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12"STAY–PUT" UNDER THE IDEA: AN ANNOTATED OVERVIEW [FNA1]

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The so–called "stay–put," or "pendency," provision of the Individuals with Disabilities Education Act (IDEA) [FN1] is not a mathematically precise or icily frozen concept. [FN2] Instead, it is a rather fluid and complicated concept [FN3] with "many faces." [FN4] Its primary purpose, which is to maintain the status quo, [FN5] is often merely circular, not resolving many of the wide variety of circumstances that Congress did not and could not anticipate. [FN6]

This document provides an annotated outline of a broad sampling of the many faces of stay–put. [FN7] As the citations in **bold font** reflect, the emphasis is on one notably active jurisdiction—California—to illustrate the customization of this federal concept to the decisional framework for a specific state. [FN8] Thus, the application to other states would necessitate adjustment to focus on the ***13** legislation, regulations, and case law specific to the respective jurisdiction. Moreover, based on its format as a decisional framework, the primary perspective is that of adjudicators under the IDEA, starting with impartial hearing officers (IHOs), [FN9] even though it helps inform the parties and other interested individuals.

The first part of the document provides the statutory and regulatory outer structure. The second part focuses on the pivotal term "then current educational placement." The third part demarcates the scope of stay–put. The fourth part examines its applications in various types of cases and situations. The fifth part serves as a catchall for miscellaneous other aspects of stay–put. The final part proposes a general synthesizing flowchart–like decisional framework.

I. Framework of IDEA Statute and Regulations [FN10]

IDEA Legislation: [FN11]

Except as provided in subsection [concerning expedited hearings in the disciplinary context], during the pendency of any proceedings conducted pursuant to this section [concerning impartial hearings and judicial appeals], unless the State or local education agency and the parents otherwise agree, the child shall remain in the then–current educational placement of the child, or, if preparing for initial admission to public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

IDEA Regulation: [FN12]

§ 300.518 Child's status during proceedings.

(a) Except as provided in [the regulation specific to expedited hearings for disciplinary changes in placement], during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.

(c) If the complaint involves an application for initial services under this part from a child who is transitioning from Part C of the Act to Part B and is ***14** no longer eligible for Part C services because the child has turned three, the public agency is not required to provide the Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services under § 300.300(b), then the public agency must provide those special education and related services that are not in dispute between the parent and the public agency. [FN13]

(d) If the hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents for purposes of paragraph (a) of this section.

OSEP Guidance:

When parents and public agencies are unable to agree on what constitutes the current educational placement, or on an alternative placement, this question must be resolved by an EHA–B due process hearing officer or an appropriate court, on a case–by–case basis. [FN14]

II. "Then–Current Placement" and Fundamental Change? [FN15]

Then–Current Placement: [FN16]

It is generally interpreted as the placement set forth in the child's last implemented individualized education program (IEP). [FN17]

A related variation is that the current educational placement "refers to the operative placement actually functioning at the time the dispute first [arose]," which would be the last agreed–upon IEP if the child had one or whatever placement in which the child actually received instruction at the time the dispute arose. [FN18]

****15** Change:*

The intertwined issue is whether the action in question is a change, which is another fact–driven issue. More specifically, "the 'touchstone' is whether the modification 'is likely to affect in some significant way the child's learning experience.' " [FN19]

Because in this context the child's general educational placement is the setting rather than a particular school, [FN20] the following are not changes in the child's current placement: (1) moving all of the children to another similar school (in terms of the LRE continuum) upon shut down of the original school [FN21]; (2) a minor alteration, such as a change in transportation services [FN22] or a change in feeding treatment [FN23]; (3) transfer of an individually child between materially identical settings [FN24]; or (4) a district–wide shortening of the school day, or furlough. [FN25] However, upon a change in location the question is equivalence of services, not consideration of safety. [FN26]

Special Circumstances:

Some cases present special circumstances. [FN27] For example, the Ninth Circuit used a "as close as possible under the circumstances" test in accepting as the stay–put a temporary and malleable approximation of the last–agreed ***16** upon IEP, when implementation of the student's last agreed–upon IEP would have been impossible in the district. [FN28]

A related special circumstance is where the last–agreed upon placement is not available. The courts are split. According to the D.C. Circuit, the stay–put provision poses an affirmative obligation for the district to arrange for a similar placement. [FN29] However, in a more recent and well–reasoned opinion, the Fourth Circuit disagreed with regard to § 1415(j), holding that the proper procedure would be for the parents to seek a preliminary injunction in court, which is akin to *Honig* and which is not within the authority of an IDEA ALJ, under § 1415(i)(2)(c)(iii). [FN30]

III. Boundaries of Stay–Put

Scope:

Inapplicable unless and until filing for a request for an impartial hearing, not for previous period. [FN31]

Inapplicable to equitable services for parentally placed private school children. [FN32]

Stay–put expires when the litigation concludes. [FN33]

Effect:

Stay–put serves as an automatic preliminary injunction, thus not requiring the traditional factors (e.g., irreparable harm) for such relief. [FN34]

Once in effect (i.e., upon filing), it applies to mediation, impartial hearings, initial judicial review, and subsequent judicial appeals. [FN35]

***17** Graduation, at least until determined to be proper, does not terminate stay–put. [FN36] However, it

ceases at the age ceiling of the student's entitlement. [FN37]

IV. Various Applications of Stay–Put

Initial Admission Cases:

California's Education Code: "A pupil applying for initial admission to a public school, with the consent of his or her parent or guardian, shall be placed in the public school program until all proceedings have been completed." [FN38]

Eligibility Cases:

Stay–put is merely the general education program when the parent's challenge the district's determination, upon the initial evaluation, that the child is ineligible. [FN39]

Methodology Cases:

"If the parties dispute what the IEP requires, as they do here with respect to co–teaching, the court must evaluate the IEP as a whole and determine whether such a methodology is required under the terms of the IEP. Under usual circumstances, the court should find it unnecessary to go beyond the four corners of the document in order to make that determination. However, vagueness in the instrument with respect to how its goals are to be achieved may require that the court turn to extrinsic evidence to determine the intent of those who formulated the plan.... Therefore, the district court ought to determine, after evaluating the entire May 2004 IEP as a totality, whether the parties regarded this methodology as an essential part of the IEP or as simply one of several ways for implementing it. As we noted earlier, in answering this question, the court will need to explore *precisely* how the plan was implemented at [the child's middle school and whether it is possible at the child's high school]." [FN40]

Tuition Reimbursement and Placement Cases:

In general, courts have concluded that the parties have implicitly agreed to a placement when the parents receive a state administrative agency decision in favor of their choice of placement. [FN41]

***18** Both the IDEA and California law codify this conclusion and extend it to placement cases generally. [FN42]

Exceptions: (1) where the ALJ ordered reimbursement but did not conclude that the unilateral placement was appropriate [FN43]; (2) where, without such an ALJ conclusion, the parties had not previously agreed on an IEP [FN44]; and (3) where the student had graduated and gone to college [FN45]

Scope: comparable not necessarily an exact duplication, depending on equitable consideration. [FN46]

Compensatory Education Cases:

Compensatory education is not an exception to the general rule that stay–put ceases upon reaching the statutory ceiling of age 21. [FN47] Moreover, although not clearly settled, some courts have ruled that compensatory education extends to the stay–put period. [FN48]

Discipline Cases: [FN49]

For behavior substantially likely to result in danger to the student or others, the two exceptions to stay–put are (1) obtaining a *Honig* injunction in ***19** court, [FN50] and (2) obtaining an IHO–ordered change in placement to a 45–day interim alternative educational setting (IAES). [FN51]

The specialized variation is for disciplinary changes in placement, which require an expedited hearing, [FN52] including the three special–circumstances IAESs. In this disciplinary context, the stay–put is the removed setting until the completion of the hearing or the expiration of the removal, whichever occurs first. [FN53]

Some discipline cases provide special circumstances as to the application of stay–put. [FN54]

Inapplicable to (1) expulsion after agreed–upon exiting from special education; [FN55] (2) expulsion for conduct properly determined not to be a manifestation of the child's disability; [FN56] or (3) calling the police resulting in arrest. [FN57]

Extracurricular Activities:

"If the activity is included in the student's IEP, it must be considered a part of the student's present educational placement and the student has a right to continue to participate. However, if the activity is not included in the child's IEP, it is not part of the student's present educational placement and the student has no right under Part B to continue to participate in the extracurricular activity. However, if the parties cannot agree on the child's current educational placement, as reflected in his/her IEP, the determination of what constitutes the present educational placement for purposes of the pendency provision should be made by a Part B due [IHO] or by an appropriate court." [FN58]

****20** Transfer from Part C (i.e., from an Individual Family Service Plan):*

Stay–put does not apply. [FN59]

Transfer from Another District within the Same State: [FN60]

Stay–put means comparable IEP services, not same brick–and–mortar location. [FN61] However, absent a compelling reason, the private school is the stay–put when the child moves from a feeder elementary to a high school district, with the fiscal responsibility a matter of state law. [FN62]

The interim placement in this context becomes the stay–put. [FN63]

As the Result of a Private Settlement:

Stay–put depends on the specific terms of the settlement agreement. [FN64]

However, stay–put does not expand or otherwise alter the pertinent terms of the settlement agreement. [FN65]

V. Miscellaneous Other

Whether the district has an obligation to conduct the annual review of the child's IEP during stay–put is an unsettled question. [FN66]

***21** Compensatory education is, depending on the specific circumstances, among the available remedies for violation of stay–put. [FN67]

Equitable defenses do not apply in determining the stay–put. [FN68]

In a tuition reimbursement case, if the district ultimately prevails on the merits, thus nullifying the stay–put, it is likely that the parent is not obligated to pay back the district. [FN69]

A stay–put order, at least in tuition reimbursement cases, qualifies as a collateral order for purposes of interlocutory appeal. [FN70]

The material–failure test applies to implementation and, thus, enforcement of stay–put orders. [FN71]

VI. Overall Decisional Framework

1. **As a threshold matter, is stay–put within the jurisdiction of the adjudicator [FN72]?**

    e.g., not for pre–filing period
    e.g., not after age of entitlement
    e.g., not for parentally placed private school child
    e.g., not for eligibility case (upon initial evaluation)
    e.g., not for transfer from Part C

2. **If so, what was the child's then–current placement, and has the district changed it?**

    e.g., What was the operative placement actually functioning at the time the dispute first arose (i.e., the last agreed–upon IEP if the child ***22** had one or whatever placement in which the child actually received instruction at the time the dispute arose)?
    e.g., Was the district's action likely to affect in some significant way the child's learning experience?

3a. **If so but the stay–put is not available, what is the extent of the district's obligation and, thus, the adjudicator's jurisdictional/remedial authority?**

    e.g., Is the district obligated to provide a close as possible alternative or, instead, is the matter within the court's exclusive jurisdiction and broad remedial authority?

3b. **If so and the stay–put is available, what is the extent of the adjudicator remedial authority?**

    e.g., May the adjudicator order compensatory education?

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[FN1]. 20 U.S.C. §§ 1400 *et seq.* (2011). Part C of the IDEA applies to children aged 0 to 3, and Part B applies to children aged 3 to 21.

[FN2]. *See, e.g.*, *Honig v. Doe*, 484 U.S. 305, 324, 108 S.Ct. 592, 98 L.Ed.2d 686 [43 Ed.Law Rep. [857]] (1988): "Recognizing that [the Act's adjudicative] proceedings might prove long and tedious, the Act's drafters did not intend [the stay–put provision] to operate inflexibly.... " The Supreme Court also used the stay–put provision directly in *Burlington School Committee v. Department of Education*, 471 U.S. 359, 372–73, 105 S.Ct. 1996, 85 L.Ed.2d 385 [23 Ed.Law Rep. [1189]] (1985) and less directly in *Schaffer v. Weast*, 546 U.S. 49, 59–60 & 65 n.1, 126 S.Ct. 528, 163 L.Ed.2d 387 [203 Ed.Law Rep. [29]] (2005).

[FN3]. Similarly, its corollary concept of educational placement is "an inexact science." *See, e.g.*, *John M. v. Bd. of Educ.*, 502 F.3d 708, 714 [225 Ed.Law Rep. [125]] (7th Cir. 2007).

[FN4]. A respected commentator provided this characterization more than two decades ago. Gail Sorenson, *The Many Faces of the EHA's "Stay–Put" Provision*, 62 Ed. Law Rep. [833] (1990). Since then, as the case law cited herein shows, these many further faces have appeared.

[FN5]. *See, e.g., J.O. v. Orange Twp. Bd. of Educ.*, 287 F.3d 667, 772 (3d Cir. 2002).

[FN6]. *See, e.g., L.Y. v. Bayonne Bd. of Educ.*, 384 Fed.Appx. 58 [261 Ed.Law Rep. [114]] (3d Cir. 2010) (intersection of IDEA and state law for charter schools).

[FN7]. The scope is comprehensive in terms of primary sources of law, except that the case law component is limited to court decisions, thus not extending to hearing or review officer decisions.

[FN8]. For a similar illustrative customized decisional template, see Perry A. Zirkel, *Tuition Reimbursement under the IDEA: A Decisional Checklist*, 282 Ed. Law Rep. [785] (2012).

[FN9]. The term "adjudicator" refers here initially to the hearing but ultimately to review officers and courts under the IDEA's adjudicative avenue for dispute resolution. For an overview of the alternate avenues under the IDEA and Section 504, see Perry A. Zirkel & Brooke L. McGuire, *A Roadmap to Legal Dispute Resolution for Parents of Students with Disabilities*, 23 J. SPECIAL EDUC. LEADERSHIP 100 (2010).

[FN10]. This part also provides the overall guidance of the Office of Special Education Programs (OSEP). The subsequent parts provide respectively more specific OSEP guidance.

[FN11]. 20 U.S.C. § 1415(j) (2011); *see also* **CAL. EDUC. CODE** § 56505(d) (2011). For the special rules in the disciplinary (i.e., removal) context, see 20 U.S.C. § 1415(k)(4).

[FN12]. 34 C.F.R. § 300.518 (2011).

[FN13]. *See also* Commentary to the IDEA regulations, 71 Fed. Reg. 46,709 (Aug. 14, 2006) (“ We believe that a child who previously received services under Part C of the Act, but has turned three and is no longer eligible under Part C of the Act, and is applying for initial services under Part B of the Act, does not have a ‘current educational placement’ ”).

[FN14]. 71 Fed. Reg. 46,704 (Aug. 14, 2006); *see also Letter to Stohrer*, 17 IDELR 55 (OSEP 1990); *Letter to Chassey*, 30 IDELR ¶ 51 (OSEP 1997).

[FN15]. For a recent iteration of this basic two–part test, *see Johnson v. Dist. of Columbia*, 839 F.Supp.2d 173 [281 Ed.Law Rep. [469]] (D.D.C. 2012). The two parts are overlapping and interactive rather than mutually exclusive; for example, in various cases, determining the then current placement answers whether the district has fundamentally changed it.

[FN16]. The meaning of educational placement more generally does not necessarily square with the meaning in the context of stay–put. *See, e.g., Brad K. v. Bd. of Educ. of City of Chicago*, 787 F.Supp.2d 734, 740 n.1 [272 Ed.Law Rep. [376]] (N.D. Ill. 2009).

[FN17]. *See, e.g.,* ***Johnson v. Special Educ. Hearing Office,*** 287 F.3d 1176 [164 Ed.Law Rep. [52]] (9th Cir. 2002).

[FN18]. *See, e.g., L.Y. v. Bayonne Bd. of Educ.*, 384 Fed.Appx. 58 [261 Ed.Law Rep. [114]] (3d Cir. 2010) (citing *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859 [107 Ed.Law Rep. [530]] (3d Cir 1996)); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618 [64 Ed.Law Rep. [43]] (6th Cir. 1990).

[FN19]. *J.R. v. Mars Area Sch. Dist.*, 318 Fed.Appx. 113, 119 [244 Ed.Law Rep. [1074]] (3d Cir. 2009) (citing *DeLeon v. Susquehanna Cmty. Sch. Dist.*, 747 F.2d 149, 153 [21 Ed.Law Rep. [24]]) (3d Cir. 1984, and upholding provision of same services though changed from resource room to inclusion setting); *see also Robert M. v. State of Hawaii*, 51 IDELR 1# (D. Hawaii 2008) (ruling that mental health services constituted a necessary component of the student's last IEP); *cf. Letter to Fisher*, 21 IDELR 992 (OSEP 1994) (“whether the proposed change would substantially or materially alter the child's educational program”—specifying four factors).

[FN20]. *See, e.g., White v. Ascension Sch. Parish Sch. Bd.*, 343 F.3d 373 [180 Ed.Law Rep. [491]] (5th Cir. 2003); *Johnson v. Dist. of Columbia*, 839 F.Supp.2d 173 [281 Ed.Law Rep. [469]] (D.D.C. 2012). The early cases offered a rather blurry line. For example, in a relatively early case, the Seventh Circuit provided this characterization in the context of stay–put: “Under IDEA case law developed by other circuits, the meaning of ‘educational placement’ falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP.” *Bd. of Educ. of Cmty. High Sch. Dist. No. 218 v. Illinois State Bd. of Educ.*, 103 F.3d 545, 548 [115 Ed.Law Rep. [287]] (7th Cir. 1996).

[FN21]. *See, e.g., Concerned Parents v. New York City Bd. of Educ.*, 629 F.2d 751 (2d Cir. 1980) (“remain[ed] in the same classification, the same school district, and the same type of educational program special classes”).

[FN22]. *DeLeon v. Susquehanna Cmty. Sch. Dist.*, 747 F.2d 149 [21 Ed.Law Rep. [24]] (3d Cir. 1984).

[FN23]. *Lunceford v. Dist. of Columbia Bd. of Educ.*, 745 F.2d 1577 [20 Ed.Law Rep. [1075]] (D.D.C. 1984).

[FN24]. *AW v. Fairfax County Sch. Bd.*, 372 F.3d 674 [189 Ed.Law Rep. [14]] (4th Cir. 2004); *Bd. of Educ. of Cmty. High Sch. Dist. No. 218 v. Illinois State Bd. of Educ.*, 103 F.3d 545, 548 [115 Ed.Law Rep. [287]] (7th

Cir. 1996); *cf. Bd. of Educ. v. Illinois State Bd. of Educ.*, 35 IDELR 213 (N.D. Ill. 2001) (granting parent's challenged request to move the child from an out–of–state to a less costly in–state residential placement as the stay–put).

[FN25]. ***N.D. v. State of Hawaii Dep't of Educ.*, 600 F.3d 1104 [255 Ed.Law Rep. [537]] (9th Cir. 2010), vacated as moot, 469 Fed.Appx. 570 [281 Ed.Law Rep. [40]] (9th Cir. 2012).**

[FN26]. *George A. v. Wallingford–Swarthmore Area Sch. Dist.*, 655 F.Supp.2d 546 [251 Ed.Law Rep. [625]] (E.D. Pa. 2009).

[FN27]. For an additional example, see *supra* note 6.

[FN28]. ***Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1134 [179 Ed.Law Rep. [147]] (9th Cir. 2003)**; accord *John M. v. Bd. of Educ.*, 502 F.3d 708 [225 Ed.Law Rep. [125]] (7th Cir. 2007). Yet, stay–put is not a clearly temporary placement superseded by an agreed–upon permanent placement. See, e.g., ***W.A. v. Paterson Joint Unified Sch. Dist.*, 57 IDELR 38 (E.D. Cal. 2011).**

[FN29]. *Knight v. Dist. of Columbia*, 877 F.2d 1025 [54 Ed.Law Rep. [791]] (D.C. Cir. 1989).

[FN30]. *Wagner v. Bd. of Educ. of Montgomery Cnty.*, 335 F.3d 297 [178 Ed.Law Rep. [694]] (4th Cir. 2004).

[FN31]. *See, e.g.*, ***K.D. v. Dep't of Educ., State of Hawaii*, 665 F.3d 1110 [275 Ed.Law Rep. [585]] (9th Cir. 2011).**

[FN32]. *Bd. of Educ. of Appoquinimink Sch. Dist. v. Johnson*, 51 IDELR 182 (D. Del. 2008).

[FN33]. *See, e.g.*, ***Marcus I. v. Dep't of Educ.*, State of Hawaii, 434 Fed.Appx. 600 [272 Ed.Law Rep. [887]] (9th Cir. 2011)**, further proceedings, 58 IDELR 251 (D. Hawaii 2012).

[FN34]. *See, e.g.*, ***Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036 [242 Ed.Law Rep. [654]] (9th Cir. 2009)**; *Casey K. v. St. Anne Cmty. High Sch. Dist.* No. 302, 400 F.3d 508 [196 Ed.Law Rep. [38]] (7th Cir. 2005); *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859 [107 Ed.Law Rep. [530]] (3d Cir 1996); *Zvi v. Ambach*, 694 F.2d 904 [8 Ed.Law Rep. [10]] (2d Cir. 1982). One limited exception is for child find in the disciplinary context (i.e., the district did not previously identify the child as eligible under the IDEA. *See, e.g.*, *Rodiriecus L. v. Waukegan Sch. Dist.*, 90 F.3d 249 [111 Ed.Law Rep. [94]]) (7th Cir. 1996). A second is for preliminary injunction motion that affects a stay put invocation, but is not itself the invocation. See, e.g., ***N.D. v. State of Hawaii, Dep't of Educ.*, 600 F.3d 1104 [255 Ed.Law Rep. [537]] (9th Cir. 2010); *Johnson v. Special Educ. Hearing Office*, 287 F.3d 1176 [164 Ed.Law Rep. [52]] (9th Cir. 2002)**; *Aliah K. v. State of Hawaii, Dep't of Educ.*, 788 F.Supp.2d 1176 [272 Ed.Law Rep. [495]] (D. Hawaii 2011).

[FN35]. *Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036 [242 Ed.Law Rep. [654]] (9th Cir. 2009). With regard to judicial levels beyond the district court other jurisdictions do not necessarily agree. *See, e.g.*, *Andersen v. Dist. of Columbia*, 877 F.2d 1018 [54 Ed.Law Rep. [784]] (D.C. Cir. 1989). This disagreement extends within some jurisdictions. Compare, e.g., *J.E. v. Boyertown Area Sch. Dist.*, 807 F.Supp.2d 236 [275 Ed.Law Rep. [789]] (E.D. Pa. 2011), with *M.R. v. Ridley Sch. Dist.*, 59 IDELR 156 (E.D. Pa. 2012).

[FN36]. *See, e.g., Kevin T. v. Elmhurst Cmty. Sch. Dist.*, 34 IDELR 242 (N.D. Ill. 2001); *Cronin v. Bd. of Educ.*, 689 F.Supp. 197 [48 Ed.Law Rep. [461]] (S.D.N.Y. 1988).

[FN37]. *See, e.g.*, ***Bd. of Educ. of Oak Park & River Forest High Sch. Dist. No. 200 v. Illinois State Bd. of Educ.*, 79 F.3d 654 [108 Ed.Law Rep. [32]] (7th Cir. 1996)**; *K.K. v. Dep't of Educ.*, 57 IDELR 100 (D. Hawaii 2011); *B.T. v. Dep't of Educ.*, State of Hawaii, 57 IDELR 134 (D. Hawaii 2011).

[FN38]. **CAL. EDUC. CODE § 56505(d).**

[FN39]. *See, e.g., Mangum v. Renton Sch. Dist.*, 56 IDELR 46 (W.D. Wash. 2011).

[FN40]. *John M. v. Bd. of Educ.*, 502 F.3d 708, 716 [225 Ed.Law Rep. [125]] (7th Cir. 2007).

[FN41]. *See, e.g.*, ***Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036 [242 Ed.Law Rep. [654]] (9th Cir. 2009)**; ***Clovis Unified Sch. Dist. v. California Special Educ. Hearing Office*, 903 F.2d 635 [60 Ed.Law Rep. [728]] (9th Cir. 1990)**; ***Ravenswood City Sch. Dist. v. J.S.*, 55 IDELR 222 (N.D. Cal. 2010).** This conclusion applies elsewhere as the clearly prevailing view. *See, e.g., Bd. of Educ. v. Schutz*, 290 F.3d 476, [165 Ed.Law Rep. [76]] 36 IDELR 261 (2d Cir. 2002); *St. Tammany Parish Sch. Bd. v. State of Louisiana*, 142 F.3d 776, [126 Ed.Law Rep. [76]] 28 IDELR 194 (5th Cir. 1998); *Susquenita v. Raelee S.*, 96 F.3d 78 [112 Ed.Law Rep. [590]] (3d Cir. 1996); However, this effect does not apply in the absence of an adjudicative decision agreeing that the private placement is appropriate. *See, e.g.*, ***K.D. v. Dep't of Educ.*, State of Hawaii, 665 F.3d 1110 [275 Ed.Law Rep. [585]] (9th Cir. 2011).** Similarly, it does not generally apply to pre–decision expenses. The Second Circuit regarded an unreasonably delayed hearing as an exception. *Mackey v. Bd. of Educ. of Arlington Cent. Sch. Dist.*, 386 F.3d 158 [192 Ed.Law Rep. [642]] (2d Cir. 2004). However, finding the particular impartial hearing not to fit this factual circumstance, the Ninth Circuit avoided determining the merits of the Second Circuit's view. ***Ashland Sch. Dist. v. Parents of Student E.H.*, 587 F.3d 1175 [251 Ed.Law Rep. [36]] (9th Cir. 2009).**

[FN42]. 34 C.F.R. § 300.518(d); **CAL. EDUC. CODE § 56505(d)**; *see also Letter to Hampden*, 49 IDELR 197 (OSEP 2007).

[FN43]. *See, e.g.*, ***L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900 [242 Ed.Law Rep. [23]] (9th Cir. 2009)** ; ***Huerta v. San Francisco Unified Sch. Dist.*, 57 IDELR 282 (N.D. Cal. 2011).** *But cf.* ***J.H. v. Los Angeles Unified Sch. Dist.*, 54 IDELR 195 (C.D. Cal. 2010)** (ALJ's conclusion that district's IEP was not appropriate plus services not in dispute).

[FN44]. ***S.L. v. Shoreline Unified Sch. Dist.*, 55 IDELR 165 (N.D. Cal. 2010).**

[FN45]. *Weakley Cnty. Bd. of Educ. v. H.M.*, 53 IDELR 114 (W.D. Tenn. 2009).

[FN46]. *See, e.g., Dep't of Educ., State of Hawaii v. M.F.*, 840 F.Supp.2d 1214 [281 Ed.Law Rep. [886]] (D. Hawaii 2011); *cf.* ***Johnson v. Special Educ. Hearing Office*, 287 F.3d 1176 [164 Ed.Law Rep. [52]] (9th Cir. 2002)** (transfer from Part C prior to new pertinent IDEA provision).

[FN47]. *Bd. of Educ. of Oak Park & River Forest High Sch. Dist. No. 200 v. Illinois State Bd. of Educ.*, 79 F.3d 654 [108 Ed.Law Rep. [32]] (7th Cir. 1996).

[FN48]. *See, e.g., Mr. R. v. Maine Sch. Admin. Dist. No. 35*, 295 F.Supp.2d 113 [184 Ed.Law Rep. [273]] (D. Me. 2003).

[FN49]. 20 U.S.C. § 1415(k); 34 C.F.R. §§ 300.530—300.536. For an overview, see, e.g., Perry A. Zirkel, "

Stay–Put" under the IDEA Discipline Provisions, 214 Ed.Law Rep. [467] (2007).

[FN50]. *Honig v. Doe,* 484 U.S. 305 (1988). The outcomes have varied in such cases. See, e.g., *Sch. Dist. of Philadelphia v. Stephan M.,* 25 IDELR 506 (E.D. Pa. 1997).

[FN51]. 20 U.S.C. § 1415(k)(3)(B)(ii)(II); 34 C.F.R. § 300.532(b)(2)(ii). For an extension of this period, see *infra* note 52.

[FN52]. 20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c). In the various such cases, the regulations provide that this expedited process may be repeated "if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or to others." *Id.* § 300.532(b)(3).

[FN53]. 20 U.S.C. § 1415(k)(4)(A); 34 C.F.R. § 300.533; *see also* 20 U.S.C. § 1415(k)(5)(D)(ii); 34 C.F.R. § 300.534(d)(2)(ii) (during expedited evaluation when not protected under deemed–to–know provision). But *cf. S.W. v. Holbrook Pub. Sch.,* 221 F.Supp.2d 222 [170 Ed.Law Rep. [565]] (D. Mass. 2002) (ruling that the stay–put is the original school setting when the parent asserts the issue of eligibility).

[FN54]. See, e.g., *M.M. v. Special Sch. Dist. No. 1,* 512 F.3d 455 [228 Ed.Law Rep. [684]] (8th Cir. 2008) (parties agreed that current placement was inappropriate but parent contributed to lack of lack of FAPE in the interim); cf. In re P.E.C., 211 S.W.3d 368 [215 Ed.Law Rep. [1237]] (Tex. Ct. App. 2006) (IDEA "stay–put does not apply to juvenile court dispositions").

[FN55]. *Plumbly v. Ne. Indep. Sch. Dist.,* 46 IDELR 126 (W.D. Tex. 2006).

[FN56]. *Doe v. Bd. of Educ.,* 115 F.3d 1273 [118 Ed.Law Rep. [881]] (7th Cir. 1997).

[FN57]. 20 U.S.C. § 1415(k)(6); 34 C.F.R. § 300.535. See, e.g., *Valentino C. v. Sch. Dist. of Philadelphia,* 40 IDELR 208 (E.D. Pa. 2004).

[FN58]. *Letter to Heldman,* 20 IDELR 621 (OSEP 1993).

[FN59]. See *supra* note 13 and accompanying text; *see also D.P. v. Sch. Bd. of Broward Cnty.,* 483 F.3d 725 [218 Ed.Law Rep. [826]] (11th Cir. 2007) (mentioning but not relying on the regulation). The conflicting case law arose before this 2006 IDEA regulation (and its subsequent repetition in California's education code). Compare ***Johnson v. Special Educ. Hearing Office,* 287 F.3d 1176 [164 Ed.Law Rep. [52]] (9th Cir. 2002)**, with *Pardini v. Allegheny Intermediate Unit,* 420 F.3d 181 [201 Ed.Law Rep. [44]] (3d Cir. 2005). However, OSEP cautioned districts in the Third Circuit to consult with legal counsel. *Letter to Zahorchak,* 48 IDELR 135 (OSEP 2007).

[FN60]. 34 C.F.R. § 300.323(e). For potential California stay–put variations specific to intra–state moves, see **CAL. EDUC. CODE § 56325.**

> In contrast, for IDEA authority specific to transfer from a district in another state, see 34 C.F.R. §§ 300.323(f). OSEP's commentary accompanying the regulations opines that stay–put does not apply in this situation, because it is considered an initial evaluation. 71 Fed. Reg. 46,682 (Aug. 14, 2006).

[FN61]. 20 U.S.C. § 1414(d)(2)(C)(i)(L); 34 C.F.R. § 300.32(e); *see also* 71 Fed. Reg. 46,681 (Aug. 14, 2006) (" 'comparable'' services means services that are 'similar' or 'equivalent'' to those that were described in the child's IEP from the previous public agency, as determined by the child's newly designated IEP Team in the new

public agency"). See, e.g., *G.B. v. New York City Dep't of Educ.*, 58 IDELR 100 (S.D.N.Y. 2012).

[FN62]. *Casey K. v. St. Anne Cmty. High Sch. Dist. No. 302*, 400 F.3d 508 [196 Ed.Law Rep. [38]] (7th Cir. 2005).

[FN63]. ***Termine v. William S. Hart High Sch. Dist.*, 219 F.Supp.2d 1049 [170 Ed.Law Rep. [242]] (C.D. Cal. 2002).**

[FN64]. See, e.g., ***K.D. v. Dep't of Educ., State of Hawaii*, 665 F.3d 1110 [275 Ed.Law Rep. [585]] (9th Cir. 2011); *K.D. v. Dep't of Educ.*, State of Hawaii, 665 F.3d 1110 [275 Ed.Law Rep. [585]] (9th Cir. 2011)**; *J.K. v. Council Rock Sch. Dist.*, 58 IDELR 43 (E.D. Pa. 2011); *D.C. v. Chicago Bd. of Educ.*, 58 IDELR 166 (N.D. Ill. 2011); cf. ***G.M. v. Drycreek Joint Elementary Sch. Dist.*, 55 IDELR 249 (N.D. Cal. 2010)** (settlement agreement + IEP).

[FN65]. ***B.M. v. Encinitas Union Sch. Dist.*, 2009 WL 29652, 109 LRP 367 (S.D. Cal. 2009).**

[FN66]. Compare, e.g., *Letter to Watson*, 48 IDELR 24 (OSEP 2007) (yes), with *Kuszewski v. Chippewa Valley Sch.*, 131 F.Supp.2d 926 [151 Ed.Law Rep. [845]] (E.D. Mich. 2001), aff'd on other grounds, 56 Fed.Appx. 655 [173 Ed.Law Rep. [713]] (6th Cir. 2003) (no).

[FN67]. See, e.g., ***Alexis R. v. High Tech Middle Media Arts Sch.*, 53 IDELR 259 (N.D. Cal. 2009)** (citing *Hale v. Poplar Bluffs R–I Sch.*, 280 F.3d 831 [161 Ed.Law Rep. [778]] (8th Cir. 2002) and *Mr. C. v. Maine Sch. Admin. Dist.*, 538 F.Supp.2d 298 [230 Ed.Law Rep. [599]] (D. Me. 2008)). A separate, open question is whether the compensatory education award extends to the stay–put period.

[FN68]. ***Termine v. William S. Hart High Sch. Dist.*, 219 F.Supp.2d 1049 [170 Ed.Law Rep. [242]] (C.D. Cal. 2002).**

[FN69]. Without deciding the issue, the court in *Wagner v. Board of Education Montgomery County*, 340 F.Supp.2d 603, 617 n.6 [193 Ed.Law Rep. [172]] (D. Md. 2004) observed:

> Several courts have held that, while not entirely free from doubt, parents are not required to reimburse school systems for costs of maintaining "stay put" even when the parents do not prevail on the administrative appeal, thus making the "stay put" placement retroactively unnecessary. See, e.g., *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 86 F.Supp.2d 354, 367–68 [142 Ed.Law Rep. [810]] (S.D.N.Y. 2000), aff'd, 297 F.3d 195 [167 Ed.Law Rep. [591]] (2d Cir. 2002); *T.B. v. Warwick Sch. Dept.*, 2003 WL 22069432, *7 (D.R.I.2003), aff'd sub nom. *T.B. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80 [186 Ed.Law Rep. [15]] (1st Cir. 2004). *But see Verhoeven v. Brunswick Sch. Comm.*, 207 F.3d 1, 6 n.2 [143 Ed.Law Rep. [54]] (1st Cir. 1999).

For additional support, see *Atlanta Indep. Sch. Sys. v. S.F.*, 740 F.Supp.2d 1335 [264 Ed.Law Rep. [225]] (N.D. Ga. 2010)
[FN70]. *Houston Indep. Sch. Dist. v. V.P.*, 582 F.3d 576 [249 Ed.Law Rep. [585]] (5th Cir. 2009).

[FN71]. *L.J. v. Broward Cnty. Sch. Bd.*, 850 F.Supp.2d 1315 [282 Ed.Law Rep. [1113]] (S.D. Fla. 2012). The flexible factors in this context include utility and feasibility, including fluidity of methodologies. Id. at 1321 and 1325. For the material–failure test for FAPE implementation cases, see, e.g., ***Van Duyn v. Baker Sch. Dist.*, 502 F.3d 811 [225 Ed.Law Rep. [136]] (9th Cir. 2007).**

[FN72]. See *supra* note 9.
286 Ed. Law Rep. 12

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