404 Ed. Law Rep. 398

West's Education Law Reporter
November 24, 2022

Education Law into Practice
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STAY-PUT UNDER THE IDEA: THE LATEST UPDATE[a1]

The so-called "stay-put," or "pendency," provision of the Individuals with Disabilities Education Act (IDEA)[1] is not a mathematically precise or icily frozen concept.[2] Instead, it is a rather fluid and complicated concept[3] with "many faces."[4] Its primary purpose, which is to maintain the status quo,[5] is often merely circular, not resolving many of the wide variety of circumstances that Congress did not and could not anticipate.[6] Finally, this wide variety of circumstances is clearly and ultimately a matter for hearing/review officers and courts to resolve,[7] including in the recent, unprecedented pandemic period.[8]

As the most recent in successive snapshots,[9] this article provides an annotated outline of a broad sampling of the many faces of stay-put.[10] Moreover, as the citations in **bold font** reflect, the emphasis here is on one notably active jurisdiction--**California**--to illustrate the ***399** customization of this federal concept to the decisional framework for a specific state.[11] Thus, the application to other states would necessitate adjustment to focus on the 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),[12] even though it helps inform the parties and other interested individuals.

The first part of 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[13]

A. IDEA Legislation:[14]

> 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.

B. IDEA Regulation:[15]

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 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 ***400** 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.[16]

> (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.

C. 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 IDEA IHO or an appropriate court, on a case-by-case basis.[17]

Stay-put starts upon the filing for a hearing[18] and applies during the 30-day resolution period.[19]

D. State Laws:

Most states merely mirror the IDEA in terms of limiting stay-put to adjudicative proceedings, but a few state laws extend it to mediation, with one also extending it to the complaint procedures process.[20]

II. "Then-Current Placement" and Fundamental Change?[21]

A1. Then-Current Placement:[22]

a. Then-Current:

The controlling date is the filing date for the due process hearing. For FAPE/placement cases, then-current is the child's last implemented individualized education program (IEP) at the time of filing.[23] For initial eligibility, then-current is the child's status

at the time of filing, ***401** because there is no IEP.[24] Similarly, after initial eligibility, filing before the IEP's implementation per the parties' agreement leaves the then-current placement in general education.[25]

b. Placement:

Revealing the potential complexities in some cases, courts have explained: "The IDEA does not define the term 'then-current educational placement,' but the courts have explained that a child's educational placement 'falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP.'"[26] A relatively recent case characterized the concept as a continuum, which includes location and services.[27]

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, if not (i.e., before any IEP), whatever placement in which the child actually received instruction at the time the dispute arose.[28] This version does not include unilateral placements where the final tier has not ruled in favor of the parent.[29]

Identifying the alternative variations, the Second Circuit explained that "a court typically looks to 1) 'the placement described in the child's most recently implemented IEP'; (2) 'the operative placement actually functioning at the time when the stay put provision of the IDEA was invoked'; or (3) 'the placement at the time of the previously implemented IEP.'"[30]

A2. Change:

The intertwined issue is whether the action in question is a fundamental change in a basic element,[31] 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." ***402** '[32] For example, the court concluded that the combination of 1) reducing the child's special ed services from 32 to 27.5 hours (with addition of aide being in this case of no weight), 2) exposure to nondisabled peers during transitions rather than a fully separate setting, and 3) eating lunch alone rather than with disabled peers was a fundamental change.[33] As another example, a court concluded that the following combination in an IHO's order also constitutes the requisite placement and change: (1) transportation, (2) behavior intervention plan, and (3) staffing (e.g., aide).[34] Conversely, the revision of a state vaccination law to remove the religious exemption did not qualify as a fundamental change because the IEP remained the same and the religious exemption was not a fundamental element of the placement.[35]

Because in this context the child's general educational placement is the setting rather than a particular school,[36] 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;[37] 2) a minor alteration, such as a change in transportation services[38] or a change in feeding treatment;[39] 3) transfer of an individual child between materially identical settings;[40] or 4) a state-wide shortening of the school day, or furlough,[41] ***403** or other such system-wide change.[42] However, upon a change in location the question is equivalence of services, not considerations of safety.[43]

B. Special Circumstances:

Some cases present special circumstances.[44] For example, the Ninth Circuit used an "as close as possible under the circumstances" test in accepting as the stay-put a temporary and malleable approximation of the last-agreed upon IEP, when implementation of the student's last agreed-upon IEP would have been impossible in the district.[45]

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A related special circumstance is where the last-agreed upon placement is not available. On this issue, the courts are split. According to the District of Columbia Circuit, the stay-put provision poses an affirmative obligation for the district to arrange for a similar placement.[46] 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 under § 1415(i)(2)(c)(iii), which is akin to *Honig* and which is not within the authority of an IDEA IHO.[47]

Another variation is where the prior placement refuses to readmit the student due to insufficient staffing. The Tenth Circuit ruled that this public-school placement was the stay-put where the IEP listed it as the school of attendance, refusing the parent's contention that it should instead be a private school.[48]

Another special circumstance in the gray area is where the state's enforcement of its private school policies interferes with the implementation of an individual student's IEP.[49] A different special circumstance is when the parents disagree and neither has sole educational custody. An unpublished decision ruled that either parent's consent suffices to establish the requisite agreed-upon placement for purposes of stay-put.[50]

As an additional example, the Ninth Circuit ruled that a partially implemented, multi-stage IEP, as a whole, is a student's then-current educational placement. In this case, ***404** due to a summer break (and a move to a different district), the effect was to move forward to the next stage rather than freeze, or continue in place, the previous stage.[51] Another such issue is when the parent allegedly disrupts the status quo during the stay-put. In a recent Illinois case, the court sided with the parent, rejecting the district's arguments about the parent's purported unilateral placement and explaining that the stay-put period otherwise remained controlling.[52]

In contrast, a parent's challenge to the current placement, which was the last one implemented, as a failure to provide FAPE is not a special circumstance, or public policy exception, to stay-put.[53]

III. Boundaries of Stay-Put

A. Scope:

Stay-put is inapplicable:

- unless and until filing for a request for an impartial hearing, not for previous period.[54]

- when the parent, not the district, is the party changing the placement.[55]

- to equitable services for parentally placed private school children.[56]

- to FBAs?[57]

Conversely, stay-put applies to:

• related services.[58]

• preschool IEPs of other public agencies.[59]

***405** Except in jurisdictions that end stay-put at the district court level,[60] it expires when the litigation concludes.[61] Moreover, the student's graduation, at least until determined to be proper, does not terminate stay-put.[62] Nevertheless, stay-put ceases at the age ceiling of the student's entitlement.[63]

B. Effect:

Stay-put starts upon the filing for due process, not upon the date of the impasse.[64] Once started, stay-put serves as an automatic preliminary injunction, thus not requiring the traditional factors (e.g., irreparable harm or likelihood of success) for enforcement.[65] However, undoing stay-put triggers the traditional factors, with the public policy weighing against such a reversal.[66]

When the stay-put is a private placement, an order to stay is an order to pay.[67] Conversely, nonpayment, when temporary and not resulting in an interruption of services or other significant impact on the child, is not a violation of stay-put.[68] Once in effect, stay-put applies to mediation, impartial hearings, initial judicial review, and--depending on the ***406** jurisdiction--subsequent judicial appeals.[69] The appeal process includes, at least upon the party's notice of the intent to do so, the period for filing an appeal.[70]

IV. Various Applications of Stay-Put

A. 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."[71]

B. Eligibility Cases:

Stay-put is merely the general education program when the parents challenge the district's determination, upon the initial evaluation, that the child is ineligible.[72]

C. Methodology Cases:

In a leading case, the Seventh Circuit reasoned as follows:

> 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].[73]

D. Tuition Reimbursement and Other Remedy-Based Cases:[74]

In general, as both the IDEA regulations and California legislation have codified, courts have concluded that the parties have implicitly agreed to a placement when the parents receive a state administrative agency decision (i.e., by the IHO except in the relatively few states with a second review officer tier) in favor of their choice of placement, which typically are for the remedy of tuition reimbursement.[75] Both the IDEA regulations and California ***407** legislation have codified this conclusion for placement cases.[76] Thus, upon appeal to court, the school district must implement the IHO (or, in two-tiered jurisdictions, the review officer's decision against it) even upon judicial appeal, unless the district obtains a court stay of the enforcement of the decision.[77] It also applies to other IHO remedial orders, or injunctive relief more generally, upon judicial appeal.[78]

However, this inferred agreement does not apply to IHO decisions in favor of the district in which the parent has not proposed or agreed with the IHO's placement order.[79] Similarly, it does not apply to hearing officer orders concerning the location capable of implementing the IEP rather than the appropriateness of the IEP itself, especially where the hearing officer limited such order for a specific, now expired period.[80] Finally, it does not apply if the hearing officer ordered reimbursement for the past denial of FAPE but ruled that the proposed new IEP was appropriate (and "ongoing placement [at the private school] is not ordered").[81]

***408** Here are other exceptions: 1) cases in which the IHO ordered reimbursement but did not reach the merits to conclude that the unilateral placement was appropriate;[82] 2) in cases without such an IHO conclusion and the parties had not previously agreed on an IEP;[83] 3) when the original stay-put placement became moot and the school authorities acquiesced to a new placement;[84] 4) when the factors for a preliminary injunction including irreparable harm weigh against it;[85] and 5) when the student had graduated and gone to college.[86]

In the intermediate area, settlement agreements may or may not establish stay-put, depending on their terms.[87] However, stay-put does not expand or otherwise alter the pertinent terms of the settlement agreement.[88]

For duration, this inferred agreement continues for the unilateral placement even when (a) the IHO found that the district revised its proposal mid-year for an appropriate placement[89] or (b) the IHO provided an ending date for the reimbursement order.[90]

For scope, it must be comparable (i.e., substantially similar), not necessarily an exact duplication of the child's placement, depending on equitable considerations.[91]

In tuition reimbursement cases, payment is a matter of state law, including IHO determinations, rather than automatically part of stay-put.[92] This equitable remedy, depending ***409** on the circumstances, may well be for the full value of the services, not just the out-of-pocket payments.[93] Nevertheless, if the district ultimately prevails on the merits, thus nullifying the stay-put, it is unlikely that the parent must pay back the district.[94] Finally, a stay-put order, at least in tuition reimbursement cases, qualifies as a collateral order for purposes of interlocutory appeal.[95]

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The remedy of compensatory education presents a few special applications. First, compensatory education is not an exception to the general rule that stay-put ceases upon reaching the statutory ceiling of age 21.[96] Second, compensatory education is, depending on the specific circumstances, among the available remedies for violation of stay-put.[97] Some courts have applied stay-put to compensatory education when combined with tuition reimbursement.[98] Third, although not clearly addressed and settled, it would seem likely that a denial of FAPE for the disputed period would extend, upon the final adjudication, to the stay-put period that maintained the same deficient IEP.[99] Finally, stay-put does not render compensatory education moot upon the child's change in residence to another district.[100]

E. Divorced Parents with Joint Legal Custody:

As an extension of the tuition reimbursement cases, a federal district court recently ruled in an unpublished decision that an IHO's order changing the extent of inclusion of the child, ***410** that one parent agreed to (but the other did not), is the stay-put during the judicial appeal of the decision.[101]

F. Discipline Cases:[102]

For disciplinary changes in placement based on 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 court,[103] and 2) obtaining an IHO-ordered change in placement to a 45-day interim alternative educational setting (IAES)[104] per the expedited hearing procedure that applies to disciplinary changes in placement.[105]

An IHO order is not needed for disciplinary changes in placement based on three special-circumstances IAESs--weapons, illegal drugs, and serious bodily harm.[106] 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.[107] However, upon the expiration of the period, the district has a heavy burden to overcome the presumption of stay-put as the return to the student's placement.[108]

Some other discipline cases provide variations as to the application of stay-put.[109]

Finally, stay-put does not apply to these disciplinary situations: 1) expulsion of the student after agreed-upon exiting from special education;[110] 2) expulsion for conduct properly determined not to be a manifestation of the child's disability;[111] or 3) calling the police resulting in arrest.[112]

***411 G. Extracurricular Activities:**

OSEP has provided the following policy interpretation for stay-put in relation to 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.[113]

H. Transfers

For transfers from Part C (i.e., from an Individual Family Service Plan), stay-put does not apply.[114] However, the district must provide those services not in dispute.[115] For transfers to another school district within the same school year, specific IDEA provisions, including corollary state law, override stay-put.[116] In such circumstances, the new district must provide the child with services "comparable" to those in the previous district's IEP,[117] with slight differences as to the duration of this arrangement depending on whether the new district is in the same or a different state.[118]

However, the IDEA's transfer provisions do not directly apply to transfers during the summer.[119] Moreover, neither the IDEA's transfer provisions nor stay-put applies as the result of a voluntary parental intrastate transfer from one private school placement to another.[120]

***412 I. Charter Schools:**

Disenrollment by the charter school during due process proceedings is a change in placement and, thus, a violation of stay-put.[121] The local education agency responsible for payment of the stay-put placement may be the charter school or the district of residence depending primarily on the state law arrangement of charter schools.[122]

V. Miscellaneous Other

Stay-put does not apply to the same class or, except if promotion/retention is at issue, grade level.[123]

Stay-put does not require parental consent for a change in the IEP where the parents had the requisite opportunity for participation in the IEP process.[124]

Obtaining a judicial order for stay-put after filing for an impartial hearing does not require exhaustion of the stay-put issue.[125]

Whether the district has an obligation to conduct the annual review of the child's IEP during stay-put is not an entirely settled question.[126]

Equitable defenses do not apply in determining the stay-put.[127]

In a case in which the parent arranged for private provision of stay-put services upon the district's refusal and thereafter the district assumed this obligation, the Second Circuit ruled that the district may use its own services rather than continue the private services.[128] In a case in which the district failed to implement stay-put services and the parents arranged for their private provision, a federal district court in West Virginia applied the general approach of IHO orders to the specific order for a third-party service.[129]

A federal district court in New York recently ruled that a district's addition of a service in response to an interim IHO order constituted the stay-put "until a final, non-appealable ***413** order."[130] Conversely, in cases of an IHO final order for a limited period, the courts have split depending on whether the order was specific as to the consequence at the end of the period.[131]

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In a case in which the practice in implementing the last-agreed upon IEP differed from its terms, a federal district court in California ruled that the change was a mutual modification in the stay-put when it came closer to the overall goal of the IEP.[132]

The material-failure test applies to implementation and, thus, enforcement of stay-put orders.[133]

The case law is fractured as to whether parents who succeed only for stay-put are prevailing in terms of attorneys' fees.[134]

Stay-put does not relieve the district of its obligation to have an annual IEP meeting, but if revised, the new IEP may not be implemented unless both parties agree.[135]

VI. Overall Decisional Framework

1. **As a threshold matter, is stay-put within the jurisdiction of the adjudicator?**[136]

- 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 had one or whatever placement in which the child actually received instruction at the time the dispute arose)?
- ***414** 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?

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

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

Footnotes

a1 *Education Law Into Practice* is a special section of the Education Law Reporter sponsored by the Education Law Association. The views expressed are those of the author and do not necessarily reflect the views of the publisher or the Education Law Association. Cite as 404 Educ. Law Rep. 398 (November 24, 2022).

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1 20 U.S.C. §§ 1400 *et seq.* (2018). Part C of the IDEA applies to children aged 0 to 3, and Part B applies to children aged 3 to 21.

2 *E.g.,* Honig v. Doe, 484 U.S. 305, 324, 43 Educ. L. 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 Sch. Comm. v. Dept. of Educ., 471 U.S. 359, 372-73, 23 Educ. L. Rep. 1189 (1985) and less directly in Schaffer v. Weast, 546 U.S. 49, 59-60 & 65 n.1, 203 Educ. L. Rep. 29 (2005).

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

4 A respected commentator provided this characterization more than two decades ago. Gail Sorenson, *The Many Faces of the EHA's "Stay-Put" Provision*, 62 Educ. L. Rep. 833 (1990). Since then, as the case law cited herein shows, these many further faces have appeared. *See infra* note 9.

5 *E.g.*, J.O. v. Orange Twp. Bd. of Educ., 287 F.3d 267, 272, 164 Educ. L. Rep. 44 (3d Cir. 2002).

6 *E.g.*, L.Y. v. Bayonne Bd. of Educ., 384 F. App'x 58, 261 Educ. L. Rep. 114 (3d Cir. 2010) (intersection of IDEA and state law for charter schools).

7 *E.g.*, Letter to Classy, 30 IDELR (OSEP 1997); Letter to Armstrong, 28 IDELR 303 (OSEP 1997).

8 *E.g.,* **E.E. v. Norris Sch. Dist., 4 F.4th 866, 392 597 (9th Cir. 2021); Lain v. Pleasanton Unified Sch. Dist., 77 IDELR ¶184 (N.D. Cal. 2020);** Westhampton Beach Sch. Dist., 77 IDELR ¶ 96 (E.D.N.Y. 2020); L.A. v. N.Y.C. Dep't of Educ., 77 IDELR ¶ 104 (S.D.N.Y. 2020).

9 For the predecessor articles, *see* Perry A. Zirkel, *Stay-Put under the IDEA: An Updated Overview*, 330 Educ. L. Rep. 8 (2016); Perry A. Zirkel, *Stay-Put under the IDEA: An Annotated Overview*, 286 Educ. L. Rep. 12 (2013).

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10 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.

11 For a similar illustrative customized decisional template, *see* Perry A. Zirkel, *Tuition Reimbursement under the IDEA: A Decisional Checklist*, 282 Educ. L. Rep. 785 (2012).

12 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).

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

14 20 U.S.C. § 1415(j) (2018); *see also* **Cal. Educ. Code § 56505(d) (2018)**. For the special rules in the disciplinary (i.e., removal) context, *see* 20 U.S.C. § 1415(k)(4).

15 34 C.F.R. § 300.518 (2019).

16 *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").

17 71 Fed. Reg. 46,704 (Aug. 14, 2006); *see also* Letter to Chassy, 30 IDELR ¶ 51 (OSEP 1997); Letter to Heldman, 20 IDELR 621 (OSEP 1993); Letter to Stohrer, 17 IDELR 55 (OSEP 1990).

18 Letter to Winston, 213 IDELR 102 (OSEP 1987). In contrast, a parent request for an IEE at public expense (or other such issue) does not trigger stay-put in the absence of filing for a hearing. Letter to Anonymous, 72 IDELR ¶ 163 (OSEP 2018).

19 71 Fed. Reg. 46,709 (Aug. 14, 2006).

20 *E.g.*, 23 Ill. Admin. Code 226.560; Iowa Admin. Code r. 281-41.518(5); N.J. Admin. Code § 14-2.6(d)(10); 22 Pa. Code § 14.162(s) (mediation); 05-071 Me. Admin. Code Ch. 101, §§ XVI.20-A (mediation and complaint procedure).

21 For a recent iteration of this basic two-part test, *see* G.B. v. District of Columbia, 78 F. Supp. 3d 109, 319 Educ. L. Rep. 882 (D.D.C. 2015); Johnson v. District of Columbia, 839 F. Supp. 2d 173, 281 Educ. L. 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.

22 The meaning of educational placement more generally does not necessarily square with the meaning in the context of stay-put. *E.g.*, Brad K. v. Bd. of Educ. of City of Chi., 787 F. Supp. 2d 734, 740 n.1, 272 Educ. L. Rep. 376 (N.D. Ill. 2009).

23 *E.g.*, R.B. v. Mastery Sch., 532 F. App'x 136, 299 Educ. L. Rep. 24 (3d Cir. 2013); **Johnson v. Special Educ. Hearing Office, 287 F.3d 1176, 164 Educ. L. Rep. 52 (9th Cir. 2002)**; Erickson v. Albuquerque Pub. Sch., 199 F.3d 1116, 140 Educ. L. Rep. 894 (10th Cir. 1999). For recent examples, *see* Scordato v. Kinnikinnick Sch. Dist., 72 IDELR ¶ 248 (N.D. Ill. 2018) (identifying the IEP that was, per notice, implemented after 10 days rather than the placement the parents' argued upon filing subsequent to that date); G.W. v.

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Boulder Valley Sch. Dist, 67 IDELR ¶ 112 (D. Colo. 2016) (upholding last-implemented IEP in out-of-state placement, even though parents refused it and insisted on comparable in-state placement).

24 *E.g.*, **A.D. v. Haw. Dep't of Educ., 727 F.3d 911, 296 Educ. L. Rep. 816 (9th Cir. 2013)**.

25 *E.g.,* Northfield City Bd. of Educ. v. K.S., 847 F. App'x 130, 389 Educ. L. Rep. 751 (3d Cir. 2021) (ruling that for summer filing date stay-put is general education when initial IEP was effective on June 1 but not to be implemented until start of next school year).

26 Johnson v. District of Columbia, 839 F. Supp. 2d at 176-77 (quoting Bd. of Educ. of Cmty. High Sch. Dist. No. 218 v. Ill. State Bd. of Educ., 103 F.3d 545, 115 Educ. L. Rep. 287 (7th Cir. 1996)).

27 Eley v. District of Columbia, 47 F. Supp. 3d 1, 314 Educ. L. Rep. 767 (D.D.C. 2014).

28 *E.g.,* Drinker v. Colonial Sch. Dist., 78 F.3d 859, 107 Educ. L. Rep. 530 (3d Cir 1996); Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 64 Educ. L. Rep. 43 (6th Cir. 1990). For recent repetitions of this intertwined standard, citing these well-accepted court decisions, *E.g.*, J.E. v. Boyertown Area Sch. Dist., 452 F. App'x 172, 277 Educ. L. Rep. 146 (3d Cir. 2011): L.Y. v. Bayonne Bd. of Educ., 384 F. App'x 58, 261 Educ. L. Rep. 114 (3d Cir. 2010).

29 N.W. v. Boone Cnty. Bd. of Educ., 763 F.3d 611, 308 Educ. L. Rep. 616 (6th Cir. 2014) (limiting *Thomas* in light of more recent IDEA regulation defining "placement").

30 Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 319 Educ. L. Rep. 641 (2d Cir. 2015) (citing Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 192 Educ. L. Rep. 642 (2d Cir. 2004)); *cf.* **C.Q. v. River Springs Charter Sch., 771 F. App'x 778 (9th Cir. 2019)** (using such combination of factors without detailed discussion).

31 Erickson v. Albuquerque Pub. Sch., 199 F.3d 1116, 1122, 140 Educ. L. Rep. 894 (10th Cir. 1999) ("An educational placement is changed when a fundamental change in, or elimination of, a basic element of the educational program has occurred."). For a recent example in which the court found no change in a basic element upon implementing an IEP designed for a private school instead at the district, *see* Smith v. Cheyenne Mountain Sch. Dist. 12, 75 IDELR ¶ 39 (D. Colo. 2019).

32 J.R. v. Mars Area Sch. Dist., 318 F. App'x 113 119, 244 Educ. L. Rep. 1074 (3d Cir. 2009) (citing DeLeon v. Susquehanna Cmty. Sch. Dist., 747 F.2d 149, 153, 21 Educ. L. Rep. 24 (3d Cir. 1984) and upholding provision of same services though changed from resource room to inclusion setting); *see also* Robert M. v. Haw., 51 IDELR ¶ 211 (D. Haw. 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). For a more recent example, *see* **Anchorage Sch. Dist. v. M.P., 689 F.3d 1047, 283 Educ. L. Rep. 653 (9th Cir. 2012)** (holding that updating the IEP does not qualify as a change to a student's educational placement "so long as such revisions do not involve changes to the academic setting in which instruction is provided or constitute significant changes in the student's educational program").

33 G.B. v. District of Columbia, 78 F. Supp. 3d 109, 319 Educ. L. Rep. 882 (D.D.C. 2015) (citing LRE dicta in Lunceford v. District of Columbia Bd. of Educ., 745 F.2d 1577, 20 Educ. L. Rep. 1075 (D.D.C. 1984); *cf.* H.R. v. District of Columbia, 81 IDELR ¶ 72 (D.D.C. 2022) (relying on substantial reduction in services and change in the student's interaction with nondisabled peers).

34 Enterprise City Bd. of Educ. v. S.S., 75 IDELR ¶ 214 (M.D. Ala. 2019).

35 V.D. v. N.Y., 403 F. Supp. 3d 76, 371 Educ. L. Rep. 914 (E.D.N.Y. 2019).

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36 *E.g.,* White v. Ascension Sch. Parish Sch. Bd., 343 F.3d 373, 180 Educ. L. Rep. 491 (5th Cir. 2003); Johnson v. District of Columbia, 839 F. Supp. 2d 173, 281 Educ. L. Rep. 469 (D.D.C. 2012); *see also* **Oliver C. v. Dep't of Educ., 762 F. App'x 413 (9th Cir. 2019)** (concluding that the change to a different school, upon parents' move, was not change in placement); *cf.* Round Rock Indep. Sch. Dist. v. Amy M., 540 F. Supp. 3d 679, 398 Educ. L. Rep. 114 (W.D. Tex. 2021) (parent's temporary change to private school for virtual instruction during district's pandemic transition back to in-person instruction).

37 *E.g.*, Concerned Parents v. N.Y.C. 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").

38 DeLeon v. Susquehanna Cmty. Sch. Dist., 747 F.2d 149, 21 Educ. L. Rep. 24 (3d Cir. 1984). *But cf.* Douglas v. District of Columbia, 4 F. Supp. 3d 1, 308 Educ. L. Rep. 343 (D.D.C. 2014) (change from neighborhood school to vaguely described alternative placement with needed addition of transportation).

39 Lunceford v. District of Columbia Bd. of Educ., 745 F.2d 1577, 20 Educ. L. Rep. 1075 (D.D.C. 1984).

40 AW v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 189 Educ. L. Rep. 14 (4th Cir. 2004); Bd. of Educ. of Cmty. High Sch. Dist. No. 218 v. Ill. State Bd. of Educ., 103 F.3d 545, 548, 115 Educ. L. Rep. 287 (7th Cir. 1996); Z.B. v. D.C., 292 F. Supp. 3d 300, 353 Educ. L. Rep. 682 (D.D.C. 2018); D.K. v. District of Columbia, 983 F. Supp. 2d 138, 305 Educ. L. Rep. 97 (D.D.C. 2014); James v. District of Columbia, 949 F. Supp. 2d 134, 299 Educ. L. Rep. 873 (D.D.C. 2013); *cf.* Bd. of Educ. v. Ill. 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).

41 **N.D. v. Haw. Dep't of Educ., 600 F.3d 1104, 255 Educ. L. Rep. 537 (9th Cir. 2010), *vacated as moot*, 469 F. App'x 570, 281 Educ. L. Rep. 40 (9th Cir. 2012).** Instead, the court characterized this issue as a failure-to-implement claim.

42 *E.g.*, Carmona v. Dep't of Educ., 81 IDELR ¶ 50 (D.N.J. 2022); J.T. v. de Blasio, 500 F. Supp. 3d 137 (S.D.N.Y. 2020); J.C. v. Fernandez, 77 IDELR ¶ 15 (D. Guam 2020) (pandemic change to virtual instruction).

43 George A. v. Wallingford-Swarthmore Area Sch. Dist., 655 F. Supp. 2d 546, 251 Educ. L. Rep. 625 (E.D. Pa. 2009).

44 For an additional example, *see supra* note 6.

45 **Ms. S. v. Vashon Island Sch. Dist., 337 F.3d 1115, 1134, 179 Educ. L. Rep. 147 (9th Cir. 2003)**; *accord* John M. v. Bd. of Educ., 502 F.3d 708, 225 Educ. L. Rep. 125 (7th Cir. 2007); *cf.* **C.Q. v. River Springs Charter Sch., 771 F. App'x 788 (9th Cir. 2019)** (affirming the "only rational then-current placement"). Yet, stay-put is not a clearly temporary placement superseded by an agreed-upon permanent placement. *E.g.*, **W.A. v. Paterson Joint Unified Sch. Dist., 57 IDELR ¶ 38 (E.D. Cal. 2011).**

46 Knight v. District of Columbia, 877 F.2d 1025, 54 Educ. L. Rep. 791 (D.C. Cir. 1989). For subsequent applications, *see* Laster v. District of Columbia, 394 F. Supp. 2d 60, 204 Educ. L. Rep. 161 (D.D.C. 2005); Spilsbury v. District of Columbia, 307 F. Supp. 2d 22, 186 Educ. L. Rep. 741 (D.D.C. 2004).

47 Wagner v. Bd. of Educ. of Montgomery Cnty., 335 F.3d 297, 178 Educ. L. Rep. 694 (4th Cir. 2004); *cf.* Meza v. Bd. of Educ. of Portales Mun. Sch., 56 IDELR ¶ 167 (D.N.M. 2011). For an example of a preliminary injunction enforcing a hearing officer's order for comparable services upon closure of the child's out-of-state residential placement, *see* **K.K. v. William S. Hart High Sch. Dist., 80 IDELR ¶ 271 (C.D. Cal. 2022).**

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48 Smith v. Cheyenne Mountain Sch. Dist., 652 F. App'x 697, 335 Educ. L. Rep. 182 (10th Cir. 2016).

49 D.M. v. N.J. Dep't of Educ., 801 F.3d 205, 322 Educ. L. Rep. 127 (3d Cir. 2015).

50 Sheils v. Pennsbury Sch. Dist., 64 IDELR ¶ 294 (E.D. Pa. 2015).

51 **N.E. v. Seattle Sch. Dist., 842 F.3d 1093, 337 Educ. L. Rep. 620 (9th Cir. 2016)**. For a subsequent case, where N.E. favored the parent but the irreparable harm factor did not, the court declined to grant the parent's motion for a temporary restraining order. **R.F. v. Delano Union Sch. Dist., 224 F. Supp. 3d 979, 343 Educ. L. Rep. 825 (E.D. Cal. 2016)**.

52 L.S. v. Lansing Sch. Dist., 169 F. Supp. 3d 761, 334 Educ. L. Rep. 1078 (N.D. Ill. 2015).

53 **E.E. v. Norris Sch. Dist., 4 F.4th 866, 392 Educ. L. Rep. 597 (9th Cir. 2021)**.

54 *E.g.*, **K.D. v. Dep't of Educ., Haw., 665 F.3d 1110, 275 Educ. L. Rep. 585 (9th Cir. 2011)**; *see also* Sammons v. Polk Cnty. Sch. Bd., 165 F. App'x 750 (11th Cir. 2006) (ruling that filing for mediation before filing for a due process hearing does not trigger stay-put). More recently, the Second Circuit clarified that the trigger is the filing for the hearing, not when and if the parties reached an impasse. Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 319 Educ. L. Rep. 641 (2d Cir. 2015). Similarly, except for the very few state laws that provide otherwise, filing a state complaint does not trigger stay-put. *See, e.g.*, Clarfeld v. Dep't of Educ., 78 IDELR ¶ 42 (D. Haw. 2021), *aff'd*, **80 IDELR ¶ 210 (9th Cir. 2022)**.

55 Ventura de Paulino v. N.Y.C. Dep't of Educ., 959 F.3d 519, 377 Educ. L. Rep. 53 (2d Cir. 2020); *cf.* Morrison v. Perry Sch. Dep't, 2018 WL 6819313 (D. Me. 2018), *adopted*, 73 IDELR ¶ 172 (D. Me. 2019) (ruling that IDEA provision for moving to another district applies rather than stay-put).

56 Bd. of Educ. of Appoquinimink Sch. Dist. v. Johnson, 51 IDELR ¶ 182 (D. Del. 2008).

57 For the limited case law on point, an unpublished court decision ruled that stay put does not apply to an FBA in the context of an IHO order that one of the parents agreed with. Sheils v. Pennsbury Sch. Dist., 64 IDELR ¶ 294 (E.D. Pa. 2015).

58 Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 319 Educ. L. Rep. 641 (2d Cir. 2015); **Marcus I. v. Dep't of Educ., 583 F. App'x 753, 311 Educ. L. Rep. 35 (9th Cir. 2014)**.

59 Jalen Z. v. Sch. Dist. of Phila., 104 F. Supp. 3d 660, 324 Educ. L. Rep. 766 (E.D. Pa. 2015).

60 *E.g.*, Kari H. v. Franklin Special Sch. Dist., 125 F.3d 855 (6th Cir. 1997); Andersen v. District of Columbia, 877 F.2d 1018, 54 Educ. L. Rep. 784 (D.C. Cir 1989).

61 *E.g.*, M.R. v. Ridley Sch. Dist., 744 F.3d 112, 302 Educ. L. Rep. 522 (3d Cir. 2014); **Marcus I. v. Dep't of Educ., Haw., 434 F. App'x 600, 272 Educ. L. Rep. 887 (9th Cir. 2011), *further proceedings*, 506 F. App'x 613, 292 Educ. L. Rep. 613 (9th Cir. 2013) (citing Joshua A. v. Rocklin Unified Sch. Dist., 559 F.3d 1036, 242 Educ. L. Rep. 654 (9th Cir. 2009)**; AW v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 684 n.11 (4th Cir. 2004). For a discussion of the split in case law authority and proposal for the shorter view, *see* Blakely Simoneau, *Stay-Put and the Individuals with Disabilities Education Act: A Proposal for Clarity and Change*, 21 U. Pa. J.L. & Soc. Change 153, 171-76 (2018).

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62 *E.g.*, Kevin T. v. Elmhurst Cmty. Sch. Dist., 34 IDELR ¶ 202 (N.D. Ill. 2001); *cf.* Doe v. Marlborough Pub. Schs. 54 IDELR ¶ 283 (D Mass. 2010); R.Y. v. Haw. Dep't of Educ., 54 IDELR ¶ 4 (D. Haw. 2010); Cronin v. Bd. of Educ., 689 F. Supp. 197, 48 Educ. L. Rep. 461 (S.D.N.Y. 1988) (applying even if not challenging graduation). *But cf.* **G.M. v. Dry Creek Joint Elementary Sch. Dist., 458 F. App'x 654, 278 Educ. L. Rep. 851 (9th Cir. 2011)**.

63 *E.g.*, Bd. of Educ. of Oak Park & River Forest High Sch. Dist. No. 200 v. Ill. State Bd. of Educ., 79 F.3d 654, 108 Educ. L. Rep. 32 (7th Cir. 1996); J.R. v. Cox-Cruey, 61 IDELR ¶ 212 (E.D. Ky. 2013); K.K. v. Dep't of Educ., 57 IDELR ¶ 100 (D. Haw. 2011); B.T. v. Dep't of Educ., Haw., 57 IDELR ¶ 134 (D. Haw. 2011); Hilden v. Lake Oswego Sch. Dist., 21 IDELR 671 (D. Or. 1994). *But cf.* **A.D. v. Haw. Dep't of Educ., 727 F.3d 911, 296 Educ. L. Rep. 816 (9th Cir. 2013)** (not where challenging the lawfulness of a state law).

64 Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 319 Educ. L. Rep. 641 (2d Cir. 2015).

65 *E.g.*, **Joshua A. v. Rocklin Unified Sch. Dist., 559 F.3d 1036, 242 Educ. L. Rep. 654 (9th Cir. 2009)**; Casey K. v. St. Anne Cmty. High Sch. Dist. No. 302, 400 F.3d 508, 196 Educ. L. Rep. 38 (7th Cir. 2005); Drinker v. Colonial Sch. Dist., 78 F.3d 859, 107 Educ. L. Rep. 530 (3d Cir 1996); Zvi v. Ambach, 694 F.2d 904, 8 Educ. L. Rep. 10 (2d Cir. 1982); Abington Heights Sch. Dist. v. A.C., 63 IDELR ¶ 97 (E.D. Pa. 2014); *cf.* Letter to Goldstein, 60 IDELR ¶ 200 (OSEP 2013) (opining that if placement is not at issue the district should immediately implement the stay-put, but if the placement is at issue it is appropriate to wait for the IHO's determination). 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. *E.g.*, Rodiriecus L. v. Waukegan Sch. Dist., 90 F.3d 249, 111 Educ. L. Rep. 94 (7th Cir. 1996). A second is for preliminary injunction motion that affects a stay put invocation, but is not itself the invocation. *E.g.*, **N.D. v. Haw., Dep't of Educ., 600 F.3d at 1112; Johnson v. Special Educ. Hearing Office, 287 F.3d 1176, 164 Educ. L. Rep. 52 (9th Cir. 2002)**; Aliah K. v. Haw., Dep't of Educ., 788 F. Supp. 2d 1176, 272 Educ. L. Rep. 495 (D. Haw. 2011).

66 *E.g.*, **E.E. v. Norris Sch. Dist., 4 F.4th 866, 392 Educ. L. Rep. 597 (9th Cir. 2021)**; S.T. v. Howard Cnty. Pub. Sch. Sys., 64 IDELR ¶ 63 (D. Md. 2014); *see also* Seashore Charter Sch. v. E.B., 64 IDELR ¶ 44 (S.D. Tex. 2014) (danger); D.M. v. N.J. Dep't of Educ., 64 IDELR ¶ 20 (D.N.J. 2014) (mainstreaming); Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375 (N.D.N.Y. 2001) (equitable stay-put).

67 A.B. v. Balt. City Bd. of Sch. Comm'rs, 65 IDELR ¶ 10 (D. Md. 2015).

68 **F.K. v. Dep't of Educ., Haw., 585 F. App'x 710 (9th Cir. 2014)**.

69 *See supra* notes 69-70 and accompanying text.

70 *E.g.*, H.W. v. Comal Indep. Sch. Dist., 78 IDELR ¶ 216 (W.D. Tex. 2021), *aff'd on other grounds*, 32 F.4th 454 (5th Cir. 2022).

71 **Cal. Educ. Code § 56505(d)**.

72 *E.g.*, Mangum v. Renton Sch. Dist., 56 IDELR ¶ 46 (W.D. Wash. 2011).

73 John M. v. Bd. of Educ., 502 F.3d 708, 716, 225 Educ. L. Rep. 125 (7th Cir. 2007).

74 For the separable issue of the possible mootness intersection between stay-put and tuition reimbursement where the parent files for an impartial hearing to challenge the district's proposed placement for the year following a final adjudication in favor of tuition reimbursement, *see* Daniel W. Morton-Bentley, *Is a Paid IDEA Tuition Reimbursement Case Moot?: The Intersection of Pendency, Tuition Reimbursement, and Mootness*, 2015 B.Y.U. Educ. & L.J. 395. For the mootness effect on the district's attempted appeal of a lower court's (not IHO's) tuition reimbursement order, *see* Steven R.F. v. Harrison Sch. Dist. No. 2, 924 F.3d 1309, 366 Educ. L. Rep.

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603 (10th Cir. 2019); *cf.* Pocono Mountain Sch. Dist. v. T.D., 790 F. App'x 387, 373 Educ. L. Rep. 510 (3d Cir 2019) (compensatory education mooted eligibility case).

75 *E.g.*, **Joshua A. v. Rocklin Unified Sch. Dist., 559 F.3d 1036, 242 Educ. L. Rep. 654 (9th Cir. 2009); Clovis Unified Sch. Dist. v. Cal. Special Educ. Hearing Office, 903 F.2d 635, 60 Educ. L. 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. *E.g.*, Bd. of Educ. v. Schutz, 290 F.3d 476, 165 Educ. L. Rep. 76 (2d Cir. 2002); St. Tammany Parish Sch. Bd. v. La., 142 F.3d 776, 126 Educ. L. Rep. 76 (5th Cir. 1998); Susquenita v. Raelee S., 96 F.3d 78, 112 Educ. L. Rep. 590 (3d Cir. 1996); District of Columbia v. Wimbish, 153 F. Supp. 3d 4, 332 Educ. L. Rep. 118 (D.D.C. 2016); *cf.* Weaver v. Millbrook Cent. Sch. Dist., 812 F. Supp. 2d 514, 276 Educ. L. Rep. 284 (D.N.Y 2011); Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 208 Educ. L. Rep. 389 (S.D.N.Y. 2006) (determining equitable starting date). *But see* DeKalb Cnty. Sch. Dist. v. J.W.M., 445 F. Supp. 2d 1371, 212 Educ. L. Rep. 761 (N.D. Ga. 2006) (ruling that tuition reimbursement and compensatory education awards are not changes in placement); *cf.* J.T. v. District of Columbia, 78 IDELR ¶ 219 (D.D.C. 2019) (not where hearing officer's order was short-term or otherwise limited in time). This conclusion applies even in the absence of a prior IEP. *E.g.*, District of Columbia v. Vinyard, 901 F. Supp. 2d 7, 291 Educ. L. Rep. 615 (D.D.C. 2012) (no IEP). Moreover, it applies to a reimbursement order just as long as the IHO has included a finding that the unilateral placement was appropriate. District of Columbia v. Wimbish, 66 IDELR ¶ 281 (D.D.C. 2015). However, at least in the Ninth Circuit, this effect does not apply in the absence of an adjudicative decision agreeing that the private placement is appropriate. *E.g.*, **K.D. v. Dep't of Educ., Haw., 665 F.3d 1110, 275 Educ. L. Rep. 585 (9th Cir. 2011)**; Thomas W. v. Haw. Dep't of Educ., 60 IDELR ¶ 104 (D. Haw. 2012) (remanding to IHO to clarify the intention). 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. for Arlington Cent. Sch. Dist., 386 F.3d 158, 192 Educ. L. 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 Educ. L. Rep. 36 (9th Cir. 2009)**. Another exception is when the final administrative determination is that the unilateral placement is no longer appropriate after a specified period of time, which would be the limit of the stay-put period. A.W. v. Bd. of Educ. of Wallkill Cent. Sch. Dist., 65 IDELR ¶ 211, *adopted*, 65 IDELR ¶ 237 (N.D.N.Y. 2015).

76 34 C.F.R. § 300.518(d); **Cal. Educ. Code § 56505(d)**; *see also Letter to Hampden*, 49 IDELR ¶ 197 (OSEP 2007).

77 *E.g.*, Lawrence Cnty. Sch. Dist. v. McDaniel, 71 IDELR ¶ 3 (E.D. Ark. 2017). Conversely, the parent may opt to go to court to enforce the stay-put order without exhausting the alternative of the state complaint process. *E.g.*, Round Rock Indep. Sch. Dist. v. Amy M., 540 F. Supp. 3d 679, 398 Educ. L. Rep. 114 (W.D. Tex. 2021).

78 *E.g.*, **S.C. v. Lincoln Cnty. Sch, Dist., 16 F.4th 587, 395 Educ. L. Rep. 521 (9th Cir. 2021) (including two-phased nature of IHO placement order)**; Enterprise City Bd. of Educ. v. S.S., 75 IDELR ¶ 214 (M.D. Ala. 2019). *But cf.* D.C. v. Klein Indep. Sch. Dist., 75 IDELR ¶ 128 (S.D. Tex. 2019) (ruling that stay-put of IHO's order does not include dyslexia services).

79 ***E.g.*, E.E. v. Norris Sch. Dist., 77 IDELR ¶ 158 (E.D. Cal. 2020), *aff'd on other grounds*, 4 F.4th 866, 392 Educ. L. Rep. 597 (9th Cir. 2021)**; *cf.* Greenberg v. Dep't of Educ. of Haw., 81 IDELR ¶ 127 (D. Haw. 2022) (rejecting implied consent claim during parents' continued unilateral placement after affirmed IHO decision in favor of district).

80 *E.g.*, J.S. v. District of Columbia, 78 IDELR ¶ 219 (D.D.C. 2021).

81 Doe v. Portland Pub. Schs., 30 F.4th 85, 401 Educ. L. Rep. 144 (1st Cir. 2022).

82 *E.g.*, **L.M. v. Capistrano Unified Sch. Dist., 556 F.3d 900, 242 Educ. L. Rep. 23 (9th Cir. 2009); J.G. v. Dep't of Educ., Haw., 64 IDELR ¶ 7 (D. Haw. 2014); Huerta v. S.F. Unified Sch. Dist., 57 IDELR ¶ 282 (N.D. Cal. 2011)**. *But cf.* **J.H. v. L.A. Unified Sch. Dist., 54 IDELR ¶ 195 (C.D. Cal. 2010)** (IHO's conclusion that district's IEP was not appropriate plus services not in dispute).

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83 **S.L. v. Shoreline Unified Sch. Dist., 55 IDELR ¶ 165 (N.D. Cal. 2010).**

84 **Marcus I. v. Dep't of Educ., Haw., 506 F. App'x 613, 292 Educ. L. Rep. 613 (9th Cir. 2013).**

85 **Berkeley Unified Sch. Dist. v. A.B.T., 75 IDELR ¶ 11 (N.D. Cal. 2019).**

86 Weakley Cnty. Bd. of Educ. v. H.M., 53 IDELR ¶ 114 (W.D. Tenn. 2009).

87 *E.g.*, **K.D. v. Dep't of Educ., Haw., 665 F.3d 1110, 275 Educ. L. Rep. 585 (9th Cir. 2011)**; N. Highlands Reg'l High. Sch. Bd. of Educ. v. C.E., 75 IDELR ¶ 195 (D.N.J. 2019); L.L. v. N.Y.C. Dep't of Educ., 68 IDELR ¶ 129 (S.D.N.Y. 2016); K.L. v. Berlin Borough Bd. of Educ., 61 IDELR ¶ 216 (D.N.J. 2013); Taylor F. v. Arapahoe Cnty. Sch. Dist., 954 F. Supp. 2d 1197, 300 Educ. L. Rep. 220 (D. Colo. 2013); J.K. v. Council Rock Sch. Dist., 58 IDELR ¶ 43 (E.D. Pa. 2011); A.B. v. Franklin Twp. Cmty. Sch. Corp., 898 F. Supp. 2d 1067, 291 Educ. L. Rep. 265 (S.D. Ind. 2012); D.C. v. Chi. Bd. of Educ., 58 IDELR ¶ 166 (N.D. Ill. 2011); Stanley v. M.S.D. of Sw. Allen Cnty., 50 IDELR ¶ 163 (N.D. Ind. 2008); *cf.* Rena C. v. Colonial Sch. Dist., 890 F.3d 404 (3d Cir. 2018) (private agreement within context of 10-day offer of settlement); **G.M. v. Dry Creek Joint Elementary Sch. Dist., 55 IDELR ¶ 249 (N.D. Cal. 2010)** (settlement agreement + IEP). *But see* Dervishi v. Stamford Bd. of Educ., 653 F. App'x 55, 336 Educ. L. Rep. 194 (2d Cir. 2016); Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 319 Educ. L. Rep. 641 (2d Cir. 2015) ("The Board's obligation to fund stay-put placement is rooted in statute, not contract.").

88 N.W. v. Boone Cnty. Bd. of Educ., 763 F.3d 611, 308 Educ. L. Rep. 616 (6th Cir. 2014); **B.M. v. Encinitas Union Sch. Dist., 2009 WL 29652, 109 LRP 367 (S.D. Cal. 2009)**. Conversely, where the settlement agreement for a private placement expired and the IEP team proposed a public placement, the court ruled that the public placement was the stay-put. Peter G. v. Chi. Pub. Sch. Dist. No. 299, 36 IDELR ¶ 237 (N.D. Ill. 2002).

89 Sch. Dist. of Phila. v. N.K., 66 IDELR ¶ 247 (E.D. Pa. 2015).

90 **Anchorage Sch. Dist. v. M.G., 735 F. App'x 441 (9th Cir. 2018).**

91 *E.g.*, Angamarca v. N.Y.C. Dep't of Educ., 74 IDELR ¶ 229 (S.D.N.Y. 2020); Dep't of Educ., Haw. v. M.F., 840 F. Supp. 2d 1214, 281 Educ. L. Rep. 886 (D. Haw. 2011); *cf.* **Johnson v. Special Educ. Hearing Office, 287 F.3d 1176, 164 Educ. L. Rep. 52 (9th Cir. 2002)** (transfer from Part C prior to new pertinent IDEA provision). *But cf.* Ventura de Paulino v. N.Y.C. Dep't of Educ., 959 F.3d at 533 (not where parent changes the child from one private school to a substantially similar one).

92 Letter to Philpot, 60 IDELR ¶ 140 (OSEP 2012); *see also* Dep't of Educ., Haw. v. M.F., 62 IDELR ¶ 169 (D. Haw. 2013) (not for related services that IHO determined to be not appropriate and intertwined). *But see* District of Columbia v. Vinyard, 901 F. Supp. 2d 77, 291 Educ. L. Rep. 615 (D.D.C. 2012) (automatic payment).

93 Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 319 Educ. L. Rep. 641 (2d Cir. 2015), *further proceedings*, 962 F.3d 649, 378 Educ. L. Rep. 42 (2d Cir. 2020).

94 Without deciding the issue, the court in Wagner v. Board of Education Montgomery Cnty., 340 F. Supp. 2d 603, 617 n.6, 193 Educ. L. 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. *E.g.*, Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 367-68 (S.D.N.Y. 2000), *aff'd*,

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297 F.3d 195 (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 (1st Cir. 2004). *But see* Verhoeven v. Brunswick Sch. Comm., 207 F.3d 1, 6 n.2 (1st Cir. 1999).

For additional support, *see* E.Z.-L. v. N.Y.C. Dep't of Educ., 763 F. Supp. 2d 584, 267 Educ. L. Rep. 201 (S.D.N.Y. 2011); Atlanta Indep. Sch. Sys. v. S.F., 740 F. Supp. 2d 1335, 264 Educ. L. Rep. 225 (N.D. Ga. 2010); District of Columbia v. Jeppsen, 468 F. Supp. 2d 107, 216 Educ. L. Rep. 384 (D.D.C. 2006).

95 *E.g.*, Doe v. Portland Pub. Schs., 30 F.4th 85, 401 Educ. L. Rep. 144 (1st Cir. 2022); **A.D. v. Haw. Dep't of Educ., 727 F.3d 911, 296 Educ. L. Rep. 816 (9th Cir. 2013)**; Hous. Indep. Sch. Dist. v. V.P., 582 F.3d 576, 249 Educ. L. Rep. 585 (5th Cir. 2009).

96 Bd. of Educ. of Oak Park & River Forest High Sch. Dist. No. 200 v. Ill. State Bd. of Educ., 79 F.3d 654, 108 Educ. L. Rep. 32 (7th Cir. 1996); J.R. v. Cox-Cruey, 61 IDELR ¶ 212 (E.D. Ky. 2013).

97 *E.g.*, Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 319 Educ. L. Rep. 641 (2d Cir. 2015); **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 Educ. L. Rep. 778 (8th Cir. 2002) and Mr. C. v. Me. Sch. Admin. Dist., 538 F. Supp. 2d 298, 230 Educ. L. Rep. 599 (D. Me. 2008)); John M. v. Evanston Twp. High Sch. Dist. No. 202, 52 IDELR ¶ 73 (N.D. Ill 2009).

98 Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 319 Educ. L. Rep. 641 (2d Cir. 2015), *further proceedings*, 962 F.3d 649, 378 Educ. L. Rep. 42 (2d Cir. 2020); Brennan v. Reg'l Sch. Dist. No. 1, 531 F. Supp. 2d 245, 229 Educ. L. Rep. 513 (D. Conn. 2008); Dep't of Educ. v. Ria L., 60 IDELR ¶ 9 (D. Haw.).

99 *Cf.* Mr. R. v. Me. Sch. Admin. Dist. No. 35, 295 F. Supp. 2d 113, 184 Educ. L. Rep. 273 (D. Me. 2003) (ruling that compensatory education was not precluded during the stay-put period, although the relatively unusual circumstances limited generalizability).

100 *E.g.*, L.R.L. v. District of Columbia, 896 F. Supp. 2d 69, 290 Educ. L. Rep. 818 (D.D.C. 2012).

101 Sheils v. Pennsbury Sch. Dist., 64 IDELR ¶ 294 (E.D. Pa. 2015).

102 20 U.S.C. § 1415(k); 34 C.F.R. §§ 300.530 - 300.536. For an overview, *see* Perry A. Zirkel, *"Stay-Put" under the IDEA Discipline Provisions*, 214 Educ. L. Rep. 467 (2007). Stay-put applies to issues at the margin of discipline, such as disenrollment for absenteeism. *E.g.*, R.B. v. Mastery Charter Sch., 762 F. Supp. 2d 745, 267 Educ. L. Rep. 158 (E.D. Pa. 2010).

103 Honig v. Doe, 484 U.S. 305, 43 Educ. L. Rep. 857 (1988). The outcomes have varied in such cases. *Compare* Troy Sch. Dist. v. K.M., 64 IDELR ¶ 303 (E.D. Mich. 2015); Sch. Dist. of Phila. v. Stephan M., 25 IDELR 506 (E.D. Pa. 1997) (in favor of parents), *with* N.L. v. Springboro Cmty. City Sch. Dist., 74 IDELR ¶ 161 (S.D Ohio 2019); Roslyn Union Free Sch. Dist. v. Geffrey W., 36 IDELR ¶ 239 (N.Y. App. Div. 2002) (in favor of district). Moreover, not all of the courts have agreed that a Honig injunction remains an open alternative. *E.g.*, Gilbert Unified Sch. Dist. No. 41 v. K.M., 39 IDELR ¶ 187 (D. Ariz. 2003).

104 20 U.S.C. § 1415(k)(3)(B)(ii)(II); 34 C.F.R. § 300.532(b)(2)(ii).

105 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).

106 20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g).

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107 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 Educ. L. Rep. 565 (D. Mass. 2002) (ruling that the stay-put is the original school setting when the parent asserts the issue of eligibility).

108 Olu-Cole v. E.L. Haynes Pub. Charter Sch., 930 F.3d 519, 368 Educ. L. Rep. 59 (D.C. Cir. 2019).

109 *E.g.*, M.M. v. Special Sch. Dist. No. 1, 512 F.3d 455, 228 Educ. L. 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 (Tex. Ct. App. 2006) (IDEA "stay-put does not apply to juvenile court dispositions).

110 Plumbly v. Ne. Indep. Sch. Dist., 46 IDELR ¶ 126 (W.D. Tex. 2006).

111 Doe v. Bd. of Educ., 115 F.3d 1273, 118 Educ. L. Rep. 881 (7th Cir. 1997); Ocean Twp. Bd. of Educ. v. E.R., 63 IDELR ¶ 16 (D.N.J. 2014).

112 20 U.S.C. § 1415(k)(6); 34 C.F.R. § 300.535. *E.g.*, Valentino C. v. Sch. Dist. of Phila., 40 IDELR ¶ 208 (E.D. Pa. 2004).

113 Letter to Heldman, 20 IDELR 621 (OSEP 1993).

114 *See supra* note 40 and accompanying text; *see also* D.P. v. Sch. Bd. of Broward Cnty., 483 F.3d 725, 218 Educ. L. Rep. 826 (11th Cir. 2007); M.M. v. N.Y.C. Dep't of Educ., 583 F. Supp. 2d 498, 239 Educ. L. Rep. 414 (S.D.N.Y. 2008) (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 Educ. L. Rep. 52 (9th Cir. 2002)**, *with* Pardini v. Allegheny Intermediate Unit, 420 F.3d 181, 201 Educ. L. 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). However, two recent cases in Pennsylvania did not follow this line of authority, perhaps because the transition from early intervention was at a much later point that age 3. Sch. Dist. of Phila. v. Post, 262 F. Supp. 3d 178, 349 Educ. L. Rep. 499 (E.D. Pa. 2017); Jalen Z. v. Sch. Dist. of Phila., 104 F. Supp. 3d 660, 324 Educ. L. Rep. 766 (E.D. Pa. 2015).

115 *E.g.*, **J.H. v. L.A. Unified Sch. Dist., 54 IDELR ¶ 195 (C.D. Cal. 2010).**

116 *E.g.*, Y.B. v. Howell Twp. Bd. of Educ., 4 F.4th 196 (3d Cir. 2021); Morrison v. Perry Sch. Dep't, 119 LRP 69, adopted, 73 IDELR ¶ 172 (D. Me. 2019); Braden O. v. W. Chester Sch. Dist., 70 IDELR ¶ 97 (E.D. Pa. 2017); G.B. v. N.Y.C. Dep't of Educ., 58 IDELR ¶ 100 (S.D.N.Y. 2012). *But cf.* **S.C. v. Palo Alto Unified Sch. Dist., 63 IDELR ¶ 124 (N.D. Cal. 2014)** (concluding that the intra-state transfer provision does not supersede the 9th Circuit's "to the extent possible" qualification in Vashon Island).

117 According to the commentary accompanying the IDEA's transfer regulations, "'comparable' services means services that are 'similar' or 'equivalent" to those that were described in the child's IEP from the previous [school district], as determined by the child's newly designated IEP Team in the new [district]." 71 Fed. Reg. 46,681 (Aug. 14, 2006).

118 20 U.S.C. § 1414(d)(2)(C)(i)(I); 34 C.F.R. § 300.323(e) (same state); 20 U.S.C. § 1414(d)(2)(C)(i)(II); 34 C.F.R. § 300.323(f) (different state). For potential California stay-put variations specific to intra-state moves, *see* **Cal. Educ. Code § 56325; Termine v. William S. Hart High Sch. Dist., 219 F. Supp. 2d 1049, 170 Educ. L. Rep. 242 (C.D. Cal. 2002)**.

119 *E.g.*, **S.H. v. Mt. Diablo Unified Sch. Dist., 263 F. Supp. 3d 746, 349 Educ. L. Rep. 625 (N.D. Cal. 2017)**.

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120 Ventura de Paulino v. N.Y.C. Dep't of Educ., 959 F.3d at 533-36; *see also* Soria v. N.Y.C. Dep't of Educ., 831 F. App'x 16, 384 Educ. L. Rep. 739 (2d Cir. 2020).

121 R.B. v. Master Charter Sch., 532 F. App'x 136, 299 Educ. L. Rep. 24 (3d Cir. 2013) ("The charter school may not skirt its responsibility toward R.B. merely because R.B. has the option of continuing her education at another high school within the School District .... The relevant inquiry is not whether a child has educational options outside of her current placement, but whether forcing a child to utilize those options will significantly affect the child's learning experience").

122 *E.g.*, Hatikvah Acad. Charter Sch. v E. Brunswick Twp Bd. of Educ., 10 F.4th 215, 394 Educ. L. Rep. 38 (3d Cir. 2021) (ruling that the resident district liable for the stay-put based on state law that makes resident districts responsible for the costs of charter schools).

123 *E.g.*, Letter to Carroll, 43 IDELR ¶ 116 (OSEP 2004). For the Ninth Circuit's "close as possible" approach upon advancing to the next grade, *see* **Van Scoy v. San Luis Coastal Unified Sch. Dist., 353 F. Supp. 2d 1083 (C.D. Cal. 2005).**

124 K.A. v. Fulton Cnty. Bd. of Educ., 741 F.3d 1195, 301 Educ. L. Rep. 35 (11th Cir. 2013) (citing Hjortness v. Neenah Sch. Dist., 507 F.3d 1060, 227 Educ. L. Rep. 100 (7th Cir. 2007)).

125 *E.g.*, Ventura de Paulino v. N.Y.C. Dep't of Educ., 959 F.3d at 530; Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 319 Educ. L. Rep. 641 (2d Cir. 2015); **N.D. v. Haw. Dep't of Educ., 600 F.3d at 1111**; Carl B. v. Mundelein High Sch. Dist. 120, 20 IDELR 263 (N.D. Ill. 1993).

126 Compare C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 71-72, 257 Educ. L. Rep. 39 (3d Cir. 2010); Letter to Watson, 48 IDELR ¶ 284 (OSEP 2007) (yes), *with* CP v. Leon Cnty. Sch. Bd., 483 F.3d 1151, 1157-58, 218 Educ. L. Rep. 859 (11th Cir. 2007); Kuszewski v. Chippewa Valley Sch., 131 F. Supp. 2d 926, 931, 151 Educ. L. Rep. 845 (E.D. Mich. 2001), *aff'd on other grounds*, 56 F. App'x 655, 173 Educ. L. Rep. 713 (6th Cir. 2003) (no).

127 **Termine v. William S. Hart High Sch. Dist., 219 F. Supp. 2d 1049, 170 Educ. L. Rep. 242 (C.D. Cal. 2002).**

128 T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 305 Educ. L. Rep. 29 (2d Cir. 2014).

129 Bd. of Educ. of Cnty. of Boone v. K.M., 65 IDELR ¶ 138 (S.D. W. Va. 2015).

130 M.G. v. N.Y.C. Dep't of Educ., 982 F. Supp. 2d 240, 304 Educ. L. Rep. 873 (S.D.N.Y. 2013).

131 *Compare* Verhoeven v. Brunswick Sch. Comm., 207 F.3d 1, 143 Educ. L. Rep. 54 (1st Cir. 1999); Leonard v. McKenzie, 869 F.2d 1558, 52 Educ. L. Rep. 498 (D.C. Cir. 1989) (end), with A.B. v. Balt. City Bd. of Sch. Comm'rs, 65 IDELR ¶ 228 (D. Md. 2015); Ricci v. Beech Grove City Sch., 63 IDELR ¶ 187 (S.D. Ind. 2014) (continue).

132 **R.R. v. Oakland Unified Sch. Dist., 62 IDELR ¶ 290 (N.D. Cal. 2014).**

133 L.J. v. Broward Cnty. Sch. Bd., 927 F.3d 1203, 367 Educ. L. Rep. 103 (S.D. Fla. 2012). For the material-failure test for FAPE implementation cases more generally, *see* **Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 225 Educ. L. Rep. 136 (9th Cir. 2007).**

134 *E.g.*, Ostby v. Manhattan Sch. Dist. No. 114, 851 F.3d 677, 341 Educ. L. Rep. 605 (7th Cir. 2017); Tina M. v. St. Tammany Parish Sch. Bd., 816 F.3d 57, 328 Educ. L. Rep. 512 (5th Cir. 2016); Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Nathan R., 199 F.3d 377, 869, 140 Educ. L. Rep. 864 (7th Cir. 2000); *cf.* J.O. ex rel. C.O. v. Orange Twp. Bd. of Educ., 287 F.3d 267, 164

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Educ. L. Rep. 44 (3d Cir. 2002) (denying attorneys' fees for forward-looking interim relief short of the merits under characterization of stay-put). *But see* K.P. v. District of Columbia, 73 IDELR ¶ 156 (D.D.C. 2018); Wimbish v. District of Columbia, 251 F. Supp. 3d 187, 347 Educ. L. Rep. 903 (D.D.C. 2017); A.P. v. Bd. of Educ. for City of Tullahoma, 160 F. Supp. 3d 1024, 333 Educ. L. Rep. 254 (E.D. Tenn. 2016); Douglas v. District of Columbia, 67 F. Supp. 3d 36, 318 Educ. L. Rep. 142 (D.D.C. 2014); *cf.* M.R. v. Ridley Sch. Dist., 868 F.3d 218, 346 Educ. L. Rep. 683 (3d Cir. 2017); Student X v. N.Y.C. Dep't of Educ., 51 IDELR ¶ 122 (E.D.N.Y. 2008) (awarding attorneys' fees for compensatory education or tuition reimbursement relief under stay-put provision).

135 Letter to Cohen, 67 IDELR ¶ 217 (OSEP 2016).

136 *See supra* note 12.

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