No. _____

In The
Supreme Court of the United States

CYNTHIA SORIA, Individually and as Parent and Natural Guardian of G.S.,
GIOVANNI SORIA, Individually and as Parent and Natural Guardian of G.S.,

Petitioners,

v.

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does a school district have an affirmative obligation to provide pendency-related educational and support services to its special education students under the Individuals with Disabilities Act ("IDEA"), 20 U.S.C. §1400, et seq.?

If a school district has such an affirmative obligation, may the parent of a special education student procure the pendency services to which the student is entitled under the IDEA, when the district has failed to procure them?

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the Second Circuit Court of Appeals:

1. Plaintiffs/Petitioners Cynthia Soria and Giovanni Soria

2. Defendant/Respondent New York City Department of Education

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PETITION FOR WRIT OF CERTIORARI

Cynthia Soria and Giovanni Soria ("Petitioners") respectfully petition for a writ of certiorari to review the Second Circuit Court of Appeals' judgment.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals is *Soria v. New York City Department of Education*, 2020 U.S. App. LEXIS 34252 (2d Cir. October 28, 2020), which was issued on October 28, 2020 and is included in the Appendix. The August 7, 2019 opinion and order of the Honorable Analisa Torres, U.S.D.J., granting Petitioners' motion for a preliminary injunction, is included in the Appendix.

STATEMENT OF JURISDICTION

The summary order and judgment of the Second Circuit Court of Appeals in this matter, vacating the opinion and order of the District Court, are dated October 28, 2020. Jurisdiction of the Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1415(j) of the IDEA, which reads in relevant part:

> **(j) MAINTENANCE OF CURRENT EDUCATIONAL PLACEMENT**
>
> [D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child…until all such proceedings have been completed.

STATEMENT OF THE CASE

This matter concerns a public school district's failure to provide for G.S.'s continued education, a severely disabled nine-year-old boy, during the 2018-2019 school year.

Petitioners, G.S.'s parents Cynthia and Giovanni Soria ("Petitioners" or "Parents"), submitted a Ten Day Notice ("TDN") to DOE, providing notice of her intent to place G.S. at the International Institute for the Brain ("iBRAIN"). After receiving no response from DOE following the ten-day notice period, Petitioners filed an administrative due process complaint ("DPC") against Respondent New York City Department of Education ("DOE") on July 9, 2018. The administrative complaint alleged, in relevant part, that DOE failed to offer G.S. a free, appropriate public education ("FAPE") for the 2018-2019 school year ("SY"). Additionally, through the administrative complaint, Petitioners requested that DOE fund the implementation of the educational program established for G.S. for that school year through his claim to pendency under Section 1415(j) of the IDEA.

Petitioners were entitled to invoke Section 1415(j) ("Pendency Provision" or "Stay-Put Provision") through filing the DPC and had become entitled to funding for G.S.'s education for the 2018-2019 SY after prevailing in an administrative hearing against DOE the prior school year. Specifically, during the 2017-2018 SY, Petitioners and DOE appeared before an administrative hearing officer who received documentary evidence from both parties and heard

testimony from each party's witnesses. The hearing officer ("IHO") then issued a decision known as a Findings of Fact and Decision ("FOFD"), by which the IHO determined that: 1) DOE had denied G.S. a FAPE; 2) the educational program provided by the private school G.S. had been attending, the International Academy of Hope ("iHOPE"), was appropriate to suit G.S.'s needs; and 3) equitable considerations did not preclude granting the relief Petitioner sought. *See Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985); *Florence County School District Four et al. v. Carter by Carter*, 510 U.S. 7 (1993). DOE did not appeal the IHO's FOFD.

Having won the hearing, Petitioners also prevailed in having the *educational program* G.S. had received at iHOPE, as described in the FOFD, become the baseline educational program ("status quo") for G.S.'s pendency moving forward, also known as "the then-current educational placement of the child" within the Pendency Provision of the IDEA. 20 U.S.C. § 1415(j). That is because a special education student's "then-current educational placement" has been interpreted to mean either: (1) the educational program outlined in the student's most recently implemented Individualized Education Program ("IEP") (also referred to as the last agreed-upon IEP); (2) the operative placement functioning at the time that the due process proceeding was commenced; or, (3) the educational placement at the time of the previously implemented IEP. *See, e.g., Dervishi v. Stamford Board of Educ.,* 653 Fed. App'x

55, 57-58 (2d Cir. 2016).[1] By virtue of the FOFD concerning the 2017-2018 SY being decided in *Petitioners'* favor, G.S.'s "then-current educational placement" for the 2018-2019 SY became the educational program G.S. received during the 2017-2018 SY. *Id.*

Further, because Petitioners prevailed on the FOFD, Petitioners became entitled to funding for G.S.'s baseline educational program for pendency ("pendency placement"), as "[a] school district is responsible for funding educational placement during the pendency of a dispute under the IDEA *regardless of whether the case is meritorious or whether the child would otherwise have a substantive right to that placement*." *Id.* at 58 (citing *Doe v. E.*

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[1] The *Dervishi* court's view that one of the ways a pendency placement can be formed is by agreement of the parties is supported by IDEA regulations, which state, in relevant part, that: "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." 34 CFR § 300.518(d); *see also Dervishi, supra,* 653 Fed. App'x at 57-58. Paragraph (a) is a restatement of the text of the Pendency Provision. 34 CFR § 300.518(a). Accordingly, as both Petitioners and Respondent herein agree, G.S.'s pendency placement was formed when Petitioners won the contested administrative hearing concerning the 2017-2018 SY. *See* 34 CFR § 300.518(d).

Lyme Bd. of Educ., 790 F.3d 440, 453 (2d Cir. 2015), cert. denied, 136 S. Ct. 2022, 195 L. Ed. 2d 218 (2016), reh'g denied, 136 S. Ct. 2546, 195 L. Ed. 2d 882 (2016)) (emphasis added).

On June 22, 2018, Parents provided DOE with a TDN, indicating that G.S. was being placed into the International Institute for the Brain ("iBRAIN") educational program for the 2018-2019 school year.[2] For the 2018-2019 school year, G.S. received all academic and related services at iBRAIN. He had an extended school day that was part of a twelve (12)-month academic program. Because of his medical needs, G.S. received special transportation services that consist of a 1:1 transportation paraprofessional, a wheel chair accessible vehicle, air conditioning and limited travel time.

G.S. began attending iBRAIN on July 9, 2018 and remained in attendance there for the entirety of the 2018-2019 school year. On July 9, 2018, Parents brought an administrative due process complaint under Impartial Hearing Case No. 175146 against DOE alleging, among other things, that the DOE did not provide G.S. with a FAPE for the 2018-2019 school year and requesting as relief, among other things, a "stay-put" or pendency order requiring the DOE fund G.S.'s placement at iBRAIN during the pendency of the due process proceeding, as required under 20 U.S.C. § 1415(j).

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[2] The purpose of a TDN is to enable a school district to have the opportunity to cure deficiencies set forth in a DPC. Here, DOE failed to cure the deficiencies the Sorias had raised.

A new IHO conducted a hearing to address Petitioners' pendency claim for the 2018-2019 school year, hearing evidence on August 20, 2018. Following the hearing, in an Interim Order on Pendency ("IOP"), dated August 27, 2018, the IHO denied Parents' request for pendency at iBRAIN, but did not provide G.S. with any alternative pendency placement, leaving G.S. without pendency altogether.

On October 9, 2018, Parents filed an appeal from the IHO's IOP to the New York State Education Department's Office of State Review. On November 9, 2018, State Review Officer Steven Krolak ("SRO Krolak") rendered a decision in SRO Appeal No. 18-113. The SRO dismissed Parents' appeal, effectively leaving G.S. bereft of pendency.

On March 8, 2019, Parents filed a federal civil action in the Southern District of New York to appeal SRO Krolak's decision. Towards that end, Petitioners filed a motion for a preliminary injunction by order to show cause seeking an award of pendency at iBRAIN for G.S.

The Honorable Analisa Torres, U.S.D.J., granted the motion, issuing a preliminary injunction in favor of Petitoners by order dated August 7, 2019 ("Pendency Order"). (A – 22). DOE filed a notice of appeal of the Pendency Order to the Second Circuit Court of Appeals on August 16, 2019.

Following briefing and oral argument, on October 28, 2020, the Second Circuit, through a three-judge

panel, issued a summary order and judgment, vacating Judge Torres' opinion and order.

Petitioners now respectfully petition for a writ of certiorari to review the judgment of the Second Circuit in *Soria v. New York City Department of Education*, 2020 U.S. App. LEXIS 34252 (2d Cir. October 28, 2020).

REASONS FOR GRANTING THE PETITION

The first question presented – does a school district have an affirmative obligation to provide pendency-related educational and support services to its special education students under the IDEA? – demonstrates the vast and far-reaching significance of this matter because, through its decision in *Soria*, the Second Circuit has answered this question in the negative, which has negative ramifications for special education students across the country.

Specifically, if the Second Circuit's holding in *Soria* is left undisturbed, the entire landscape concerning the relationship between a school district and the family of a special education student will be permanently altered, as school districts across the country would be able to cite the Second Circuit's *Soria* decision as a basis for taking absolutely no action on behalf of special education students with respect to pendency. DOE itself has already been doing so, citing *Soria*, inter alia, in the context of administrative hearings and federal court litigation and failing to make any effort whatsoever to secure seats at schools where the pendency placements of

special education students can be implemented – even in instances where there is no dispute as to what the pendency placements of such students consist of and their entitlement to such placement at iBRAIN.

Most significantly, the Second Circuit's ruling that school districts do not have any affirmative obligation to offer special education students pendency services, because, according to the Circuit, their duty to such students is satisfied by operation of law, has created conflicts with the precedents of several other Circuits, which have held the exact opposite. Moreover, the Second Circuit's ruling is also in direct contravention of Congress' express intent concerning the IDEA and the Pendency Provision, specifically.

This drastic departure from the law of other circuits and from the Second Circuit's own precedents warrants revisiting.

Additionally, the second question presented – may parents procure pendency services for their children where school districts have failed to procure them? – is equally compelling and a natural issue to address in light of the first question. Indeed, due to the IDEA's breadth and scope, because it governs special education in every public school district in America, the answer to this question is relevant for every family with a child receiving special education. As the Second Circuit recently addressed this question for the first time in the matter of *De Paulino v. New York City Department of Education*, 959 F.3d 519 (2d Cir. 2020), the issue falls within a category of

unsettled law that is ripe for resolution by the Court, because of *De Paulino*, *Soria* and another recent case, *Neske v. New York City Dep't of Educ.*, 2020 U.S. App. LEXIS 31435 (2d Cir. October 2, 2020). *See De Paulino, supra*, 959 F.3d 519; *Soria v. New York City Dep't of Educ.*, 2020 U.S. App. LEXIS 34252 (2d Cir. October 28, 2020); *Neske v. New York City Dep't of Educ.* ("*Neske III*"), 2020 U.S. App. LEXIS 31435 (2d Cir. October 2, 2020).

In fact, in *De Paulino*, the Second Circuit explicitly found the issue to be *one of first impression* where the parent in that matter, as Petitioners did here, procured pendency services for her disabled child at a new school on the basis that the pendency placement provided there is substantially similar to the pendency placement that emerged as the "last agreed upon" educational program from the contested administrative hearing. *De Paulino, supra*, 959 F.3d at 524-25; *see also Soria, supra*, 2020 U.S. App. LEXIS 34252, at *2. *Soria* followed closely on the heels of *De Paulino*, and expanded on its reasoning to the point of absolving a school district of *any responsibility* for providing pendency services while, at the same time, maintaining that a school district retains *absolute power* over where and how a student's pendency services are administered. *Id.* In short, *Soria* has created a disturbing incongruence between the rights and responsibilities of a school district such as DOE.

I. Factual Background

G.S. is a nine (9) year-old boy who suffers from an acquired brain injury. Due to his brain injury, G.S. has global developmental impairments that have adversely affected his educational abilities and performance. Due to the severe nature of the brain injury, G.S. is non-verbal and non-ambulatory, has highly intensive management needs, and requires a high degree of individualized attention and intervention.

As a student with a disability and resident of New York City, DOE was obligated to provide G.S. with a FAPE under the IDEA for the 2018-2019 SY, as outlined in an IEP DOE prepared for him for every school year. 34 CFR § 300.320(a). DOE's legal obligation to G.S. under both federal and state law included the duty to place him at a school where the IEP DOE prepared for him could have been implemented. 34 CFR § 300.116; N.Y. Educ. L. § 4404(c). The same laws required that DOE was obligated to provide G.S., and all special education students, with the educational and support services that were found to comprise his pendency placement under the Pendency Provision of the IDEA for the 2018-2019 SY. 20 U.S.C. § 1415(j); N.Y. Educ. L. § 4404(c).

Generally, there are two purposes of the IDEA: (1) to ensure students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to

ensure the rights of students with disabilities and parents of such students are protected. 20 U.S.C. § 1400(d)(1)(A)-(B); *see also Forest Grove Sch. Dist. v. T.A.,* 557 U.S. 230, 239 (2009); *Bd. Of Educ. v. Rowley*, 458 U.S. 176, 206-207 (1982). In short, "[t]he IDEA was Congress's response to a national problem: the exclusion of disabled children from the benefits and opportunities of public education." *L.J. v. Sch. Bd.*, 927 F.3d 1203, 1210 (11th Cir. 2019).

As outlined in the findings of Congress that prompted the passage of the modern IDEA's precursor, the Education for All Handicapped Children Act of 1975 (Public Law 94–142), in the 1970s and before, "the educational needs of millions of children with disabilities were not being fully met because —
(A) the children did not receive appropriate educational services;
(B) the children were excluded entirely from the public school system and from being educated with their peers;
(C) undiagnosed disabilities prevented the children from having a successful educational experience; or
(D) a lack of adequate resources within the public school system forced families to find services outside the public school system." 20 U.S.C. § 1400(c)(2).

Congress found that, while legislation such as the IDEA, the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 provided broad protection for individuals with physical and mental impairments, special education students were not being properly educated, or educated at all, during the periods of time in which their families

engaged in disputes with school districts within the context of administrative due process proceedings. *Congress sought to rectify this problem through the creation of pendency*. *See, e.g., Doe, supra*, 790 F.3d at 453 ("Section 1415(j) represents Congress' policy choice that all handicapped children, *regardless of whether their case is meritorious or not*, are to remain in their current educational placement until the dispute with regard to their placement is ultimately resolved.") (quoting *Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist.* 386 F.3d 158, 160 (2d Cir. 2004)).

Accordingly, "[t]he purpose of the [Pendency Provision] is to strip schools of the 'unilateral authority they had traditionally employed to exclude disabled students . . . from school' and to protect children from any retaliatory action by the agency." *Johnson v. Special Educ. Hearing Office*, 287 F.3d 1176, 1181 (9th Cir. 2002) (quoting *Honig v. Doe*, 484 U.S. 305, 323 (1988).

II. Conflict with Other Circuits

In light of this history, each special education student's pendency rights, as guaranteed by the IDEA, are vitally important to their education. For that reason, Circuit Courts across the country have found the Pendency Provision mandates that public school districts ***must*** secure special education students' pendency services. *See, e.g., L.J., supra*, 927 F.3d at 1213 (Pendency case where 11th Circuit found that "[w]hatever implementation standard the IDEA requires, it *must* apply to these sorts of stay-put cases.") (emphasis added); *Olu-Cole v. E.L.*

Haynes Pub. Charter Sch., 930 F.3d 519, 530-31 (D.C. Cir. 2019) (reversing district court's order allowing a school district to withhold pendency services from student); *John M. v. Bd. of Educ. of Evanston Twp. High Sch. Dist. 202,* 502 F.3d 708, 714-15 (7th Cir. 2007) (finding that a school district's obligation "is to provide educational services that approximate the student's old IEP as closely as possible."); *Johnson, supra*, 287 F.3d at 1182 (finding pendency order requiring a school district to provide pendency services "while taking into account the reality of a shift in responsible educational agencies" to be acceptable under the Pendency Provision); *Erickson v. Albuquerque Pub. Sch.*, 199 F.3d 1116, 1121-22 (10th Cir. 1999) (holding that the school district properly upheld its obligation to provide services under the Pendency Provision).

Before the triumvirate decisions of *De Paulino, Soria* and *Neske III*, even the Second Circuit had held that a school district has a legal duty under the Pendency Provision to offer pendency services to special education students. *See Doe, supra*, 790 F.3d at 456 ("[T]he Board's obligation to provide stay-put services was not triggered until the Parent's administrative complaint was filed."); *T.M. v. Cornwall Central School District,* 752 F.3d 145, 171 (2d Cir. 2014) ("Although [the Cornwall school district] was wrong to deny T.M. pendency services in the first place, the IDEA does not bar Cornwall from subsequently correcting its mistake and offering to provide the required pendency services directly.").

Collectively, these Circuit Court decisions stand for the universally accepted principle that, just as a school district has an affirmative obligation to place a special education student at a school where a district's IEP can be implemented, so too must the district place a student at a school where the student's pendency placement can be implemented – whenever a student's parents have filed a TDN and thereafter filed a DPC, fulfilling the parents' legal requirements.

By contrast, in *Soria*, the Second Circuit held that DOE need not have taken *any* affirmative measures to secure pendency services for G.S. in order to have met its obligation to him but, instead, automatically fulfilled its pendency-related duty, *solely by operation of law*. *See Soria, supra*, 2020 U.S. App. LEXIS 34252, at *4 ("Repeating what we made clear in *Neske*, [i]n both *De Paulino* and this case, iHOPE became the students' pendency placement **not at the City's instigation, but rather by operation of law** after the City chose not to appeal the rulings of the impartial hearing officers holding that iHOPE was an appropriate placement for these students.") (internal quotations omitted) (emphasis added); *see also De Paulino, supra*, 959 F.3d at 532 ("When the impartial hearing officers in these tandem cases concluded that iHOPE was an appropriate placement for the Students and the City chose not to appeal the ruling to a state review officer, the City consented, **by operation of law**, to the Students' private placement at iHOPE.") (emphasis added); *Neske, supra*, 2020 U.S. App. LEXIS 31435, at *3-4 ("**Just as we deemed the City to have implicitly chosen iHOPE as the pendency placement for**

the students in *Ventura de Paulino*, the same applies here.") (emphasis added). Thus, the Second Circuit's holding in *Soria* directly contradicts the precedents set forth above in other Circuits and even precedents within the Second Circuit, making *Soria* an outlier without legal support. *See L.J., supra*, 927 F.3d at 1213; *Olu-Cole, supra*, 930 F.3d at 530-31; *John M., supra,* 502 F.3d at 714-15; *Johnson, supra*, 287 F.3d at 1182; *Erickson, supra,* 199 F.3d at 1121-22; *see also Doe, supra*, 790 F.3d at 456; *T.M., supra*, 752 F.3d at 171.

Further, *Soria* stands in direct conflict with New York state law in that New York Education Law imposes the burden of providing educational services, including pendency services, on school districts – as opposed to parents like the Sorias. *See* N.Y. Educ. Law § 4404(c) ("The board of education or trustees of the school district or the state agency responsible for providing education to students with disabilities shall have the burden of proof, including the burden of persuasion and burden of production, in any such impartial hearing," except for the parent's Prong II burden in the substantive FAPE proceeding.).

The practical effect of these contradictions, besides eroding the uniformity of the application of the IDEA across the country, is the sliding back of protections that have benefited special education students since the inception of the Pendency Provision. For these reasons, *Soria* is an abrogation of pendency rights generally and a repudiation of Congress' effort to ensure that special education students receive the services to which they are entitled during the

pendency of disputes between their families and their school districts. 20 U.S.C. § 1400(c)(2). It is also a repudiation of judicial precedents nationwide.; *see also L.J., supra*, 927 F.3d at 1210; *Doe, supra*, 790 F.3d at 453.

III. Origin of *Soria*'s Erroneous Rationale

The origin of the Second Circuit's erroneous rationale in *Soria* concerning DOE's obligation to G.S. with respect to the provision of pendency services seems to stem from a Southern District of New York case with similar facts wherein the district court ruled that the parents in that matter were disqualified from eligibility for pendency funding because, according to the Court, when the parents unilaterally enrolled their child at iBRAIN, they sought to "veto" DOE's choice of iHOPE as the school for the implementation of the child's pendency placement. *Neske v. New York City Dep't of Educ.* ("*Neske I*"), 2019 U.S. Dist. LEXIS 129995, at *16-17 (S.D.N.Y. August 2, 2019) ("[P]arents may 'participate' in the school-selection process; they may not, however, 'veto' the school district's choice of location."). However, the district judge overlooked the fact that, in order for the *Neske I* parents to be guilty of attempting to usurp DOE's veto power, they would have needed something to "veto" *in the first instance*. *Id.*

In other words, because it is impossible to veto a choice *that never existed*, the Court's holding was misplaced, because, in that matter, as here in *Soria*, DOE failed to make *any* choice of a school for the student's pendency. *Id.* As a result of its erroneous

determination, the district court granted DOE's motion to dismiss the complaint, finding that the *Neske* parents' unilateral enrollment of their child at iBRAIN was an attempted veto of DOE's non-existent school choice. *Id.*

In their ensuing motion for reconsideration, the *Neske* parents pointed out to the district court the incontrovertible fact that *at no point* before or during the 2018-2019 SY had DOE secured their child a seat at iHOPE, or any other school, for the implementation of his pendency placement, establishing that *there had never been any choice of a school* for the *Neske* parents to veto. *See Neske v. New York City Dep't of Educ.* ("*Neske II*"), 2019 U.S. Dist. LEXIS 194276 (S.D.N.Y. November 7, 2019).

When confronted with this glaring error in its original opinion, the district court pivoted from the "veto" rationale of that original opinion to the rationale that "[the *Neske* parents] have not pointed to any authority for the proposition that school districts must 'offer' a pendency placement <u>*at all*</u>." *Neske II, supra*, 2019 U.S. Dist. LEXIS 194276, at *4 (emphasis added).

By eliminating DOE's legal obligation to provide the *Neske* child with pendency services altogether, the district court resolved the quandary created by the fact that DOE had failed to offer pendency services to the student – but, in so doing, created new law that contradicts the established precedents of the Second Circuit, other circuits and the express intent of Congress in establishing the Pendency Provision, 20 U.S.C. § 1415(j). *See L.J., supra*, 927 F.3d at

1213; *Olu-Cole, supra*, 930 F.3d at 530-31; *John M., supra,* 502 F.3d at 714-15; *Johnson, supra*, 287 F.3d at 1182; *Erickson, supra,* 199 F.3d at 1121-22; *see also Doe, supra*, 790 F.3d at 456; *T.M., supra*, 752 F.3d at 171.

Then, the Second Circuit, rather than rejecting the rationale of *Neske II* as an extreme departure from precedent, *adopted* a similar rationale in *De Paulino*, in *Neske III,* which is an appeal of *Neske I* and *Neske II*, and here in *Soria*.

In *De Paulino,* the Second Circuit seems to have misinterpreted the record's facts. Specifically, while the Second Circuit had found that DOE had selected iHOPE as the location for the pendency placement of the student in that case, DOE had not, in fact, chosen iHOPE, or any other school, for that purpose. *See De Paulino, supra*, 959 F.3d at 534 ("The Parents and the City had agreed that the Students' educational program would be provided at iHOPE."). This misinterpretation may have contributed to the Second Circuit's adoption of *Neske II*'s erroneous rationale and doubling down on that rationale in *Neske III* and here in *Soria*.

In justifying the reversal of Judge Torres' Pendency Order, the Second Circuit held here that "[i]n both *Ventura de Paulino* and this case, iHOPE became the students' pendency placement not at the City's instigation, but rather by operation of law after the City chose not to appeal the rulings of the impartial hearing officers holding that iHOPE was an appropriate placement for these students." *Soria*, 2020 U.S. App. LEXIS 34252, at *4.

Thus, incredibly, the Second Circuit held that, when a school district *loses* a contested hearing to a parent, as DOE *lost* to Petitioners here, all the district has to do to fulfill its pendency obligation to the student is fail to appeal, i.e., it is obligated to do *absolutely nothing*. *Id.*

This rationale is not only legally incorrect under the IDEA, as several Circuit Courts have found, but also harmful to the entire purpose of the IDEA, particularly the Pendency Provision. *See L.J., supra*, 927 F.3d at 1210; *Doe, supra*, 790 F.3d at 453; 20 U.S.C. § 1400(c)(2). When school districts are not required to procure any services for special educations students, it logically follows that, in order to save resources, they will not, leaving special education students in limbo during their families' disputes with school districts – *precisely the result the Pendency Provision was intended to prevent*. *Id.*

IV. The Rights And Responsibilities Of A School District

Through its holding in *Soria*, the Second Circuit has essentially conferred DOE with powerful rights without assigning to it any concomitant responsibilities. *See Soria, supra*, 2020 U.S. App. LEXIS 34252, at *4. Thus, DOE has the benefit of controlling the entire process of the administration of pendency placements for special education students such as G.S. - without bearing any responsibility for ensuring that such students *actually receive* those pendency placements.

Specifically, the Second Circuit held that, while G.S.'s parents were not entitled to pendency funding because they ran afoul of DOE's right to determine which school would educate G.S. for purposes of pendency, DOE, for its part, bore no responsibility for ensuring that G.S. even had a school to educate him for the pendency of the administrative hearing to resolve the Sorias' dispute with the district. *Id.* That is because, according to the Second Circuit, "iHOPE became the students' pendency placement **not at the City's instigation, but rather by operation of law** after the City chose not to appeal the rulings of the impartial hearing officers holding that iHOPE was an appropriate placement for these students." *Id.* (emphasis added).

Thus, instead of having to affirmatively select iHOPE as the means for G.S. to obtain pendency services and to procure him a seat at that school, all DOE had to do to satisfy its duty to G.S. under the IDEA, in the eyes of the Second Circuit, was passively refrain from appealing the IHO's ruling in Parents' favor. *Id.* That holding absolves DOE of its traditional obligation to provide pendency services to disabled students. *See Doe, supra*, 790 F.3d at 456; *T.M., supra*, 752 F.3d at 171. In essence, it eradicates the obligation altogether. Such a result contravenes the purpose and intent of the Pendency Provision. *See Johnson, supra*, 287 F.3d at 1181. That is why the Second Circuit's holding in *Soria* must not be allowed to stand.

In sum, a district can maintain exclusive control over where and how a student receives pendency services, but it cannot and should not maintain such

control without being required to act on the student's behalf by providing such pendency services for the student.

V. Empowering Parents Where Districts Have Failed

Even if the Court were to rectify the problem of DOE's current lack of responsibility for G.S.'s pendency by vacating and reversing *Soria*, thereby resolving the conflict among the Circuits, the question remains of what parents are and are not able to do in those instances where school districts have failed to uphold their legal obligation to offer pendency services. This appears to be a matter of first impression before the Court; however, the mandate Congress has set forth to ensure that special education students are never deprived of an education offers a strong indication of what a proper solution is here. As "Section 1415(j) represents Congress' policy choice that all handicapped children, *regardless of whether their case is meritorious or not*, are to remain in their current educational placement until the dispute with regard to their placement is ultimately resolved," parents should be able to procure pendency services for their children in the absence of such procurement by school districts. *Doe, supra*, 790 F.3d at 453.

Otherwise, special education students will often be bereft of essential educational services in circumstances where their parents have disputes with school districts. That would violate the students' pendency rights and would signal a return to the disturbing reality of the past when special

education students were not being educated during the pendency of administrative due process proceedings. It is that problematic past that led Congress to legislate the passage of the IDEA's Pendency Provision in the first instance.[3]

In *Soria*, the Second Circuit has created a perverse incentive for a school district such as DOE to oppose the due process claims brought on behalf of special

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[3] In the Court's seminal case of *Florence County Sch. Dist. Four v Carter by & Through Carter*, 510 U.S. 7 (1993), the Court explained how the Second Circuit was incorrect to find that "a parent may not obtain reimbursement for a unilateral placement if that placement was in a school that was not on [the State's] approved list of private schools." *Carter*, 510 U.S. at 14 (quoting *Tucker v. Bay Shore*, 873 F.2d 563, 568 (2d Cir. 1989)) (internal quotation marks omitted). Reversing the Second Circuit's opinion, the Court held, in contrast, that "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement." *Id.* Here, the Second Circuit is making a mistake similar to the one it made in *Carter* by denying Parents funding for a pendency placement at iBRAIN for failing to place G.S. at a school DOE had approved of in advance, for purposes of pendency. Here, the Second Circuit's opinion in *Soria* is even more egregious, as, unlike the situation in *Carter*, DOE failed to make *any* alternative choice and was deemed instead to have satisfied its duty under the IDEA's Pendency Provision through "operation of law." *See Soria, supra*, 2020 U.S. App. LEXIS 34252, at *4.

education students in administrative hearings and then to do nothing to secure pendency services for those students after *losing* such hearings. That is precisely what occurred here.

Concerning G.S.'s education in the 2017-2018 SY, DOE lost the contested hearing to Petitioners. The educational program advocated by Petitioners became the binding educational placement for G.S.'s pendency for the 2018-2019 SY. Nevertheless, after Petitioners filed a TDN, and DOE offered only the same public school program that had just been rejected by the IHO in the context of the 2017-2018 SY, rather than securing a seat for G.S. to ensure he received the pendency services to which he was entitled, DOE did absolutely nothing. That created a situation where, unless the Petitioners had taken action, G.S. would have been deprived of the benefit of pendency altogether. In fact, DOE was on notice, through the TDN Petitioners had served, that G.S. was not returning to iHOPE for the 18-19 SY and was attending iBRAIN. Yet, in response, DOE took no action whatsoever. And therein lies the rub.

Petitioners filled the void DOE's inaction had created in violation of its duty to G.S. under the IDEA. By contrast, Petitioners provided G.S. with pendency services through iBRAIN, by means of an educational program that was not only similar but nearly identical to the educational program that was established as his pendency placement when Petitioners *won* the contested hearing the prior school year. In this way, the Petitioners relied upon the doctrine of substantial similarity, which the Second Circuit had established decades ago. *See*

Concerned Parents v. NYC Board of Educ., 629 F.2d 751, 753 (2d Cir. 1980) ("[T]he narrow question on this appeal is whether the transfer of handicapped children in special classes at one school to **substantially similar** classes at other schools within the same school district constitutes a change in 'placement' sufficient to trigger the Act's prior notice and hearing requirements") (emphasis added). Additionally, New York's Office of State Review long ago adopted this legal standard of review, which is also based on the United States Department of Education guidelines. *See Letter to Fisher*, 21 IDELR 992 (OSEP 1994).

The substantial similarity doctrine, as applied to pendency, functions based on the proposition that, as long as the *substance* of a special education student's educational program for pendency, i.e., pendency placement, remains the *same or similar*, there is no change of placement, and, accordingly, there is no violation of the Pendency Provision, or IDEA, more generally. *Id.*

Being acutely aware that the issue of whether there is a change of placement is the central question concerning any application of the substantial similarity doctrine, the Second Circuit in *Concerned Parents* held that a change in educational placement occurs only when there is a change in the general educational program in which a child is enrolled, rather than mere variations in the program itself. *Id.* at 754; *accord*, *Lunceford v. District of Columbia Board of Educ.,* 745 F. 2d 1577, 1582 (D.C. Cir. 1984) ("A fundamental change in, or elimination of a basic

element of the educational program [must be identified] in order for the change to qualify as a change in educational placement.").

A crucial element of the Second Circuit's rationale in *Concerned Parents* is the holding that "the term' educational placement' refers only to the general type of educational program in which the child is placed." *Id.* at 753. This definition of educational placement signifies that it is the substance of the educational program the child receives, and not the school or school location, that determines whether there has been a change of placement when a parent changes the location of the child's enrollment. *See T.Y. v. N.Y. City Dep't of Educ.*, 584 F.3d 412, 419-20 (2d. Cir. 2009) ("' Educational placement' refers to the general educational program - such as the classes, individualized attention and additional services a child will receive - rather than the' bricks and mortar' of the specific school."). Thus, for pendency, the courts distinguish between changes in a disabled student's educational placement and changes in the physical location where the disabled student receives educational services. *See T.M., supra,* 752 F.3d at 170-71 ("Educational placement refers only to the general type of educational program in which the child is placed. . . . [Pendency] guarantees only the same general level and type of services that the disabled child was receiving.").

Applied here, the Second Circuit's holdings in *Concerned Parents* and its progeny demonstrate that, because G.S.'s enrollment at iBRAIN

changed the *location* (bricks and mortars) of his educational placement (program), but not the *substance* of the educational placement (program) itself, there was no change in his educational placement, and Petitioner remains eligible for pendency funding, having not violated the IDEA. *Concerned Parents, supra,* 629 F.2d at 754.

In light of the preceding, the substantial similarity doctrine, and Petitioners' application thereof in this instance, should be adopted by the Court. Otherwise, DOE will continue to flout its legal obligation to affirmatively offer pendency services to G.S. and other special education students, simply because they can. Moreover, other school districts across the country will be emboldened to follow suit. Even though Petitioners do not believe unavailability is the correct legal standard, at a bare minimum, the Second Circuit should have remanded the case back to the District Court to make a factual determination of whether iHOPE was available to the Sorias, as that issue was before the Second Circuit.

In short, within the Second Circuit, a school district currently has absolutely no obligation to obtain pendency services for a special education student because that obligation is now fulfilled "by operation of law." *Soria, supra*, 2020 U.S. App. LEXIS 34252, at *4. As this decision changes the nature of the duty school districts historically have had towards special education students, it is, effectively, an alteration of the IDEA itself. Such a monumental change in the law is worthy of review.

VI. Operative Placement Doctrine

An alternative means to ensuring that a special education student is not left without any pendency placement is the operative placement doctrine. In other words, if the Court were to grant review and determine that Petitioners were not entitled to self-help regarding the pendency-related deficiency left by DOE, the application of the operative placement doctrine would serve the same purpose of ensuring that special education students such as G.S. are not deprived of their pendency rights when a school district such as DOE has failed them.

Within the Second Circuit, the operative placement doctrine is the concept that, because each special education student is guaranteed a pendency placement by the IDEA, where a student would otherwise not have a pendency placement, his or her "operative placement" serves as a basis for pendency. The student's operative placement is the student's educational program that is operating at the time the stay-put provision of the IDEA is invoked. *See Dervishi, supra,* 653 Fed. App'x at 57-58; *Doe, supra*, 790 F.3d at 452.

Here, G.S. was enrolled at iBRAIN at the time Petitioner filed an administrative due process complaint on his behalf on July 9, 2018; therefore, iBRAIN is G.S.'s operative placement for purposes of pendency. *Id.* Thus, even if the Court disagrees with Petitioners that they should be granted pendency funding for G.S.'s placement at iBRAIN using the substantial similarity doctrine, the Court should still find G.S.'s educational program at iBRAIN for the

2018-2019 SY to be "the operative placement actually functioning at the time when the stay-put provision of the IDEA was invoked" and, as such, his pendency placement. *Dervishi*, 653 Fed. App'x at 57-58. Otherwise, G.S. would be left without a pendency placement for that school year, an outcome that has been found to be "an impossible result." *See Gabel v. Bd. of Educ., supra*, 368 F. Supp. 2d 313, 325 (S.D.N.Y. 2005).

In essence, the operative placement doctrine provides an equitable solution where a school district has failed to provide pendency services. Here, at no point did DOE secure a pendency placement for G.S. *at <u>any</u> school*, violating its legal obligation to him. *See L.J., supra*, 927 F.3d at 1213; *Olu-Cole, supra*, 930 F.3d at 530-31; *John M., supra,* 502 F.3d at 714-15; *Johnson, supra*, 287 F.3d at 1182; *Erickson, supra,* 199 F.3d at 1121-22; *see also Doe, supra*, 790 F.3d at 456; *T.M., supra*, 752 F.3d at 171.

That reality left Petitioners with no choice but to select a school that could implement G.S.'s then current educational program. That school was iBRAIN. After Petitioners served DOE with a TDN concerning G.S.'s planned enrollment at iBRAIN, if DOE truly had desired to select where G.S. would receive a pendency placement, DOE would have promptly secured G.S. a seat at any school it believed could have implemented his then-current educational placement. It failed to do so, violating its duty to G.S. not only under the IDEA but also New York state law. 20 U.S.C. § 1415(j); N.Y. Educ. Law. § 4404(c). Instead, DOE only offered the same public school placement that had been deemed

inappropriate by an IHO in a contested hearing concerning the prior school year.

Because all special education students are entitled to pendency, DOE was responsible for ensuring that G.S. received pendency services. DOE failed to uphold that responsibility.

The operative placement doctrine, which acts as a stop-gap to ensure that no disabled student is left without pendency, is, therefore, necessary and essential to the integrity of the Pendency Provision as a means of protecting this guaranteed procedural right under the IDEA. It should be applied here to enable G.S. to have the benefit of that guarantee.

CONCLUSION

Because *Soria* has far-reaching consequences on disabled children and their families in every jurisdiction in the country, this matter presents a substantial question of federal law that should be settled by the Court. Simply put, it is vital for the Court to resolve the issue of what the parameters are of the pendency-related duty, if any, that a school district owes to a special education student.

Additionally, it is equally essential that the conflict between the Second Circuit and other Circuit Courts be resolved on this issue. Further, the rationale and practical effect of *Soria* contradict Congressional intent and the Court's own determination that, through the IDEA, "Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled

students…from school." *Honig, supra*, 484 U.S. at 323. Therefore, the Court should grant review.

Respectfully submitted,

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