No. 13-1547

IN THE
Supreme Court of the United States

RIDLEY SCHOOL DISTRICT
Petitioner,

v.

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

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

AMICI CURIAE BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION, PENNSYLVANIA SCHOOL BOARDS ASSOCIATION, AND NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTERESTS OF THE *AMICI*[1]

The National School Boards Association ("NSBA"), founded in 1940, is a non-profit organization representing state associations of school boards, and the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,800 local school districts serving nearly 50 million public school students, including approximately 6.4 million students with disabilities. NSBA regularly represents its members' interests before Congress and federal and state courts and has participated as *amicus curiae* in numerous cases.

The Pennsylvania School Boards Association ("PSBA") is a non-profit association of virtually all the public school boards in the state, pledged to the highest ideals of local lay leadership for public schools. PSBA participates in appellate-level court cases as an *amicus curiae*, supporting school district positions in cases that raise issues of statewide or national interest, including cases involving the Individuals with Disabilities Education Act ("IDEA").

The National Association of State Directors of Special Education ("NASDSE") is a not-for-profit

[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. In accordance with Supreme Court Rule 37.2(a), counsel for both parties received timely notice of *amici's* intention to file this brief and granted consent; the requisite consent letters have been filed with the Clerk of this Court.

organization established in 1938 to promote and support education programs and related services for children and youth with disabilities. Its members are the state directors of special education in the states, District of Columbia, Department of Defense Education Agency, federal territories and the Freely Associated States. NASDSE's primary mission is to serve students with disabilities by providing services to state educational agencies to facilitate their efforts to maximize educational and functional outcomes for students with disabilities.

Amici and the state and local school officials they represent nationwide believe resolution of the issue at stake in this case is of exceptional importance, warranting this Court's review. *Amici* are concerned that if left intact, the Third Circuit's decision regarding the outer limits of the IDEA's stay-put provision potentially could inflict substantial harms on school districts and the students they serve by creating an incentive for parents to engage in protracted litigation rather than working collaboratively with educators to resolve disputes without delay.

SUMMARY OF ARGUMENT

The issue here concerns the proper interpretation of one word in the IDEA's stay-put provision, 20 U.S.C. § 1415(j) (2014). Stay-put requires that a child with disabilities be maintained in his then-current educational placement until the completion of any "***proceedings***" brought pursuant to the statute. IDEA provides a complex set of procedural rights to parents and students to resolve

disputes about the special education and related services necessary to provide students with a free appropriate public education ("FAPE"). Stay-put carries with it the obligation of the school district to pay the costs of the stay-put placement until the proceedings are completed. Interpreting the word "proceedings" to encompass appeals brought in federal court after a district court ruling in favor of the school district potentially inflicts significant harm on school districts and the children they serve. In an effort to avert these detrimental consequences, *Amici* strongly urge this Court to grant review.

The Third Circuit's extension of school districts' obligations to pay for private school placements while stay-put continues through litigation—including appeals of trial court rulings in a school district's favor—creates a perverse incentive for parents to prolong appeals simply to reap the benefit of private school tuition funded by public dollars. Parents are much less likely to participate meaningfully in IDEA's collaborative framework which requires educators and parents to work together to form education plans, or to hasten resolution of a dispute once a due process complaint has been filed, if stay-put requires the school district to continue paying for private school placements as long as the parent keeps appealing decisions favorable to the district. This type of prolonged, often futile, litigation frustrates the clear purposes of the IDEA to resolve disputes expeditiously, 20 U.S.C. § 1415(b) (2014), and to encourage collaboration between parents and educators.

Requiring a school district to shoulder the cost of maintaining a child's private school placement

after a district court's determination that the district has provided a FAPE funnels tens of thousands of dollars per year into an unnecessary placement. This misdirection of funds diminishes the resources available to school districts to serve other children with disabilities. The time and resources a school district must devote to protracted appeals on behalf of a single student similarly robs other children, both with and without disabilities, of needed educational services. In addition, an expansive reading of stay-put, such as the Third Circuit's, may have the unintended consequence of leaving the student at the center of the dispute in an **in**appropriate placement (as determined by lower court proceedings), as a result of the parents obstructing the processes meant to ensure timely delivery of a FAPE to their child.

A clear ruling from this Court regarding the outer limits of the financial obligations of a school district for a student's stay-put placement would make the law consistent throughout the circuits, support the IDEA's collaborative framework, and deter parents from pursuing unnecessary judicial appeals that inflict undue financial burdens and educational costs.

REASONS FOR GRANTING THE WRIT

The Individuals with Disabilities Education Act ("IDEA" or the "Act") ensures that students with disabilities receive a FAPE. 20 U.S.C. § 1412(a)(1)(A) (2014). A cornerstone of the IDEA is the development of individualized education plans ("IEPs") for students with disabilities to prepare them for future work, education, and living. The

IDEA encourages parents and educators to collaborate in developing IEPs by granting parents extensive procedural rights, such as allowing them to examine all records and to participate in meetings about the student's educational placement. 20 U.S.C. § 1415(b) (2014).

When this collaborative process fails to produce agreement between the parents and schools, and a dispute results, the IDEA provides the additional safeguard of stay-put. With some limited exceptions, (i.e., violent students), this provision requires that a student remain in his or her then-current educational placement until all proceedings have been completed to resolve the dispute. 20 U.S.C. § 1415(j) (2014). The question in this case centers on what "proceedings" Congress contemplated when it instituted stay-put.

Courts of appeals have issued divergent decisions on this issue, causing a circuit split warranting this Court's involvement to settle the question. In *Andersen v. District of Columbia*, 877 F.2d 1018, 1024 (D.C. Cir. 1989), the D.C. Circuit determined that the student's stay-put placement—and the associated payment obligation for private school placements—continued until issuance of the district court decision and no further. The Sixth Circuit agreed, in an unpublished opinion. *Kari H. by & through Dan H. v. Franklin Special Sch. Dist.*, 125 F.3d 855 (table), 1997 WL 468326 (6th Cir. 1997). The Ninth Circuit diverged from its sister circuits in *Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 1040 (9th Cir. 2009), holding that the current educational placement must be upheld during the pendency of all proceedings, including appeals. The

Third Circuit Court of Appeals in the instant case has now joined the Ninth Circuit.

I. THE THIRD CIRCUIT'S DECISION IMPEDES EXPEDITIOUS RESOLUTION OF SPECIAL EDUCATION DISPUTES AND COLLABORATION BETWEEN PARENTS AND EDUCATORS.

A. The Third Circuit has placed IDEA's promise of prompt resolution at risk by extending reimbursement of private school tuition for a stay-put placement.

The intent of the IDEA is to protect the access of students with disabilities to a FAPE, and to ensure their parents' participation in developing their IEPs. *See, e.g., Dell v. Board of Educ.,* 32 F.3d 1053, 1060 (7th Cir. 1994) (quoting Senator Williams,[2] 121 Cong. Rec. 37416, 94th Cong., 1st Sess. (Nov. 19, 1975)). To ensure access to a FAPE for students with disabilities is not unduly delayed when disputes emerge between parents and educators, the IDEA calls for an expeditious administrative process: the parties must engage and attempt to reach a resolution within 30 days of receipt of the due process complaint, 20 U.S.C. § 1415(f)(1)(B), 34 C.F.R. § 300.510(b), (c); a due process hearing must be held and final decision issued within 45 days of the conclusion of the resolution period, 20 U.S.C. §

[2] Senator Williams was the principal author of the original law now known as the IDEA.

1415(f)(1)(A), (B)(ii), 34 C.F.R. § 300.515(a); and any state administrative review of that decision must take place within 30 days of receipt of the request for review. Delayed decisions harm students with disabilities by hindering necessary changes to their educational plans and postponing appropriate placement decisions. *Dell,* 32 F.3d at 1060. The IDEA reflects a strong policy choice for prompt decision-making about a child's education plans and placement, to avoid long periods of limbo for the child, while his parents dispute his appropriate placement though litigation.

For this and other reasons, courts have long recognized the importance of avoiding prolonged legal proceedings under the IDEA. The Third Circuit, in *Muth v. Central Bucks Sch. Dist.*, acknowledged that the IDEA's timeline for administrative proceedings protects the access of children with disabilities to educational programs. 839 F.2d 113, 125 (3d Cir. 1988), *rev'd on other grounds sub nom.*, *Dellmuth v. Muth*, 491 U.S. 223 (1989). Citing *Muth,* a Delaware district court reasoned that protracted administrative and judicial proceedings undermine the IDEA's goal to provide prompt resolutions. *Slack v. Delaware Dep't of Pub. Instruction,* 826 F. Supp. 115, 121 (D. Del. 1993). The District of Columbia Circuit Court of Appeals similarly cautioned that judicial review should be expeditious to promote the IDEA's goal of providing prompt resolution of disputes. *Spiegler v. District of Columbia*, 866 F.2d 461, 467 (D.C. Cir. 1989).

This important statutory goal, rooted in educational policy, is thwarted by the Third Circuit's interpretation of the stay-put provision and the

associated obligations of school districts to pay the costs of the placement until the exhaustion of all judicial appeals. This reading of the statute allows parents to obtain expensive private placements for their children at public expense as long as appeals are pending, thereby creating an incentive to extend the appeal period rather than to seek a prompt resolution of the educational dispute. Congress intended the stay-put provision to ensure that students with disabilities would not be moved between schools during the pendency of a due process hearing, 20 U.S.C. § 1415(j) (2014), and to prevent school districts from unilaterally determining the placement of a student until the decision of an impartial hearing officer is rendered. 20 U.S.C. § 1415(k)(3)(B) (2014). Congress did not intend for it to be used as a tool for obtaining expensive private placements at public expense while special education litigation moves through federal courts, especially (as here) after a trial court has ruled in the school district's favor.

B. The Third Circuit's approach to stay-put disrupts the IDEA's collaborative framework.

The IDEA establishes an "interactive process [between parents and educators] for the child's benefit, but it does not empower parents to make unilateral decisions about programs the public funds." *Gill v. Columbia, 93 Sch. Dist.,* 217 F.3d 1027, 1038 (8th Cir. 2000). While the IDEA assures parents the right to challenge decisions made at an IEP meeting, it creates a framework for

collaboration that is designed to avoid the need for that eventuality by promoting cooperation.

The IDEA requires involvement of both parents and school personnel in developing a child's IEP. 20 U.S.C. § 1414(d)(1)(B). This requirement is so critical to achieving the IDEA's goals that courts have rebuffed parents' complaints about deficient IEPs based on the parents' own failure to collaborate. For example, the Seventh Circuit held parents responsible for failing to collaborate with the school district in the IEP process and then blaming the school for not including certain components in an IEP. *Hjortness v. Neenah Joint Sch. Dist.*, 507 F.3d 1060, 1066 (7th Cir. 2007). Similarly, the Fourth Circuit found no fault attributable to the school district for an incomplete IEP when there was a lack of parental cooperation. *M.M. v. School Dist .of Greenville County*, 303 F.3d 523, 535 (4th Cir. 2002).

Amici urge this Court to review this case to address the Third Circuit's troubling interpretation of the stay-put provision in a manner that runs counter to the collaborative intent of the IDEA. The appellate court has created an incentive for parents to prolong an inappropriate or unnecessary placement at public expense rather than work in good faith with educators to develop an appropriate education plan for their children. In addition to the raft of procedural safeguards the IDEA provides to ensure parent involvement during the development of an IEP, 20 U.S.C. § 1414 (2014), the IDEA emphasizes collaboration by seeking early resolution of disputes. It requires mandatory resolution sessions within the first 15 days after a due process hearing request is filed, 20 U.S.C. § 1415(f)(1)(B)

(2014), and the opportunity for mediation in order to provide parents and school personnel the chance to find a solution short of legal proceedings, 20 U.S.C. § 1415(e) (2014). *Amici* urge this Court to accept review of this case and to render an interpretation of the stay-put provision that encourages schools and parents to re-engage more quickly in a collaborative effort after working to resolve disputes as early as possible.

II. THE CIRCUIT SPLIT ON THE DURATION OF STUDENTS' PRIVATE STAY-PUT PLACEMENTS MUST BE RESOLVED TO AVERT PLACING SIGNIFICANT BURDENS ON PUBLIC FUNDS AND IMPOSING EDUCATIONAL COSTS ON CHILDREN WITH DISABILITIES.

Amici urge this Court to grant review in light of the dramatic impact of the Third Circuit's departure from the long-standing ruling in *Andersen* that restricted the duration of stay-put placements and more reasonably limited the financial responsibility of school districts to pay for private placements to the period preceding a district court's judgment. Under the Third Circuit's decision, school districts could potentially be forced to use taxpayer dollars to pay for additional years of tuition pending any further judicial appeal of a ruling in the school district's favor—even if affirmed again. These additional expenditures are particularly troubling because school districts must misappropriate resources intended to secure the benefits of the IDEA to all children with disabilities served by the

district in order to pay for an unnecessary—and sometimes inappropriate—placement for one child. School districts must similarly divert funds away from educational services to pay for the increased litigation costs that protracted appeals entail. Furthermore, this expenditure of funds does not necessarily serve the educational interests of the children whom the stay-put provision is intended to protect.

A. When stay-put at a private placement remains in effect throughout judicial appeals, the financial burden on the school district increases substantially.

Since the first enactment of the IDEA in 1975, the number of due process hearings has substantially increased.[3] In 2004, Congress addressed the growing adversarial posture of educational decision-making under the IDEA, by amending the Act to promote a more collaborative framework and specifically to encourage informal dispute resolution without the need for due process hearings or court proceedings.[4] *See, e.g.*, 20 U.S.C. § 1415(f)(1)(B) (mandatory resolution); 20 U.S.C. § 1415(e) (mediation procedures). Despite these amendments, a parent's decision to resort to the legal process to decide educational questions under the IDEA remains a costly, cumbersome, and often

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[3] Perry Zirkel, *Longitudinal trends in impartial hearings under the IDEA,* 302 EDUC. L. REP. 1 (2014).

[4] *See* Section I, *supra*.

contentious mechanism that inflicts significant costs on all who are involved in the proceedings.

Disputes involving private placements are often particularly difficult to resolve quickly and collaboratively, especially if the parents become entrenched in their position. Final resolution of such cases may take as long as five to six years. The instant case demonstrates how intractable such disputes can become. E.R.'s parents requested a due process hearing in December 2008, and nearly six years later the appeal proceedings remain pending.[5] Over this period of time, the burden of litigation costs for a school district continues to mount, adding to the financial burden of supporting the private school placement. More importantly, the child at the center of prolonged special education litigation could spend almost half of the 12-13 years of his K-12 education experience in a placement later found to be ***in***appropriate.

1. The Third Circuit's rule imposes substantial additional costs on school districts to fund stay-put placements.

When appeal proceedings extend the benefits of private school tuition during the stay-put period, parents may view them as a vehicle for obtaining funding for their preferred placement without the need to prevail, even when that private placement

[5]*See also School Comm. of Town of Burlington v. Dep't of Educ. of Mass.,* 471 U.S. 359 (1985) (six years elapsed from the time of the due process request in 1979 until this Court's decision in 1985).

was later determined not to provide a FAPE. In fact, in most IDEA cases, the parents lose. By the time an IDEA case arrives at a federal circuit court of appeals, it has already been subject to review several times,[6] making it likely that a district court decision in favor of a school district will be affirmed. This result is borne out by statistics showing that federal circuit courts of appeals overwhelmingly affirm trial court decisions.[7]

These odds do not deter parents convinced of the educational benefits of a particular placement for their child with disabilities. When the cost of that placement is particularly high, the parents may see a great benefit to prolonged appeals. For example, in *Salley v. St. Tammany Parish Sch. Bd.*, the parents, facing costs totaling $748,096.47 over five years for their child's private residential placement and related services, naturally—though unsuccessfully—sought to hold the school district responsible for as much of that cost as possible. No. 92-1937, 1994 WL 148721 (E.D. La. Apr. 18, 1994), *aff'd*, 57 F.3d 458 (5th Cir. 1995). In *Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.,* 540 F.3d 1143 (10th Cir. 2008), although the Tenth Circuit ultimately determined that the school district had

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[6] In some states, cases go through a second tier of administrative review after the due process hearing before making it to the district court level.

[7] Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Effect" on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 359 (2005) (reporting a 91% affirmance rate by federal courts of appeal in 2003).

provided a FAPE, the district still had to pay for more than four years of tuition at the Boston Higashi School. At today's tuition rates,[8] this would amount to over $500,000 for the student's residential placement. In *Luke P.*, the school district, not the parents, sought the appeal, but the stay-put provision still required the school district to fund the placement until completion of the proceedings.

These outcomes demonstrate the monumental costs that could be imposed on a school district if it is required to pay for a stay-put placement beyond a district court decision finding that the district has provided a FAPE. *Amici* view the Court's acceptance of this case as imperative to rein in the Third Circuit's expansive reading that creates an incentive for parents—despite unfavorable rulings—to pursue appeals in an effort to prolong costly private school placement at public expense.

In this case, the Ridley School District was required to pay $57,658 for E.R.'s private school placement. This amount is much more than the school district otherwise would have borne under a proper reading of the stay-put provision. But even this significant sum does not fully demonstrate the magnitude of the impact the Third Circuit rule could impose. To provide further illumination, *amici* offer the following examples based on previous IDEA private placement cases:

- In *School Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359 (1985), six years transpired between the due process request and this Court's ruling. Although

[8] Boston Higashi School, http://www.bostonhigashi.org/about.php?id=1.

Burlington involved tuition reimbursement for only one year, if a similar dispute were to arise in the Third Circuit today, the school district would potentially be required to pay for the private school placement during the entire six years of litigation—approximately $256,000 using current tuition rates.[9]

- In *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009), the parents withdrew the student as a junior from public school and unilaterally placed him in a private school in the spring of 2003. The hearing officer found the school district had failed to provide a FAPE and ordered the district to reimburse the cost of the private placement. Using the tuition rate of $5,200 per month cited by the district court on remand, 675 F.Supp.2d 1063 (D. Or. 2009), the school district could have been liable for $57,200 to pay for the eleven months until the child's graduation. On remand, however, the court denied reimbursement. The parents again appealed. Under the Third Circuit's ruling, had the student been in elementary school rather than high school, the potential cost to fund the placement throughout the nearly nine years of legal proceedings would have been over half a million dollars.

[9] Carroll School, http://www.carrollschool.org/admissions/tuition-fees.

- In *Farzana K. v. Indiana Dep't of Educ.*, No. 2:05-CV-266 JVB, 2009 WL 3642748 (N.D. Ind. Oct. 30, 2009), the stay-put placement remained in effect for three years from the time of the due process request through the time of the district court's ruling. The school district was required to pay $872,496 in tuition costs for this period of time. The case was appealed to the Seventh Circuit and was remanded back to the district court. 473 F.3d 703 (7th Cir. 2007). Had the obligation to pay tuition continued until the appeal proceedings ultimately concluded in 2009, the district would have been responsible for approximately $1,744,992 in tuition costs.

Amici recognize the responsibility of school districts to fund private placements when necessary to provide a FAPE to a child with disabilities. Indeed, school districts sometimes consent to private placements during the IEP process. The case examples above are not intended to challenge the propriety of the stay-put requirement itself, but rather to illustrate the significant increase in public funds the Third Circuit's decision will force school districts to divert away from serving other children, both with and without disabilities, in order to subsidize the costs of one unnecessary or inappropriate private placement pending the resolution of protracted judicial appeals.

2. The Third Circuit's rule increases the cost of IDEA litigation to school districts, thereby draining public funds away from the provision of educational services.

Public school districts must underwrite not only the costs of private school tuition for years of litigation under the Third Circuit's stay-put interpretation, but also the costs of the litigation itself. From 1999 to 2000, schools spent approximately $146.5 million on special education mediation, due process, and litigation costs under the IDEA.[10] During this time, school districts spent an average of $8,000 to $12,000 for each due process hearing or mediation alone.[11] It is reasonable to assume that these expenditures from 15 years ago[12] would be substantially higher today. Of course, the longer the proceedings continue, the more legal fees will be incurred by both sides. By creating incentives for parents to prolong appeals, the Third Circuit's rule unnecessarily promotes just such an unfortunate result.

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[10] Jay G. Chambers, *What are we spending on procedural safeguards in special education*, *1999-2000,* Spec. Educ. Expenditure Proj., at v (2003), *available at* http://csef.air.org/publications/seep/national/Procedural%20Safeguards.pdf.

[11] *Id.*

[12] These expenditures are the most recent reported figures *Amici* were able to discover through on line research.

Any increase in school district expenditures on legal fees is particularly regrettable because it means already-scarce public funds are diverted away from providing educational services to all children, with and without disabilities, into legal proceedings that may not end up serving the educational needs of the child(ren) at the center of the dispute. Local budget constraints and continuing federal shortfalls in special education funding[13] already make it difficult for school districts to meet their IDEA obligations. Any rule that increases the need for schools to spend money on litigation rather than educating children is detrimental to the Act's very purpose.

There are also non-monetary costs associated with these proceedings, including teachers being pulled from classrooms, sometimes for one to two weeks to prepare for and testify at hearings.[14] In such situations, teachers are being required to spend time on resolving one case instead of providing educational services needed by multiple students. Qualified special education teachers currently are in short supply, making their absence from the classroom a particular burden on schools, teachers and students alike. Special education teachers themselves already face untold demands in carrying

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[13] NATIONAL SCHOOL BOARDS ASSOCIATION, ISSUE BRIEF ON INDIVIDUALS WITH DISABILITIES EDUCATION ACT: EARLY PREPARATION FOR REAUTHORIZATION 8 (Feb. 2014) (showing 2014 federal appropriations for IDEA funding amounted to a little over 15% of the total cost of providing special education services despite Congress' original promise to provide 40%).

[14] Perry A. Zirkel, *Transaction Costs and the IDEA*, EDUCATION WEEK, May 21, 2003, at 44.

out their daily responsibilities in the classroom; the added stress of involvement in legal proceedings is a heavy burden.

While teachers are tied up in administrative and judicial hearings, schools must hire substitutes, who may not be licensed to teach special education, or, depending on state law, may not even be required to hold a college degree. Thus, students in those classrooms with substitutes may not receive the benefit of a qualified professional providing the services they need.

In addition to teachers, other school staff, such as aides, counselors, and specialists (e.g., speech/ language, occupational, and physical therapy) may be drawn away from their primary responsibilities into due process and judicial proceedings. During their absence, the students they serve may be deprived altogether of the educational benefits and assistance these staff provide.

CONCLUSION

For the reasons set forth above, *amici* believe the issue at stake here is of exceptional importance and urge the Court to grant review in order to set properly the outer limits of the stay-put provision.

Respectfully submitted,

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