student ("the May 2015 IEP"). (*See* ALJ Decision at 2; C.E. Decl. ¶ 5, Ex. 2 ("5/15 IEP").) The May 2015 IEP had two stages: (1) the Student would finish the end of the 2014-15 school year in the agreed-upon individual classes; and (2) the Student would be placed in separate classes at the start of the 2015-16 school year. (*See* ALJ Decision at 2-3; C.E. Decl. ¶ 5; 5/15 IEP at 15-16.) The Parents received this IEP approximately one week later along with a prior written notice ("PWN") notifying the Parents that the BSD intended to alter the Student's educational placement and that the individual classes would serve as a transition to separate classes. (*See* ALJ Decision at 3; 5/15 IEP at 18-19 ("PWN"); C.E. Decl. ¶ 5.) The Parents did not file an administrative due process challenge to the May 2015 IEP and instead allowed the Student to continue attending the individual classes until the end of the school year on June 22, 2015. (*See* ALJ Decision at 2-3; C.E. Decl. ¶ 7.)

The Parents and the Student moved to Seattle in the summer of 2015 and contacted the SSD to enroll

the Student. (*See* ALJ Decision at 3; C.E. Decl. ¶ 8; Landwehr Decl. ¶ 7.) The Parents requested continuation of individual classes similar to those in which the Student had completed the prior school year. (*See* ALJ Decision at 3; Landwehr Decl. ¶ 7.) The SSD, however, reviewed the Student's records and proposed placing him in separate classes similar to those contemplated in the second part of the BSD's May 2015 IEP. (*See* ALJ Decision at 3; C.E. Decl. ¶ 8; Landwehr Decl. ¶ 7.) The Parents objected and filed an administrative due process challenge to the SSD's decision. (*See* ALJ Decision at 3; Hruska Decl. ¶ 2, Ex. 1 ("DP Hearing Request").) At the same time, the Parents filed a motion for "stay put," arguing that the Student's "stay put" placement is the placement described in the December 2014 IEP – general classes. (*See* ALJ Decision at 3; DP Hearing Request at 3; Hruska Decl. ¶ 3, Ex. 2 ("Stay Put Mot.")); 20 U.S.C. § 1415(j). The SSD resisted that motion and contended that the separate classes described in the May 2015 IEP represent the Student's "stay put" placement. (*See* ALJ Decision at 3; Hruska Decl. ¶¶ 4-6, Exs. 3-5.)

Following testimony and oral argument on the "stay put" motion, the ALJ sided with the SSD. (*See* ALJ Decision at 1, 4.) The ALJ determined that under Ninth Circuit law a student's "stay put" placement typically is the placement described in the last implemented IEP. (*See id.* at 3-4.) In addition, the ALJ found that the May 2015 IEP included a placement in separate classes and that the May 2015 IEP was implemented because the Student had attended individual

classes for several weeks, as described in the first part of the May 2015 IEP. (*See id.* at 4.) The ALJ therefore concluded that separate classes were the Student's "stay put" placement. (*See id.*) Plaintiffs filed this action as an interlocutory appeal from the ALJ's "stay put" decision. (*See* Compl.); *A.D. ex rel. L.D.*, 727 F.3d at 913-14. They now request a TRO and a preliminary injunction ordering the SSD to place the Student in general classes pending the outcome of their due process challenge. (*See* Mot.) Because they believe separate classes would be harmful to the Student, the Parents have kept the Student at home since the beginning of this school year. (*See* C.E. Decl. ¶ 9.) Plaintiffs' motion is now before the court.

III. DISCUSSION

A. Legal Standards

District courts apply a modified *de novo* standard of review when reviewing administrative decisions under IDEA. *See Ashland Sch. Dist. v. Parents of Student R.J.*, 588 F.3d 1004, 1108-09 (9th Cir. 2009); *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1471-73 (9th Cir. 1993). Under this standard, the court has discretion as to the weight given to the administrative findings and should give them deference where the administrative decision was careful, thorough, impartial, and sensitive to the complexities of the case. *See Parents of Student R.J.*, 588 F.3d at 1008-09; *Jackson*, 4 F.3d at 1472, 1476. The party challenging the administrative ruling bears the burden of proof on appeal to the district

court. *Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1127 (9th Cir. 2003).

In order to merit a preliminary injunction, a plaintiff must establish that (1) "he is likely to succeed on the merits," (2) "he is likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in his favor," and (4) "an injunction is in the public interest." *Winter v. Nat. Res. Def. Counsel, Inc.*, 555 U.S. 7, 20 (2008); *NML Capital, Ltd. v. Spaceport Sys. Int'l, L.P.*, 788 F. Supp. 2d 1111, 1117 (C.D. Cal. 2011) ("The standard for issuing a [TRO] is identical to the standard for issuing a preliminary injunction.").[2] This extraordinary remedy is "never awarded as of right." *Id.* at 24. Instead, it "may only be awarded

[2] The Ninth Circuit holds that its "serious questions" version of the sliding scale test for preliminary injunctions also remains viable after *Winter*. *See Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). The Ninth Circuit formulates the alternative test as follows:

> [S]erious questions going to the merits, and a balance of hardships that tips sharply toward the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.

Id. at 1135. Plaintiffs have not argued this version of the preliminary injunction and TRO test. Even if they had, however, the court would deny their motion for failure to show either serious questions going to the merits or that the balance of hardships "tips sharply" toward them. *See id.*; *see infra* Part III.C.

upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 22.[3]

B. Stay Put

IDEA's "stay put" provision dictates that while a due process challenge is pending, the student is entitled to remain in his or her "then-current educational placement," unless the parents and the state or local education agency otherwise agree. 20 U.S.C. § 1415(j); *see K.D. ex rel. C.L. v. Dep't of Ed. of Haw.*, 665 F.3d 1110, 1114-15 (9th Cir. 2011). Neither IDEA nor its legislative history defines "then-current educational placement." The Ninth Circuit has stated that "the current educational placement is typically the placement described in the child's most recently implemented IEP." *Johnson ex rel. Johnson v. Special Ed. Hearing Office of Cal.*, 287 F.3d 1176, 1180 (9th Cir. 2002); *see also K.D. ex rel. C.L.*, 665 F.3d at 1117-18 ("We have interpreted 'current educational placement' to mean 'the placement set forth in the child's last implemented IEP.' We have offered no additional guidance on the issue."). Temporary arrangements generally do not

[3] As the court indicated at oral argument, Plaintiff is incorrect in asserting that IDEA entitles a student to an automatic injunction pending appeal from an administrative determination of the student's "stay put" placement. *See Johnson ex rel. Johnson v. Special Ed. Hearing Office of Cal.*, 287 F.3d 1176, 1180 (9th Cir. 2002) ("We hold that a request to enjoin a preexisting 'stay put' order is handled appropriately by the district court's application of the traditional preliminary injunction analysis.").

qualify as "stay put" placements. *See K.D. ex rel. C.L.*, 665 F.3d at 1118-21.

C. Analysis

This motion turns on whether the May 2015 IEP's separate classes are the placement described in the Student's last implemented IEP. *See id.* at 1117-18; *Johnson ex rel. Johnson*, 287 F.3d at 1180. The relevant facts are undisputed: (a) the May 2015 IEP prescribed separate classes after a transition period in individual classes; (b) the Student attended the individual classes, including after the Parents received the May 2015 IEP, but he moved before attending the separate classes; and (c) Plaintiffs did not challenge the May 2015 IEP after the BSD finalized it. (*See* ALJ Decision at 2-3; C.E. Decl. ¶¶ 5, 7; 5/15 IEP at 15-16, 18-19.) From these facts, the ALJ determined that the separate classes are the placement set forth in the May 2015 IEP, and that the May 2015 IEP was implemented because the Student attended the individual classes set forth in the first portion of that IEP. (*See* ALJ Decision at 3.) The ALJ therefore concluded that the separate classes are the placement set forth in the Student's last implemented IEP. (*See id.*)

Plaintiffs disagree with this conclusion. They contend that the separate classes cannot be the placement described in the Student's last implemented IEP because the Student never attended the separate

classes.[4] (*See* Mot. at 6-9, 11.) Plaintiffs' argument depends on the theory that multi-stage IEPs are divisible for purposes of the "stay put" analysis.[5] Accordingly, in order to prevail, Plaintiffs must establish that the court should either (i) disregard any unrealized stages of a partially realized multi-stage IEP when determining "the placement described in the child's most recently implemented IEP," *Johnson ex rel. Johnson*, 287 F.3d at 1180, or (ii) treat a multi-stage IEP as multiple IEPs, and any unrealized stage as an unimplemented IEP. The validity of this theory of IEPs presents a legal question.

Plaintiffs, however, offer no authority to show that their divide-and-conquer approach to multi-stage IEPs is valid, and the court has located none. (*See* Mot.)[6] Although the Ninth Circuit has not provided guidance on this particular issue, the Ninth Circuit has stated

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[4] Plaintiffs also argue that separate classes are not the Student's "stay put" placement because the Parents never agreed to separate classes. (*See* Mot. at 6-8.) This argument misconstrues the Ninth Circuit's standard for "stay put" or current educational placement, which is the placement described in the child's last implemented IEP, not the last placement to which the Parents agreed. *See K.D. ex rel. C.L.*, 665 F.3d at 1117-18; *Johnson ex rel. Johnson*, 287 F.3d at 1180.

[5] Plaintiffs do not contest that at least the first stage of the May 2015 IEP was implemented. (*See* Mot.)

[6] Both in their brief and at oral argument, Plaintiffs place significant reliance on *Verhoeven v. Brunswick School Committee*, 207 F.3d 1 (1st Cir. 1999). (*See* Mot. at 6-7.) *Verhoeven*, however, does not deal with a partially realized multi-stage IEP and also appears to apply a different "stay put" standard than does the Ninth Circuit. As such, the court does not find *Verhoeven* persuasive in the present circumstances.

on several occasions that a child's "stay put" placement is typically the placement described in the child's last implemented IEP. *See K.D. ex rel. C.L.*, 665 F.3d at 1117-18; *Johnson ex rel. Johnson*, 287 F.3d at 1180. Nothing in this language suggests that courts should ignore any unrealized stages of a multi-stage IEP or treat such stages as distinct IEPs. Thus, finding no support for the legal theory on which Plaintiffs' motion depends, the court finds that Plaintiffs have failed to show that they are likely to succeed on the merits of their appeal. The court therefore denies Plaintiff's motion.

IV. CONCLUSION

For the foregoing reasons, the court DENIES Plaintiffs' motion for a TRO and a preliminary injunction (Dkt. # 2).

Dated this 27th day of October, 2015.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

N. E., by and through his parents C.E. and P.E.; et al., Plaintiffs-Appellants, v. SEATTLE SCHOOL DISTRICT, Defendant-Appellee.	No. 15-35910 D.C. No. 2:15-cv-01659-JLR Western District of Washington, Seattle ORDER (Filed Jan. 26, 2017)

Before: GRABER, BERZON, and MURGUIA, Circuit Judges.

Judges Graber and Murguia have voted to deny Appellants' petition for panel rehearing and rehearing en banc. Judge Berzon has voted to grant it.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellants' petition for panel rehearing and rehearing en banc is DENIED.