No. 16-1285

In The
Supreme Court of the United States

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

Petitioners,

v.

SEATTLE SCHOOL DISTRICT,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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The School District argues that this case is moot, because the underlying due process complaint was dismissed. But the District does not deny that N.E.'s parents incurred educational expenses while their due process complaint was pending – expenses for which the parents will be entitled to reimbursement if we succeed in overturning the Ninth Circuit's definition of "then-current educational placement." 20 U.S.C. § 1415(j). Accordingly, this is very much a live controversy. The District also contends that there is no conflict in the circuits. But the Ninth Circuit is the *only* circuit that has held that a placement that a child has never attended, to which the parents have consistently objected, can be the child's "then-current educational placement." This Court's intervention is necessary to resolve the conflict, and to correct the Ninth Circuit's manifestly erroneous interpretation of the IDEA's stay-put requirement.

A. There is a Live Controversy

The School District contends that this case is moot. It notes that the right to a stay-put placement extends only through the conclusion of due process proceedings, and the ALJ dismissed the underlying due process case on November 23, 2016. BIO 10-11. But there nonetheless remains a live controversy.

As we noted in our petition (Pet. 10 n.3), N.E.'s parents spent a substantial sum on educational expenses while the due process proceeding was pending. Should the parents ultimately prevail here, they would be

entitled to reimbursement of those expenses. A long line of cases in the Ninth Circuit (where this case arose) and elsewhere has held that the right to reimbursement for expenses incurred during the pendency of proceedings is independent of the merits of the underlying due process claim. Even if parents ultimately lose their due process case, they are entitled to recover the cost of educational services provided while the school district was violating the stay-put provision. See *Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036 (9th Cir. 2009) (allowing reimbursement for expenses incurred during stay-put period even though underlying free appropriate public education (FAPE) claim rejected); Pet 10-11 n.3 (citing cases).

The School District states that N.E.'s parents did not raise a "claim" for reimbursement below. BIO 11-12. Of course, the claim here is for violation of the IDEA's stay-put provision. Reimbursement is simply a form of relief for that claim. See 10 Charles Alan Wright, et al., Fed. Prac. & Proc. Civ. § 2664 (3d ed., through Apr. 2017 update) (noting that "the demand for relief does not constitute part of the pleader's claim for relief"). What the School District means is that the prayer for relief in the district-court complaint did not specifically ask for reimbursement. BIO 11-12.

But the Federal Rules of Civil Procedure could not be clearer: A plaintiff does not waive entitlement to a particular form of relief simply by failing to ask specifically for it. Rule 54(c) explicitly provides that a nondefault judgment "should grant the relief to which each party is entitled, even if the party has not demanded

that relief in its pleadings." Under that rule, a court cannot dismiss a meritorious claim "because the complaint seeks one remedy rather than another plainly appropriate one." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 65 (1978).

That is particularly true in a case like this one. When N.E.'s parents filed their stay-put complaint in the district court, they were seeking immediate preventive relief to require the School District to serve their child in his "then-current educational placement." 20 U.S.C. § 1415(j). Preventive relief is the basic goal of the stay-put provision, which "functions, in essence, as an automatic preliminary injunction." *Drinker by Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864 (3d Cir. 1996). Had the request for immediate relief been granted, there would have been no practical need to obtain reimbursement, because N.E. would have been served in the stay-put placement for virtually all of the due process proceedings. Application of the plain text of Rule 54(c) is thus especially appropriate here.[1]

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[1] As N.E.'s parents explained in their request for reconsideration of the district court's mootness order – a request that remains pending – the district court completely disregarded Rule 54(c) as well as on-point Ninth Circuit case law applying that rule. See *Western Dist. Council of Lumber Prod. & Indus. Workers v. Louisiana Pac. Corp.*, 892 F.2d 1412, 1416 (9th Cir. 1989) (although complaint sought only immediate relief to prevent the voting of proxies at a shareholder meeting, the case did not become moot once that relief was denied and the voting went forward; under Rule 54(c) the court could grant retrospective relief to undo the election even though the plaintiff did not specifically request it in the complaint). See generally D. Ct. Dkt. 34.

None of the cases cited by the School District undermines this point. In those cases, the problem was not simply that the parents failed to specifically request reimbursement in their complaint. Rather, in each case the parents took affirmative steps to waive a request for reimbursement. In *Brown v. Bartholomew Consol. Sch. Corp.*, 442 F.3d 588, 597 (7th Cir. 2006), for example, the parents had settled the stay-put issues before filing a district-court complaint seeking review on the merits of their FAPE claim. Their complaint requested merely that the same stay-put program be continued in effect, without at all suggesting that the school district had violated its terms. As the Seventh Circuit explained, "[b]y requesting that the 'preexisting pendency/stay-put program be continued in full force and effect,' the Browns' complaint actually suggests that they were amenable to the status quo and needed no additional reimbursement." *Id.* at 598. When, in their appellate reply brief, the parents argued for the first time in federal court that the district had violated the stay-put obligation (thus entitling them to reimbursement), the Seventh Circuit held that the claim had been raised too late. See *id.* That is a far cry from this case, where the question whether the School District has complied with the stay-put obligation has been front and center from the beginning.

Similarly, in *Lillbask ex rel. Mauclaire v. State of Conn. Dep't of Educ.*, 397 F.3d 77, 90-91 (2d Cir. 2005), the mother took several steps to abandon any request for reimbursement, before attempting to revive that request at oral argument in the court of appeals. She

specifically deleted a request for reimbursement from her third and fourth amended complaints after specifically including such a request in her previous three complaints. See *id.* at 90. And although her request for reimbursement at oral argument in 2003 related to the district's alleged violations of the stay-put provision in the 1997-1998 school year, she had filed a motion in 2001 arguing that the stay-put injunction should be modified to prevent future harm to her son; that motion "did not contend that Lindsey had already sustained an injury requiring defendants to provide compensatory education." *Id.* In *J.T. ex rel. J.T. v. Newark Bd. of Educ.*, 564 F. App'x 677, 681 (3d Cir. 2014), too, the child "raised a claim for compensatory education when she initiated this action administratively but then expressly waived her right to that remedy." No such waiver occurred here.[2]

There thus remains a live controversy regarding whether the School District complied with the stay-put provision. If this Court reverses the Ninth Circuit's decision, N.E.'s parents will be entitled to obtain

[2] In *Thomas R.W., By & Through Pamela R. v. Massachusetts Dep't of Educ.*, 130 F.3d 477, 480 (1st Cir. 1997), the parents did not argue that they were entitled to reimbursement until their appellate reply brief. Under ordinary appellate practice, the court deemed the argument waived. See *id.* ("Arguments raised for the first time in a reply brief filed in this court come too late to be preserved on appeal."). That holding has no application to this case. Here, the question of the proper remedy for the stay-put violation was never in issue below; there was thus no reason to raise it.

reimbursement for the educational expenses they incurred during the stay-put period.

B. There is a Widespread Circuit Conflict

The School District asserts that every circuit to have decided the question has held that "a child's stay-put placement was the one described in his most recently implemented IEP." BIO 23. That is incorrect. As we showed in our petition (at 12-21), the Second, Third, Sixth, Seventh, Ninth, and Tenth Circuits have applied a variety of different standards.

More to the point, the School District describes the circuit-court cases at a level of generality that elides the issue here. In every case in which a court held that the most recently implemented IEP established the stay-put placement, the child had actually attended that placement, with the parents' agreement, before the dispute arose. This case is very different. N.E. *never* attended a self-contained class, his parents consistently objected to it, and they filed a due process challenge to the IEP containing the proposed placement before that class was scheduled to begin. See Pet. 5-7. But the Ninth Circuit held that the parents' acquiescence to a *different* placement for the final three weeks of N.E.'s third-grade year – the individual class listed at "stage one" of the IEP – meant that the self-contained class was the stay-put placement, because that class was listed as "stage two" of the same IEP. The School District cannot point to a single case from any other circuit that has held that a setting the child has never

attended – one to which the parents have consistently objected – constitutes the stay-put placement. To the contrary, cases from other circuits have repeatedly held that a setting is the "then-current educational placement" under 20 U.S.C. § 1415(j) only if it is the last *agreed-upon* setting that the child actually attended. See Pet. 12-21.

Start, as the School District does, with the Sixth Circuit – because it is the Sixth Circuit's decision in *N.W. ex rel. J.W. v. Boone Cty. Bd. of Educ.*, 763 F.3d 611 (6th Cir. 2014), that most squarely conflicts with the Ninth Circuit's ruling here. In *N.W.*, the court held that the stay-put placement was "the last agreed-upon school that [the child] attended." *Id.* at 618. The court specifically relied on a Department of Education regulation that required both school-district and parental involvement in determining a "placement." See *id.* at 617 ("Moreover, '[t]he placement decision . . . [i]s made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.'") (ellipses in *N.W.*; quoting 34 C.F.R. § 300.116(a)). And the court refused to define the stay-put placement as one that the child had "never attended," because such a conclusion would be "logically dubious." *Id.* at 618. The Sixth Circuit specifically held that the stay-put setting was not the one in which the parents had unilaterally placed their child, nor was it the one that the school district had proposed but the parents rejected and the child had never attended. See *id.* The court held that the stay-put setting was instead the last school that

the child had attended with the explicit agreement of both the parents and the district. See *id.*

Respondent characterizes these portions of the *N.W.* ruling as "dicta." BIO 15 n.9, 16. That is incorrect. The question of which setting constituted the child's stay-put placement was directly before the court and disputed between the parties; the court's resolution of that question set the parties' legal obligations toward each other. Respondent also suggests that the Sixth Circuit would have agreed with the Ninth Circuit on the facts of this case, because the parents' acquiescence in the individual class at the end of N.E.'s third-grade year constituted agreement to the IEP in which the self-contained class also appeared. BIO 16-17. But the Sixth Circuit's *N.W.* decision specifically held that agreement to a placement that is explicitly designed to be temporary does not create a new stay-put setting. See *N.W.*, 763 F.3d at 618. The School District's attempts to deny the conflict are unavailing.

Turn to the Third Circuit. That court has held that "a change in the child's educational placement 'should be given an expansive reading' " and that the stay-put placement should be based on "the IEP of the child that is 'actually functioning when the stay-put is invoked.' " *D.M. v. New Jersey Dep't of Educ.*, 801 F.3d 205, 215 (3d Cir. 2015) (quoting, *inter alia*, *Drinker*, 78 F.3d at 867).

The School District suggests that the Third Circuit will not inquire into whether a placement in an IEP is "actually functioning" or has been agreed to by the

parents; in the District's view, that court will look only to whether the placement appears in the IEP. BIO 17-18. The District goes so far as to accuse us of "misrepresent[ing]" Third Circuit law by omitting the sentence from the 1996 *Drinker* decision that, it says, establishes the point. BIO 17. That accusation is a bit rich, as the School District entirely fails to cite the Third Circuit's post-*Drinker* decision in *D.M.*, 801 F.3d at 215, which described the stay-put standard by reference to "the IEP of the child that is 'actually functioning.'" Nor does the District cite the Third Circuit's post-*Drinker* decision in *J.F. v. Byram Twp. Bd. of Educ.*, 629 F. App'x 235 (3d Cir. 2015), which held that when a student changes school districts within a school year, the new district must hew "as closely as possible" to the "last agreed-upon IEP." *Id.* at 237-38 (internal quotation marks omitted).[3] As we showed in our petition (Pet. 13-15), the post-*Drinker* decision in *L.Y. ex rel. J.Y. v. Bayonne Bd. of Educ.*, 384 F. App'x 58, 62 (3d Cir. 2010), demonstrates that the Third Circuit would not consider an IEP placement to be "actually functioning" where the child had never attended that placement and the parties had never agreed to it. The Third Circuit's cases thus conflict with the Ninth Circuit's decision here.

[3] The Seventh Circuit, too, has held that "the last agreed-upon IEP" provides the stay-put baseline. *John M. v. Bd. of Educ. of Evanston Twp. High Sch. Dist. 202*, 502 F.3d 708, 715 (7th Cir. 2007). Respondents do not demonstrate the contrary. Cf. BIO 23 n.13.

As for the Second and Tenth Circuits, the School District asserts that those courts adopted the most-recently-implemented-IEP standard. BIO 20-23. But both circuits have explicitly stated that such a standard applies only in some cases, and neither circuit has explained precisely when the standard applies. See *Doe v. East Lyme Bd. of Educ.*, 790 F.3d 440, 452 (2d Cir. 2015), cert. denied, 136 S. Ct. 2022 (2016); *Smith v. Cheyenne Mountain Sch. Dist. 12*, 652 F. App'x 697, 700 (10th Cir. 2016). And the Second Circuit has specifically held that a placement set forth in an IEP has not been "implemented," and does not create the stay-put baseline, if the parents never agreed to it and the child never attended it. See *Dervishi v. Stamford Bd. of Educ.*, 653 F. App'x 55, 58 (2d Cir. 2016). The Ninth Circuit's decision conflicts with that holding. See also *Smith*, 652 F. App'x at 700-701 (setting that child attended and that was listed in most recent IEP was stay-put setting).

C. The Ninth Circuit's Holding is Incorrect

The Ninth Circuit held that N.E.'s "then-current educational placement" under 20 U.S.C. § 1415(j) was a self-contained class – a placement to which his parents had consistently objected, and one that he had never attended. As we showed in our petition (Pet. 21-27), that holding contradicts the plain meaning of the word "current" as well as the acknowledged purpose of the IDEA's stay-put provision.

The School District argues that our interpretation would lock a student into an elementary school setting if a dispute arose during the summer before middle school began. BIO 25-26. Not so. The lower courts have recognized that an "educational placement" generally refers not to the specific school a student attends but to the type of setting in which the student is served. When a student moves to a higher level of education, the stay-put obligation requires the district to "produce as closely as possible the overall educational experience enjoyed by the child under his previous IEP." *John M.*, 502 F.3d at 715. Thus, if a student is served in the general classroom in elementary school, it would not violate the stay-put requirement to place that student in the general middle-school classroom. But it *would* violate that requirement for a school district to use the occasion of the student's enrollment in middle school to place that student in a self-contained class.

The School District insinuates that its decision to place N.E. in a self-contained class was not unilateral. BIO 26-28. The District asserts that "Petitioners never filed a due process hearing request to challenge the May 2015 IEP." BIO 27. That is mere wordplay. Petitioners *did* file a due process challenge to the self-contained class, well within the IDEA's statute of limitations, and before N.E. ever attended it. See Pet. 25 & n.5. Although the immediate target of the due process challenge was the IEP proposed by the Seattle School District in September rather than the IEP proposed by the Bellevue School District in May, see BIO 26 n.14, the crucial point is that N.E.'s parents

consistently objected to the self-contained class, from the May IEP meeting forward. Pet. 5-7.

In the end, the School District appears to argue that an IEP proposed by school officials creates the "then-current educational placement" even when the parents: (a) consistently objected to that placement; (b) filed a due process complaint to challenge that placement; and (c) never allowed their child to attend that placement. BIO 28-29. Despite the District's protestations, that argument, which the Ninth Circuit accepted, blesses exactly the sort of "unilateral" school action that the stay-put provision was designed to prevent. *Honig v. Doe*, 484 U.S. 305, 327 (1988).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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