University of Chicago Legal Forum

Volume 2021 Article 16

2021

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I. INTRODUCTION

School closures in the wake of COVID-19 have caused major disruptions in the lives of our nation's students.[1] Following the widespread closures of schools in March of 2020, concerns for students have ranged widely, from social and emotional development, to physical and nutritional wellbeing, to academic progress and achievement.[2] Students with disabilities are significantly and disproportionately affected by the closures, as they often rely upon school-based services crucial to their academic progress.[3] Students with physical or mental disabilities, for example, face significant—if not insurmountable—difficulties in adapting to remote instruction.[4] These problems are only exacerbated in cases where the student with disabilities lacks access to the technology required for successful distance learning.[5]

Despite the challenges that the COVID-19 pandemic presents for students requiring special educational services, the Individuals with Disabilities Education Act[6] ("the IDEA" or "the Act") maintains the

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[1] *See* Betheny Gross & Alice Opalka, *Too Many Schools Leave Learning to Chance During the Pandemic*, CTR. FOR REINVENTING PUB. EDUC. (June 2020), https://www.crpe.org/sites/default/files/final_national_sample_brief_2020.pdf [https://perma.cc/LS6Z-EPPA].

[2] *See The Importance of Reopening America's Schools This Fall*, CTRS. FOR DISEASE CONTROL & PREVENTION (updated July 23, 2020), http://ww11.doh.state.fl.us/comm/_partners/covid19_school_resources_links/the_importance_of_reopening_americas_schools_this_fall_cdc.pdf [https://perma.cc/N9HE-ETCF].

[3] *See id.*

[4] *See id.* ("For children with intellectual or physical disabilities, nearly all therapies and services are received through schools. These vital services are difficult to provide through distance learning models. As a result, more children with disabilities have received few to no services while schools have been closed.").

[5] *See id.*

[6] 20 U.S.C. §§ 1400–82.

right of students with disabilities to obtain a "free appropriate public education" (FAPE).[7] Congress first guaranteed access to public education for children with certain disabilities through the Education for All Handicapped Children Act of 1975.[8] Today, that Act is known as the IDEA.[9] Finding that "[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society," Congress designed the IDEA to address nationwide failures to provide appropriate educational services to millions of children with disabilities across the country.[10]

One procedural safeguard the IDEA provides students with is the so-called "stay-put provision" found in § 1415(j) of the Act.[11] This provision safeguards the student's right to remain in her "then-current educational placement" during the pendency of administrative and court proceedings related to alleged IDEA violations.[12] But courts have split on whether the stay-put provision applies if the student's "then-current educational placement" becomes unavailable.[13] While some courts hold that under such circumstances, the educational agency is required to provide a comparable alternative educational placement,[14] others hold that no such affirmative obligation exists under the stay-put provision.[15] Under the latter approach, once a student's then-current placement is no longer functionally available, the object of the stay-put order is considered to no longer exist, and any alternative placement would be considered a change in the status-quo.[16]

This circuit split is more than a dispute over interpretation of the IDEA's provisions. Its resolution could either help or hamper students with disabilities at a time when stability is most crucial to them. The uncertainty inherent in the context of a novel pandemic only heightens this need for stability. To resolve the circuit split on the stay-put provision, courts must acknowledge the purposes underlying the IDEA. Oth-

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[7] *See generally id.*

[8] Pub. L. No. 94-142, 89 Stat. 773 (codified as amended throughout 20 U.S.C. §§ 1405–20).

[9] 20 U.S.C. §§ 1400–82.

[10] *Id.* § 1400(c)(1).

[11] *See id.* at § 1415(j).

[12] *See* 20 U.S.C. § 1415(j); *see also* 34 C.F.R. § 300.518(a) ("Except as provided in § 300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.").

[13] *Compare* Wagner v. Bd. of Educ. of Montgomery Cnty., 335 F.3d 297, 301 (4th Cir. 2003) *with* Knight by Knight v. District of Columbia, 877 F.2d 1025, 1028 (D.C. Cir. 1989).

[14] *See, e.g.*, *Knight*, 877 F.2d at 1028.

[15] *See, e.g.*, *Wagner*, 335 F.3d at 301.

[16] *See id.* at 301–02.

erwise, challenging or unprecedented circumstances would give educational authorities a ready-made excuse to deprive students of the services they are entitled to.

This Comment will explain the relevance of the stay-put provision in the pandemic context, with particular emphasis on addressing claims that the pandemic has rendered a student's then-current educational placement unavailable. Part II discusses the IDEA, its status during the COVID-19 pandemic, and its stay-put provision. Part III explains the rationales underlying courts' diverging interpretations of stay-put in contexts where an educational placement becomes unavailable. To resolve the circuit split, Part IV argues in favor of an affirmative-obligation approach. This approach not only provides students with much-needed stability but also provides educational agencies with the flexibility they require as they adjust their policies and practices to the realities of a global pandemic.

II. THE IDEA AND ITS STAY-PUT PROVISION

This Part discusses the IDEA, including its substantive and procedural provisions. It details the Supreme Court's FAPE jurisprudence, then explains the IDEA's dispute resolution procedures, including its "stay-put" provision, which could prove particularly valuable to students and schools alike during a pandemic. It concludes by reviewing the Department of Education's (DOE) guidance on the Act's status within the context of the COVID-19 pandemic.

A. The Individuals with Disabilities Education Act

The IDEA provides federal funds to states that agree to ensure children with qualifying disabilities have access to a free appropriate public education (FAPE).[17] To that end, schools must provide each child with a disability a written statement that includes: the child's current levels of academic achievement and performance; measurable academic and functional goals for the year; a description of how progress will be measured; and a description of the special education and related services with which the child will be provided.[18] This written statement is the student's "individualized education program" (IEP).[19] It is prepared by the child's "IEP team," comprised of the child's parents, teachers, and at least one local school official.[20] The educational services provided are

[17] *See* 20 U.S.C. § 1400(d).

[18] *See id.* at § 1414(d)(1)(A)(i).

[19] *Id.*

[20] *Id.* at § 1414(d)(1)(B)(i)–(v).

intended to allow the student to make appropriate progress toward attaining their IEP's annual goals.[21]

The IDEA also demands that a student's FAPE be executed in what the Act calls the "least restrictive environment."[22] This means that, "[t]o the maximum extent appropriate, children with disabilities . . . are [to be] educated with children who are not disabled."[23] Only if the child's disability is of such nature or severity that participation in regular classes "cannot be achieved satisfactorily" should the student be removed from the general educational environment and placed in special classes or separate schooling.[24] The least restrictive environment requirement reflects the IDEA's presumption that, for most students, a FAPE involves placement in general education classrooms and grade-level advancement.[25]

1. Free appropriate public education

While the Act delineates the precise content requirements for IEPs, it does not offer much specificity regarding what constitutes a FAPE.[26] Instead, the precise understanding of an adequate FAPE has been left to the courts. The Supreme Court first took up the issue of defining "free appropriate public education" in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.[27] In *Rowley*, the Court rejected the notion that the IDEA requires schools to provide educational services necessary to maximize the potential of the handicapped child in a way "commensurate with the opportunity provided other [nonhandicapped] children."[28] The Court instead held the Act's FAPE guarantee implicitly required "that the education . . . provided be sufficient to confer some educational benefit upon the handicapped child."[29] Under this holding, then, services provided to students with disabilities need not offer potential-maximizing opportunities equal to those offered to students without disabilities. Instead, the Act guarantees only that the

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[21] *See id.* at § 1414(d)(1)(A)(i)(IV).

[22] *See id.* at § 1412(a)(5).

[23] *Id.* at § 1412(a)(5)(A).

[24] *Id.*

[25] *See, e.g.*, Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 1000 (2017) (citing Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982)).

[26] *See* 20 U.S.C. § 1400(d)(1)(A) (describing the free and public education as tailored to the child's unique needs and designed to "prepare them for further education, employment, and independent living"); *see also Rowley*, 458 U.S. at 189 ("Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children.").

[27] 458 U.S. 176 (1982).

[28] *Id.*

[29] *Id.* at 200.

school provides an education that offers the child some educational benefit.

States thus satisfy FAPE requirements when they (1) "compl[y] with the procedures set forth in the Act" and (2) provide an IEP "reasonably calculated to enable the child to receive educational benefits" from their personalized instruction and support services.[30] In short, FAPE requirements would only be violated in cases of IDEA procedural violations or if the IEP was not adequately designed to provide the student with some educational benefit. Acknowledging the wide spectrum of disabilities that the Act embraces—and thus the wide spectrum of obtainable benefits for children with disabilities—the *Rowley* Court made clear it was not establishing "any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act."[31]

Over three decades later, the Court took up the issue of defining that test with its decision in *Endrew F. v. Douglas County School District RE-1*.[32] In *Endrew F.*, the Court held that the IDEA imposes a substantive obligation on schools to offer IEPs "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[33] Reasoning that an IEP entails a "prospective judgment by school officials," informed by both their expertise and the input of the child's parents, the Court found that the appropriate question is not whether a court deems the IEP at issue *ideal*, but rather whether that IEP is *reasonable*.[34] Thus, an IEP need not maximize the student's academic potential. Rather, it is sufficient if it is reasonably designed, based on the child's circumstances, to enable her academic progress.

The Court indeed emphasized the IDEA's "focus on the particular child" and her progress.[35] What that progress looks like, the Court noted, will depend on the child's circumstances.[36] In cases where the student with disabilities receives her education in a regular classroom—the Act's preference whenever possible[37]—the child's progress is

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[30] *Id.* at 203, 206–07 ("If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.").

[31] *Id.* at 202.

[32] 137 S. Ct. 988 (2017).

[33] *Id.* at 999.

[34] *Id.*

[35] *Id.* ("A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.").

[36] *See id.*

[37] *See* 20 U.S.C § 1412(a)(5)(A) ("To the maximum extent appropriate, children with disabilities . . . are [to be] educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.").

measurable via regular examinations, grades, and advancement from grade to grade.[38] For most students, a FAPE involves such integration into the general education curriculum and classrooms.[39] This was indeed the case for the plaintiff in *Rowley*, giving the Court "no need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level."[40]

Endrew F. presented an opportunity for the Court to offer guidance for those cases in which general-curriculum, grade-level advancement is *not* a reasonable prospect for the student. Without elaborating thoroughly upon what appropriate progress will look like in any particular case, the Court concluded that a student's IEP "must be appropriately ambitious in light of his circumstances," such that the child has the opportunity "to meet challenging objectives."[41] The Court made clear that, despite its decision not to hand down a bright-line rule,[42] the substantive standard it established "is markedly more demanding than the 'merely more than *de minimis*' test" the Tenth Circuit had applied below.[43]

Endrew F.'s rejection of a "merely more than *de minimis*" standard signaled a departure from the language in *Rowley*, which suggested only "some educational benefit" was required.[44] The Court warned, however, that the standard it established was not to be mistaken for "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review."[45] In this, the Court recognized that IEP's are prospective in nature and are informed by the expertise of school officials and the input of parents.[46] As such, courts are not to import their retrospective judgments about an IEP's adequacy. Instead, given educational authorities' expertise, courts must exercise deference in assessing an IEP's adequacy and the progress it is calculated to achieve.[47]

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[38] *See Endrew F.*, 137 S. Ct. at 999.

[39] *See id.* at 1000.

[40] *Id.*

[41] *Id.*

[42] *See id.* at 1001 (quoting Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206 (1982)) ("We will not attempt to elaborate on what 'appropriate' progress will look like from case to case . . . . This absence of a bright-line rule, however, should not be mistaken for 'an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.'").

[43] *Endrew F.*, 137 S. Ct. at 1000–01 ("[A] student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all.").

[44] See *Rowley*, 458 U.S. at 200.

[45] *Endrew F.*, 137 S. Ct. at 1001 (quoting *Rowley*, 458 U.S. at 206).

[46] *Id.* at 999.

[47] *See id.* at 1001–02.

2. IEP dispute resolution

Given the collaborative and fact-intensive nature of an IEP's formulation, education providers and parents sometimes disagree on an IEP's contents. As such, the IDEA sets forth dispute resolution procedures for parents seeking to challenge "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free and public education to such child."[48] Parents and relevant members of the IEP team may opt to resolve the disagreement via mediation.[49] They may also have an opportunity for an "impartial due process hearing" before either the state or the local educational agency, as determined by the state educational agency or by state law.[50] The opportunity for this due process hearing arises only if the parties fail to reach an agreement and settle the dispute through what the Act calls a "preliminary meeting" with the local educational agency.[51]

If these steps fail to produce an agreement between the parties, the aggrieved party may bring a civil action in state or federal district court.[52] If a student's IEP is found to be inadequate, parents may be entitled to injunctive relief, compensatory educational services, or reimbursement for expenses, like private school tuition.[53] Courts have broad discretion in fashioning such remedies where IDEA violations are found.[54]

3. The "stay-put" provision

During the pendency of administrative and court proceedings, a student is entitled to remain in her "then-current educational place-

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[48] 20 U.S.C. § 1415(b)(6)(A).

[49] *See id.* at § 1415(e).

[50] *Id.* at § 1415(f)(1)(A).

[51] *Id.* at § 1415(f)(1)(B)(i)–(iii); *see also id.* at § 1415(g) ("If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency.").

[52] *See id.* at § 1415(i)(2)(A) (noting that the action may be brought "without regard to the amount in controversy").

[53] *See* Michael Stein & Michael Waterstone, *Finding the Gaps: A Comparative Analysis of Disability Laws in the United States to the United Nations Convention on the Rights of Persons with Disabilities*, NAT'L. COUNCIL ON DISABILITY (May 12, 2008), https://ncd.gov/publications/2008/May122008 [https://perma.cc/Q8MG-Q6PP]; *see also* 20 U.S.C. § 1415(i)(2)(C) ("In any action brought under this paragraph, the court . . . shall grant such relief as the court determines is appropriate.").

[54] *See* Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 16 (1993) (quoting Sch. Comm. of Burlington, Mass. v. Dep't of Educ. of Mass., 471 U.S. 359, 369, 374 (1985)) ("Under [the IDEA], 'equitable considerations are relevant in fashioning relief,' . . . and the court enjoys 'broad discretion' in so doing.").

ment" unless her parents and the educational agency reach an alternative agreement.[55] This procedural safeguard is commonly referred to as the "stay-put" provision.[56] Congress enacted the provision to prevent school authorities from unilaterally excluding students with disabilities from school, breaking the educational status quo, or taking retaliatory actions in response to complaints.[57] While its historical impetus revolved largely around the removal of students demonstrating disruptive behaviors,[58] this safeguard is worded and has been construed broadly, extending beyond cases of disruptive student conduct. Indeed, courts issue stay-put orders in order to maintain the educational status quo throughout the course of IEP dispute proceedings.[59] The provision is intended to preserve, to the extent possible, the student's then-current placement and to prevent the impairment of their learning experience.

Complicating that goal is the fact that the IDEA fails to define the term "then-current educational placement." The term is generally understood, for purposes of the stay-put provision, as the placement described in the student's last agreed upon IEP.[60] Rather than denoting a particular site or service provider, however, "a child's educational placement 'falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP.'"[61] Successful invocation of the stay-put provision effectively serves as an automatic preliminary injunction.[62] Accordingly, the party invoking the stay-put provision need not show factors typically required for injunctive relief, like irreparable

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[55] *See* 20 U.S.C. § 1415(j); *see also* 34 C.F.R. § 300.518(a).

[56] *See, e.g.*, Honig v. Doe, 484 U.S. 305, 308 (1988).

[57] *See id.*; M.R. v. Ridley Sch. Dist., 744 F.3d 112, 118 (3d Cir. 2014); Anchorage Sch. Dist. v. M.P., 689 F.3d 1047, 1056 (9th Cir. 2012).

[58] *See Honig*, 484 U.S. at 323.

[59] *See id.* at 323–28 (describing the stay-put provision as an "unequivocal" mandate that "effectively creates a presumption in favor of the child's current educational placement"); *see also* J.O. *ex rel.* C.O. v. Orange Twp. Bd. of Educ., 287 F.3d 267, 272 (3d Cir. 2002); T.M. *ex rel.* A.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 152 (2d Cir. 2014) (stating that the purpose of the stay-put provision is "to maintain the educational status quo while the parties' dispute is being resolved").

[60] *See, e.g.*, Johnson v. District of Columbia, 839 F. Supp. 2d 173, 178 (D.D.C. 2012). For variations on this interpretation, see, for example, Doe v. East Lyme Bd. of Educ., 790 F.3d 440, 452 (2d Cir. 2015) ("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.'" (quoting Mackey *ex rel.* Thomas M. v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 (2d Cir. 2004))).

[61] *Johnson*, 839 F. Supp. 2d at 177 (quoting Bd. of Educ. of Cmty. High Sch. Dist. No. 218, Cook Cnty., Ill. v. Ill. State Bd. of Educ., 103 F.3d 545, 548 (7th Cir. 1996)); *see also* White *ex rel.* White v. Ascension Par. Sch. Bd., 343 F.3d 373, 380 (5th Cir. 2003) (agreeing that "placement" means a setting rather than a particular school).

[62] *See, e.g.*, Casey K. *ex rel.* Norman K. v. St. Anne Cmty. High Sch. Dist. No. 302, 400 F.3d 508, 511 (7th Cir. 2005); Drinker by Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996).

harm or likelihood of success on the merits.[63] Instead, the inquiry into whether the provision was violated focuses on whether the action taken constitutes a change in the student's current educational placement.[64] Such a change occurs "when a fundamental change in, or elimination of, a basic element of the educational program has occurred."[65]

The question of whether an action constitutes a fundamental change in the child's placement—and thus whether stay-put is triggered—is a highly fact-specific inquiry.[66] Courts have found that movement to substantively or materially identical school settings does not constitute a fundamental change.[67] Instead, fundamental changes are those modifications "likely to affect in some significant way the child's learning experience."[68] For example, one court found the combination of reduced special education services and alterations to a student's lunch and between-classroom transitions entitled her to a stay-put injunction.[69] Because the alterations constituted a fundamental change in the structure and quality of the student's educational placement, the stay-put provision was triggered.[70]

B. The IDEA in the Context of the COVID-19 Pandemic

In March of 2020, Congress passed the Coronavirus Aid, Relief and Economic Security Act (CARES Act).[71] The CARES Act required the Secretary of Education to recommend which IDEA provisions, if any, should be waived by Congress given the exigencies of the COVID-19 pandemic. Such waivers would aim to provide educational agencies with limited flexibility to meet the IDEA's statutory and administrative requirements during the pandemic.[72] On April 27, 2020, then-Secretary Betsy DeVos submitted a report recommending limited waivers that would allow for extensions of certain evaluation timelines as well as

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[63] Joshua A. v. Rocklin Unified Sch. Dist., 559 F.3d 1036, 1037 (9th Cir. 2009); *see also* Zvi D. by Shirley D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982) ("The statute substitutes an absolute rule in favor of the status quo for the court's discretionary consideration of the factors . . . .").

[64] *See, e.g.*, Renner v. Bd. of Educ. of Pub. Sch. of Ann Arbor, 185 F.3d 635, 645 (6th Cir. 1999); G.B. v. District of Columbia, 78 F. Supp. 3d 109, 114–17 (D.D.C. 2015).

[65] Erickson v. Albuquerque Pub. Sch., 199 F.3d 1116, 1122 (10th Cir. 1999).

[66] *See* DeLeon v. Susquehanna Cmty. Sch. Dist., 747 F.2d 149, 153 (3d Cir. 1984).

[67] *See, e.g.*, D.K. v. District of Columbia, 983 F. Supp. 2d 138, 146 (D.D.C. 2013); Bd. of Educ. of Cmty. High Sch. Dist. No. 218, Cook County, Ill. v. Ill. State Bd. of Educ., 103 F.3d 545, 549 (7th Cir. 1996); AW *ex rel.* Wilson v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 683 (4th Cir. 2004).

[68] *DeLeon*, 747 F.2d at 153 ("It is clear that the 'stay put' provision does not entitle parents to the right to demand a hearing before a minor decision alters the school day of their children.").

[69] *G.B.*, 78 F. Supp. 3d at 114–17.

[70] *Id.* at 117.

[71] Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020).

[72] *Id.* at § 3511(a), (d)(4).

some flexibility in spending funds allocated by the Act.[73] Secretary DeVos recommended no waivers, however, "for any of the core tenets of the IDEA . . . most notably a free appropriate public education [ ] in the least restrictive environment."[74] The DOE reasoned that individual students' interests and needs should be prioritized over the systems' and that innovative approaches are required in place of formerly in-person services.[75]

Secretary DeVos's recommendations were not met with unanimous agreement. While disability advocates commended the decision not to waive core provisions of the IDEA, some education officials pushed for protection from IDEA liability, citing the logistical and physical challenges posed by COVID-19 to serving special education students.[76] Most recently, the DOE's Office of Special Education Programs offered more guidance on the IDEA's provision of educational services during COVID-19.[77] The guidance reminded educators, parents, and administrators to consider various options for delivering specialized instruction and related services to students with disabilities.[78] It emphasized that, regardless of the form of instructional delivery, state and local educational agencies and IEP teams "remain responsible for ensuring that a [FAPE] is provided to all children with disabilities."[79] Furthermore, if local or state decisions limit or prohibit opportunities for in-person instruction because of health or safety concerns, these parties "are not relieved of their obligation to provide a FAPE to each child with a disability under IDEA."[80]

Some were concerned that Secretary DeVos's report could lead to a flood of complaints and legal action from parents challenging their child's special education services.[81] While suits have been filed in several states, including class actions in Hawaii and Pennsylvania,[82] there

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[73] BETSY DEVOS, RECOMMENDED WAIVER AUTHORITY UNDER SECTION 3511(D)(4) OF DIVISION A OF THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT ("CARES ACT") 11–12 (Apr. 27, 2020), https://www2.ed.gov/documents/coronavirus/cares-waiver-report.pdf [https://perma.cc/HNW3-WF4A].

[74] *Id.* at 11.

[75] *Id.*

[76] *See* Corey Mitchell, *Schools Seek Cover From Special Education Lawsuits, But Advocates See Another Motive*, EDUC. WEEK (July 29, 2020), https://blogs.edweek.org/edweek/speced/2020/07/schools_seeks_cover_from_special_education_lawsuits.html [https://perma.cc/W6MP-HSMX].

[77] *See* OFF. OF SPECIAL EDUC. & REHAB. SERVS., U.S. DEP'T OF EDUC., OSEP QA 20-01 (Sept. 28, 2020), https://sites.ed.gov/idea/files/qa-provision-of-services-idea-part-b-09-28-2020.pdf [https://perma.cc/CF4M-7WPU].

[78] *Id.* at 1–2.

[79] *Id.* at 2.

[80] *Id.* (also noting that "school staff and parents are encouraged to work together to find ways to meet the needs of children with disabilities, notwithstanding the COVID-19 challenges").

[81] *See* Mitchell, *supra* note 76.

[82] *See* Suevon Lee, *Lawsuit: Special Ed Students Need Extra Help When Schools Reopen*,

has yet to be a major surge in COVID-related FAPE litigation. IDEA-related litigation may also experience an increase in challenges to students' proposed IEPs, especially as many schools continue to function remotely or in hybrid formats. As these IEP disputes arise and administrative or judicial proceedings take place, parties may invoke the IDEA's stay-put provision. As such, there is a pressing need to clarify the implications of stay-put in the context of a global pandemic.

III. THE CIRCUIT SPLIT

This Comment addresses how the IDEA's stay-put provision functions when the last agreed-upon placement is no longer available—a circumstance particularly relevant in the pandemic context. Some courts hold that the stay-put provision requires that educational authorities arrange for similar or equivalent educational placements when a student's then-current placement becomes unavailable. Other courts maintain that the provision imposes no such affirmative obligation on school authorities. Representative of this circuit split are cases out of the D.C. Circuit and the Fourth Circuit.

A. The Stay-Put Provision as Imposing an Affirmative Obligation

The D.C. Circuit has held that when a student's then-current educational placement is no longer available, the educational agency is obligated under the stay-put provision to provide the student with a similar placement during the pendency of administrative and judicial proceedings.[83] Underlying this interpretation of the stay-put provision is the understanding that a student's then-current placement need not be tied to a physical school or service provider.[84] Instead, it encompasses the services and abstract goals included in the student's IEP.[85] Thus, a then-current placement's unavailability simply means the relevant school authorities are required to locate and provide an alternative placement similar to the one no longer available.

Under this understanding of "then-current placement," a parent seeking a stay-put order needs to demonstrate a change in educational placement by identifying some fundamental change in, or elimination

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HONOLULU CIV. BEAT (Apr. 15, 2020), https://www.civilbeat.org/2020/04/lawsuit-special-ed-students-should-get-extra-help-when-schools-reopen/ [https://perma.cc/WX5A-XPXF]; Avi Wolfman-Arent, *Lawsuit Says Pa. is Failing Special Needs Kids During Coronavirus School Closures*, CHALKBEAT PHILA. (May 19, 2020), https://philadelphia.chalkbeat.org/2020/5/19/22186707/lawsuit-says-pa-is-failing-special-needs-kids-during-coronavirus-school-closures [https://perma.cc/E86C-8FJW].

[83] *See* Knight by Knight v. District of Columbia, 877 F.2d 1025, 1028 (D.C. Cir. 1989).

[84] *See, e.g.*, Johnson v. District of Columbia, 839 F. Supp. 2d 173, 177 (D.D.C. 2012).

[85] *See id.* at 179.

of, an aspect of the child's educational program.[86] Following such a showing, the parent is entitled to stay-put relief compelling the educational authority to provide an interim placement, comparable to the then-current placement, if the then-current placement becomes unavailable.[87]

B. The Stay-Put Provision as Solely Prohibitory

The Fourth Circuit, in *Wagner v. Board of Education of Montgomery County*,[88] held that the IDEA's stay-put provision imposes no affirmative obligation on school authorities to establish alternatives for students whose then-current educational placement becomes functionally unavailable.[89] The court classified the stay-put provision as "totally prohibitory in nature."[90] Noting that the provision contains no exception for cases in which the then-current educational placement becomes unavailable, the court concluded that only the student's then-current placement—whether available or not—may serve as the object of a stay-put order.[91] The court further reasoned that an order for alternative placement would remove the student from their then-current placement, an outcome which would turn the provision "on its head by transforming a tool for preserving the status quo into an implement for change."[92]

The Fourth Circuit supported this interpretation by pointing to § 1415(k), which addresses interim alternative placements for students involved in disruptive behavior or code-of-conduct violations.[93] In such cases, the provision expressly grants hearing officers the authority to place a student in an "appropriate interim alternative educational setting" if the officer finds the student's current placement is substantially likely to pose a risk of injury to the student or to others.[94] The court reasoned that, given that Congress expressly authorizes alternative educational placements in this part of the IDEA, it is telling that the stay-put provision does not expressly vest courts with the authority to order

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[86] *See* Lunceford v. D.C. Bd. of Educ., 745 F.2d 1577, 1582 (D.C. Cir. 1984).

[87] *See Knight*, 877 F.2d at 1029; *see also* Laster v. District of Columbia, 394 F. Supp. 2d 60, 64–66 (D.D.C. 2005).

[88] 335 F.3d 297 (4th Cir. 2003).

[89] *See id.* at 301.

[90] *Id.*

[91] *See id.*

[92] *Id.* at 302.

[93] *See id.*; 20 U.S.C. § 1415(k).

[94] *Wagner*, 335 F.3d at 302; 20 U.S.C. § 1415(k)(i)(2)(C)(iii).

alternate educational placements within the context of the stay-put provision.[95] In short, the *Wagner* court argued, if Congress intended to vest courts with the authority to order alternative interim placements, it knew how to and could have done so.[96] In the stay-put context, the court concluded, Congress decided not to.[97]

The court further explained that stay-put's inapplicability in these circumstances does not leave parties without remedy.[98] Parties seeking alternatives to a then-current placement that is no longer available may simply agree on a new placement with the educational agency.[99] They may also move for a preliminary injunction under § 1415(i)(2)(C)(iii) of the IDEA, which allows a court to "grant such relief as [it] determines is appropriate."[100] The court would then have the equitable power to order a change in placement if it considers such an order appropriate under the circumstances.[101] The primary difference between such a preliminary injunction and the stay-put injunction is that the former would not be automatic, and the party seeking the injunction would bear the burden of demonstrating entitlement to injunctive relief under the standards typically governing preliminary injunctions.[102]

The Fourth Circuit concluded that the availability of the non-automatic, higher-burden preliminary injunction is "consistent with the presumption created by Congress that a child should remain in the then-current educational placement."[103] The court also considered this conclusion consistent with the reality that, in some instances, keeping a student in her then-current placement could cause irreparable harm.[104] Finally, the court warned that district courts should exercise extreme caution when considering whether to grant a preliminary injunction to change a student's educational placement, "given the statute's strong presumption, expressed in [the stay-put provision], in favor of the status quo."[105]

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[95] *Wagner*, 335 F.3d at 302.

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] 20 U.S.C. § 1415(i)(2)(C)(iii).

[101] *Wagner*, 335 F.3d at 302.

[102] *Id.*

[103] *Id.* (citing Honig v. Doe, 484 U.S. 305, 328 (1988)).

[104] *Wagner*, 335 F.3d at 302.

[105] *Id.* at 303.

C. Preliminary Injunctive Relief in the COVID-19 Special Education Context

Recent cases offer little to illustrate what the preliminary injunction balancing the Fourth Circuit describes might look like in the COVID-19 context. But one recent decision out of the District of New Mexico provides an example. In *Hernandez v. Grisham*,[106] the plaintiffs—including Woodworth, the parent of a child with special needs—sought injunctive relief to prohibit the defendants from preventing in-person instruction.[107] Woodworth alleged that COVID-related school closures interrupted her daughter's IEP services, such that she had regressed and was failing her remote courses.[108] While the plaintiffs argued Woodworth's daughter's protections under the IDEA were "profoundly affected by being denied in-person education[,]"[109] defendants argued that, under DOE guidance, "there must be some flexibility as to students' FAPE due to the exceptional and ever-changing environment of the pandemic."[110]

The court addressed whether Woodworth was entitled to a temporary restraining order.[111] It concluded that the "severe learning loss" Woodworth's daughter experienced because of her school's closure constituted "an irreparable harm under the IDEA, which requires schools provide a FAPE which 'enable[s]' a child to 'progress.'"[112] This threatened irreparable harm, the court further held, outweighed possible harm to the defendants.[113] Addressing whether the temporary restraining order would be against the public interest, the court concluded that, because of children's lower risk of spreading and contracting COVID-19—and the fact that the court was not ordering a full reopening of schools—the educational agency was obligated, even during the pandemic, to provide FAPE to students with disabilities.[114]

Finally, the court concluded that Woodworth's IDEA claim was likely to succeed on the merits.[115] Comparing Woodworth's daughter's outcomes with those of the student in *Rowley*, the court concluded it

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[106] 494 F. Supp. 3d 1044 (D.N.M. 2020).

[107] *See id.* at 1059, 1083.

[108] *See id.* at 1059.

[109] *Id.* at 1084.

[110] *Id.* at 1089.

[111] *Id.* at 1148–50; *see also* Fed. R. Civ. P. 65.

[112] *Hernandez*, 494 F. Supp. 3d at 1148–49 (quoting Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017)).

[113] *Id.* at 1149 ("It will not damage Woodworth's LEA to correctly apply the Reentry Guidance, as well as the *Endrew F.* standards.").

[114] *See id.* at 1149 ("[I]n spite of the ongoing pandemic, Secretary Stewart must provide Woodworth's daughter with a 'free and appropriate public education' as the IDEA requires.").

[115] *Id.* at 1150.

was unlikely her IEP was "reasonably calculated to ensure she received educational benefits."[116] Unlike the plaintiff in *Rowley*, Woodworth's daughter was not making progress, did not have access to substantial specialized instruction or services, and was denied in-person services because her IEP misinterpreted the state's health regulations.[117] Because remote instruction prevented her daughter from making progress, the court concluded that Woodworth could likely demonstrate her daughter was not receiving a FAPE, in violation of the IDEA.[118]

IV. THE STAY-PUT PROVISION AS A SOURCE OF BOTH STABILITY AND FLEXIBILITY IN THE PANDEMIC CONTEXT

In resolving the split among circuits regarding the stay-put provision, courts should interpret "then-current placement" not as a physical space, but rather as the educational program, services, and goals of the last agreed-upon IEP. To that end, other courts should adopt the stay-put interpretation of the D.C. Circuit, imposing an affirmative obligation on school authorities to provide comparable interim placements for students whose then-current placement becomes unavailable. Such an interpretation accords with the Act's purposes as well as the Supreme Court's interpretations of the Act. Moreover, this approach addresses both the urgent need for stability that students face during IEP disputes and the flexibility that school authorities seek in the pandemic context.

A. "Then-Current Educational Placement" Should Be Construed Broadly

While courts seem to agree that "then-current educational placement" does not necessarily denote a particular school or classroom,[119] the Fourth Circuit's approach to stay-put fails to recognize the inherent—and useful—flexibility in the term. Parties seeking enforcement of the stay-put provision would benefit from courts' affirmation of a broad

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[116] *Id.* (quoting *Endrew F.*, 137 S. Ct. at 995–96).

[117] *Id.*

[118] *Hernandez*, 494 F. Supp. 3d at 1150.

[119] *See, e.g.*, Spilsbury v. District of Columbia, 307 F. Supp. 2d 22, 26–27 (D.D.C. 2004) ("[T]he IDEA clearly intends 'current educational placement' to encompass the *whole range* of services that a child needs; the term 'current educational placement' cannot be read to only indicate which physical school building a child attends."); AW *ex rel.* Wilson v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 683 (4th Cir. 2004) (concluding that educational placement "fixes the overall instructional setting in which the student receives his education, rather than the precise location of that setting"); Bd. of Educ. of Cmty. High Sch. Dist. No. 218, Cook County, Ill. v. Ill. State Bd. of Educ., 103 F.3d 545, 549 (7th Cir. 1996) ("We accept as the outer parameters of 'educational placement' that it means something more than the actual school attended by the child."); Erickson v. Albuquerque Pub. Sch., 199 F.3d 1116, 1121–22 (10th Cir. 1999) (adopting the Seventh Circuit's interpretation).

construction of the term. Indeed, the IDEA's codified purpose of providing tailored services to students with disabilities[120] supports a comprehensive understanding of the term "educational placement." This conception of the student's placement—including related developmental, supportive, and corrective services—best accords with the fact that IEPs stipulate not only particular services but also a student's functional goals for academic performance and achievement.[121]

In the pandemic context in particular, this construction provides both stability for students with disabilities and flexibility for educational agencies altering their practices during ever-changing and uncertain times. Pandemics like COVID-19 may force closures of particular schools or cancellation of particular activities. But construing educational placement more abstractly to encompass special education and related services will require school authorities to provide the student with comparable services—even if this means providing them outside the student's typical school setting. In short, even if a pandemic puts a student at risk of exclusion from a physical classroom, the school would be responsible for maintaining the essence of the educational and related services described in the student's IEP.

This is not to say that a broad construction of "educational placement" leaves educational agencies worse-off. Indeed, inherent in this broad construction is the flexibility school authorities seek in the ever-evolving pandemic context. For example, should a particular school seek to make various minor alterations in a program as necessary during pandemic-caused school closures, the educational agency would not need to worry that every change it makes would constitute a change in placement.[122] Only changes fairly categorized as "fundamental" would trigger stay-put.[123] The same could be true for those educational agencies wishing to adopt innovative measures that would amount to materially equivalent placements.[124]

To understand what an order under this stability-meets-flexibility solution might look like, a New York case offers one example. In *L.V. on behalf of J.V.2 v. New York City Department of Education*,[125] the school

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[120] *See* 20 U.S.C. § 1400(d)(1)(A).

[121] *See id.* at § 1414(d).

[122] *See, e.g.*, Concerned Parents & Citizens for the Continuing Educ. at Malcolm X (PS 79) v. N.Y.C. Bd. of Educ., 629 F.2d 751, 756 (2d Cir. 1980) (explaining that such a construction would not apply to "all the various adjustments in [an educational] program that the educational agency, in the traditional exercise of its discretion, may determine to be necessary").

[123] *See* Part II.A, *supra*, for a discussion of the fact-specific inquiry involved in determining whether a change in placement is "fundamental."

[124] *See, e.g.*, *Concerned Parents & Citizens*, 629 F.2d at 755 (describing a narrower interpretation as tending to discourage school authorities from "introducing new activities or programs or from accepting privately sponsored programs").

[125] No. 19-CV-05451, 2020 WL 4043529 (S.D.N.Y. July 8, 2020), *report and recommendation*

district failed to provide the plaintiff's son with consistent educational services.[126] Following the onset of the pandemic, her son struggled to effectively engage in remote learning, and the internet connection on his school-issued tablet device was unreliable.[127] Because her son needed physical, occupational, and speech therapies—all of which were particularly difficult to obtain given the student's small living space and unreliable Wi-Fi—the plaintiff located private providers who would be willing to provide her son with in-person services.[128]

The court noted that the New York City Department of Education failed to adequately explain how providing computer-based services could be a satisfactory substitute for a student whose placement "contemplated delivery of in-person services."[129] The court thus ordered the plaintiff to provide the names of service providers she had located who were willing to provide her son with in-person services, notwithstanding the pandemic. The educational agency was to utilize those providers or locate others itself.[130] Finally, the court ordered the agency to "conduct an . . . evaluation to assess [the student's] individual needs and the software required to deliver his required services, remotely, to the extent certain services cannot be provided in-person due to the current pandemic."[131]

The order offered both stability to the student and flexibility to the educational agency. By mandating that the plaintiff provide the New York City Department of Education with the names of the providers she had located, the court facilitated cooperation between the parties. In this, the court allowed for the provision of crucial services without which the plaintiff's son was struggling to make progress. This much-needed stability for the student was paired with flexibility for the school agency. While the agency was ordered to utilize the providers found by the plaintiff, it was also allowed to locate its own. Additionally, where the school district deemed provision of in-person services unfeasible due to the pandemic, it was allowed to provide the required services remotely. This accommodation, however, required that the agency evaluate the child's technological circumstances to ensure that, where in-person services were not possible, provision of remote services could adequately be delivered.

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adopted, No. 19 Civ. 5451, 2020 WL 4040958 (S.D.N.Y. July 17, 2020).

[126] *Id.* at *2.

[127] *Id.*

[128] *Id.*

[129] *Id.* at *5.

[130] *See id.*

[131] *Id.*

B. Problems with the Fourth Circuit's No-Affirmative-Obligation Approach

The Fourth Circuit's no-affirmative-obligation approach is problematic because it rests on a faulty comparison:[132] requiring schools to provide equivalent services when a then-current placement becomes unavailable does not "transform[ ] a tool for preserving the status quo into an implement for change."[133] Quite the opposite. A parent seeking services equivalent to those of a now-unavailable then-current placement is merely seeking the maintenance of the educational placement and services the school authorities last agreed to provide.

A comparable alternative placement will, by definition, entail different service providers or physical placement. But even the Fourth Circuit has recognized that a student's placement is a setting rather than a particular physical location.[134] Indeed, the court concluded in *AW ex rel. Wilson v. Fairfax County School Board*[135] that a student's "'educational placement' fixes the overall instructional setting in which the student receives his education, rather than the precise location of that setting."[136] In that case, the court applied this setting-not-location approach to conclude that the student's transfer to another physical location did not implicate the stay-put provision, as the court found that the new physical location was a "materially identical setting."[137]

This is a far cry from the placement changes many students with disabilities experienced because of the COVID-19 pandemic. Future pandemics could similarly displace students from their physical educational placements, but this need not mean they will be deprived of the placement defined in their IEP—even under the Fourth Circuit's understanding of "educational placement."

The Fourth Circuit's approach to stay-put, then, prematurely resolves the question of whether an affirmative obligation on school districts exists. The court concludes that only the student's then-current placement—whether available or not—may serve as the object of a stay-put order.[138] Even accepting this as true, it does not follow that school

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[132] *See, e.g.*, Wagner v. Bd. of Educ. of Montgomery Cnty., 335 F.3d 297, 302 (4th Cir. 2003).

[133] *Id.*

[134] *See* AW *ex rel.* Wilson v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 683 (4th Cir. 2004) (citing White *ex rel.* White v. Ascension Par. Sch. Bd., 343 F.3d 373, 380 (5th Cir. 2003) (describing the "better view" as the position that placement "means a setting (such as regular classes, special education classes, special schools, home instruction, or hospital or institution-based instruction)" rather than "a particular school")).

[135] 372 F.3d 674 (4th Cir. 2004).

[136] *Id.* at 683.

[137] *Id.*

[138] *See* Wagner v. Bd. of Educ. of Montgomery Cnty., 335 F.3d 297, 302 (4th Cir. 2003).

authorities have no obligation under stay-put to provide a similar placement if the last-agreed upon placement becomes unavailable during the pendency of dispute proceedings.

Put simply, if a student's then-current placement is available, and stay-put applies, that placement would be the object of the stay-put order. If a student's then-current placement is no longer available, that then-current placement would still serve as the object of stay-put. The only difference is that, in the latter situation, the educational authority would be required to ensure the student has a comparable or equivalent educational placement at which she can "stay put" during the pendency of administrative and judicial proceedings.

Ordering a similar interim placement in this context does not, as the Fourth Circuit contends, "effect a change in placement"[139] in the sense that the stay-put provision aims to prevent. For one, parents in this situation are not attempting to secure a new placement over an already existing one. Nor are they trying to obtain more services than stipulated in the last agreed-upon IEP. Rather, they are seeking restoration, in the form of a comparable placement, of the resources and services stipulated in the last agreed-upon IEP. This is not the unilateral change in placement stay-put seeks to avoid.

Indeed, a school's failure to provide a similar pendency placement is far more akin to such undesirable, unilateral change. The Supreme Court has emphasized that the stay-put provision is intended to "strip schools of the *unilateral* authority they . . . traditionally employed to exclude disabled students . . . from school."[140] The Fourth Circuit's approach directly conflicts with this purpose by concluding that, once a then-current placement becomes unavailable, educational agencies are not affirmatively obligated to provide an equivalent placement.

This is not to suggest school authorities unabashedly act in bad faith toward special education students but rather to draw attention to the fact that the "no affirmative obligation" approach can effectively amount to exclusion from school—especially in the pandemic context of widespread school closures. This is precisely the outcome the IDEA seeks to prevent.[141] A then-current placement's unavailability, thus, must trigger a requirement that educational authorities provide comparable services to the student invoking stay-put so as to not exclude

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[139] *See id.*

[140] Honig v. Doe, 484 U.S. 305, 323 (1988); *see also* Spilsbury v. District of Columbia, 307 F. Supp. 2d 22, 27 (D.D.C. 2004) ("To comply with the IDEA, [the educational agency] must ensure that the students retain both their current placements *and* their current level of services while the proposed change is litigated.").

[141] *See* 20 U.S.C. § 1400(d)(1).

her from the special education she is entitled to. This is especially imperative because parents of special needs students may lack the resources or expertise to secure an appropriate alternative placement for their child.

To the extent the Fourth Circuit relies on the language of § 1415(k) to support its no-affirmative-obligation approach,[142] § 1415(j)'s silence on the issue of ordering alternative educational placement should not be dispositive. The court in *Wagner* noted that § 1415(k)—which concerns students engaging in code-of-conduct violations or other disruptive behavior—expressly grants hearing officers the authority to place a student in an alternative educational placement.[143] The lack of a similar authorization in § 1415(j), the Fourth Circuit reasoned, meant that courts should not order alternative educational placements via a stay-put order.[144]

The court disregards, however, another aspect of the IDEA on which the statute is silent: the definition of the term "then-current placement." Nonetheless, the court construes that term exceedingly narrowly. It concludes that only a then-current placement can serve as the object of a stay-put order.[145] When that placement becomes unavailable, the educational authority is under no obligation to provide an alternative because, it contends, such an alternative would constitute a change in placement.[146] The court follows this by emphasizing the stay-put provision's "strong presumption . . . in favor of the status quo."[147]

In the context of a now-unavailable placement, however, a reading more in line with that presumption would require schools to supply an alternative placement. This is because ordering the provision of alternative services or placements undoubtedly leaves the child closer to the "status quo" than allowing the student to go without such provisions would. If "Location A" and "Service X" from an IEP are rendered unavailable because of the circumstances of the pandemic, it is clear that offering the student a comparable "Location B" and "Service Y"—whether identified by the school alone, or with the help of parents—leaves the student closer to the status quo than would depriving her of locations or services altogether.

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[142] *See Wagner*, 335 F.3d at 301.

[143] *See id.* at 302; 20 U.S.C. § 1415(k).

[144] *Wagner*, 335 F.3d at 302.

[145] *Id.* at 301.

[146] *Id.* at 302.

[147] *Id.* at 303; *see also* Tilton by Richards v. Jefferson Cnty. Bd. of Educ., 705 F.2d 800, 804 (6th Cir. 1983) (noting that the stay-put provision codifies Congress's determination that the interests of students with disabilities are "best [ ] served by imposing the status quo upon placement pending the resolution of any parental complaints prompted by a proposed change in placement").

Indeed, deference to school authorities in the IDEA context would justify courts' enforcement of an affirmative obligation to provide equivalent or comparable services.[148] When educational agencies agree to a student's IEP, they do not merely agree to particular locations or service providers. They also set measurable goals, "including academic and functional goals" for the year.[149] Progress toward these goals is precisely what the IDEA is intended to provide.[150] A no-affirmative-obligation approach unnecessarily halts that progress in cases where a student's placement becomes unavailable. Furthermore, it allows educational agencies to escape their obligation to provide the student with the educational placement they last approved and agreed to offer. It should follow from deference to the educational authority's judgments that the student is entitled to those services stipulated in her last IEP—even if they must be secured through another provider or location. In other words, deferring to school authorities' expertise should lead courts to order the provision of the placement *those expert authorities* last deemed appropriate for the child.

Finally, the alternative remedies the Fourth Circuit offers are inadequate in the context of a now-unavailable educational placement. The court first states that parties seeking alternatives to an unavailable then-current placement may "simply" agree on a new placement with the educational agency.[151] This underestimates the potential difficulty of reaching such agreements. By the time a court becomes involved in the IEP dispute, attempts at reconciliation, as well as other administrative proceedings, have already taken place.[152] The child's unique needs, paired with the educational agency's often-limited resources, are alone enough to stifle attempts at agreement. The realities of pandemic-induced shutdowns do nothing to facilitate such resolutions. In short, if reaching a compromise were so simple, the court would not have the case before it in the first place.

The Fourth Circuit's other proposed remedial measure—a preliminary injunction under § 1415(i)(2)(C), which the court calls a "safety-valve"[153]—also fails to provide an adequate solution. Rather than re-

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[148] *See, e.g.*, Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 1001 (2017) (noting that the absence of a bright-line rule defining what constitutes appropriate progress "should not be mistaken for 'an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review'" (quoting Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206 (1982))).

[149] *See* 20 U.S.C. § 1414(d)(1)(A)(i)(II).

[150] *See id.* at § 1414(d)(1)(A)(i)(IV).

[151] *Wagner*, 335 F.3d at 302.

[152] *See generally* 20 U.S.C. § 1415.

[153] *See Wagner*, 335 F.3d at 302.

quiring the court to simply consider whether the automatic stay-put injunction is applicable, the preliminary injunction requires a showing of the typical factors, including irreparable harm and likelihood of success on the merits, none of which are required to justify a stay-put order.[154] This unnecessarily complicates and prolongs a parent's efforts to simply maintain their child's educational status quo—only to reach the result a stay-put order could have provided more efficiently. All this for an order which would be temporary, lasting only during the pendency of the dispute proceedings. Furthermore, it requires that courts engage in the more delicate balancing inherent in granting preliminary injunctive relief. This makes little sense in the special education context, where courts are encouraged to exercise deference to academic experts. It is also difficult to justify, given that parents are simply seeking to reinstate the IEP services last agreed-upon by both themselves *and* the educational agency.

C. The Affirmative-Obligation Interpretation of the Stay-Put is Optimal for Both Sides

For various reasons, the affirmative-obligation approach to stay-put can provide a workable solution for both parents and educational agencies during pandemic-related IEP disputes. To begin, the affirmative-obligation interpretation provides the student with disabilities much-needed stability during the pendency of pandemic-caused IEP dispute proceedings. The approach accords with stay-put's remedial purpose as a procedural safeguard intended to maintain the student's educational status quo.

Of course, *comparable* services provided in place of *now-unavailable* ones do not amount to perfect stability. But in the context of a pandemic that has caused widespread school closures and has rendered certain services unavailable, stability must mean something different. Where the alternative is leaving the student without a comparable placement—as a no-affirmative-obligation approach would—requiring the educational agency to secure comparable placement is the best form of stability available. It is as close to maintaining the status quo as is feasible when an original placement becomes inaccessible. Courts have long recognized how ponderous the review process can be under the IDEA;[155] and leaving students, in the interim, without the placement they are entitled to contravenes the Act's purpose of allowing students with disabilities to make academic progress. The affirmative-obligation

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[154] *See, e.g.*, Zvi D. by Shirley D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982).

[155] *See, e.g.*, *id.*; Sch. Comm. of Burlington, Mass. v. Dep't of Educ. of Mass., 471 U.S. 359, 370 (1985)).

approach thus also prevents the exclusion of students with disabilities from school, a primary historical impetus behind the enactment of the IDEA and its stay-put provision.

The affirmative-obligation approach may also serve to encourage compromises between parents and educational agencies with regard to a student's placement during administrative or judicial proceedings. The stay-put provision contains an exception whereby, if the parents and educational agency agree to an alternative placement, the latter is not required to have the student remain in her then-current educational placement.[156] Thus, if an educational agency believes it will be unable to maintain the student's then-current placement—or considers it unfeasible or unsafe due to the pandemic—it will be incentivized to reach an alternative agreement with the parents in order to avoid a stay-put violation and IDEA liability. This, in turn, may benefit parents who prefer to resolve disputes regarding their child's educational placement outside of the courtroom. It could also prove beneficial to those parents unable to afford costly litigation efforts in which parents are already less likely than schools to prevail.

D. Potential Critiques of the Affirmative-Obligation Approach

Some might argue that, in the context of an unavailable then-current placement, the automatic stay-put injunction places too low a burden on parents and too high a burden on school authorities. This is not the case. Parents may not justify a stay-put motion by merely alleging a minor change in services or setting.[157] Indeed, they are required to demonstrate a *fundamental change* in the educational placement, program, or services in order to trigger the stay-put provision.[158] Meanwhile, under the affirmative-obligation approach to the stay-put provision, educational agencies are not being ordered to provide *more* services by way of the order. They are merely ordered to provide those services stipulated in the last agreed-upon IEP, even if this means securing alternative service providers.

The Department of Education's guidelines and reports have consistently emphasized an intent not to compromise the core values of the IDEA during the pandemic.[159] The IDEA has—since its inception—been considered an ambitious piece of legislation.[160] An educational agency

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[156] *See* 20 U.S.C. § 1415(j) ("[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.").

[157] *See, e.g.*, DeLeon v. Susquehanna Cmty. Sch. Dist., 747 F.2d 149, 153 (3d Cir. 1984).

[158] *See id.*

[159] *See* DEVOS, *supra* note 73.

[160] *See* Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017).

should not be permitted to reduce the quality or degree of the services it provides to students legally entitled to them, especially during the particularly daunting circumstances surrounding a global pandemic.

Another potential critique is that the very scale of a pandemic causes problems that affected *all* students, disabled and non-disabled alike. As such, the argument would proceed, school authorities cannot be faulted for the fact that students with disabilities receive fewer services. After all, the same could be said to apply to students without disabilities. But this argument fails to address the ways in which pandemic-induced transitions to remote learning impact students with disabilities more severely.[161] Students entitled to an IEP under the IDEA often require additional services related to their educational advancement, including classroom aides and various forms of therapy. As such, the IEP's elements, and their translation into practice, are integral to the child's ability to learn.

At least one court has found that across-the-board decreases in educational services did not violate the IDEA's purpose of protecting students with disabilities from being singled out and excluded. [162] But depriving or eliminating particular elements of an IEP—especially where alternative placements or services can be found elsewhere—profoundly impacts students with disabilities who are *legally entitled* to the services described in their IEP.[163]

Finally, some might argue that the IDEA demands more from parents and families—rather than educational authorities—during a pandemic. Such critics would likely note the Act's emphasis on collaboration between educational agencies and parents, as well as its findings regarding parents' roles and their responsibility for ensuring their children "have meaningful opportunities to participate in the education of their children at school *and at home*."[164]

Undoubtedly, the pandemic has demanded more from families and parents with regard to their children's education. An argument demanding greater efforts from families, however, ignores the unique,

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[161] *See, e.g.*, *DeLeon*, 747 F.2d at 153 ("The educational program of a handicapped child, particularly a severely and profoundly handicapped child . . . is very different from that of a non-handicapped child. The program may consist largely of 'related services,' such as physical, occupational, or speech therapy."); *see also Policy Brief: The Impact of COVID-19 on Children*, UNITED NATIONS (Apr. 15, 2020), https://unsdg.un.org/sites/default/files/2020-04/160420_Covid_Children_Policy_Brief.pdf [https://perma.cc/NS2S-9D9A] ("Children with disabilities are among those most dependent on face-to-face services—including health, education and protection—which have been suspended as part of social distancing and lockdown measures. They are least likely to benefit from distance learning solutions.").

[162] *See* N.D. v. Haw. Dep't of Educ., 600 F.3d 1104, 1116 (9th Cir. 2010) ("An across the board reduction of school days such as the one here does not conflict with Congress's intent of protecting disabled children from being singled out.").

[163] *See DeLeon*, 747 F.2d at 153 (3d Cir. 1984).

[164] 20 U.S.C. § 1400(c)(5)(B) (emphasis added).

specialized training and expertise educational professionals possess—which most parents lack, and which courts often defer to in resolving IDEA disputes. This argument also ignores the disproportionately high numbers of low-income, minority, or limited-English-proficient families that are served by public special education. Language barriers pose rather obvious challenges for helping one's children in an English-language-based curriculum, and low-income families may lack the capacity to support their child's academic success for other reasons. For example, many low-income parents must work outside the home, even during a pandemic, and are thus unable to facilitate at-home instruction. Others are unlikely to have the financial means to provide their children with the technology and internet access that facilitate remote instruction.

V. CONCLUSION

The COVID-19 pandemic has caused significant disruptions in schooling across the nation. Widespread school closures have sparked concerns about academic stagnation and regression. Particularly susceptible to these are students with disabilities, who rely heavily on the educational placement and services provided to them pursuant to the IDEA. Forced transitions to remote instruction left many special education students without the environments and tailored resources described in their IEPs. While there has yet to be a significant surge in COVID-related IDEA litigation—likely explained by the often-ponderous nature of administrative and judicial proceedings—the IDEA's stay-put provision may prove highly relevant in the pandemic context.

The stay-put provision protects disabled students' right to remain in their then-current educational placement for the duration of IEP dispute proceedings. Because of the ever-evolving circumstances the pandemic entails, one circumstance likely to recur is that in which the "then-current educational placement" becomes unavailable. Courts have split in their application of the stay-put provision to these situations. Some hold that the educational agency in these cases is required to provide a similar alternative placement in lieu of the now-unavailable placement. Others hold that the stay-put provision entails no such affirmative obligation.

Because the no affirmative-obligation-approach in several ways contravenes the IDEA's purpose and text, including its stay-put provision, it is unsatisfactory. The availability of preliminary injunctive relief does not justify reliance on this approach, as such relief fails to address the urgency inherent in situations involving the stay-put provision. Meanwhile, the affirmative-obligation interpretation may benefit both parents and educational agencies involved in pandemic-

related IEP disputes. It not only offers much-needed stability to students with disabilities as they face the consequences of school closures but also provides educational agencies with flexibility in providing alternative, equivalent placements for its students. It may also encourage out-of-court agreements that help school authorities avoid IDEA liability, thus benefitting parents by circumventing the need for costly, time-consuming litigation necessary to secure their child's educational placement and services.