No. _____

In The
Supreme Court of the United States

ROSA ELBA VENTURA DE PAULINO,
Petitioner,

v.

NEW YORK CITY DEPARTMENT OF EDUCATION,
NEW YORK STATE EDUCATION DEPARTMENT,
Respondents.

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 Education Act ("IDEA"), 20 U.S.C. §1400, et seq.?

If a school district has such an 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. Plaintiff/Petitioner Rosa Elba Ventura De Paulino

2. Defendant/Respondent New York City Department of Education

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PETITION FOR WRIT OF CERTIORARI

Rosa Elba Ventura De Paulino ("Petitioner") respectfully petitions 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 *De Paulino v. New York City Department of Education*, 959 F.3d 519 (2d Cir. 2020), which was issued on May 18, 2020 and is included in the Appendix. The order of the Second Circuit Court of Appeals denying rehearing is included in the Appendix (2d Cir. June 22, 2020). The May 31, 2019 opinion and order of the Honorable George B. Daniels, U.S.D.J., granting Respondent's motion to dismiss the complaint, is included in the Appendix.

STATEMENT OF JURISDICTION

The opinion and judgment of the Second Circuit Court of Appeals in this matter are dated May 18, 2020. The Second Circuit Court of Appeals denied a petition for rehearing on June 22, 2020. The judgment for the order denying the petition for rehearing is dated June 29, 2020. Jurisdiction of the Court is invoked under 28 U.S.C.A. § 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 R.P.'s continued education, a severely disabled nine-year-old boy, during the 2018-2019 school year.

Petitioner, who is R.P.'s mother, submitted a Ten Day Notice ("TDN") to DOE, providing notice of her intent to place R.P. at the International Institute for the Brain ("iBRAIN"). After receiving no response from DOE following the ten-day notice period, Petitioner 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 R.P. a free, appropriate public education ("FAPE") for the 2018-

2019 school year ("SY"). Additionally, through the administrative complaint, Petitioner requested that DOE fund the implementation of the educational program established for R.P. for that school year through his claim to pendency under Section 1415(j) of the IDEA.

Petitioner was entitled to invoke Section 1415(j) ("Pendency Provision" or "Stay-Put Provision") through filing the DPC and had become entitled to funding for R.P.'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, Petitioner 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 R.P. a FAPE; 2) the educational program provided by the private school R.P. had been attending, the International Academy of Hope ("iHOPE"), was appropriate to suit R.P.'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).

Having won the hearing, Petitioner also prevailed in having the *educational program* R.P. had received at iHOPE, as described in the FOFD, become the baseline educational program for R.P.'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 *Petitioner's* favor, R.P.'s "then-current educational placement" for the 2018-

[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 Petitioner and Respondent herein agree, R.P.'s pendency placement was formed when Petitioner won the contested administrative hearing concerning the 2017-2018 SY. *See* 34 CFR § 300.518(d).

2019 SY became the educational program R.P. received during the 2017-2018 SY. *Id.*

Further, because Petitioner won the FOFD, Petitioner became entitled to funding for R.P.'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. 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 May 15, 2018, DOE offered R.P. an IEP for the 2018-2019 SY that was *nearly identical* to the IEP DOE produced for R.P. for the 2017-2018 SY, which, on June 19, 2018, an IHO found had failed to provide R.P. a FAPE. Not surprisingly, the Petitioner found the 2018-2019 SY IEP DOE had produced to be inappropriate to suit R.P.'s needs. As a result, on June 21, 2018, Petitioner served DOE with a TDN before the start of 2018-2019 SY, giving DOE an opportunity to cure the deficiencies in its IEP, whose substantive content had just been determined to inappropriate by the IHO when proposed by DOE in the 2017-2018 SY IEP. DOE failed to cure those deficiencies and offered the same public school placement the IHO had just determined was inappropriate, leading to Petitioner's filing of the DPC for the 2018-2019 SY and Petitioner's enrollment of R.P. at a different private school,

iBRAIN. At no time did DOE offer or secure a placement for R.P. at iHOPE.

A new IHO conducted a hearing to address Petitioner's pendency claim within the DPC for the 2018-2019 school year. By decision dated September 4, 2018, IHO Robert Briglio ("IHO Briglio") issued an interim order on pendency requiring Petitioner to produce evidence as to why Petitioner had unilaterally enrolled R.P. at iBRAIN for the 2018-2019 SY when he had attended iHOPE for the 2017-2018 school year. In the order, IHO Briglio stated that, absent such evidence, the issue of whether R.P.'s educational program at iBRAIN was substantially similar to the educational program R.P. received at iHOPE the prior year would not be heard. This ruling was significant because, based on previous decisions issued by other IHOs and New York's second-tier administrative body, the Office of State Review, it was the doctrine of substantial similarity that would enable Petitioner to obtain funding for R.P.'s pendency placement at iBRAIN.

On November 22, 2018, IHO Briglio issued a final order denying Petitioner a pendency placement at iBRAIN for the same reasons he outlined in his September 4, 2018, interim order. In IHO Briglio's November 22, 2018 order, the IHO had ruled that Petitioner was required to show the reasons that R.P. no longer attended iHOPE before the IHO would even consider the legal standard of the substantial similarity between R.P.'s educational programs at iHOPE and iBRAIN.

During the 2018-2019 SY, R.P. had a schoolmate whose parent had initiated a separate administrative due process proceeding alleging very similar facts. This student, O.F., received nearly identical interim orders from IHO Briglio at the same time as R.P. However, O.F.'s parent appealed the adverse pendency order IHO Briglio issued for O.F. to a State Review Officer ("SRO") (Office of State Review), who reversed IHO Briglio and remanded the case back to the IHO to make a determination about the substantial similarity of the educational program for pendency O.F. received during the 2018-2019 SY to the educational program for pendency O.F. had received for the 2017-2018 SY. IHO Briglio refused to make such determination, and, as a result, O.F.'s parent filed a civil action in Southern District of New York on December 21, 2018.[2] The Hon. Paul G. Gardephe, U.S.D.J., ordered IHO Briglio to follow the SRO remand within 10 days, and soon thereafter, IHO Briglio made a determination that the iHOPE (2017-2018 SY) and iBRAIN (2018-2019 SY) educational programs were substantially similar, establishing the educational program O.F. received at iBRAIN as his pendency placement for the 2018-2019 SY. Soon thereafter, IHO Briglio recused himself from the proceedings for O.F. in January of 2019.

On January 9, 2019, Petitioner filed a civil action on behalf of R.P. in the Southern District of New York. Petitioner's complaint sought relief in the form of

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[2] *Cruz et al. v. New York City Dep't of Educ.*, 18-cv-12140 (PGG), ECF Document No. 1 (S.D.N.Y. December 21, 2018).

both a temporary restraining order and a preliminary injunction. The basis for the action was IHO Briglio's refusal to reconsider his order denying R.P. pendency. IHO Briglio recused himself from the underlying administrative proceedings at the same time he recused in O.F.'s case, except in R.P.'s case the IHO recused without correcting pendency.

The Hon. George B. Daniels, U.S.D.J., denied Plaintiff's request for a preliminary injunction and temporary restraining order by order March 20, 2019.

By order dated May 31, 2019, Judge Daniels granted DOE's motion to dismiss the complaint, pursuant to Fed. R. Civ. P. 12(b)(6). (A36).

By notice of appeal, dated June 3, 2019, Petitioner appealed to the Second Circuit Court of Appeals. Following briefing and oral argument, the Second Circuit, through a three-judge panel, issued an opinion dismissing the appeal in *De Paulino*. On May 29, 2020, Petitioner filed a petition for rehearing en banc. The Second Circuit issued an order denying rehearing on June 22, 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 vital importance of this matter because, through its decision in *De Paulino* dismissing Petitioner's appeal, the Second Circuit has answered this question in the negative, which has far-reaching ramifications for special education students across the country.

Specifically, if the Second Circuit's holding in *De Paulino* were upheld, the entire landscape concerning the relationship between a school district and the family of a special education student would be altered, as school districts across the country would be able to cite the *De Paulino* decision, and its affirmance, as a basis for not taking any action on behalf of special education students with respect to pendency. DOE itself has already begun doing so, citing *De Paulino* in the context of administrative hearings and federal court litigation and failing to make any effort to secure seats at schools where the pendency placements of special education students can be implemented.

Most significantly, the De Paulino court ruling that school districts do not have an affirmative obligation to offer special education students pendency services because 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 opposite. This *DePaulino* ruling is also in direct

contravention of Congress' express intent concerning the IDEA and the Pendency Provision, specifically.

This drastic change in the law 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 was the first Court to address this question in *De Paulino*, the issue falls within an unsettled law that, because of *De Paulino* and its progeny, is ripe for resolution by the Court. *De Paulino, supra*, 959 F.3d 519; *see also 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).[3] The Second Circuit explicitly found the issue to be *one of first*

[3] The *De Paulino* case was argued and decided in tandem with DOE's appeal of a preliminary injunction order Chief Judge Colleen McMahon of the Southern District of New York had issued in favor of a parent in a different matter with similar facts. *See Carrilo v. New York City Dep't of Educ.*, 384 F. Supp. 3d 441 (S.D.N.Y. 2019). Based on the Second Circuit's decision in *De Paulino*, Chief Judge McMahon's preliminary injunction order was reversed and vacated.

impression where the parent, as Petitioner did here, has procured the pendency services 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.

I. Factual Background

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

Because R.P. is a student with a disability and a resident of New York City, DOE is obligated to provide him with a FAPE under the IDEA, as outlined in an IEP DOE has prepared for him for every school year. 34 CFR § 300.320(a). DOE's legal obligation to R.P. includes the duty to place him at a school where the IEP DOE has prepared for him can be implemented under both federal and state law. 34 CFR § 300.116; N.Y. Educ. L. § 4404(c). The same laws require that DOE provide R.P., and all special education students, with the educational and support services that have been found to comprise his pendency placement under the Pendency

Provision of the IDEA. 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 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 *De Paulino* decision, 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 rather mundane principle that, just as a school district has an affirmative obligation to place a special education student at a school where the IEP the district has promulgated 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 *De Paulino*, the Second Circuit held that DOE need not have taken *any* affirmative measures to secure pendency services for R.P. to have met its obligation to him but, instead, automatically fulfilled its pendency-related duty, *solely by operation of law*. *See Ventura 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); *see also Soria, supra*, 2020 U.S. App. LEXIS 34252, at *4 ("Repeating what we made clear in *Neske*, [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.") (internal quotations omitted) (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 *De Paulino* directly contradicts the precedents mentioned above in other Circuits and even precedents within its Circuit, making it 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.

De Paulino even conflicts with New York state law in that New York Education Law imposes the burden of providing educational services, including pendency services, on school districts, not parents. *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. As such, *De Paulino* is an abrogation of pendency rights 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, which has received the approval of the Court. 20 U.S.C. § 1400(c)(2); *see also L.J., supra*, 927 F.3d at 1210; *Doe, supra*, 790 F.3d at 453.

III. Origin of *De Paulino*'s Erroneous Rationale

The origin of the Second Circuit's erroneous rationale concerning DOE's obligation to R.P. 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 court overlooked that the Neske parents would have had to "veto" *something* for that holding to be valid. *Id.* In other words, because it is impossible to veto a choice *that never existed*, the Court's holding was misplaced, as

it is was inapplicable to the facts of that case, where, like here, DOE failed to make *any* choice of a school for 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 uncontroverted 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 the original opinion, the district court pivoted from the "veto" rationale of the 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 any pendency services to the child – but, in so doing, created law that contradicts established precedents. *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 *Ventura de Paulino*, in *Neske III,* which is an appeal of *Neske I* and *Neske II*, and in *Soria, supra*, 2020 U.S. App. LEXIS 34252, which is an appeal before the Second Circuit with facts similar to those in *Ventura de Paulino* and the *Neske* cases.

The most significant difference between *Ventura de Paulino* and the other two cases is that, in *Ventura de Paulino,* the Second Circuit seems to have misinterpreted the record's facts. Specifically, while the Second Circuit found that DOE had selected iHOPE as the location for R.P.'s pendency placement, DOE had not chosen iHOPE, or any other school, for that purpose. *See Ventura 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.

When discussing its holding in *Ventura de Paulino*, the Second Circuit held in *Soria* 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." 2020 U.S. App. LEXIS 34252, at *4. Accordingly, the Second Circuit doubled down on the idea that, when a school district *loses* a contested hearing to a parent, as DOE lost to Petitioner 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.*

Because 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, because when school districts are not required to procure any services for special educations students, it follows that most often they will not, leaving those students in limbo during their families' disputes with school districts – precisely the result the Pendency Provision was intended to prevent. *See L.J., supra*, 927 F.3d at 1210; *Doe, supra*, 790 F.3d at 453; 20 U.S.C. § 1400(c)(2).

IV. Empowering Parents Where Districts Have Failed

Even if the Court were to right the pendency ship by vacating and reversing *Ventura de Paulino*, thereby resolving the conflict among the Circuit Courts it has created and restoring the pendency rights to which disabled children are entitled, 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 left without the means to the education to which they are entitled offers a strong indication of what a proper solution is. Because "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 be bereft of much-needed services in such circumstances. That would violate the students' pendency rights and 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 between families and school districts. It is that problematic past that led Congress to legislate the passage of the IDEA's Pendency Provision in the first instance.

Through *Ventura de Paulino* and its progeny, 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 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 R.P.'s education in the 2017-2018 SY, DOE lost the contested hearing to Petitioner. The educational program advocated by Petitioner became the binding educational placement for R.P.'s pendency for the 2018-2019 SY. Nevertheless, after Petitioner filed a TDN, and DOE responded by offering 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 R.P. to ensure he received the pendency services to which he was entitled, DOE *did* *nothing*.[4] That created a situation where, unless the Petitioner had taken action, R.P. would have been deprived of his pendency rights. And therein lies the rub.

Petitioner filled the void that DOE's inaction created in violation of its duty to R.P. under the IDEA. By contrast, Petitioner provided R.P. with pendency services at iBRAIN, through an educational program that was not only similar but nearly identical to the

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[4] DOE notified Petitioner of the public school program it had recommended for R.P. through the issuance of a Prior Written Notice ("PWN"), which DOE was statutorily required to serve. 20 U.S.C. § 1415(b)(3). The PWN was the appropriate vehicle for DOE to notify Petitioner of what pendency placement DOE had selected for R.P. However, rather than indicate what pendency placement it had chosen for R.P. and where it was to be administered, DOE omitted any mention of a pendency placement from the PWN, leaving the public school program, which was not selected for purposes of pendency, as the only program DOE had offered R.P. for the 2018-2019 SY.

educational program that was established as his pendency placement when Petitioner won the contested hearing the prior school year. In this way, the Petitioner relied upon the doctrine of substantial similarity, which has origins four-decades-old within the Second Circuit. *See Concerned Parents v. NYC Board of Educ.,* 629 F.2d 751, 753 (2d Cir. 1980) ("t[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"). Additionally, New York's Office of State Review has 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 R.P.'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 Petitioner's application thereof, should be adopted by the Court. Otherwise, DOE and other school districts across the country will flout their legal obligation to affirmatively offer pendency services to special education students, simply because they can.

Currently, in the Second Circuit, a school district now has absolutely no obligation to obtain pendency services for a special education student because that obligation is now fulfilled "by operation of law." *See Ventura de Paulino, supra*, 959 F.3d at 532. 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.

V. 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 Petitioner was not entitled to self-cure 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 R.P. 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, R.P. was enrolled at iBRAIN at the time Petitioner filed an administrative due process complaint on his behalf on July 9, 2018; therefore, iBRAIN is R.P.'s operative placement for purposes of pendency. *Id.* Thus, even if the Court disagrees with Petitioner that Petitioner should be granted pendency funding for R.P.'s placement at iBRAIN using the substantial similarity doctrine, the Court should still find R.P.'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, R.P. 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 R.P. *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 left Petitioner with no choice but to select a school that could implement R.P.'s then current educational program. That school was iBRAIN. After Petitioner served DOE with a TDN concerning R.P.'s planned enrollment at iBRAIN, if DOE truly had desired to select where R.P. would receive a pendency placement, DOE should have promptly secured R.P. a seat at any school it believed could have implemented R.P.'s then-current educational placement. It failed to do so, violating its duty to R.P. 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 just weeks earlier.

Because of the legal mandate, established by Congress, that all special education students are

entitled to pendency, DOE was responsible for ensuring that R.P.'s pendency entitlement was more than just on paper. DOE had an obligation to make it real but has shirked 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 R.P. to have the benefit of that guarantee.

CONCLUSION

Because *Ventura de Paulino* has far-reaching consequences on disabled children and their families in every jurisdiction across all fifty (50) States, particularly on the issue of what the parameters are of the pendency-related duty, if any, that a school district owes to a special education student, this matter presents a substantial question of federal law that should be settled by the Court. Additionally, it is equally essential that the conflict between the Second Circuit and other Circuit Courts, created by *Ventura de Paulino,* be resolved. Further, the rationale and practical effect of *Ventura de Paulino* work in opposition to 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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