No. 16-1285

In the Supreme Court of the United States

N. E., By and Through His Parents, C. E., et ux., *et al.*,
Petitioners,

v.

SEATTLE SCHOOL DISTRICT,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The "stay-put" provision of the Individuals with Disabilities Education Act ("IDEA") entitles a child to remain in the "then-current educational placement" during the pendency of any proceedings under the Act. 20 U.S.C. § 1415(j). The questions presented by the Petition are:

1. Whether Petitioners' stay-put claim is moot because their underlying IDEA action was dismissed with prejudice.

2. Under the law interpreting the "then-current educational placement" to be the one described in a child's last-implemented individualized education program ("IEP"), whether a child's last-implemented and unchallenged multi-stage IEP, as a whole, is the stay-put placement?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

Petitioners N.E., by and through his parents C.E. and P.E., C.E., and P.E. (collectively, "Petitioners") seek review of the Ninth Circuit's application of the IDEA's "stay-put" provision. *See* 20 U.S.C. § 1415(j). That provision requires a child remain in the "then-current educational placement" during the pendency of any proceedings under the statute.

After Petitioners filed an IDEA due process hearing request and a motion for a stay-put placement, the administrative law judge applied settled law to determine N.E.'s stay-put placement was the placement described in his last-implemented IEP. Petitioners filed an interlocutory appeal of that decision in the United States District Court for the Western District of Washington, and later in the Court of Appeals for the Ninth Circuit. The Ninth Circuit held that the placement described in a "partially implemented, multi-stage IEP, as a whole, is a student's then-current educational placement." Petitioners' Appendix ("Pet. App.") 9.

After the Ninth Circuit ruling, Petitioners' underlying due process case was dismissed with prejudice. Respondent's Appendix ("Resp. App.") 1–2. Following that dismissal, Petitioners' interlocutory appeal to the District Court for the Western District of Washington was dismissed as moot. *Id.* at 5–21.

STATEMENT OF THE CASE

I. Legal framework

"The IDEA is a comprehensive educational scheme, conferring on disabled students a substantive right to public education." *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1300 (9th Cir. 1992) (citing *Honig v. Doe*, 484 U.S. 305, 310 (1988)). One of the primary purposes of the IDEA is "to ensure all children with disabilities have available to them a free appropriate public education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A).

School districts subject to the IDEA's requirements are obligated to identify, locate, and evaluate children residing within their boundaries who are in potential need of special education and related services. 34 C.F.R. § 300.111(a)(1)(i). This obligation is not limited to the beginning and end of the school year—school districts identify, evaluate, and place children with qualifying disabilities throughout the school year and develop IEPs for those children on an annual basis. *See* 34 C.F.R. § 300.116(b). Thus, children may be deemed eligible for special education services at any time during a school year, and they commonly have annual IEPs that span parts of two school years. Depending on the grade level of the child, the IEP may also cover a period during which they rise from one school level to another (e.g., elementary to middle school). As a result, a single IEP may include multiple stages to reflect the different educational programing the child will receive over portions of two school years. Similarly, a single IEP may include multiple stages to address a child's

planned transition from one program to another during a single school year. *See* Pet. App. 9 (noting previous cases "assume a single IEP may contain several phases.").

An IEP is a written statement developed by the child's IEP team—a group comprised of at least a regular education teacher, a special education teacher, a school district representative, and the child's parents. 20 U.S.C. § 1414(d)(1)(A)(i); 20 U.S.C. § 1414(d)(1)(B). The IEP must include, *inter alia*, a statement of the child's present levels of performance, a statement of measurable annual goals, a statement of the child's special education and related services, and an explanation of the extent to which the child will not participate with nondisabled children in the general education setting. *See* 20 U.S.C. § 1414(d)(1)(A)(i). The IEP is the "primary vehicle" for providing each child a free appropriate public education ("FAPE"). *Fry v. Napoleon Cmty. Schs.*, 137 S.Ct. 743, 749 (2017) (quoting *Honig*, 484 U.S. at 311).

A school district has the ultimate duty to ensure that a child's IEP is appropriate. *See* 20 U.S.C. § 1401(9) (local education agency must afford a qualifying child "special education and related services that . . . are provided in conformity with the [IEP] . . . ."). If the school-based members of the IEP team and the parents cannot reach a consensus, the school district must determine the appropriate contents of the IEP and provide the parents with a Prior Written Notice ("PWN") describing that determination. *Doe v. E. Lyme Bd. of Educ.* 790 F.3d 440, 449 (2d Cir. 2015) *cert. denied,* 136 S. Ct. 2022 (2016), *reh'g denied,* 136 S. Ct. 2546 (2016) ("[T]he duty to issue an IEP remains

with the educational agency, and a parent's right of participation is not a right to 'veto' the agency's proposed IEP. Parental dissatisfaction is channeled through administrative and (if necessary) judicial proceedings."); *Letter to Winston*, 213 IDELR 102, p. 3 (OSEP 1987); *Letter to Richards*, 55 IDELR 107 (OSEP 2010). Parents who disagree with the school district's decision may seek a remedy by requesting a due process hearing. *Id.*; *see also Fry*, 137 S.Ct. at 749 (When parents and school representatives do not agree on the development of an IEP, a dissatisfied parent may file a complaint as to any matter concerning the provision of a FAPE).

If parents request a due process hearing to challenge a proposed IEP, the IDEA's "stay-put" provision requires that the child remain in the then-current educational placement during the pendency of the due process action, unless the school district and parents agree otherwise. 20 U.S.C. § 1415(j). The United States Courts of Appeals that have addressed the meaning of the term "then-current educational placement" generally agree that the last-implemented IEP in place when an action is filed describes the child's then-current educational placement. *See* Reasons for Denying the Writ, *infra*.

II. Factual background

N.E. is a child with a disability who qualifies for special education under the IDEA. Pet. App. 2. During the 2014–15 school year, he attended Bellevue School District ("BSD") in Washington State, and until the latter part of that school year spent most of his time in general education classes. *Id.* at 3. The last IEP which

reflected that arrangement was adopted in December 2014 (the "December 2014 IEP"). *Id.*

Soon after the start of that school year, N.E.'s behaviors deteriorated. C.A. Excerpts of Record ("Excerpts") 152. He exhibited behaviors that included screaming, spitting, hitting, kicking, taking off his clothes, and running into other students or hurting them. *Id.* BSD completed a functional behavioral assessment—a tool designed to identify behaviors that interfere with a student's educational progress and the cause of those behaviors—for N.E. in the spring of 2015. *Id.* The assessment indicated N.E. exhibited unpredictable behaviors as many as three to four times per day. *Id.* His behaviors were in the "severe" range one to two times per week, and he was unable to remain in the general education setting during those times. *Id.*

BSD reevaluated[1] N.E. in May 2015. *Id.* at 153. The evaluation team determined his needs changed significantly since the beginning of the 2014–15 school year. *Id.* N.E.'s escalating behaviors resulted in him being emergency expelled[2] from school prior to when his IEP team, including Petitioners and their legal counsel, met on May 26, 2015 to discuss his reevaluation and develop a new IEP. Excerpts 235. Due to the change in his behaviors and needs, the school-based members of the IEP team proposed providing

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[1] A local education agency must reevaluate a child with a disability at least once every three years. 20 U.S.C. § 1414(a)(2)(B)(ii).

[2] A student may be temporarily removed from school by a school district in emergency situations. 20 U.S.C. § 1415(k)(1)(B); *accord* Wash. Rev. Code 28A.600.015; Wash. Admin. Code 392-400-295.

N.E. his educational program in a self-contained, highly structured therapeutic program (the "self-contained class") for the 2015–16 school year. *Id.* Petitioners disagreed with this proposal. Pet. App. 3.

The IEP team also discussed N.E.'s program for the remainder of the 2014–15 school year and determined he would finish the year in a program where most of his day was spent in an isolated educational setting with a teacher and paraeducator, but no other students (the "individual class"). *Id*. The team discussed that the individual class would assist with N.E.'s transition to the self-contained class at the beginning of the next school year. Excerpts 278.

After the May 26, 2015 IEP meeting, BSD finalized the two-stage IEP developed at the meeting (the "May 2015 IEP") and provided it to Petitioners. Pet. App. 4; Excerpts 278. Under that IEP, N.E. would attend the individual class for the remainder of the 2014–15 school year, then the self-contained class for the 2015–16 school year. Pet. App. at 3–4. The IEP described this multi-stage educational program through the use of two matrices, which reflected the services provided during each segment. Excerpts 275. The PWN embedded in the May 2015 IEP states:

> The District is proposing the [self-contained class] beginning in the 2015–2016 school year. [The self-contained class] is a therapeutic, structured program designed to support students in increasing their social, emotional, and behavioral skills and competencies. The district agreed to arrange a parent visit of the [self-contained class] during this transition period. To assist with [N.E.'s] transition to the

> [self-contained class] at the beginning of the year, the team discussed that for the remainder of [the 2014–15] school year, [N.E.] would [attend the individual class] in an interim setting at another elementary school.

Excerpts 278.

Although Petitioners expressed disagreement with the IEP at the May 26, 2015 meeting, at no time did they request a due process hearing to challenge its appropriateness. Pet. App. 4. Consequently, the IEP was implemented[3] and N.E. attended the individual class through the end of the school year on June 22, 2015. *Id.*

Petitioners moved to Seattle in the summer of 2015 and contacted the Seattle School District (the "District") to enroll N.E. for the 2015–16 school year. *Id.* In August 2015, Petitioners requested the District educate him in an individual class setting similar to the first stage of the implemented May 2015 IEP. *Id*. at 4–5. The District convened an IEP team meeting on September 3, 2015 with Petitioners and their legal counsel to determine an appropriate program for N.E. Excerpts 197. The District proposed a program similar to the self-contained class identified in the second stage of the May 2015 IEP and provided Petitioners a PWN to that effect (the "September 2015 Program"). Pet. App. 5; Excerpts 195.

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[3] Petitioners inaccurately refer to the May 2015 IEP as the "proposed May 2015 IEP", indicating it was only proposed but not implemented. *See*, *e.g.*, Petition 7–9. There is no dispute the May 2015 IEP was implemented from May 27, 2015 until June 22, 2015. Pet. App. 4; Excerpts 8.

III. Procedural History

Petitioners disagreed with the proposed September 2015 Program and filed a due process hearing request to challenge it on September 9, 2015. Pet. App. 5. They also filed a stay-put motion which argued N.E. was entitled to be placed in the general education classes described in the December 2014 IEP during the pendency of their challenge to the September 2015 Program. *Id.* The District asserted that the self-contained class described in the second stage of the May 2015 IEP (the stage for the 2015–16 school year) was N.E.'s then-current educational placement. *Id.*

The administrative law judge ruled in the District's favor and found the self-contained class described in the May 2015 IEP was N.E.'s stay-put placement. *Id.* Petitioners filed an interlocutory appeal to the United States District Court for the Western District of Washington, and filed a motion for a temporary restraining order and preliminary injunction to place N.E. in the placement described in his December 2014 IEP pending the outcome of the due process action. *Id.* at 5–6. The District Court denied Petitioners' motion based on their failure to establish a likelihood of success on the merits. *Id.* at 6. Petitioners filed a motion for reconsideration, which the court also denied. Excerpts 11–13.

Petitioners appealed to the Ninth Circuit Court of Appeals. Pet. App. 6. Although their appeal was based on the District Court's denial of their motion for a temporary restraining order and preliminary injunction, the Ninth Circuit ruled on the merits of Petitioners' stay-put claim. *See* Pet. App. 6. Applying well-settled law, the majority looked to the last-

implemented IEP—the May 2015 IEP—for a description of N.E.'s then-current educational placement. That IEP described N.E.'s placement for the 2015–16 school year as the self-contained class, which the majority found to be his stay-put placement. Pet. App. 11. The majority noted the December 2014 IEP was superseded by the implementation of the May 2015 IEP, and concluded that the placement described in a "partially implemented, multi-stage IEP, as a whole, is a student's then-current educational placement." *Id.* at 9–10. The court rejected Petitioners' contention that a multi-stage IEP should be viewed as containing multiple discrete educational placements and that any unrealized stage cannot serve as stay-put. *Id.* at 9.

While Petitioners' interlocutory appeal was pending before the Ninth Circuit, they sought a continuance of the underlying due process action. *See* Resp. App. 22–39. The administrative law judge granted their request over the District's objection based on their stipulation that they would, *inter alia*, dismiss their due process action with prejudice if the Ninth Circuit issued a decision against them on the merits of their stay-put claim. *Id*. After the Ninth Circuit did so, the administrative law judge dismissed with prejudice the due process action underlying this appeal.[4] *Id.* at 1–2. The time period for Petitioners to appeal the dismissal of the administrative action expired on or about February 21, 2017. *See* 20 U.S.C. 1415(i)(2)(B).

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[4] Petitioners appealed the dismissal to the United States District Court for the Western District of Washington, but subsequently voluntarily dismissed it. *See N.E. v. Seattle Sch. Dist.*, No. 2:16-cv-01910 (W.D. Wash. 2016) (Dkt. Nos. 1, 7).

Petitioners then filed a motion for panel rehearing and rehearing *en banc* in the Ninth Circuit, which the court denied. Pet. App. 47. The District thereafter moved to dismiss the Petitioners' interlocutory appeal pending before the United States District Court for the Western District of Washington. Resp. App. 5. On May 16, 2017, the District Court dismissed with prejudice the Petitioners' appeal as moot. *Id.* at 5–21.[5]

REASONS FOR DENYING THE WRIT

I. Petitioners' appeal is moot.

"A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.' " *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 133 S. Ct. 721, 726–27 (2013) (quoting *Murphy v. Hunt,* 455 U.S. 478, 481 (1982)).

Petitioners' underlying due process action was dismissed with prejudice pursuant to their own stipulation on November 23, 2016. Resp. App. 1–2; *see also* Resp. App. 22–39 (describing Petitioners' stipulation). Dismissal of the underlying due process action removed N.E.'s entitlement to a stay-put placement. *See Johnson ex rel. Johnson v. Special Educ. Hearing Office, State of Cal.*, 287 F.3d 1176, 1179 (9th Cir. 2002) (the stay-put provision "requires the educational agency to maintain a disabled child's educational program until any placement dispute

[5] Petitioners filed a motion for reconsideration on May 22, 2017, which is pending as of the filing of this opposition. Dist. Ct. Dkt. No. 34.

between the agency and the child's parents is resolved."). Because N.E. is no longer entitled to a stay-put placement, there is no live controversy between the parties—a ruling by this Court on the stay-put issue would be purely advisory and could not grant Petitioners any effectual relief. *Already, LLC*, 568 U.S. at 133 ("No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.' ") (quoting *Alvarez v. Smith*, 558 U.S. 87, 93 (2009)); *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 132 S. Ct. 2277, 2287 (2012) (case is moot when it is impossible for a court to grant any effectual relief to the prevailing party).

Petitioners argue their case is not moot because they "have a live claim seeking reimbursement for educational expenses incurred during the stay-put period."[6] Petition 10, n. 3. Petitioners have no such claim. They did not assert one in their underlying stay-put motion nor in this interlocutory appeal. Excerpts 96–100 (Petitioners' stay-put motion in the due process action); Resp. App. 40–47 (Petitioners' District Court complaint on their interlocutory appeal); Excerpts 76–87 (Petitioners' motion for temporary restraining order and preliminary injunction in their District Court interlocutory appeal); Resp. App. 5–21 (District Court's dismissal of Petitioners' interlocutory appeal as moot).

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[6] The District Court explicitly rejected this argument when it dismissed Petitioners' interlocutory appeal as moot: "[Petitioners] have not alleged a claim for compensatory costs . . . ." Resp. App. 14.

In addition, their underlying due process action was dismissed with prejudice. Resp. App. 1–2. Courts have repeatedly held that a claim for compensatory education benefits or reimbursement will not save a case from mootness where plaintiffs fail to properly plead the claim.[7] *See*, *e.g.*, *Brown v. Bartholomew Consol. Sch. Corp.*, 442 F.3d 588, 598 (7th Cir. 2006) (claim for compensatory education deemed waived and unable to "supply the residual live controversy necessary to prevent [plaintiffs'] entire claim from being moot" where the plaintiffs failed to properly raise it); *see also Lillbask ex rel. Mauclaire v. State of Conn. Dep't of Educ.*, 397 F.3d 77, 91 (2d Cir. 2005); *Thomas R.W., By & Through Pamela R. v. Massachusetts Dep't of Educ.*, 130 F.3d 477, 480–81 (1st Cir. 1997); *J.T. ex rel. J.T. v. Newark Bd. of Educ.*, 564 F. App'x 677, 681 (3d Cir. 2014).

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[7] A claim for general relief is insufficient to create a claim for damages. *See*, *e.g., Lillbask ex rel. Mauclaire v. State of Conn. Dep't of Educ.*, 397 F.3d 77, 90 (2d Cir. 2005) (concluding that "a general claim for 'other such relief as the Court deems appropriate' " does not assert a compensatory education claim); *Thomas R.W., By & Through Pamela R. v. Mass. Dep't of Educ.*, 130 F.3d 477, 480 (1st Cir. 1997) ("Nor does the general prayer for 'such further relief as this court deems just and proper[ ]' operate to preserve a request for damages in order to avoid mootness . . . .") (internal citation omitted). Similarly, a claim for attorneys' fees and costs does not prevent mootness. *See Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990) ("This interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim").

II. The Circuits are not split regarding the interpretation of then-current educational placement.

At issue is the determination of N.E.'s then-current educational placement at the time Petitioners filed their due process hearing request. 20 U.S.C. § 1415(j) ("[D]uring the pendency of any proceedings conducted pursuant to this section . . . the child shall remain in the then-current educational placement of the child . . . ."). The Ninth Circuit interprets the term "then-current educational placement" as "typically the placement described in the child's most recently implemented IEP." *Johnson ex rel. Johnson*, 287 F.3d at 1180; *accord, K.D. ex rel. v. Dep't of Educ., State of Haw.,* 665 F.3d 1110, 1118 (9th Cir. 2011)*; N.D. ex rel. parents acting as guardians ad litem v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1111 (9th Cir. 2010); *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 902 (9th Cir. 2009).

Petitioners assert there is a split among the Second, Third, Sixth, Seventh, Ninth, and Tenth Circuits in the interpretation of the term then-current educational placement. However, a review of the chronological development of the law in this area reveals there is no split.

A. The Sixth Circuit interpretation focuses on the placement described in the child's last-implemented IEP.

The Sixth Circuit first interpreted "then-current educational placement" in the 1990 case of *Thomas v. Cincinnati Board of Education*, where the court concluded the term refers to:

> [T]he operative placement actually functioning at the time the dispute first arises. If an IEP has been implemented, then that program's placement will be the one subject to the stayput provision. And where, as here, the dispute arises before any IEP has been implemented, the 'current educational placement' will be the operative placement under which the child is actually receiving instruction at the time the dispute arises.

918 F.2d 618, 626 (6th Cir. 1990). Thus, if a child has a previously implemented IEP, the then-current educational placement is the placement described in that IEP. *Id*. If no IEP was previously implemented,[8] the then-current educational placement is the placement under which the child was actually receiving instruction at the time the due process hearing request was filed. *Id*.

Petitioners incorrectly assert the Sixth Circuit "abandoned" this interpretation and redefined then-current educational placement as simply " 'the last agreed-upon' " placement. Petition 15–16 (quoting *N.W. ex rel. J.W. v. Boone Cty. Bd. of Educ.*, 763 F.3d 611, 618 (6th Cir. 2014)).

Boone did not abandon the Sixth Circuit's long-held interpretation of then-current educational placement. Rather, it modified its interpretation by determining a placement may only be a then-current educational placement if it was previously approved by the school

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[8] For example, a child who is first being qualified for special education services when the dispute arises would not have a previous IEP.

district. *Boone,* 763 F.3d at 617 ("the school district must, in some fashion, approve of the placement decision. . . ."). This ruling left unchanged *Thomas's* conclusion that "[i]f an IEP has been implemented, then that program's placement will be the one subject to the stayput provision." *Thomas*, 918 F.2d at 626. After *Boone*, the Sixth Circuit interpretation of then-current educational placement may be summarized by adding the following emphasized language to *Thomas's* interpretation:

> [Then-current educational placement] refers to the operative placement actually functioning at the time the dispute first arises [***so long as the school district approved of that placement***]. If an IEP has been implemented, then that program's placement will be the one subject to the stayput provision. And where, as here, the dispute arises before any IEP has been implemented, the "current educational placement" will be the operative placement under which the child is actually receiving instruction at the time the dispute arises [***so long as the school district approved of that placement***].

Id. (emphasis added).[9]

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[9] Petitioners also argue *Boone* "emphasized that the stay-put placement must be one that the student had actually attended in the past". Petition 16. In dicta, the court noted "it is logically dubious to stay in a school that you have never attended." *Boone,* 763 F.3d at 618. The court did not announce a rule in this regard and did not contemplate whether its dicta had any applicability to situations where a multi-stage IEP had been implemented.

Boone did not establish a new rule that the then-current educational placement is the last agreed upon placement the child attended, nor did it hold that parental agreement is required for a placement to become stay-put. The court observed in dicta that the stay-put placement in that case was a placement to which the parents agreed. *Boone*, 763 F.3d at 618. To the extent Petitioners argue parents must agree to a placement for it to become stay-put, their argument is contrary to the IDEA's framework, which ultimately places the obligation on the school district to determine an appropriate placement when consensus with the parents cannot be reached. *See*, *e.g.*, *E. Lyme Bd. of Educ.* 790 F.3d at 449 ("[T]he duty to issue an IEP remains with the educational agency, and a parent's right of participation is not a right to 'veto' the agency's proposed IEP. Parental dissatisfaction is channeled through administrative and (if necessary) judicial proceedings."); *Letter to Winston*, 213 IDELR 102, p. 3 (OSEP 1987). A stay-put rule requiring parental agreement would foster subsequent litigation over whether and to what extent an IEP was agreed to, and would lead to absurd results. For example, if parents agreed to their child's initial kindergarten placement and then disagreed with, but did not challenge years of subsequent IEPs, the kindergarten placement would be stay-put when the parents eventually filed a request for due process hearing.

The Sixth Circuit interpretation remains substantively the same as the Ninth Circuit; the child's stay-put placement is as described in the last-implemented IEP. *Compare L.M.*, 556 F.3d at 902–03 ("then-current educational placement" is "the placement set forth in the child's last implemented

IEP.") *with Thomas*, 918 F.2d at 626 ("If an IEP has been implemented, then that program's placement will be the one subject to the stayput provision.").

B. The Third Circuit interpretation focuses on the placement described in the child's last-implemented IEP.

In the 1996 case of *Drinker by Drinker v. Colonial School District*, the Third Circuit quoted with approval the *Thomas* court's interpretation of then-current educational placement and stated "the standard in our cases has been the same." 78 F.3d 859, 867 (3d Cir. 1996). Petitioners misrepresent the Third Circuit standard by omitting the following emphasized language in their recitation of the *Drinker* rule:

> [Then-current educational placement] refers to the operative placement actually functioning at the time the dispute first arises. ***If an IEP has been implemented, then that program's placement will be the one subject to the stayput provision.*** And where ... the dispute arises before any IEP has been implemented, the 'current educational placement' will be the operative placement under which the child is actually receiving instruction at the time the dispute arises.

Compare Petition 13 *with Drinker*, 78 F.3d at 867 (quoting *Thomas,* 918 F.2d at 625–26). The phrase omitted by Petitioners is precisely the language applicable to the facts of this case, and it shows the Third Circuit interpretation of then-current educational placement, like in the Sixth Circuit, is

substantively the same as in the Ninth Circuit.[10] *Compare Drinker*, 78 F.3d at 867 ("If an IEP has been implemented, then that program's placement will be the one subject to the stayput provision.") *with L.M.*, 556 F.3d at 902–03 (the placement subject to the stay-put provision is "the placement set forth in the child's last implemented IEP.").[11]

Petitioners cite an unpublished case in support of their argument that the Third Circuit approach differs from the Ninth Circuit. Petition 13–14 (citing *L.Y. ex rel. J.Y. v. Bayonne Bd. of Educ.*, 384 F. App'x 58 (3d Cir. 2010)). This case adds nothing to their argument and is consistent with the Ninth Circuit interpretation. In *L.Y.*, a charter school offered a student an IEP in June 2009 that included a single stage for the 2009–10 school year. *Id*. at 59. The student's resident school district disagreed with the IEP and filed a due process challenge in the summer of 2009 before the 2009–10 school year began. *Id*. at 60. Citing its interpretation that " '[i]f an IEP has been implemented, then that program's placement will be the one subject to the stay put provision,' " the Third Circuit held that the June 2009 IEP could not describe the student's stay-put placement because the student never received

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[10] Petitioners similarly omitted the following emphasized language when they quote *Thomas*: "[then-current educational placement] refers to the operative placement actually functioning at the time the dispute first arises. ***If an IEP has been implemented, then that program's placement will be the one subject to the stayput provision. . . ."*** *Compare* Petition 15 *with Thomas*, 918 F.2d at 626. The language they omitted controls in this case.

[11] It is noteworthy that the Ninth Circuit cited *Drinker* as consistent with its definition of stay-put. *See L.M.*, 556 F.3d at 902–03.

instruction under the IEP and it therefore had not "been implemented in any true sense." *Id*. at 61–62 (quoting *Drinker* at 867).

Petitioners argue that the May 2015 IEP was not the then-current placement because it " 'had not been implemented in any true sense.' " Petition 15 (quoting *L.Y.*, 384 F. App'x at 61 (3d Cir. 2010)). They ignore the undisputed fact that the May 2015 IEP was implemented at the end of the 2014–15 school year. Pet. App. 4; Excerpts 8. This distinction is determinative: the IEP at issue in *L.Y.* was not the child's last-implemented IEP, whereas in the present case, the May 2015 IEP was N.E.'s last-implemented IEP. *L.Y.* is not contrary to the Ninth Circuit view of stay-put; it is simply factually inapposite to this case.

C. The Ninth Circuit interpretation focuses on the placement described in the child's last-implemented IEP.

Like the Third Circuit, the Ninth Circuit relied on *Thomas* to interpret the meaning of then-current educational placement. *Johnson ex rel. Johnson*, 287 F.3d at 1180. The Ninth Circuit stated "[f]or the purpose of § 1415(j)'s 'stay put' provision, the current educational placement is typically the placement described in the child's most recently implemented IEP." *Id.* (citing *Thomas,* 918 F.2d at 625). In the 2009 *L.M.* case, the Ninth Circuit highlighted the conformance of its interpretation with that of the Sixth and Third Circuits through a series of parenthetical citations:

> Courts have generally interpreted [then-current educational placement] to mean the placement

> set forth in the child's last implemented IEP. *Johnson v. Special Educ. Hearing Office,* 287 F.3d 1176, 1180 (9th Cir.2002) ("typically the placement described in the child's most recently implemented IEP"); *Thomas v. Cincinnati Bd. of Educ.,* 918 F.2d 618, 625 (6th Cir.1990) ("[the placement at the time of] the previously implemented IEP"); *Drinker v. Colonial Sch. Dist.,* 78 F.3d 859, 867 (3d Cir.1996) ("the dispositive factor in deciding a child's 'current educational placement' should be the [IEP] ... actually functioning when the 'stay put' is invoked.") (internal quotation marks and citation omitted).

L.M., 556 F.3d at 902–03 (some alterations in original). The Ninth Circuit reaffirmed this interpretation in subsequent cases. *See, e.g.*, *N.D.*, 600 F.3d at 1114 ("We have interpreted current educational placement to mean the placement set forth in the child's last implemented IEP.") (quotation marks and citations omitted); *K.D.*, 665 F.3d at 1118 (same).

D. The Second Circuit relies on the interpretation from the Third, Sixth, and Ninth Circuits to determine a child's then-current educational placement.

In 2004, the Second Circuit recognized the similar interpretations of then-current educational placement of the Ninth, Third, and Sixth Circuits:

> Although the IDEA does not define, and our Circuit has not previously considered the meaning of, the term "then-current educational

> placement," our sister circuits have interpreted the term to mean: (1) "typically the placement described in the child's most recently implemented IEP," *Johnson v. Special Educ. Hearing Office,* 287 F.3d 1176, 1180 (9th Cir. 2002); (2) "the operative placement actually functioning at the time ... when the stay put provision of the IDEA was invoked," *Drinker v. Colonial Sch. Dist.,* 78 F.3d 859, 867 (3d Cir.1996); and (3) "[the placement at the time of] the previously implemented IEP," *Thomas v. Cincinnati Bd. of Educ.,* 918 F.2d 618, 625 (6th Cir.1990).

Mackey ex rel. Thomas M. v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 (2d Cir. 2004), *supplemented sub nom. Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist.*, 112 F. App'x 89 (2d Cir. 2004) (alterations in original).[12] It recently applied this approach. *E. Lyme Bd. of Educ.*, 790 F.3d at 452 (affirming a lower court's determination that a child's then-current educational placement was the placement identified in his "most recently implemented IEP," which was "also 'the operative placement actually functioning at the time'" his parents invoked stay-put); *see Doe v. E. Lyme B. of Educ.*, No. 3:11-cv-291, 2012 WL 4344301, *2 (D. Conn. Sept. 21, 2012).

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[12] The portion of the Third Circuit rule quoted by *Mackey* that defines the then-current educational placement as the "the operative placement actually functioning at the time" is only applicable when there is no IEP in existence at the time a due process action is filed. *See Drinker*, 78 F.3d at 867 (citing *Thomas*, 918 F.2d at 625–26).

Petitioners cite unpublished authority to argue that the Ninth Circuit would have reached a different result if it had followed the Second Circuit approach. Petition 19–20 (citing *Dervishi v. Stamford Bd. of Educ.*, 653 F. App'x 55 (2d Cir. 2016)). In *Dervishi*, the Second Circuit again recognized the Ninth, Third, and Sixth Circuit interpretations of then-current educational placement and held that an IEP that was never implemented or agreed to could not function as a student's stay-put placement. *Dervishi*, 653 F. App'x at 58. *Dervishi* offers nothing to the debate here, where it is undisputed that the May 2015 IEP was implemented and Petitioners never filed a due process hearing request to challenge it. Pet. App. 4.

E. The Tenth Circuit approach centers on the placement described in the last-implemented IEP.

The authority cited by Petitioners from the Tenth Circuit does not support their claim of a circuit split. Although the Tenth Circuit has not articulated a definitive interpretation of then-current educational placement, it focuses its stay-put analysis on the placement described in the last-implemented IEP.

In *Erickson v. Albuquerque Public Schools*, the parties did not dispute what placement was "then-current" for purposes of stay-put. *See* 199 F.3d 1116 (10th Cir. 1999). The last-implemented IEP provided for occupational therapy services, and the issue before the court was whether the child was entitled to a specific modality of occupational therapy in his stay-put placement. *Id.* at 1122. The Tenth Circuit concluded that the IEP did not call for a particular modality, and the school district was therefore not

required to provide it as part of his stay-put placement. *Id.*

The Tenth Circuit again focused on the placement described in the last-implemented IEP in an unpublished case cited by Petitioners. Petition 19–20 (citing *Smith v. Cheyenne Mountain Sch. Dist.*, 652 F. App'x 697, 699 (10th Cir. 2016)). Consistent with the Second, Third, Sixth, and Ninth Circuits, the court determined a child's stay-put placement was the one described in his most recently implemented IEP. *Smith*, 652 F. App'x at 700–701.

F. The Seventh Circuit has not interpreted the meaning of then-current educational placement.

Although the Seventh Circuit has addressed cases that raised stay-put issues, those cases did not involve disputes regarding what placement was "then current" under 20 U.S.C. § 1415(j). *See*, *e.g.*, *John M. v. Bd. of Educ. of Evanston Twp. High Sch. Dist. 202*, 502 F.3d 708, 713 (7th Cir. 2007) (addressing how closely a new school must approximate the services in a transfer student's previous IEP from another school)[13]; *Casey K. ex rel. Norman K. v. St. Anne Cmty. High Sch. Dist. No. 302*, 400 F.3d 508, 511 (7th Cir. 2005) (addressing whether a receiving school district became responsible for funding the otherwise undisputed stay-put

[13] In *John M.*, the court referred to the student's undisputed stay-put placement interchangeably as the placement described in the "last agreed-upon," "former," and "previous" IEP. *Compare* 502 F.3d at 711 *with* 502 F.3d at 714–15. As in *Boone*, the *John M.* court did not define what constitutes an agreement nor hold parental agreement is required for a placement to become stay-put. *See John M.*, 502 F.3d at 708.

placement of a transfer student); *Bd. of Educ. of Cmty. High Sch. Dist. No. 218, Cook Cty., Ill. v. Illinois State Bd. of Educ.*, 103 F.3d 545, 549 (7th Cir. 1996) (addressing whether a particular residential program was capable of implementing a student's undisputed stay-put placement). Because the Seventh Circuit has not interpreted the term then-current educational placement, it does not create the circuit split alleged by Petitioners.

III. The Ninth Circuit application of the stay-put provision was correct in this case.

The United States Circuit Courts of Appeals interpret then-current educational placement to be the program described in a child's last-implemented IEP, if there is one. The Ninth Circuit applied this interpretation to determine N.E.'s then-current educational placement was the one described in the second stage of the May 2015 IEP while the Petitioners challenged the September 2015 Program. Pet. App. 9–10. That IEP was the last-implemented IEP at the time they filed their due process action on September 9, 2015. *Id*.

In front of the Ninth Circuit, Petitioners argued that any unrealized portion of a multi-stage IEP cannot serve as a stay-put placement. Petition 8. They offered no supporting precedent for this position and the Ninth Circuit appropriately rejected it.

> [Petitioners]' reading of the statute would allow students and their families to challenge the second half of any two-stage IEP when the transition occurs during a school break and would permit repeated challenges at every stage

> of a multi-stage IEP. We do not think that Congress intended that result.

Id. at 9. The Ninth Circuit is the only court to address stay-put in the context of a multi-stage IEP. Petitioners' claim that other Circuits would have reached different conclusions is speculative and contrary to those Circuits' interpretation of then-current educational placement.

The Ninth Circuit also appropriately rejected Petitioners' argument that its ruling would upset the "status quo" the stay-put provision is designed to protect:

> First, and most importantly, the IEP was implemented, and stage two was always the intended setting in which N.E. would begin the 2015–16 school year, effective September 1 (before N.E.'s parents requested a due process hearing). Second, we commonly think of education as forward-looking; we refer to a child who has completed fourth grade and is about to enter fifth grade as a "rising fifth grader." The status quo at the time of the hearing request was the anticipated entry into the self-contained program. Stage two of the May 2015 IEP, therefore, was N.E.'s stay-put placement.

Id. at 11.

Applying Petitioners' desired outcome to common situations faced by families and schools highlights the impracticality of their argument that the filing of a due process action locks the child's stay-put placement to a prior stage of a multi-stage IEP. For example, a rising middle school student would be locked into the

elementary school stage of a multi-stage IEP if their parents filed a due process hearing request in the summer before they matriculated to middle school. Interpreting the stay-put rule to hold a student in a placement that is not in conformity with the most recently implemented IEP is contrary to the IDEA's core purpose of providing FAPE, which requires that a school district afford a child "special education and related services that . . . are provided in conformity with the individualized education program . . . ." 20 U.S.C. § 1401(9).

Petitioners misapply the holding of *Honig*, and disregard the structure of the IDEA when they argue the Ninth Circuit decision sanctions the "unilateral" action the stay-put provision was designed to prevent.[14] Petition 22 (citing *Honig*, 484 U.S. at 327). In *Honig*, without the involvement of parents, a school district indefinitely suspended students from school for behavior related to their disabilities. *Honig*, 484 U.S. at 305. This Court held the stay-put provision prohibits school authorities from unilaterally excluding disabled children from the classroom. *Id.* at 306. *Honig* is not implicated because no such unilateral action occurred in this case. The May 2015 IEP was developed at an IEP meeting attended by the parents and their legal

[14] Petitioners also confuse what they are challenging in this appeal when they argue: "Defining the 'current' placement according to an IEP to which the parents objected would give sanction to precisely the sort of 'unilateral' school district action—action taken 'over the parents' objection—that the stay-put provision was designed to prevent." Petition 22. It is undisputed Petitioners never challenged to the May 2015 IEP—their due process action and subsequent appeals relate to the District's proposed September 2015 Program. Pet. App. 4.

counsel. Excerpts 235. Petitioners received the finalized IEP and were given notice of its implementation. Pet. App. 4. The IEP was thereafter implemented from May 28, 2015 through June 22, 2015 without objection. *Id.* Petitioners never filed a due process action to challenge the May 2015 IEP. *Id.* Their choice to not challenge that IEP does not convert its development or implementation into an inappropriate unilateral school district action.

The United States Department of Education's Office of Special Education Programs has explained:

> The right of the parents is to dispute any proposed change in program or placement for their child in a due process hearing, but the parents must exercise this right if they want to stop the district from exercising its responsibility in the way the district believes is appropriate. Simply withholding parent consent for a proposed change in program or placement will not act to enjoin implementation of that change.

Letter to Winston, 213 IDELR 102, p. 3 (OSEP 1987); *see also Fry*, 137 S.Ct. at 749 (When parents and school representatives do not agree on the development of an IEP, a dissatisfied parent may file a complaint as to any matter concerning the provision of a FAPE).

Petitioners' reliance on the dictionary definition of "current" ignores decades of legal precedent that interprets then-current educational placement to refer to the placement described in the child's last-implemented IEP. Petition 21. In addition, the Ninth Circuit correctly explained that such a literal approach

was unworkable in this case because N.E. was on summer vacation at the time Petitioners filed their due process hearing request: "during the hiatus between school years, it is artificial to refer to remaining in a then-current placement; literally, there is none." *Id.* at 7. Petitioners' approach also contradicts their argument—they claim the December 2014 IEP is N.E.'s then-current educational placement even though it was superseded by the implementation of the May 2015 IEP, an undisputed fact they repeatedly ignore.[15]

Petitioners similarly disregard precedent and the Department of Education's regulations when they argue that a child's IEP should not be referenced when determining educational placement. Petition 24. The IDEA's regulations state the opposite: "The child's placement - (1) Is determined at least annually; (2) *Is based on the child's IEP*; and (3) Is as close as possible to the child's home." 34 CFR § 300.116(b) (emphasis added); *see also N.D.*, 600 F.3d at 1114 ("We have interpreted current educational placement to mean the placement set forth in the child's last implemented IEP."); *Doe*, 790 F.3d at 452 ("To determine a child's 'then-current educational placement,' a court typically

[15] Petitioners also ignore the first stage of the May 2015 IEP when they incorrectly assert that the self-contained class in the second stage was the most restrictive placement contained in any of N.E.'s IEPs. Petition 26. During the first stage, N.E. was educated in the individual class, which consisted of N.E., a paraeducator, a teacher, and no other students. Pet. App. 3; *see also* Excerpts 153–54. A placement in which a child is completely segregated from all other children is one of the most restrictive placements in a public school. *See* 20 U.S.C. § 1412(a)(5)(A). The second stage, which provided for N.E. to be educated with his peers, is inarguably less restrictive than the first stage.

looks to: (1) 'the placement described in the child's most recently implemented IEP' ") (internal quotations and citations omitted); *Drinker*, 78 F.3d at 867 (" 'If an IEP has been implemented, then that program's placement will be the one subject to the stayput provision.' ") (quoting *Thomas* 918 F.2d at 626).

CONCLUSION

The petition for a writ of certiorari should be denied.

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APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX 1

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE SUPERINTENDENT OF PUBLIC INSTRUCTION

OSPI CAUSE NO. 2015-SE-0083

OAH DOCKET NO. 09-2015-OSPI-00187

[Filed November 23, 2016]

IN THE MATTER OF	)
	)
	)
	)
SEATTLE SCHOOL DISTRICT	)
	)

ORDER OF DISMISSAL

A prehearing telephone conference was held before Administrative Law Judge (ALJ) Michelle C. Mentzer on November 23, 2016, pursuant to notice emailed to the parties. The Parents of the Student whose education is at issue[1] were represented by Lara Hruska, attorney at law. The Seattle School District (District) was represented by David Hokit, attorney at law, and Andrea Schiers, District senior assistant general counsel.

[1] To ensure confidentiality, names of parents and students are not used.

Based upon the statements of the parties and the pleadings and documents on file herein, the following Order is entered:

1. The District orally moved that the due process hearing be dismissed with prejudice based on: the Order on Parents' Motion to Continue Due Process Hearing (April 8, 2016); the Order on Reconsideration of the Order on Parents' Motion to Continue Due Process Hearing (April 14, 2016); and the decision in *N.E. v. Seattle School District*, No. 15-35910 (9th Cir. November 17, 2016) (2016 U.S. App. LEXIS 20612).

2. The Parents opposed that motion for the reasons set forth in their letter brief of November 23, 2016, and for the reasons stated during oral argument.

3. For the reasons stated in the ALJ's oral ruling on November 23, 2016, the District's motion for dismissal with prejudice is GRANTED. It is hereby ordered that the due process hearing is dismissed with prejudice.

Signed at Seattle, Washington on November 23, 2016.

s/_____
Michelle C. Mentzer
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

Pursuant to 20 U.S.C 1415(i)(2), any party aggrieved by this final decision may appeal by filing a civil action in a state superior court or federal district court of the United States. The civil action must be brought within ninety (90) days after the ALJ has mailed the final decision to the parties. The civil action must be filed and served upon all parties of record in the manner prescribed by the applicable local state or federal rules of civil procedure. A copy of the civil action must be provided to OSPI, Administrative Resource Services.

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein. s/ initials

Parents 3002 NE 89th Street Seattle, WA 98115	Andrea Schiers, Assistant General Counsel Seattle Public Schools PO Box 34165, MS 32-151 Seattle, WA 98124-1165
Lara Hruska, Attorney at Law Cedar Law PLLC 2200 Sixth Ave., #1250 Seattle, WA 98122	David Hokit, Attorney at Law Curran Law Firm PO Box 140 Kent, WA 98035

cc: Administrative Resource Services, OSPI
Matthew D. Wacker, Senior ALJ, OAH/OSPI Caseload Coordinator

APPENDIX 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C15-1659JLR

[Filed May 16, 2017]

N.E., et al.,	)
Plaintiffs,	)
	)
v.	)
	)
SEATTLE SCHOOL DISTRICT,	)
	)
Defendant.	)
	)

ORDER GRANTING MOTION TO DISMISS

I. INTRODUCTION

Before the court is Defendant Seattle School District's ("the District") motion to dismiss this case as moot. (Mot. (Dkt. # 27).) Plaintiffs N.E. and his parents C.E. and P.E. ("the Parents") (collectively, "Plaintiffs") oppose the District's motion. (Resp. (Dkt. # 29).) The court has considered the District's motion, the parties' submissions in support of and opposition to the motion, the relevant portions of the record, and the applicable

law. Being fully advised,[1] the court grants the District's motion for the reasons set forth below.

II. BACKGROUND

On October 16, 2015, Plaintiffs filed this interlocutory appeal from an administrative law judge's ("ALJ") decision regarding N.E.'s "stay-put" placement under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.* (*See* Compl. (Dkt. # 1) ¶ 1; 1st Hruska Decl. (Dkt. # 3) ¶ 7, Ex. 7 ("ALJ Decision")).)

N.E. is a male child who attended third grade at Newport Heights Elementary School in the Bellevue School District ("the BSD") for most of the 2014-15 school year. (*See* ALJ Decision at 2.) During most of that year and in the prior years, N.E.'s individual education plan ("IEP") placed him in general education classes with paraeducator support ("general classes") for the majority of the school day. (*See id.*; 1st C.E. Decl. (Dkt. # 4) ¶ 1.) The most recent IEP reflecting that arrangement dates from December 2014 ("the December 2014 IEP"). (*See* ALJ Decision at 2; 1st C.E. Decl. ¶ 2, Ex. 1 ("12/14 IEP").)

N.E. had significant difficulties during the 2014-15 school year. (*See* ALJ Decision at 2; 1st C.E. Decl. ¶ 3.) Certain BSD officials and teachers, the Parents, and their respective counsel attended an IEP meeting on May 26, 2015. (*See* ALJ Decision at 2; 1st Hruska Decl. ¶ 5, Ex. 4 at 10-13 ("Landwehr Decl.") ¶ 5.) At the

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[1] No party requests oral argument, and the court determines that oral argument would not be helpful to its disposition of the District's motion. *See* Local Rules W.D. Wash. LCR 7(b)(4).

meeting, the BSD proposed a new IEP that would place N.E. in specialized classes for students with behavioral and emotional disorders ("separate classes"). (*See* Landwehr Decl. ¶ 5; 1st C.E. Decl. ¶ 3.) The Parents objected to this proposal. (*See* ALJ Decision at 2; 1st C.E. Decl. ¶ 3; Landwehr Decl. ¶ 5.)

At the meeting, BSD officials and the Parents also discussed where to place N.E. for the remainder of the school year. (*See* ALJ Decision at 2.) When the meeting occurred, N.E. was subject to an emergency expulsion, and the Parents were uncomfortable with N.E. returning to Newport Heights Elementary. (*See id.*; Landwehr Decl. ¶ 6.) The BSD and the Parents agreed that N.E. would finish the final weeks of the 2014-15 school year at a different school in the district. (*See* ALJ Decision at 2.) At that school, N.E. would spend the majority of the day in a one-on-two setting that included N.E., a teacher, and a paraeducator, but no other students ("individual classes"). (*See id.*; 1st C.E. Decl. ¶ 4; Landwehr Decl. ¶ 6.)

One day later, on May 27, 2015, the BSD produced a final IEP for N.E. ("the May 2015 IEP"). (*See* ALJ Decision at 2; 1st C.E. Decl. ¶ 5, Ex. 2 ("5/15 IEP").) The May 2015 IEP had two stages: (1) N.E. would finish the end of the 2014-15 school year in the agreed-upon individual classes; and (2) N.E. would be placed in separate classes at the start of the 2015-16 school year. (*See* ALJ Decision at 2-3; 1st C.E. Decl. ¶ 5; 5/15 IEP at 15-16.) The Parents did not file an administrative due process challenge to the May 2015 IEP and instead allowed N.E. to continue attending the

individual classes until the school year ended on June 22, 2015. (*See* ALJ Decision at 2-3; 1st C.E. Decl. ¶ 7.)

The Parents and N.E. moved to Seattle in the summer of 2015 and contacted the District to enroll N.E. for the 2015-16 school year. (*See* ALJ Decision at 3; 1st C.E. Decl. ¶ 8; Landwehr Decl. ¶ 7.) The Parents requested that the District place N.E. in classes similar to the individual classes N.E. had attended during the final part of the prior school year. (*See* ALJ Decision at 3; Landwehr Decl. ¶ 7.) The District reviewed N.E.'s records and decided to place him in separate classes similar to those contemplated in the second part of the BSD's May 2015 IEP. (*See* ALJ Decision at 3; 1st C.E. Decl. ¶ 8; Landwehr Decl. ¶ 7.)

The Parents objected and filed an administrative due process challenge to the District's decision. (*See* ALJ Decision at 3; Hruska Decl. ¶ 2, Ex. 1 ("DP Hearing Req.")); 20 U.S.C. § 1415(f). At the same time, the Parents filed a motion for "stay put," arguing that N.E.'s stay-put placement is his placement in general classes as described in the December 2014 IEP. (*See* ALJ Decision at 3; DP Hearing Req. at 3; 1st Hruska Decl. ¶ 3, Ex. 2 ("Stay-Put Mot.")); 20 U.S.C. § 1415(j) (stating that pending a due process challenge, "the child shall remain in the then-current educational placement of the child"). The District contended that the separate classes described in the May 2015 IEP represented the appropriate stay-put placement for N.E. (*See* ALJ Decision at 3; 1st Hruska Decl. ¶¶ 4-6, Exs. 3-5.) Following testimony and oral argument on the stay-put motion, the ALJ sided with the District and concluded that separate classes were N.E.'s stay-put placement. (*See* ALJ Decision at 1, 4.)

Plaintiffs' interlocutory appeal seeks reversal of the ALJ's stay-put decision and a declaration that the District is required to place N.E. in a general education setting consistent with his December 2014 IEP pending the outcome of Plaintiffs' due process challenge to the District's intended placement. (Compl. at 5.) Upon filing this appeal, Plaintiffs sought a temporary restraining order ("TRO") and preliminary injunction ordering the District to place N.E. in general classes pending the due process challenge. (*See* Compl.; TRO Mot. (Dkt. # 2); 10/27/15 Order (Dkt. # 11) at 5.) The court denied Plaintiffs' motion because the court found no support for Plaintiffs' theory that the court could "ignore any unrealized stages of a multi-stage IEP or treat such stages as distinct IEPs." (10/27/15 Order at 9.)

Plaintiffs appealed the court's decision to the Ninth Circuit Court of Appeals. (*See* Not. of Appeal (Dkt. # 15).) On November 11, 2016, the Ninth Circuit affirmed the court's denial of the TRO and preliminary injunction. *See N.E. by and through C.E. & P.E. v. Seattle Sch. Dist.*, 842 F.3d 1093, 1098 (9th Cir. 2016) (holding that "[s]tage two of the May 2015 IEP . . . was N.E.'s stay-put placement"). On February 3, 2017, the Ninth Circuit issued its formal mandate, returning the case to this court's jurisdiction. (Mandate (Dkt. # 23).)

The parties took no further action in this matter after the Ninth Circuit issued its mandate until the court ordered Plaintiffs to show cause why the case should not be dismissed as moot. (3/9/17 OSC (Dkt. # 24) at 5.) In Plaintiffs' response to the court, they contended that an actual controversy regarding N.E's educational placement continues to exist. (Resp. to

OSC (Dkt. # 25) at 2.) Plaintiffs did not inform the court of the status of their underlying due process claim. (*See generally id.*)

When the court ordered Plaintiffs to show cause, the court also afforded the District an opportunity to respond (3/9/17 OSC at 5), but the District did not file a response at that time (*see* Dkt.). Rather, on March 30, 2017, the District moved to dismiss this matter as moot. (*See generally* Mot.) Plaintiffs oppose the District's motion (Resp. at 1), which the court now addresses.

III. ANALYSIS

A. Legal Standard

Mootness is often characterized "as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Cook Inlet Treaty Tribes v. Shalala,* 166 F.3d 986, 989 (9th Cir. 1999) (internal quotation marks omitted). Mootness is a jurisdictional issue, so any party can raise the issue at any time. *See United States v. Strong*, 489 F.3d 1055, 1059 (9th Cir. 2007); *R.F. by Frankel v. Delano Union Sch. Dist.*, --- F. Supp. 3d ----, 2016 WL 7338597, at *3 (E.D. Cal. Dec. 19, 2016). "[F]ederal courts have no jurisdiction to hear a case that is moot, that is, where no actual or live controversy exists." *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003). A case becomes moot when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome" of the case. *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1274 (9th Cir. 1998); *see also Chafin v. Chafin*,

568 U.S. 165, ---, 133 S. Ct. 1017, 1023 (2013) ("[A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." (internal quotation marks omitted)); *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 836 (9th Cir. 2014) ("[A] federal court loses its jurisdiction to reach the merits of a claim when the court can no longer effectively remedy a present controversy between the parties."). The party asserting that a case has become moot bears a "heavy burden of establishing that there is no effective relief remaining for a court to provide." *Strong*, 489 F.3d at 1059 (internal quotation marks omitted).

B. The District's Motion

The District argues that this case is moot because the "only issue in this interlocutory appeal is the Student's stay-put placement during the pendency of the Parents' underlying administrative due process case," which the ALJ "dismissed with prejudice on November 23, 2016." (MTD at 1.) The District argues that "[a]ny disputes over the District's future proposed placements fall outside the scope of the underlying due process matter, which related to the special education services offered by the District for the 2015-2016 school year." (*Id.* at 5.) Plaintiffs argue that there continues to be an actual controversy because they "seek compensatory education and reimbursement for costs associated with their stay-put claim" and on April 26, 2017, filed a petition for writ of certiorari in the United States Supreme Court. (Resp. at 3; *see also* 2d Hruska Decl. (Dkt. # 31) ¶ 2, Ex. 1 ("Pet.").) They further argue that the stay-put placement issue is capable of repetition yet evades review. (*Id.* at 4.)

"The IDEA is a comprehensive educational scheme, conferring on disabled students a substantive right to public education." *Hoeft v. Tucson Unified Sch. Dist.,* 967 F.2d 1298, 1300 (9th Cir. 1992) (citing *Honig v. Doe,* 484 U.S. 305, 310 (1988)). The IDEA ensures that "all children with disabilities have available to them a free appropriate public education ["FAPE"] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). To provide a FAPE in compliance with the IDEA, a state educational agency receiving federal funds must evaluate a student, determine whether that student is eligible for special education and services, conduct and implement an IEP, and determine an appropriate educational placement for the student. 20 U.S.C. § 1414.

If a parent disagrees with a school district's proposed IEP, the parent may challenge that IEP by requesting an administrative due process hearing. *See* 20 U.S.C. § 1415(b)(6), (f)(1)(A). A parent may also enroll the child in a private program, and, upon establishing that the public school failed to provide a FAPE, seek reimbursement. *See* 20 U.S.C. § 1412(a)(10)(C)(ii). Most relevant to this case, the IDEA's stay-put provision permits a child to stay in the child's current educational placement during the pendency of any administrative or judicial proceeding regarding a due process complaint. *See* 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a), (d); *Verhoeven v. Brunswick Sch. Comm.*, 207 F.3d 1, 6 (1st Cir. 1999) (Because Section 1415 "makes available both administrative proceedings and judicial actions to appeal the administrative determination, subsection

1415(j) provides for 'stay put' placement throughout both the administrative and judicial proceedings challenging a placement decision.").

On September 9, 2015, the Parents filed an administrative due process action challenging N.E.'s IEP for the 2015-16 school year. (DP Hearing Req. at 1.) While that action was pending, N.E. was entitled to stay-put placement. 20 U.S.C. § 1415(j); (ALJ Decision.) In this interlocutory appeal of the ALJ's stay-put decision, Plaintiffs seek four forms of relief: (1) vacatur of the ALJ's particular stay-put decision; (2) a declaration that N.E. is entitled to a stay-put placement pursuant to the December 2014 IEP, rather than the May 2015 IEP; (3) an order that the District provide stay-put placement pursuant to the December 2014 IEP; and (4) attorneys' fees and costs. (Compl. at 5.) However, on November 23, 2016, the ALJ dismissed the Parents' due process claim related to the 2015-16 school year based on the Parents' stipulation. (Hokit Decl. (Dkt. # 28) ¶¶ 3, Ex. 2 ("4/8/16 ALJ Order") at 7-8 (granting continuance of hearing on due process claim because the Parents agreed to request dismissal with prejudice of the due process claim "if the Ninth Circuit rules against the Parents on the merits of their stay-put claim"), 4, Ex. 3 ("ALJ Dismissal").)

Based on these facts, the District has met its burden of demonstrating that there is no longer an active controversy related to N.E.'s stay-put placement pending the 2015-16 due process claim. *See Strong*, 489 F.3d at 1059; *cf. Eddins v. Excelsior Indep. Sch. Dist.*, 88 F. Supp. 2d 695, 702 (E.D. Tex. 2000) (stating in an IDEA case that "abandonment of a claim renders it moot"). The court is no longer able to afford any relief

to Plaintiffs because the relief they seek relates directly to N.E.'s stay-put placement pending that particular due process claim, *Bowen*, 752 F.3d at 836; (Compl. at 5), which is now dismissed (*see* ALJ Dismissal). Nevertheless, Plaintiffs attempt to revive the case by arguing that they claim compensatory education costs, have filed a petition for writ of certiorari with the Supreme Court to appeal the Ninth Circuit's interpretation of N.E.'s stay-put placement, and this matter is capable of repetition, yet evades review. (Resp. at 2-6.) The court addresses each of these arguments in turn and concludes that they are insufficient to demonstrate that the case is not moot.

1. Compensatory Education Costs

Although a claim for compensatory education benefits or reimbursement may defeat a mootness challenge in an IEP placement dispute, such a claim will not save a case where the plaintiff's "pending complaint fails to present properly a claim for compensatory education." *Lillbask ex rel. Mauclaire v. State of Conn. Dep't of Educ.*, 397 F.3d 77, 89 (2d Cir. 2005); *cf. Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 890 (9th Cir. 1995) (holding that because the tuition reimbursement claim constituted a live controversy, the case was not moot); *Brown v. Bartholomew Consol. Sch. Corp.*, 442 F.3d 558, 597 (7th Cir. 2006) (holding that the case was moot because the parents had abandoned their claim for reimbursement). Plaintiffs have not alleged a claim for compensatory costs (*see generally* Compl.; Dkt.), and Plaintiffs' general plea for "such further and additional relief as may be just and proper" insufficiently states such a claim, *Lillbask*, 397 F.3d at 90 (concluding that

a "general claim for 'other such relief as the Court deems appropriate'" does not assert a request for compensatory education benefits); *Toyo Tire & Rubber Co. v. Fitinparts-USA, LLC*, No. SACV 15-513-JLS (RNBx), 2016 WL 5219465, at *2 (C.D. Cal. June 3, 2016) (stating that "boilerplate or formulaic language" in a prayer for relief "is not the same as requesting a specific type of remedy"). Accordingly, a claim for reimbursement is not properly before the court. *See, e.g.*, *Lillbask*, 397 F.3d at 90 ("[T]he complaint fails to make any mention whatsoever of [the student's] need for compensatory education.").)

Although Plaintiffs do not raise the issue, the court further concludes that Plaintiffs' claim for attorneys' fees and costs also does not cure the mootness problem. *See Termine ex rel. Termine v. William S. Hart Union High Sch. Dist.*, 249 F. App'x 583, 587 (9th Cir. 2007) ("That the attorney's fees issue was still outstanding is insufficient to keep the district court from finding [the party's] claims moot."). Even if the claim for attorneys' fees were sufficient, Plaintiffs do not appear to be entitled to attorneys' fees and costs. As discussed above, the Parents stipulated to the dismissal of their due process claim upon the Ninth Circuit's ruling and therefore are not a prevailing party. *See* 20 U.S.C. § 1415(i)(3)(B) (stating that a "prevailing party" may be awarded attorneys' fees in an IDEA case); *Dep't of Educ. Hawai'i v. C.B. ex rel. Donna B.*, Civ. No. 11-00576 SOM/RLP, 2013 WL 704934, at *5-6 (D. Haw. Feb. 26, 2013) (stating that a "claim for attorney's fees in connection with having prevailed on the 'stay put' issue" may not be moot even if the stay-put issue is moot due to the student's graduation); (Hokit Decl. ¶ 3, Ex. 2 ("4/14/16 ALJ Order") at 12 ("If what results from

[the Ninth Circuit's] decision . . . is that the Student's stay-put placement is either 'general classes' or 'individual classes,' then the Parents will have prevailed on their stay-put claim. If the result is that the Student's stay-put placement is 'special classes,' then the District will have prevailed on the Parents' stay-put claim." (emphasis omitted)).) Accordingly, Plaintiffs' assertions that they are entitled to fees and costs does not provide a basis for the court to exercise further jurisdiction over this case.

2. Petition for Writ of Certiorari

Although Plaintiffs continue to disagree with the Ninth Circuit's interpretation of the appropriate standard for determining a stay-put placement, Plaintiffs' petition for review by the Supreme Court does not entitle N.E. to further stay-put placement stemming from the Parents' 2015-16 due process complaint.[2] *See R.F.*, 2016 WL 7338597, at *3 (citing

[2] Plaintiffs did not seek a stay of the Ninth Circuit's mandate pending Plaintiffs' petition for certiorari to the Supreme Court or seek a stay of further proceeding from this court while Plaintiffs await the Supreme Court's decision on their petition. *See* Fed. R. App. P. 41(d)(2); (Mandate; *see also* Dkt.) For these reasons, the court is obligated to reevalute its subject matter jurisdiction, even though Plaintiffs' petition is pending. *See Strong*, 489 F.3d at 1059 ("Mootnesss is a jurisdictional issue which we address at the threshold."); *Potter v. Hughes*, 546 F.3d 1051, 1061 (9th Cir. 2008) ("[F]ederal courts normally must resolve questions of subject matter jurisdiction before reaching other threshold issues."); *United States v. Cook*, 705 F.2d 350, 351 (9th Cir. 1983) (holding that because the mandate was "issued and neither stayed nor recalled, the Supreme Court's action on [the party's] certiorari petition is thus irrelevant" to the district court's disposition of a motion).

20 U.S.C. § 1415(j) ("The stay-put provision of the IDEA mandates that, while a due process challenge is pending, a student is entitled to remain in his or her 'then-current educational placement . . . .'"). As the Ninth Circuit has stated, "the stay-put provision is designed to allow a child to remain in an educational institution pending litigation. It does not guarantee a child the right to remain in any particular institution once proceedings have concluded." *See, e.g.*, *Marcus I. ex rel. Karen I. v. Dep't of Educ.,* 434 F. App'x. 600, 601 (9th Cir. 2011) Accordingly, "the fact that dismissing an appeal as moot would remove a child from the protection of the stay-put provision cannot in and of itself create a live controversy, as the stay-put order will lapse however the litigation concludes." *Id.* (internal citation omitted). Because N.E. is no longer entitled to stay-put placement regarding the 2015-16 due process claim, Plaintiffs' petition for writ of certiorari regarding that placement does not cure the mootness issue.[3]

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[3] Nor does the Parent's newly filed due process hearing request cure the mootness of the current action. (*See* P.E. Decl. (Dkt. #29-1) ¶¶ 9 ("Because N.E.'s last IEP expired in September 2016, my wife and I are now seeking appropriate educational placement for N.E. in the District for the 2016-2017 school year."), 10 ("On April 17, 2017, we filed a new due process request with the Office of the Superintendent of Public Instruction including a motion for stay put seeking stay put placement pursuant to N.E.'s December 2014 IEP.").) Although the Parents once again seek stay-put placement based on the December 2014 IEP, they do so in connection with a due process claim related to N.E.'s appropriate educational placement for the 2016-2017 school year. Accordingly, the court can afford no further relief regarding stay-put placement related to a due process challenge of N.E.'s educational placement for the 2015-16 school year. The ALJ dismissed that challenge with prejudice. (*See* ALJ Dismissal.)

3. Capable of Repetition, Yet Evading Review

Finally, the Parents argue that the "capable of repetition, yet evading review" exception to mootness applies to this case. (Resp. at 4-5.) They contend that "[t]his dispute has well exceeded the one-year lifespan of an IEP, thus[] proving the lifespan of N.E.'s IEP was too short in duration to be fully litigated." (*Id.* at 5.) Finally, the Parents argue that "N.E. is not just likely to be subject to the same action again, N.E. is presently subject to the same District action"—the District's alleged "failure to offer adequate educational placement." (*Id.*)

The "capable of repetition, yet evading review" doctrine is a narrow exception to mootness. *Bowen*, 752 F.3d at 836-37 ("Because mootness concerns whether [a court] has the power to hear a case," courts must "apply the 'capable of repetition, yet evading review' exception sparingly, and only in 'exceptional situations.'"). The exception "applies only when (1) the challenged action is too short in duration to be fully litigated before cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098 (9th Cir. 2000). An action is too short in duration to be fully litigated only when the controversy is of "inherently limited duration" because the exception "is concerned not with particular lawsuits, but with classes of cases that absent an exception, would always evade judicial review." *Bowen*, 752 F.3d at 836 (internal citations, quotation marks, and emphasis omitted).

"Controversies that are not of inherently limited duration do not create exceptional situations justifying

the rule's application, because, even if a particular controversy evades review, there is no risk that future repetitions of the controversy will necessarily evade review as well." *Id.* at 837 (internal quotation marks omitted). Accordingly, courts will not apply the exception where the party's own action or failure to act has rendered the action moot. *Cf. id.* (stating that a party may not "profit" from the exception where the party failed to seek and obtain "prompt relief"). Where such a circumstance exists, "the controversy must be resolved in a future action presenting a live dispute." *Id.*

The controversy regarding N.E.'s stay-put placement pending the due process claim regarding the 2015-16 school year was not of inherently limited duration. Indeed, N.E. was entitled to stay-put placement as long as the due process claim and any judicial appeals of that claim were pending. *See* 20 U.S.C. § 1415(i)(2), (j). Here, the Parents stipulated to dismiss their due process claim upon the Ninth Circuit's ruling regarding N.E.'s stay-put placement, if the ruling was unfavorable to them. (*See* 4/8/16 Order at 7-8.) Although courts have held that "IEP challenges usually endure longer than the nine-month school year," *Brown*, 442 F.3d at 599, this particular action was limited in duration only because the Parents' dismissal cut the case short. Thus, it is not the case that a controversy like the one Plaintiffs raise regarding the stay-put placement will always evade judicial review. Indeed, if the Parents had not stipulated to dismissal of their underlying claim, it is possible that additional judicial review would be warranted.

In addition, even though Plaintiffs now challenge N.E.'s IEP for the 2017-16 school year, it is unclear whether N.E. has been subjected to the same action. Little information about the new due process claim is before the court, the court recognizes that the Parents may have raised new issues related to N.E.'s 2016-17 IEP that they did not raise in relationship to the 2015-16 IEP. (*See* P.E. Decl. ¶¶ 9-10 (stating that the Parents have filed a new due process claim but not providing a copy of that claim to the court)); *Brown*, 442 F.3d at 599 ("Our decision would merely tell the parties who was correct about [the] outdated IEP."). Nevertheless, even if N.E. has again been subjected to the same action, Plaintiffs fail to demonstrate the first prong of the exception. Accordingly, the court concludes that Plaintiffs' case does not fall within the capable of repetition, yet evading review exception.[4]

IV. CONCLUSION

For the reasons set forth above, the court GRANTS the District's motion to dismiss (Dkt. # 27).

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[4] The District also argues that the law of the case doctrine renders this case moot because the Ninth Circuit has determined the appropriate stay-put placement and this court is bound to follow that ruling in subsequent proceedings. (Mot. at 5-6.) Although the court agrees that it is bound to follow the Ninth Circuit's decision, the court notes that if the Supreme Court were to issue a contrary ruling, the court would be bound to follow the Supreme Court's ruling. Given the court's determination that this matter is moot because the ALJ dismissed the underlying due process claim, the court declines to further address this particular argument.

Dated this 16th day of May, 2017.

s/_____
JAMES L. ROBART
United States District Judge

APPENDIX 3

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE SUPERINTENDENT OF PUBLIC INSTRUCTION

OSPI CAUSE NO. 2015-SE-0083

OAH DOCKET NO. 09-2015-OSPI-00187

[Filed April 8, 2016]

IN THE MATTER OF	)
	)
	)
	)
SEATTLE SCHOOL DISTRICT	)
	)

ORDER ON PARENTS' MOTION TO CONTINUE DUE PROCESS HEARING

On March 22, 2016, the Parents of the Student whose education is at issue[1] moved for a continuance of the due process hearing scheduled for May 12 – 13 and May 16 – 19, 2016. The Seattle School District (District) notified the Parents and the Office of Administrative Hearings that the District opposed the motion, and would present its arguments orally at the prehearing conference scheduled to hear the motion.

[1] To ensure confidentiality, names of parents and students are not used.

The prehearing telephone conference was held before Administrative Law Judge (ALJ) Michelle C. Mentzer on April 5, 2016, pursuant to notice emailed to the parties. ALJ Mentzer was assisted by ALJ Matthew D. Wacker at the prehearing conference because ALJ Mentzer is having problems with her voice. All decisions herein are made by ALJ Mentzer.

The Parents are represented by Charlotte Cassady and Lara Hruska, attorneys at law. Ms. Hruska appeared for the Parents at the prehearing conference. The District is represented by David Hokit, attorney at law, and Andrea Schiers, District senior assistant general counsel.

Based upon the statements of the parties and the pleadings and documents on file herein, the following Order is entered:

1. Prior orders remain in effect unless otherwise specifically stated.

2. Pending before the U.S Court of Appeals for the Ninth Circuit is an interlocutory appeal (docket no. 15-35910) filed by the Parents concerning a stay-put order entered in this due process proceeding. The stay-put order was entered on October 2, 2015 by ALJ David G. Hansen, who presided in this case before the case was reassigned to ALJ Mentzer on January 13, 2016. Oral argument before the Ninth Circuit is scheduled for May 5, 2016. The parties have been unable to obtain any information from the Ninth Circuit regarding how long after oral argument a decision is likely to be issued. The parties have researched the matter and found that there are cases in the Ninth Circuit still pending decision nine to ten months after oral argument.

3. The Parents request that the due process hearing dates be stricken and the hearing be postponed until after the Ninth Circuit issues its decision To address prejudice to the District, the Parents offer to cap their reimbursement request at May 12, 2016, the date the hearing will start if a continuance is denied.

4. The grounds for the Parents' motion are set forth below, followed by the District's response, followed by the ALJ's conclusion.

a. Parents: There is insufficient time for counsel to prepare for the Ninth Circuit oral argument on May 5, 2016, and also prepare for the due process hearing on May 12 – 19. District: The parties have had sufficient time to prepare. The parties have known since January 29, 2016, that the Ninth Circuit oral argument would occur on one of several dates in the first two weeks of May. On March 2, they learned that the exact date would be May 5. The due process hearing has been scheduled for mid-May for more than five months (*see* First Prehearing Order of October 29, 2015). All briefing to the Ninth Circuit was completed on February 1, 2016, so preparing for oral argument is all that remains to be done. ALJ's conclusion: The District's argument on this point is more persuasive than the Parents'.

b. Parents: There have been no prior continuances of the due process hearing in this case. Also, prejudice to the District from a continuance is removed because the Parents are willing to cap their reimbursement request on the date the due process hearing is currently scheduled to begin,

May 12, 2016. District: There are other forms of prejudice to the District, primarily that the due process hearing (filed in September 2015) would be delayed so long that witnesses could become unavailable and/or their memory of events could become unreliable. It may be nine to ten months after May 2016 before the Ninth Circuit rules. ALJ's conclusion: The District is correct; the Parents' offer resolves much, but not all prejudice that would arise from a lengthy and indefinite continuance. The continuance would stretch beyond the date the Ninth Circuit issues its decision. Once that decision is issued, a prehearing conference would be held to select new due process hearing dates. The ALJ has extensive prior experience with both parties' counsel, and knows that their calendars are heavily booked; it is often very difficult to find dates for a multi-day hearing that are available for both counsel and for the ALJ, who also has a crowded calendar. Therefore, there may be an extensive delay in the due process hearing even after the Ninth Circuit issues its decision. The prejudice from such a lengthy delay is not just to one party or the other, but to the integrity of the fact-finding process in which the ALJ will be engaged, for the reasons articulated by the District.[2]

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[2] The Parents suggested that witness testimony could be preserved by the parties having their witnesses execute declarations now. However, declarations would only preserve the witnesses' direct testimony. They would not preserve responses to cross-examination, re-direct, or re-cross, which typically occur in due process hearings. The only way to preserve witnesses' testimony

c. Parents: It is too great an expense for the Parents to pay for litigation in two forums plus pay private school tuition for the Student. Therefore, if the Ninth Circuit rules against the Parents on the merits of their stay-put claim, the Parents plan to withdraw their due process hearing request. This would save all parties the cost of a due process hearing. District: The District previously informed the Parents that it would agree to a continuance of the due process hearing until after the Ninth Circuit decision if the Parents put in writing the plan stated above, as well as capping their reimbursement request at May 12, 2016. Parents: The Parents were amenable to such an agreement, but were concerned that a dispute might arise as to whether the Ninth Circuit's decision constituted a ruling on the merits of their stay-put claim. Therefore, the parties were unable to reduce their theoretical agreement to writing. ALJ conclusion: The ALJ suggested at oral argument that the parties could enter into such a stipulation, and add to it that if they ultimately dispute whether the Ninth Circuit has ruled against the Parents on the merits of their stay-

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is by taking preservation depositions. That would involve extensive time and expense for both parties, essentially putting on their whole cases by deposition. At the due process hearing, the State pays for the court reporter. In depositions, the parties must bear that cost. Also, since an ALJ would not be present to rule on objections during depositions, or to decide which exhibits testified about by the witnesses are actually admitted, much would remain to be resolved at the due process hearing, necessitating further time and expense for the parties.

put claim, that question would be submitted to the ALJ for resolution. Both parties were amenable to this suggestion, but asked that a definition of "the merits" be carefully drawn in light of the District Court's rulings and the parties' briefs to the Ninth Circuit.

d. Parents: Continuing the due process hearing until after the Ninth Circuit decision will increase the chances that the due process case will be settled prior to hearing. District: The Parents have been unwilling to put in writing their orally-expressed intent to withdraw the due process hearing if they lose on the merits in the Ninth Circuit. If the Parents prevail in the Ninth Circuit, the District would have greater incentive to proceed to the due process hearing to prove that their proposed placement was appropriate and they are not liable for the Student's private school tuition. ALJ conclusion: The parties have differing motivations for settlement, not all of which have necessarily been disclosed. The likelihood of settlement after the Ninth Circuit's decision will depend in part on how that court rules. Importantly, however, the issues before the Ninth Circuit are completely distinct from the issues to be litigated in the due process hearing.[3] For all of

[3] There are numerous issues in the due process hearing, only one of which overlaps with what is at issue in the federal court litigation. *See* Second Prehearing Order of February 16, 2016. The single overlapping issue is whether the District violated the IDEA by failing to implement the Student's stay-put placement (paragraph 11(e) of that Order). That issue will not be further

> the reasons set forth above, the best resolution of the present motion is the one set forth as the ALJ's conclusion in the immediately-preceding paragraph.

5. Due to the lengthy and indefinite nature of the requested continuance, and for the other reasons discussed above, the Parents' motion would have been denied had they not indicated they were amenable to the resolution discussed above. That resolution has the potential to save both parties considerable time and expense, and so the Parents' motion for continuance is not being denied at this time.

6. It is hereby ORDERED: The Parents' motion to continue the due process hearing will be denied by a subsequent written order[4] unless, by 5:00 p.m., April 18, 2016, the following occurs, in which case the Parents' motion will be granted: A written stipulation, signed by counsel for both parties, is filed with the ALJ by 5:00 p.m., April 18, 2016, which stipulation provides, in essence: (1) The Parents agree to cap their reimbursement request in the due process proceeding as of May 12, 2016; (2) The Parents agree to request dismissal with prejudice of this proceeding (OSPI cause no. 2015-SE-0083) if the Ninth Circuit rules against

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litigated before the ALJ; it was already decided against the Parents in ALJ Hansen's stay-put order of October 2, 2015. If a contrary ruling is issued by a federal court, the ALJ will be bound by that federal court ruling. There will thus be no further litigation before the ALJ on the stay-put issue.

[4] The ALJ will be unavailable to issue the order at that time, but will issue the order subsequent to April 18, 2016 if the conditions set forth herein are not met by April 18, 2016.

the Parents on the merits of their stay-put claim; (3) The District agrees to a continuance of the due process hearing until after the Ninth Circuit has issued its decision in docket no. 15-35910; and (4) Once the Ninth Circuit issues its decision, if the parties dispute whether the condition in (2) has occurred, the parties will submit that dispute to the ALJ for decision. The ALJ will then interpret the parties' stipulation in light of the Ninth Circuit's decision and resolve the dispute by written order. Prior to ruling on the dispute, the ALJ will afford the parties an opportunity to present written and/or oral argument, at each party's discretion.

7. At this time, it appears to the ALJ that it will not be difficult to discern whether the Ninth Circuit has ruled for or against the Parents on the merits of their stay-put claim. If the result of the Ninth Circuit decision is that the Student's stay-put placement is either the placement in his Bellevue School District December 2014 IEP (referred to by the District Court as "general classes"), or the first-stage placement in his Bellevue May 2015 IEP (referred to by the District Court as "individual classes"), then the Parents will have prevailed on the merits of their stay-put claim. If, on the other hand, the result of the Ninth Circuit decision is that the Student's stay-put placement is the second-stage placement in his Bellevue May 2015 IEP (referred to by the District Court as "special classes"), then the Parents will have lost on the merits of their stay-put claim. However, it is not possible to discern in advance all conceivable outcomes of any appellate court ruling. It is therefore unwise to lock in a definition of the condition in item (2) (from the immediately-the preceding paragraph) in advance. The matter will be

much clearer once the Ninth Circuit's ruling is in hand. The parties may make their arguments at that time.

DUE DATE FOR WRITTEN DECISION

8. As set forth in the Preheating Order of October 29, 2015, the due date for the written decision is thirty (30) days after the record of the hearing closes.

IT IS HEREBY FURTHER ORDERED that if no objection to this Order is filed within ten (10) days after its mailing, it shall control the subsequent course of the proceeding unless modified for good cause by subsequent order.

Signed at Seattle, Washington on April 8, 2016.

s/_____
Michelle C. Mentzer
Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid and faxed to counsel on the date stated herein. s/ initials

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cc: Administrative Resource Services, OSPI
Matthew D. Wacker, Senior ALJ, OAH/OSPI
Caseload Coordinator

APPENDIX 4

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE SUPERINTENDENT OF PUBLIC INSTRUCTION

OSPI CAUSE NO. 2015-SE-0083

OAH DOCKET NO. 09-2015-OSPI-00187

[Filed April 14, 2016]

IN THE MATTER OF	)
	)
	)
	)
SEATTLE SCHOOL DISTRICT	)
	)

ORDER ON RECONSIDERATION OF THE ORDER ON PARENTS' MOTION TO CONTINUE DUE PROCESS HEARING

On April 8, 2016, Administrative Law Judge (ALJ) Michelle C. Mentzer entered an Order on Parents' Motion to Continue Due Process Hearing (Order). On April 13, 2016, the Seattle School District (District) filed a timely objection to the Order. Also on that date, the Parents of the Student whose education is at issue[1] filed a response to the District's objection, asking that

[1] To ensure confidentiality, names of parents and students are not used.

the Order be modified to grant a continuance of the due process hearing despite the District not agreeing to the stipulation discussed in the Order.

The Parents are represented by Charlotte Cassady and Lara Hruska, attorneys at law. The District is represented by David Hokit, attorney at law, and Andrea Schiers, District senior assistant general counsel.

Based upon the statements of the parties and the pleadings and documents on file herein, the following Order is entered:

1. Prior orders remain in effect unless otherwise specifically stated.

DISTRICT'S OBJECTION TO THE ORDER OF APRIL 8 2016

2. The District objects to paragraphs 6 and 7 of the Order, based on the District's belief that the U.S. Court of Appeals for the Ninth Circuit (in docket no. 15-35910) might not rule on the underlying issue of what constitutes the Student's stay-put placement, but might rule only on whether a temporary restraining order (TRO) was properly denied by the district court.

3. The Parents respond that they are willing to stipulate as required by the Order in order to obtain a continuance of the due process hearing. They argue as follows:

> The District has expressed concern that the Ninth Circuit will not clearly rule for or against the Parents. However, Parents submit that any dispute regarding the Ninth Circuit ruling can

> be adequately resolved by the ALJ as set forth in [the Order].

Letter from Parents' Counsel of April 13, 2016. The Parents therefore agree to the conditions set forth in the Order and request that their motion for a continuance be granted over the District's objection. *Id.*

4. As stated twice in paragraph 7 of the Order, the ALJ will resolve any dispute about the meaning of the Ninth Circuit decision based on "the result" of that decision. If what *results* from that decision, regardless of the legal reasoning the court employs, is that the Student's stay-put placement is either "general classes" or "individual classes," then the Parents will have prevailed on their stay-put claim. If the *result* is that the Student's stay-put placement is "special classes," then the District will have prevailed on the Parents' stay-put claim.

5. The Order used the term "the merits of the stay-put claim" because both parties used that term. However, the ALJ's intent was that, regardless of the Ninth Circuit's reasoning, and regardless of whether it ruled on substantive or procedural grounds, it is the *result* that will determine which party has prevailed in the stay-put issue.

6. Without further explanation from the District, it is difficult to see how the Ninth Circuit could rule on the appropriateness of the district court's TRO denial *without* ruling on the merits of the Parents' stay-put claim. That is because the district court did not reach any of the other required elements for a TRO. The district court only ruled on one element: the likelihood of the Parents prevailing on the merits of their stay-put

claim. It ruled against the Parents on this. It is very unlikely that the Ninth Circuit would reverse the district court on the merits element and then decline to decide the remaining elements itself (based on the evidence already presented to the district court and in the record), and instead remand to the district court to determine the remaining elements, resulting in the lack of resolution that the District fears. The reason this is very unlikely is that the matter is a TRO motion. Having found in the Parents' favor on the merits element of a TRO, it is very unlikely the Ninth Circuit would cause further delay and a pyrrhic victory for the Parents by remanding to the district court for the remaining determinations.

7. For the reasons set forth above, and because the Parents have now agreed in writing (in their counsel's letter of April 13, 2016) to all conditions imposed on them by the Order for obtaining a continuance of the due process hearing (namely, conditions (1), (2) and (4) in paragraph 6 of that Order), the Order is hereby MODIFIED ON RECONSIDERATION to remove the condition that the District must agree to the continuance (namely, condition (3) in paragraph 6 of that Order). The Parents' motion for a continuance of the due process hearing is hereby GRANTED over the District's objection.

DUE PROCESS HEARING

8. For the reasons set forth above, the due process hearing dates of May 12, 13, 16, 17, 18 and 19, 2016 are hereby STRICKEN. The related deadline of April 28, 2016 for holding the Joint Exhibit Conference is hereby STRICKEN. The related deadline of May 5, 2016 for the exchange and filing of exhibits, witness lists, and

optional pre-hearing briefs is hereby STRICKEN. The related deadline of May 10, 2016 for filing motions *in limine* is hereby STRICKEN.

9. Both parties are responsible for notifying the ALJ when the Ninth Circuit issues its decision in docket no. 15-35910. They shall notify the ALJ within four (4) business days after learning that the Ninth Circuit has issued its decision.

10. The ALJ will then promptly schedule a prehearing conference to determine: Whether the parties agree that the Parents are now required by the Order of April 8, 2016 to move for dismissal with prejudice of their due process hearing request (OSPI cause no. 2015-SE-0083); or whether the parties disagree on that matter. If the parties disagree on that matter, the ALJ will offer them an opportunity to submit written and/or oral argument prior to the ALJ deciding the matter.

STATUS CONFERENCE

11. Because the due date for the written decision is thirty (30) days after the hearing record closes, periodic status conferences must be set so that the decision due date has an anchor and can be clearly determined at all times, as required by OSPI. Therefore, a status conference is set below. If the date of the status conference is near, and the Ninth Circuit has not yet issued its decision, the parties may contact the ALJ's assistant with that information, and the ALJ can issue an order continuing the status conference. However, there must always be a status conference scheduled, for the reason explained above.

12. A status conference will be held as follows, unless a prehearing conference has been held at an earlier date pursuant to paragraph 10, above:

DATE: **August 4, 2016**
TIME: **9:45 a.m.**
PLACE: **By telephone**

13. The parties are instructed to call the Office of Administrative Hearings at (206) 389-3400 or (800) 845-8830 **no later than ten minutes prior** to the scheduled time and leave their telephone number with the receptionist. The ALJ will initiate the conference call at the scheduled time.

DUE DATE FOR WRITTEN DECISION

14. As set forth in the Prehearing Order of October 29, 2015, the due date for the written decision is 30 days after the record of the hearing closes. The hearing record is presently scheduled to close with the status conference of August 4, 2016. Thirty days after August 4, 2016 is September 3, 2016. The due date for the written decision in this case is therefore **September 3, 2016**.[2]

IT IS HEREBY FURTHER ORDERED that if no objection to this Order is filed within ten (10) days after its mailing, it shall control the subsequent course of the proceeding unless modified for good cause by subsequent order.

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[2] September 3, 2016 is a Saturday. The written decision is therefore effectively due on the immediately preceding day on which there is U.S. mail service: Friday, September 2, 2016.

Signed at Seattle, Washington on April 14, 2016.

s/_____
Michelle C. Mentzer
Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid and faxed to counsel on the date stated herein. s/ initials

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cc: Administrative Resource Services, OSPI
Matthew D. Wacker, Senior ALJ, OAH/OSPI
Caseload Coordinator

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

NO.

[Filed October 16, 2015]

N.E., by and through his parents C.E. and P.E.	)
Plaintiffs,	)
v.	)
SEATTLE SCHOOL DISTRICT	)
Defendant.	)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff N.E. (the "Student"), by and through his parents C.E. and P.E. (the "Parents"), represented by the undersigned counsel, hereby seeks review of an administrative agency decision and submits this complaint for declaratory and injunctive relief and alleges as follows:

I. INTRODUCTION

1. Plaintiffs appeal from and seek judicial review of an Order Denying Parents' Stay-Put Motion dated October 2, 2015 (the "Order"), rendered by David

Hansen, an Administrative Law Judge (ALJ) at the Office of Administrative Hearings in Seattle, WA.

2. The Order wrongly interpreted "current educational placement" for the purposes of implementing 20 U.S.C. 1415(j), finding that a self-contained program for behaviorally disordered students was "current"even though it was never agreed upon nor implemented, simply because it was planned at approximately the same time as a three-week interim placement completed at the end of the school year.

3. The Parents had initially requested the interim placement weeks prior to the IEP meeting at which the self-contained program was proposed (and rejected by the Parents) and the Parties finally agreed to the interim program only after Student had been out of school for over a week due to a disciplinary allegation. The Parents were not informed and did not believe that the interim placement was linked to the self-contained program proposed for the following school year since they had unambiguously rejected the proposed self-contained program and that program was never implemented.

II. JURISDICTION

4. Plaintiffs' claims arise under the Individuals with Disabilities in Education Act (IDEA), 20 USC §1415(i)(2)(A); the Declaratory Judgments Act, 28 USC §2201 and §2202; the state Education for All Act (State Act), Chapter 28A.13 RCW; and the regulations promulgated thereunder, including WAC 392-172A-05115. By these laws, the parents are entitled to bring an action in a district court of the United States without regard to the amount in controversy and to

have the court receive the records of the administrative proceedings at issue. 20 USC §1415(i)(2)(C)(i); WAC 392-172A-05115(3) and (4).

5. This Court has jurisdiction pursuant to 28 USC §1331; 20 USC §1415(i)(2)(A); and, as to the state claims, its pendant jurisdiction.

6. The ALJ's "stay put"order is a collateral order subject to interlocutory appeal.

7. Venue lies in the Western District of Washington pursuant to 28 U.S.C. §1392(b) because the parties reside in and Plaintiffs' claims arose in the District.

III. PARTIES

8. Plaintiff N.E. is a Student within the Seattle School District eligible for special education services under the disability category Health Impaired due to a complex profile of intellectual giftedness, attention deficit/hyperactivity disorder, and sensory motor hypersensitivity. He was born in 2006 and is eligible to receive special education and related services under the IDEA until his 22nd birthday in 2028. The Student is not currently attending school due to the placement dispute at issue here.

9. Plaintiffs C.E. and P.E. are N.E.'s parents and educational representatives.

10. Defendant Seattle School District, located in Seattle, Washington, is responsible for the provision of a free and appropriate public education (FAPE) to students with disabilities residing within its

boundaries pursuant to the IDEA and relevant enforceable state laws and regulations.

IV. FACTUAL ALLEGATIONS

11. The Student attended Bellevue School District ("BSD") from April 2012 until June 2015. For all school years prior to 2014-2015 and for most of the 2014-2015 school year, the Student spent 91% of his time in the general education setting with full-time 1:1 paraeducator support. His last agreed upon and implemented educational placement was set forth in an Individualized Educational Program (IEP) dated December 1, 2014.

12. After a tumultuous start to the 2014-2015 school year, the Parents worked with the BSD on the Student' re-evaluation and behavior plan, which were drafted and proposed at the end of May 2015. At that time, the District also proposed a change of educational placement for the 2015-2016 school year to a self-contained program for emotionally and behaviorally disordered students. The Parents unambiguously rejected that educational placement and wrote "DISAGREE"on the draft IEP, which they understood to propose the 2015-2016 program. That disputed self-contained program was never implemented.

13. For approximately three weeks at the end of the school year, the Student attended an interim program with 1:1 instruction. The Parents had initially requested the interim program weeks earlier. The Parents sent the Student to the interim program believing it to be completely unrelated to the disputed self-contained program proposed for the 2015-2016 school year.

14. At least one week after the Student was already attending the three-week interim program, the BSD issued a Prior Written Notice framing the interim 1:1 program as a "transition" to the self-contained program for the following school year. This was not consistent with what had been presented to the Parents in prior meetings and was contrary to their understanding of the placement. The BSD also issued an IEP with two placement matrixes: one for the interim program the student was already attending and one for the 2015-2016 school year. The 2014-2015 school year ended shortly thereafter.

15. The Parents did not file for due process against BSD at the end of the 2014-2015 school year because they were moving to Seattle that summer and knew that the Student' 2015- 2016 placement would be determined by the new IEP team in the Seattle School District. Moreover, they believed they had unambiguously rejected the self-contained program and knew that it had never been implemented. Finally, an independent educational evaluation (IEE) paid for by the BSD was pending and the Parents expected this new data to inform their new district' 2015-2016 placement decision.

16. When they arrived in the Seattle School District, the Parents provided the District with a timeline of events and records including the recently finalized IEE and they requested an IEP meeting prior to the start of the school year. When the Seattle School District adopted the BSD's proposed program for the 2015-2016 school year, the Parents filed due process and invoked stay-put seeking to maintain the Student's status quo, which they understood to be his last agreed

upon and last implemented educational program and placement pursuant to his December 2014 IEP.

17. The District argued that by attending the three-week interim program, the Parents had unintentionally agreed to the disputed and unimplemented self-contained program despite their unambiguous rejection of the same.

18. Administrative Law Judge Hansen issued an order wrongly interpreting "current educational placement" to include the disputed and unimplemented self-contained program.

19. The Parents, the Student's treating psychologist, and the independent evaluator hired by the BSD are concerned that the proposed self-contained program will be harmful to the Student and exacerbate his existing issues and result in educational and behavioral regression. Accordingly, to date, the Student has not attended school in the Seattle School District.

V. CLAIMS FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court:

A. Vacate the Administrative Law Judge's decision dated October 2, 2015;

B. Declare that N.E. is entitled to a stay-put placement in a general education setting over 90% of the school day with the support of a full-time paraeducator pursuant to his last implemented educational placement under the December 2014 IEP;

C. Order that Defendant provide this stay-put placement pursuant to the December 2014 IEP;

D. Award Plaintiffs attorney's fees and costs as provided by law; and

E. Award such further and additional relief as may be just and proper.

DATED this 15th day of October, 2015.

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