No. 13-1547

In The
Supreme Court of the United States

RIDLEY SCHOOL DISTRICT,

Petitioner,

v.

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

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

REPLY BRIEF FOR THE PETITIONER

John F.X. Reilly
Solicitor
Ridley School District
230 North Monroe Street
Media, P.A. 19063-2908
(610) 565-0975

Pratik A. Shah
Counsel of Record
Z.W. Julius Chen
Matthew A. Scarola
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000
pshah@akingump.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND REGULATIONS:

OTHER AUTHORITIES:

In The
Supreme Court of the United States

No. 13-1547

RIDLEY SCHOOL DISTRICT,
Petitioner,

v.

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

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

REPLY BRIEF FOR THE PETITIONER

From the inception of this case, Respondents had candidly acknowledged the existence of a direct conflict among federal courts of appeals over whether the "proceedings" referenced in the "stay-put" provision of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(j), include judicial appeals—and, specifically, whether the school district's accompanying payment obligation for a private-school placement terminates upon entry of a final trial court judgment in its favor. Now faced with the prospect of certiorari review, Respondents insist for the first time that the circuit conflict is "non-existent," "greatly exaggerated," or "tolerable."

None of those contradictory characterizations withstands scrutiny. As the Third Circuit recognized below (Pet. App. 26a-27a), its decision—along with Ninth Circuit law—conflicts squarely with D.C. Circuit precedent on the question presented. Respondents' view that the D.C. Circuit overlooked relevant authority or reached the wrong result—neither of which is true—does not mitigate the conflict. And Respondents' wishful speculation that the D.C. Circuit might revisit its 25-year-old precedent is just that.

In light of the irreconcilable and expanding conflict among the courts of appeals, only this Court can render a definitive interpretation of the stay-put provision that eliminates its patchwork application in school districts across the country. Especially given that Respondents cannot conjure up even a single vehicle problem, now is the ideal time to resolve the important question this case presents and to provide school districts and parents alike the certainty they deserve.

I. THE CIRCUIT CONFLICT IS CLEAR AND DIRECT

1. At every stage of this litigation (until now), Respondents repeatedly have acknowledged "a split among the Circuits" over "[w]hether a private parental placement continues to remain the pendent placement during the period of appeal from the decision of the district court." Compl. ¶ 40, No. 2:11-cv-2235 (E.D. Pa.) (ECF No. 1); *see also* Mot. for J. on the Pleadings 5, No. 2:11-cv-2235 (ECF No. 8) (identifying conflicting D.C., Sixth, and Ninth Circuit decisions); Appellee's Br. 33-34, No. 12-4137 (3d Cir.)

(same). Before siding with the Ninth Circuit, the Third Circuit below acknowledged the same: the D.C. Circuit and Ninth Circuit "are split" over "whether the stay-put provision also applies through the pendency of an IDEA dispute in the Court of Appeals." Pet. App. 26a-27a.

Respondents' about-face before this Court—contending that "[t]he claimed circuit split is non-existent or, at most, greatly exaggerated" (BIO 10)—is the only exaggeration. The choice between the two entrenched camps is binary: "the stay-put requirement either covers appellate proceedings or it doesn't." *Id.* at 26. *Compare, e.g., Andersen by Andersen v. District of Columbia*, 877 F.2d 1018, 1023-1024 (D.C. Cir. 1989); *Kari H. by & Through Dan H. v. Franklin Special Sch. Dist.*, 1997 WL 468326, at *6 (6th Cir. 1997), *with* Pet. App. 27a; *Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036 (9th Cir. 2009); Pet. 15 n.3 (citing state court decisions); *see also* pp. 7-8 & notes 3-4, *infra* (citing district court decisions). All the conceivable arguments have been aired either in the prior decisions or by the parties here. Accordingly, further "percolat[ion] to see what, if anything, other courts have to say," BIO 10, would serve no purpose.

2. Faced with the reality of that stark conflict, Respondents next contend that "the circuit split is tolerable." BIO 10. The principal reason Respondents offer for such self-serving tolerance is that *Andersen* (a unanimous opinion joined by then-Judge Ginsburg) is "a wobbly decision *** ripe for reconsideration in the D.C. Circuit." *Id.* at 11. But Respondents' view (*id.* at 11-14) that the D.C. Circuit would reverse course if confronted with 34 C.F.R.

§ 300.518(a)—which permits a child to remain in a current educational placement during the pendency of "any *** judicial proceeding"—is meritless for at least three reasons.

First, the D.C. Circuit expressly considered the same "any *** judicial proceeding" language, which also appears in the IDEA's legislative history, and found it to be wholly consistent with its view that "proceedings" in Section 1415(j) encompass only trial court proceedings. *See Andersen*, 877 F.2d at 1023 (holding that "remark of Senator Williams *** that an injunction would be available 'during the pendency of any administrative or judicial proceedings regarding a complaint,' *** does nothing to establish that the judicial proceedings contemplated extend beyond the trial court stage"). Respondents are therefore simply incorrect that the D.C. Circuit would have come out differently if it had considered the regulatory text. It is no hypothetical: the D.C. Circuit *did* consider that precise language and deemed it immaterial.

Second, assuming the statute were ambiguous,[1] the clear-statement rule, rather than the regulation, would resolve the interpretive uncertainty. As this Court has explained: "We only defer *** to agency interpretations of statutes that, *applying the normal 'tools of statutory construction,'* are ambiguous." *INS*

---

[1] As explained in the petition (Pet. 16-17), the terms of Section 1415 answer the question presented in Petitioner's favor. *See Andersen*, 877 F.2d at 1023 (extending stay-put provision to judicial appeals is "inconsistent with" and could not be "shoehorned into the literal language of [the statute]"); *Kari H.*, 1997 WL 468326, at *6 (agreeing with *Andersen*).

v. St. Cyr, 533 U.S. 289, 320 n.45 (2001) (emphasis added). The clear-statement rule—applicable here because the IDEA is Spending Clause legislation (Pet. 17-19)—is a tool of statutory construction meant to resolve questions of ambiguity in favor of "clear notice." *E.g., Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,* 548 U.S. 291, 296 (2006) ("the conditions must be set out 'unambiguously'"). Its application therefore will "end *** the matter" and make consideration of the Department's view unnecessary. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Consequently, there would be no reason to broach "whether the agency's construction of the statute was reasonable" (BIO 12) or how that regulation itself should be interpreted.

Third, the regulation would not be entitled to deference in any event because it does not reflect the application of "considerable experience and expertise." *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006). The "any *** judicial proceeding" language was promulgated with the caveat that the Department incorporated the Section 1415 procedures, including the stay-put provision, "substantially verbatim into the proposed regulations" without "expan[sion]" or "additional interpretation." 41 Fed. Reg. 56,966, 56,971 (1976). It is thus unsurprising that Respondents can point to no agency interpretation of its regulation as adopting Respondents' position. Respondents' bare assertion (BIO 22) that the regulation decisively resolves any ambiguity in their favor cannot surmount the

Department's own characterization of the regulation.[2]

3. Respondents also assert (BIO 14-18) that the D.C. Circuit would reconsider its holding in light of a different, later-promulgated regulation providing that an administrative ruling favorable to parents changes a child's then-current educational placement for stay-put purposes. 34 C.F.R. § 300.518(d). But that regulation simply codifies this Court's "long-standing judicial interpretation of the Act's pendency provision," 64 Fed. Reg. 12,406, 12,615 (1999) (citing *School Comm. of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 371 (1985)), which predates *Andersen*. Accordingly, that law has remained unchanged throughout the development of the circuit conflict.

That fact undermines the entire premise of Respondents' counterfactual argument. But even putting aside *Burlington*'s preexisting holding, the regulation would be immaterial under *Andersen*'s analysis. The regulation does not speak to whether the then-current educational placement changes after a district court has ruled in the school district's favor.

Moreover, after holding that the operation of the stay-put provision terminates upon entry of the trial court's judgment, the D.C. Circuit expressly noted that the parents would be "entitled to an injunction *** by establishing the usual grounds for such relief." *Andersen*, 877 F.2d at 1024; *cf. Lofton v. District of*

---

[2] For these same reasons, this case also does not implicate *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 983 (2005). *See* BIO 12-13.

Columbia, --- F. Supp. 2d ---, 2013 WL 6710352, at *1 (D.D.C. 2013) (granting preliminary injunction reinstating private placement "outside the stay-put provision" on "usual grounds"). Under that reasoning, the (typically low) risk that an appellate court would reverse a trial court's judgment as to the appropriate educational placement and cause discontinuity in a child's educational placement must be weighed under traditional equitable principles.

II. THE QUESTION PRESENTED IS IMPORTANT AND CLEANLY PRESENTED

1. Respondents nowhere dispute that this case presents an ideal vehicle for resolving the question presented. They do not point to even a single possible vehicle problem. That is because none exists. *See* Pet. 26.

Respondents instead suggest (BIO 31) that the issuance of only "five precedential decisions in the last forty years" signals the issue's unimportance. That single data point obscures the frequency with which courts differ on the issue. Numerous district courts have decided the question presented as well. Within the Seventh Circuit, for instance, district courts overwhelmingly follow *Andersen*.[3] A district court in New York, by contrast, recently granted

[3] *See, e.g., Farzana K. v. Indiana Dep't of Educ.*, 2009 WL 3642748, at *4-*6 (N.D. Ind. 2009); *Z.F. v. S. Harrison Cmty. Sch. Corp.*, 2005 WL 2373729, at *21 (S.D. Ind. 2005); *Tammy S. v. Reedsburg Sch. Dist.*, 302 F. Supp. 2d 959, 981 (W.D. Wis. 2003). *But see T.H. v. Bd. of Educ.*, 55 F. Supp. 2d 830, 845 (N.D. Ill. 1999) (stay-put order "would remain in place" pending appeal).

stay-put relief pending "a final, non-appealable order." *M.G. v. New York City Dep't of Educ.*, 982 F. Supp. 2d 240, 250 (S.D.N.Y. 2013). And the Third Circuit's decision in this case resolved an existing intra-circuit split among district courts.[4]

Respondents also ignore the fact that trial court decisions (particularly in state courts) on the termination of a stay-put injunction and accompanying payment obligation are not always published or even publicly accessible. *See, e.g.*, Minute Order, *Heather S. ex rel. Mark S. v. Niles Twp. High Sch. Dist. No. 219*, 99-cv-1827 (N.D. Ill. 2000) (ECF No. 21) (lifting stay-put order). As a result, it is relatively rare that the issue is teed up in a way amenable to this Court's review. That only reinforces the unique opportunity this petition presents for resolving the entrenched circuit conflict.

2. Respondents also offer a host of suppositions about why resolution of the question presented would not be significant. *See* BIO 31-36. But those arguments wither in the face of Respondents' concession that the approximately $20,000 at issue here—E.R.'s tuition and related costs during the pendency of appeal, discounted by "an income-based scholarship," *id.* at 7—is "impactful for the parties to this case." *Id.* at 31. Private school tuition for children with disabilities is usually much higher, and

---

[4] *Compare, e.g., J.E. v. Boyertown Area Sch. Dist.*, 807 F. Supp. 2d 236, 240 (E.D. Pa. 2011) (finding *Andersen* "very persuasive"), *with Ringwood Bd. of Educ. v. K.H.J. ex rel. K.F.J.*, 469 F. Supp. 2d 267, 270 (D.N.J. 2006) (rejecting *Andersen*).

the amount at stake will almost always be significant to the school districts and families involved. *See* National School Boards Ass'n Amicus Br. 13-16.

Moreover, the amicus brief of the National School Boards Association and other interested groups directly contradicts Respondents' claim of unimportance. With on-the-ground experience and expertise on IDEA-related issues, *amici*—not Respondents—are best situated to articulate whether resolving the scope of the stay-put provision is sufficiently important to their members nationwide. And they have unequivocally done so here. *See* Br. 2 ("[R]esolution of the issue at stake in this case is of exceptional importance, warranting this Court's review.").

Respondents' statistics only underscore the salience of the issue. Respondents state that "[n]ationwide, only .18% of public-school students are in private schools at public expense." BIO 32. But that translates to over 88,000 children. Their focus on percentages rather than absolute numbers likewise masks that the ".24% of overall public-school budgets" devoted to private placement, BIO 34, amounts to $922 million.[5] Accordingly, even though "the incidence of private-school placement at public expense is quite small," BIO 32 (quoting *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2009)), that statement merely conveys the *relative* use of private placement, and does not diminish the real-world

[5] Winters & Greene, *Debunking a Special Education Myth*, Education Next (Spring 2007), http://educationnext.org/debunking-a-special-education-myth/.

consequences of the tens of thousands of such placements that do occur.

III. RESPONDENTS' ARGUMENTS ARE WRONG ON THE MERITS

1. On the merits, Respondents maintain that the Spending Clause's clear-statement rule would not apply because the stay-put provision "does not impose a 'liability' on the states" and "is *neutral* among the disputants." BIO 24. Not so. Where the current educational placement is a private school, the school district unquestionably bears a financial burden that would not exist absent operation of the stay-put provision. And where the current educational placement is a public school, the school continues to bear the cost of educating the child. Operation of the stay-put provision—including during a judicial appeal—therefore always imposes a financial burden on school districts.

Respondents further suggest (BIO 25) that a school district may prefer a more expensive private placement over parents' objection, and that the money saved when the stay-put provision requires the public placement demonstrates the provision's "neutrality." In that scenario, however, the stay-put provision still forces the school district to spend funds in a manner that is against its will and was not clearly understood at the time the federal funds were accepted.

Respondents' hypothetical scenarios in which a school district seeks operation of the stay-put provision pending judicial appeal (BIO 26-27) are "hypothetical" in the truest sense. Respondents cite no case—and Petitioner is aware of none—in which a

school district has "argue[d] that the stay-put requirement lasts until the court of appeals rules on the merits." *Id.* at 26. "[T]his [C]ourt must deal with the case in hand, and not with imaginary ones." *Yazoo & M.V.R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219 (1912).

At any rate, the clear-statement rule would apply to a "neutral" rule. In *Arlington Central*, 548 U.S. at 295-296, the rule "guided" the "resolution" of whether the IDEA authorized an award of expert fees under a statutory scheme that allows certain expenses to be taxed against *either* the school district or (in some cases) the parents or the parents' attorney, *see* 20 U.S.C. § 1415(*i*)(3)(B)(i). Thus, the requirement of clear notice is not predicated on the existence of financial liability against school districts in *all* cases; that it will accrue in *some* cases (like this one) is sufficient.[6]

2. Respondents also contend (BIO 28) that the "most important[]" purpose of the stay-put provision is to provide stability for a child's placement. There

[6] Respondents note (BIO 23) that the Spending Clause was raised for the first time in the petition, but do not suggest any waiver problem. For good reason: the Court applied the clear-statement rule in *Arlington Central*, 548 U.S. at 295-296, even though none of the court of appeals decisions (including the decision below) had mentioned the Spending Clause, *see id.* at 295, and despite respondents' objection (absent here) that the argument had been forfeited, *see* Resp. Br. 16, 48-49, No. 05-18, (Mar. 28, 2006). The clear-statement rule is simply another tool of statutory construction supporting the same interpretation of Section 1415 that Petitioner sought below.

is no question that Congress had stability in mind, but that fact hardly resolves the inquiry.

Respondents' approach gives short shrift to the text of Section 1415, which—clear-statement rule aside—nowhere mentions judicial appeals. Judicial appeals in federal court, of course, are authorized under 28 U.S.C. § 1291—but not under 20 U.S.C. § 1415, as the terms of the stay-put provision require. *See* 20 U.S.C. § 1415(j) (referring to proceedings "conducted pursuant to *this section*") (emphasis added).

Apart from the text, Respondents incorrectly assume that Congress pursued the single objective of stability to the exclusion of all others. *See Arlington Cent.*, 548 U.S. at 303 ("The IDEA obviously does not seek to promote [overarching] goals at the expense of all other considerations[.]"); *see also* Pet. 19-20 (describing competing statutory purposes). The fact that an administrative ruling in favor of parents changes a child's current educational placement in the midst of the dispute process, *see* p. 6, *supra*, illustrates that the stay-put provision is not so absolutist.

Finally, Respondents fail to explain (BIO 28) why terminating the operation of the stay-put provision upon entry of a trial court's judgment in the school district's favor will have a disruptive effect on a child's education in mine-run cases. The overwhelming odds are that the judgment will be affirmed on appeal. *See* National School Boards Ass'n Amicus Br. 13 n.7 (citing 91% affirmance rate

by courts of appeals).[7] Although parents can opt to pay for a continuing private placement, it otherwise makes sense for the child to be moved sooner rather than later to what likely will be the appropriate educational setting going forward, rather than languish unnecessarily for another year in an improper placement. In addition, parents can always seek an injunction pending appeal under the traditional standard if a ruling in the school district's favor presents a close call and if any potential change in placement risks undue harm. *See* pp. 6-7, *supra*. Accordingly, Petitioner's interpretation of the stay-put provision appropriately safeguards children against disruption while continuing to serve the provision's other goals.

[7] It is hardly "imagined" (BIO 35) that parents sometimes use the stay-put provision to prolong judicial review without a reasonable likelihood of success. *See, e.g., Heather S. ex rel. Mark S. v. Niles Twp. High Sch. Dist. No. 219*, 1999 WL 1100931, at *11 (N.D. Ill. 1999) ("Despite their lack of any real basis for obtaining reversal ***, these proceedings have enabled Heather's parents to delay implementation of the District's recommendation.").

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

John F.X. Reilly
Solicitor
Ridley School District

Pratik A. Shah
Counsel of Record
Z.W. Julius Chen
Matthew A. Scarola
AKIN GUMP STRAUSS
HAUER & FELD LLP

Counsel for Petitioner

September 10, 2014