No. 20-713

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 REHEARING

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PREAMBLE

Pursuant to Rule 44.2 of this Court, Petitioner Rosa Elba Ventura De Paulino ("Petitioner") respectfully petitions for a rehearing of the denial of a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

In this matter, the Second Circuit's opinion virtually eviscerates decades of case law pertaining to Pendency placements under the stay-put provision of the Individuals with Disabilities Education Act ("IDEA") and otherwise – case law that has developed to protect the right of special education students to remain in their then-current educational setting while their parents' Due Process challenge to a school district's Individualized Education Program ("IEP") is adjudicated[1] – in favor of a new rule that benefits school districts to the detriment of the special education students they are charged with educating. This rule wholly contravenes the intent of the IDEA to ensure that children who fall within the purview of the statute are provided with a free appropriate public education.

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[1] During the pendency of the due process review proceedings, parents are entitled to have the child "stay put" in his or her "current educational placement." 20 U.S.C. § 1415(j); *Honig v. Doe*, 484 U.S. 305, 323, 325 (1988) (finding that in "the language of [the stay put provision, Congress unequivocally," intended to "strip schools of the unilateral authority they had traditionally employed" and that the provision "means what it says").

PETITION FOR REHEARING

The original certiorari petition asked this Court to resolve two issues: 1) 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.; and 2) 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?

The IDEA, known originally as the Education of the Handicapped Act, was passed in order "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs" *Id.* § 1400(c).

As reflected in the text of the provision and case law, Congress' policy choice was that a child is entitled to remain in his or her placement at public expense during the Pendency of an IEP dispute, regardless of the merit of the child's IEP challenge or the outcome of the relevant proceedings.

It is clear that Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school. *Honig*, 484 U.S. at 311-12. A similar view of the provision was articulated in *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 373 (1985).

In this case, the Second Circuit noted that "[i]t is up to the school district," not the Parent, "to decide how to provide that educational program [until the

IEP dispute is resolved], so long as the decision is made in good faith. *De Paulino v. N.Y. City Dep't of Educ.*, 959 F.3d 519, 534 (2d Cir. 2020).

The Second Circuit ultimately held that parents who unilaterally enroll their child in a new private school and challenge the child's IEP are not entitled to public funding for the new school during the Pendency of the IEP dispute under the IDEA's stay-put provision; nor are the parents entitled to public funding for the new school during the Pendency of the IEP dispute on the basis that the educational program being offered at the new school is substantially similar to the program that was last agreed upon by the parents, and the school district, at the previous school.[2]

The Second Circuit has turned the holding in *Honig* on its head – *Honig* held that Congress intended to strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school. The Second Circuit has given back to the schools that which this Court found Congress had taken away – unilateral authority over the Pendency Process.

Regardless of whether the educational program that a student is receiving at a new school is substantially similar to the one offered at a previous school, when Parents unilaterally enroll the Student

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[2] It is unclear how the public school district would be adversely affected if the student's new school is substantially similar to the student's old school – that is if the new school can implement the student's IEP in the same manner as the old school, and at the same cost, why would such a placement be prohibited? This is exactly the type of placement that the IDEA would seem to encourage – a placement made by a parent in their child's best interest, with no additional cost or burden to the public school.

at the new school for the subsequent school year, they do so at their own financial risk. *Id.* .

The District Courts within the Second Circuit, and more importantly, the NYS Department of Education's State Review Officers ("SRO"s), have interpreted the holding in the instant case to mean that if a parent unilaterally moves a child from one private school to another, Pendency can NEVER lie at the second school unless and until there is an unappealed administrative decision finding the unilateral transfer to be appropriate.

Put another way, the Second Circuit's holding stands for the proposition that a parent cannot unilaterally transfer his or her child to a new school and subsequently initiate an IEP dispute to argue that the new school's services must be funded on a pendency basis. *Id.* at 536. [3]

Since the initial certiorari petition was submitted, the number of State Review Officers who have relied upon the Second Circuit's instant decision to deny Pendency to special education students has grown exponentially – to the detriment of the students whom the stay-put provision was

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[3] This would not be the first time that the Second Circuit has gone too far in penalizing a parent for their "unilateral" placement of their child in IDEA matters. In *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 114 S. Ct. 361 (1993), an appeal from the Fourth Circuit, this Court addressed the Second Circuit as follows, "Accordingly, we disagree with the Second Circuit's theory 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. *Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563, 568 (2d Cir. 1989) (internal quotation marks omitted). 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."

designed to protect. In case after the case, SROs are reversing Impartial Hearing Officers' Pendency Orders finding that once a Parent moves their child from one private school to another, any claim to Pendency is lost – perhaps for years.

As an SRO recently wrote in reversing an Impartial Hearing Officer's finding[4] of Pendency[5],

> "The district court has repeatedly rejected the parent's claims regarding the student's Pendency at iBrain[6], and there are no intervening events such as a subsequent pendency agreement of the parties or a merits determination in favor of the parent's unilateral placement of the student at iBrain that would warrant a new result." SRO Decision No. 20-178.

In her Decision dated December 23, 2020, the SRO continued,

> "As a final matter, as mentioned above, there have been no merits determinations regarding the Student's special education programming since the unappealed June 2018 IHO Decision for the 2017-18 school year when the Student was attending iHope. Each year, the Parent pursued

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[4] The State of New York has a two-tiered administrative review process in IDEA matters.

[5] SRO No. 20-178 was decided on or about December 23, 2020.

[6] SRO Decision No. 20-178 involves a different student than in the instant case, but the same private schools.

> pendency claims seeking iBrain as the Student's Pendency under new theories, none of which, as of this appeal, have succeeded.[7]
>
> Given the outcome of the various proceedings both at the administrative and federal levels, pendency funding at iBrain is unlikely to occur unless the parents achieve a favorable determination on the merits of their substantive underlying claims regarding FAPE and the appropriateness of iBrain as a unilateral placement. . . . I strongly encourage the parents and their counsel to desist with the baseless[8] pendency disputes on the same facts and advance the merits of the cases they have filed to their conclusion rather than accumulating additional unsuccessful pendency determinations for successive school years, particularly where the Second Circuit has essentially foreclosed[9] the viability of a legal strategy premised on establishing Pendency at iBrain through a parent's

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[7] Mostly because of the holding by the Second Circuit in this matter.

[8] That any Pendency could be referred to as "baseless" should be reason enough for this Honorable Court to hear this matter.

[9] The perception that Second Circuit has essentially foreclosed Pendency under any circumstances should be chilling to this Court.

> unilateral placement of a student at the school." *Id.*

The SRO fails to recognize or intentionally ignores the fact that the defendant school district, the NYC Department of Education, appoints the IHOs in the first instance, and only for the limited purpose of determining Pendency. After determining Pendency issues, the IHOs are divested of their jurisdiction by the defendant school district and ordered to "recuse" themselves. There can be no final adjudication of a student's Due Process Complaint unless and until the defendant school district re-assigns an Impartial Hearing Officer for such purpose.

Parents in New York City have no control over the ability to achieve a favorable determination on the merits of their substantive claims regarding their child's FAPE and the appropriateness of a new school as a unilateral placement. The only remedy that they have had traditionally, on a real-time basis, is Pendency. However, the Second Circuit's opinion has severely eroded, if not foreclosed, the possibility of Pendency in a great many cases.

Relying on the Second Circuit's holding in this matter, the SRO in Decision No. 20-178 reversed a Pendency Order of an IHO that found a student's Pendency to be at the Student's new school. In his Pendency Order, the IHO held in pertinent part:

> "The stay-put provision was enacted as a procedural safeguard . . . preventing the school district from unilaterally modifying a student's educational

> program during the Pendency of an IEP dispute.
>
> It does not eliminate, however, the school district's preexisting and independent authority to determine how to provide the most-recently-agreed-upon educational program.
>
> It "is up to the school district," not the Parent, "to decide how to provide that educational program [until the IEP dispute is resolved], so long as the decision is made in good faith . . .
>
> In this instance, the DOE points to iHOPE, without evidence of either continued existence or Student acceptance to the program.[10] DOE, therefore, attempts to alter the Student program from the Pendency it argues exists in the services and program at iHOPE. In this case, the DOE offers an existential program, which actually is no program at all.
>
> A Parent cannot unilaterally decide a child's Pendency placement would be better provided in another location and

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[10] Despite this finding, in reversing the IHO, the SRO in Decision No. 20-178 held, "In any event, . . .the evidence in the hearing record does not support a finding that iHope was not available or that the district "refuse[d] or failed] to provide pendency services as iHOPE" *Neske v. N.Y. City Dep't of Educ.*, No. 19-4068-cv, 2020 WL 5868279, at *2 (2d Cir. Oct. 2, 2020)."

> invoke the stay-put provision to force a school district to pay via Pendency.
>
> In this instance, the Student has already been attending the iBRAIN program for the 18-19 and 19-20 school years. These school years are still in various stages of litigation. DOE certainly could have engaged the iHOPE school and offered the Student return via Pendency.
>
> In this instance, a Pendency must be established as a right of the Student. Without evidence of a DOE offered Pendency placement, the analysis moves onto the substantially similar analysis, which results in the iBRAIN Student Pendency.
>
> Regarding Pendency, I find the DOE has failed to offer a program capable of delivering Student Pendency Services
>
> I find the Parent establishes substantial similarity between the services and supports of the iHOPE and iBRAIN IEPs."[11]

Despite the well reasoned, well-thought-out opinion above, the SRO reversed the IHO's Pendency Order. With no deference to the IHO, the SRO applied the Second Circuit's holding in the instant

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[11] Hearing Officer's Pendency Order in IHO Case No. 196391 by Impartial Hearing Officer Ajello.

case in a rigid, inflexible manner, leaving the Student without Pendency – because, in 2018, the Student's parents unilaterally moved the Student to a new school, albeit a substantially similar, almost identical school.

The SRO in Decision 20-178 went even further than the Second Circuit in this case when it relied on a subsequent Second Circuit Case, as follows:

> "In *Neske,* the Second Circuit also rejected the argument that the facts of that matter fell under a footnote [65] in *Ventura de Paulino*, where the Court left open the question as to what would happen if a student's prior nonpublic school placement was not available to provide pendency services and the district either refused or failed to provide pendency services (Neske, 2020 WL 5868279, at *2; *Ventura de Paulino* 959 F.3d at 534 n.65). The Court in *Ventura de Paulino* cited a decision by the Fourth Circuit Court of Appeals, which held that 20 U.S.C. § 1415(j) does not impose any affirmative obligations on a school district to seek out alternative placements when a student's then-current educational placement is not functionally available *(Wagner*, 335 F.3d at 301) . . .

In the Second Circuit, the Court's holding in the instant matter is now being cited for the proposition that a school district has no affirmative obligation to establish Pendency for a special education student –

thereby foreclosing the possibility of Pendency, as well as the prospect of Pendency, for special education students for years.

THE PETITION FOR REHEARING SHOULD BE GRANTED

While the Second Circuit may not have previously addressed the specific issues presented herein, case law is replete with examples of similar cases or issues that have been decided. This Court, and the Fifth Circuit, have established that a parent's unilateral action in obtaining supplemental or substitute care for a handicapped child in place of that provided by the school district under the IEP does not constitute a waiver of the right to reimbursement. *See Sch. Comm. of Burlington*, 471 U.S. 359; *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1161 (5th Cir. 1986).

The purpose of the IDEA's Pendency provision is to provide stability and consistency in the education of a student with a disability. *Honig*, 484 U.S. 305. The Pendency provision protects a student's educational *status quo* while the parents and the school fight out the legalities of the Student's placement – the provision is student-focused, not school district or parent-focused. *See Cosgrove v. Bd. of Educ.*, 175 F. Supp. 2d 375, 391 (N.D.N.Y. 2001).

The Pendency inquiry focuses on identifying the Student's then-current educational placement. *D. v. Ambach*, 694 F.2d 904 (2d Cir. 1982); *Gabel ex rel. L.G. v. Bd. of Educ.*, 368 F. Supp. 2d 313 (S.D.N.Y. May 10, 2005).

In *Gabel*, the Court characterized the idea that there was no Pendency placement for a student as "an impossible result."

The substantial similarity doctrine, as applied to Pendency, is based on the proposition that, as long as the *substance* of a special education student's educational Pendency program 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. *Concerned Parents & Citizens for Continuing Educ. at Malcolm X v. N.Y. City Bd. of Educ., 629* F.2d 751, 754 (2d Cir. 1980).

A crucial element of the rationale in *Concerned Parents* is 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 emphasizes that it is the substance of the educational program the child receives, not the school or school location, that determines whether there has been a change of placement when a parent changes 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").

Applying the holdings of the preceding cases to the instant matter should have resulted in a finding that although the Student's enrollment at iBRAIN changed *where* the educational placement was implemented (bricks and mortar location), it did not change the *educational placement itself* (the substance of the Student's program). Since there was

no change in the Student's educational placement, the Petitioner remained eligible for, and should have received, Pendency funding – there was no violation of the IDEA. *Concerned Parents & Citizens for Continuing Educ. at Malcolm X, 62*9 F.2d at 754.

REASONS FOR REHEARING

A Petition For Rehearing should present intervening circumstances of a substantial or controlling effect or other substantial grounds not previously presented. See Rule 44.2.

CONCLUSION

For the reasons set forth herein, the Petitioner Rosa Elba Ventura De Paulino requests this Honorable Court grant rehearing and her Petition for a Writ of Certiorari.

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

/s/ Rory J. Bellantoni

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