No. 20-8245

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Shkelqesa Dervishi in behalf of T.D.
Petitioner
vs.

Stamford Board of Education
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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May 24, 2021

QUESTION PRESENTED FOR REVIEW

I. Whether 20 U.S.C. § 1415(j) protect a disable student's right during the "stay-put" and requires a local education agency ("LEA") to maintain at LEA expense the stay put placement of the student during the pendency of the proceedings under 20 U.S.C. § 1415.

II. Whether the panel's order affirming the District Court's decision conflicts with the prior panel's order of the Second Circuit remanded for further proceeding to the district court pursuant to 20 U.S.C. § 1415(j), conflicts with the opinion of the Supreme Court and other U.S Circuit Courts.

III. Whether compensatory education as prospective equitable relief is warranted given the school board's failure to abide by the automatic and unconditional pendency entitlement, for a period of almost six years.

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PETITION FOR A WRIT OF CERTIORARI

I, Shkelqesa Dervishi, pro se, in behalf of a my autistic son T.D. and as his full legal guarding respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals of the Second Circuit affirming the United States District Court the District of Connecticut in this matter.

JURISDICTION

The Second Circuit entered its judgment on February 10, 2021 and denied a timely petition for rehearing in banc on March 1, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and having timely filed this petition for a writ of certiorari within ninety days of the Second Circuit's Amended Summary Order.

STATEMENT OF THE CASE

On August 4, 2016 the United States Court of Appeals for the Second Circuit issued a Summary Order from the judgment of the United States District Court for the District of Connecticut affirming an administrative hearing officer's ("IHO") decision denying Individuals with Disabilities Education Act ("IDEA") claims that I brought on behalf of my minor autistic son, T.D., assigned as case No. 15-2798 Dervishi v. Stamford Board of Education ("Board"). The Second Circuit in the set one of its Order affirmed the district court decision in the Board's favor under 20 U.S.C. &1400 (d) (1) (A), while, in the **set two** under 20 U.S.C. & 1415(j) vacated the district court's denial of Dervishi's stay put, in the parent's favor and remanded for further proceedings stated:[1] "On remand, the Court of Appeals directed this Court to "(i) calculate the total value of the home program, as specified in the settlement agreement,[2] for the period from

[1] After this Appeal's order the Board placed T.D. in the school that was rejected by the hearing officer and affirmed by the district in set one.

[2] T.D. was in home based program and on November 6, 2009 the board agreed that if the parent's wish to continue the home based program, the Board agrees to reimburse the Parents in the amount of $2,500 per week for the cost of speech, occupational therapy and ABA services and autism consulting services provided to the Student from

November 18, 2010 until the dispute over the 2010-2011 IEP is no longer pending, and (ii) order the Board to pay that amount to Dervishi." Appendix A.

The terms of the settlement agreement clearly precluded the board from interrupting services before the IEP was implemented and T.D.was transferred in the school setting as the Director for Special Education in Stamford Public School Wayne Holland that signed the s. Agreement did.[3]Appendix D. In October 2016 the board filed a brief where they attacked the family and stated that T.D.'s statutory pendency entitlement came to an end in 2010 and refused to reimburse the family as ordered by the Second Circuit.[4] In response to the Board's brief on November 21, 2016 I filed an Affidavit and Response in Support of Second Circuit "Pendency" Remand Adjudication stated, the Second Circuit's ruling regarding Stamford's "obligation to fund" pendency as a law of the case and the Second Circuit repeatedly focused on pendency "funding." Appendix E.

At the trial.

In January 2017, the district court assigned the case to the magistrate judge, who held a three day trial on March 16, 22 and 29 of 2017 and strayed from the Second Circuit's order as stated at the Recommended Ruling: "The Court remanded the case for a determination of reimbursement due plaintiff for the home-based education program provided to T.D. during the pendency of judicial review". Appendix B. Pendency funding here should not be strictly limited to "reimbursement"

September 2009 through the development and implementation of the Student's IEP. (T.D.'s education services were specified at the S. Agreement not at the IEP). Appendix D.

[3] I testified that in June 2010, Wayne Holland stopped funding qualified home providers such as Dr. Fiorile Ph.D., BCBA, Lucinda Ribeiro ABA therapist, Communication Clinic of Connecticut, LLC, and Marilena Baldino ABA therapist that were qualified indeed 20 U.S.C. §1432(4)(F); 34 C.F.R. §303.31.. This was based on his unilateral decision before the August 2010 IEP was developed. The child was not transferred to a school setting (a main condition of the November 2009 agreement), and yet this was covered up at the ruling. Mr. Holland refused to reimburse the family for home services we paid out of the packet the providers to continue the home services. Mr. Holland's: "Do not send your invoices to us." [Pl. Ex. 31; see also Tr. 3/29/17 at 570:18-19 (Dr. Holland testified, "[w]e did not pay any invoices once the settlement agreement ended.") Appendix B pg. 9 and Tr. at 605.

[4] The board avenged the family why we appealed and reported to DCF three times, a complaint that did not result in a finding of neglect(Id. At 146). I submit that the DCF complaint was unfunded and retaliatory. Appendix F.

relief as I legally argued in my affidavit and memoranda. Appendix E and Appendix F. The district court calculated how much the family was able to pay for the pendency services rather than calculating how much the Board was obligated to pay as the total value of the home program. In turn, the district court shifted the Board's pendency responsibility onto the parents instead. Presented here is a blatant conflict between the decision made by the Second Circuit and the recommended ruling by the district, as the Court of Appeals did not order for a determination of the reimbursement due plaintiff. Instead, the Court of Appeals ordered the district court to calculate on remand. Appendix A . At the trial, I testified and reiterated what I stated in my Affidavit: I asked the Court to provide additional "funding" relief to allow us to finally pay our still unpaid invoices and to provide an award of compensatory relief that we believe is warranted given defendant's failure to abide by the automatic and unconditional pendency entitlement, for a period of almost six years. Otherwise, Stamford will have been unjustly enriched by our son T.D. being unjustly denied his pendency entitlements and services that he clearly would have fully received had the Stamford school district provided that funding all along." Appendix E.

I testified that because of the Board's failure to provide for pendency funding, I took on the role of being T.D.'s primary service provider for years because the board refused to reimburse or provide therapists to continue the home program until the dispute was over. I testified that I was training from qualified providers and in 2004, received 35 hours intensive training from the Autism Treatment Center of America that serves as a training center to teach parents and professionals to develop home based program for children with autism. Appendix G.[5] I testified I received training and feedback from Lucinda Ribeiro, who worked as an ABA teacher with

[5] I testified on March 16, 2017 that, based on this training, the board paid me as my son's therapist for one school year 2005-2006.

T.D. for seven years, from Dr. Stephanie Bader Ph.D., BCBA-D, also continued online training.[6] Due to the board's failure and given the intensity of the services that were needed, based on the invoices, I provided 7026 hours ABA services following the same program during five years of pendency and I valued my time at $50-$70 per hour (far less than what a BCBA would have charged).[7] I requested in my briefs and the trial to get paid 50% of my work (far less than what a therapist would have charged" or with the same rate relying on *Bucks County Department of Mental Health/Mental Retardation v. Pennsylvania,* 379 F.3d 61 (3d Cir. 2004), where the mother got paid $22 for hours. (Tr. 3.16.2017)

The district court denied to reimburse my work, concluding I was unqualified. Appendix B. The district court calculated pendency services for a period of seven months starting on November 18, 2010 to June 2011, instead of six years as ordered by the Second Circuit for the period of November 18, 2010 to August 4, 2016. The district court determined the reimbursement due plaintiff for the home-based education program provided to T.D. in the amount of $30,222.50 based on the funds the family was able to pay during the pendency and denied to calculate the total of the home program, based on T.D.'s stay-put "funding" entitlement ($2,500 per week) as specified at November 6, 2009 stipulation.[8] Appendix B and Appendix D. The district court reimbursed in the amount of $6,790.37 for transportation only for mileage not for the time I spent driving T.D. at the stay put services. The district court failed to calculate the total value of other services such as Speech, Occupational Therapy (OT) and autism consulting, which the Board owed to T.D., services that were specified in the November 2009 agreement; denied to compensate T.D. for the lack of special education services he lost during the six years of

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[6] I was trained by qualified providers under 20 U.S.C. §1432(4)(F); 34 C.F.R. §303.31 as Mrs. Ribeiro's and Dr. Bader. Their testimony at trial. Tr. Pp. 184-242); (Id. at Pp. 242-260. Appendix E.

[7] The court asked me where I based the rate and I explained after I contacted ABA therapists to work with T.D. and with no experience they charged above $90/hours.

[8] This reimbursement was called by the board and the district court as attribution from the board to the parent.

pendency due to the Board's own violations; denied to reimburse for the time I spent providing transportation to other stay put services, as well as denying to reimburse D.Bader's services. Appendix B. On August 5, 2017, the district court adopted the recommended ruling. Doc. # 154. On September 17, 2018 I appealed the district court's decision of recommended ruling to the Second Circuit as case No. 18-2745 Dervishi v. Stamford Board of Education. I filed a brief and reply brief in the Second Circuit on December 3, 2018 and July 2020 as Doc. #54 and #158 with sufficient facts and evidence opposing the recommended ruling in support of the Second Circuit's Order. I filed a motion with the Court of Appeals to consider my request for compensatory education services due to T.D. 's age (21) before he exited from the school system due to his age, the motion was denied. In July 2020, the Court of Appeal requested that the parent be presented by the counsel.[9] On February 5, 2021, an oral argument took place in which I was presented by the counsel. On February 10, 2021 the panel issued a summary ordered that supported the district court's decision and conflicted the prior panel's order when stated:

> "We remanded because, under the "stay-put" provision of the IDEA, 20 U.S.C. § 1415(j), Dervishi was entitled to reimbursement for the home-based education program T.D. received while the parties' dispute was pending. See Dervishi v. Stamford Bd. of Educ., 653 F. App'x 55 (2d Cir. 2016)." Appendix C.

Here, the panel has tweaked what was said in the prior panel's order, which did not order to reimburse the home-based education program T.D. received, but instead remanded to the district for the calculation of the total value of the home program as specified in November 2009 as the board's fault.[10] The panel contradicts its own statement when it concluded : "On remand, pursuant to a referral by the district court, the magistrate judge held an evidentiary hearing to

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[9] After 10 years of presenting this case pro se, the new panel requested the plaintiff to be presented by counsel. However, a parent has an independent enforceable right under the IDEA and may pursue a claim on her own behalf. *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 535 (2007).

[10] Prior panel's stated: "…..continue funding whatever educational placement was last agreed upon for the child until the relevant administrative and judicial proceedings are complete." *T.M. ex rel. A.M. v. 28 Cornwall Cent. Sch. Dist., 752 F.3d 145, 152, 171 (2d Cir. 2014). Appendix A*

determine the amount the Board owed to Dervishi under the terms of the settlement agreement...." As I stated in my affidavit, under the terms of the s. Agreement the Board owed to Dervishi $2,500 per week to cover ABA, Speech, OT and autism consulting for T.D. 's pendency period from November 18, 2010 to August 4, 2016 or 298 weeks multiplied by $2,500 per week, in the total amount of $745,000. Appendix E. The district court only reimbursed $32,222.50, thus saving the Board $714,778 from T.D. 's education funds. Dervishi was able to pay for stay put services for only one year after the Board failed to do so. T.D. was entitled to special education services from the age of 3 up until his 22nd birthday as a resident of CT. The panel unfairly supported the district court's decision that reimbursed only for 2010-2011, and denied for other school years: 2011-2012; 2012-2013; 2013-2014; 2014-2015; and 2015-2016 or at the age of 13, 14, 15, 16 and 17 year old, that clearly conflicted with the prior panel decision ordered for six years. Appendix A and C. The panel stated: "The magistrate judge issued a Recommended Ruling, which contained factual findings and recommended granting Dervishi's requests for reimbursement for services that were in place when the dispute began...."[11] Appendix C. Dervishi's request for reimbursement was clearly made at the Affidavit in support of Second Circuit's order and at the first day of the trial in my opening statement requested:

- "To the extent that Stamford failed to provide the $2,500 pendency benefit from November 18, 2010 to August 4, 2016 (a total of 298 weeks), this Court's pendency "funding" discretion extends to $745,000, i.e. $2,500 x 298 weeks." Appendix E

Dervishi requested for services that the board was obligated to provide to T.D. during the stat put as parties agreed at November 6, 2016 agreement. The district court calculated only what the Dervishi paid, not what the board was obligated to pay in order for the Dervishi to provide services that the Board denied and T.D. was in title during the pendency.

[11] Stay put invoked when the August IEP was rejected by the parents.

The panel erred when supported the district court's conclusion when stated: "Here, however, the school board did not refuse to provide services within the reimbursement period,"[12] Yes, actually they did, that is why the prior panel remanded the district court to calculate the stay put services under the s. Agreement.[13] The Board ended their responsibility in June 2010, before the August IEP was developed. The panel erred that supported the district court's decision that concluded Mrs. Dervishi was not entitled to payment for providing her own services to T.D. A private service for a student is not required to meet the same stringent public school requirements for "qualified personnel" where, as here, there has been a failure to provide home services. The panel affirmed the district court's decision, which clearly conflicts with the prior panel of the Second Circuit's order issued on August 4, 2016. On February 22, 2021, the parent's counsel filed a petition for rehearing in support of the Second Circuit's order, issued on August 4, 2016 that was contradicted by the panel's decision of February 10. On March 1, 2021 the panel issued an Amended Summary Order where denied the petition for rehearing and corrected footnote 1 regarding a compensatory issue. The Court of Appeals closed the case a few weeks later on March 31, 2021.

SUMMARY OF ARGUMENTS

I. **Whether 20 U.S.C. § 1415(j) protects a disable student's right during the "stay-put" and requires a local education agency ("LEA") to maintain at LEA expense the stay put placement of the student during the pendency of the proceedings under 20 U.S.C. § 1415.**

[12] The panel here ignored the fact that the prior panel stated that the August IEP was not implemented and it was rejected by the parents and did not constitute the placement as the district court pretended. Appendix A. to maintain the educational status quo while the parties' dispute is being resolved" and requires that the school district "continue funding whatever educational placement was last agreed upon for the child until the relevant administrative and judicial proceedings are complete. Appendix A. Also see footnote 3 of this petition.

[13] 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 33 placement. Doe, 790 F.3d at 453.

The stay put provision requires maintenance of "the then-current educational placement" while proceedings under section 1415 (j) are pending "unless the State or local educational agency and the parents otherwise agree." 20 U.S.C. § 1415(j). Section 1415(j) states that "during 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 . . " 20 U.S.C. §1415(j). If the stay put provision includes this duty and a board fails to meet it, an order for pendente lite reimbursement is warranted. By not including the stay-put protection throughout the entire appeals process, disabled students would be stripped of the Act's protection. " A local educational agency ("LEA") may be required to reimburse parents for their tuition payment to a private school for the services obtained for the student by his or her parents if the services offered by the LEA were inadequate or inappropriate, the services selected by the parents were appropriate under the Act, and equitable considerations support the parents' claim.[14] T.D. stayed in the same home program agreed and received the same services as partied agreed on November 2009 agreement.

II. **Whether the panel's order affirming the District Court's decision conflicts with prior panel's decision to calculate pendency fund pursuant to 20 U.S.C. § 1415(j) conflicts with the opinion of the Supreme Court and other US Circuit Courts.**

The panel decision conflicts with the prior panel's decision and the decisions of the *United States Supreme Court in School Comm. of Burlington v. Department of Ed. of Mass.,* 471 U.S. 359 , 370, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985); *Florence County School Dist. Four v. Carter,* 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993); and *Honig v. Doe,* 108 S.Ct. 592, 484 U.S. 305, 98 L.Ed.2d 686, 56 U.S.L.W. 4091; with opinions of other Circuits in *Anchorage School Dist. v. M.P.*, 689 F.3d 1047 (9th Cir. 2012); *Olu-Cole v. E.L. Haynes Public Charter School*, 930 F.3d

[14] *Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 20 IDELR 532 (1993); Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 103 LRP 37667 (1985).*

519 (D.C. Cir. 2019), and *Board of Educ. of Community High Sch. Dist. No. 218 v. Illinois State Bd. of Educ.*, 103 F.3d 545, 548-550 (7th Cir. 1996); and with other Second Circuit opinions in *Doe v. East Lyme Board of Education,* 962 F.3d 649 (2nd Cir. 2020) and *Doe v. East Lyme Bd. Of Educ.* 790 F.3d 440 (2d Cir. 2015); *T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.*,752 F.3d 145,152, 171 (2nd Cir. 2014); *Zvi D. v. Ambach,* 694 F.2d 904, 906 (2nd Cir. 1982); and *Mackey ex rel. Thomas M. v. Board of Educ. For Arlington Central School Dist.*, 386 F.3d 158 (2nd Cir. 2004); and consideration by the full Court is necessary to secure and maintain uniformity of the courts' decisions. The proceeding also involves questions of exceptional importance, involving issues on which the panel decision does conflict with the authoritative decisions of this Circuit, and sister Circuits, including the issues of: the length of the pendency for purposes of 20 U.S.C. §1415j, the "stay-put" provision of the Individuals with Disabilities in Education Act, ("IDEA"); whether the burden falls on the educational agency to fund the full value of education services provided to the student during the pendency period based on the then-current placement, or whether the burden shifts to the Parent to fund only the lesser value of services the Parent was able to afford during the pendency period.

A. The panel's decision affirming the District Court's decision in determination of the *pendency period* for "stay-put" reimbursement, pursuant to 20 U.S.C. § 1415(j) conflicts with the prior panel's order of the Second Circuit and other U.S. Circuit Courts.

In its decision on August 4, 2016, the panel rejected the Board's argument as to its "stay-put" responsibilities under an agreed upon home program in effect as the then-current placement during IDEA's "stay-put" pendency period, pursuant to 20 U.S.C. §1415 (j). Appendix A. Prior to remand, the prior panel noted that because the Board's obligation to fund "stay-put" placement during the pendency period is "rooted in the statute, not contract," the parties' intent as to the duration of T.D.'s home program does not alter the Board's reimbursement obligation under the "stay-put" provision." The prior panel then remanded the case to the District Court to "calculate

the total value of the home program, as specified in the settlement agreement, for the period from November 18, 2010 until the dispute over the 2010-2011 IEP is no longer pending, and order the Board to pay that amount to Dervishi." Appendix A. That ruling effectively ended the dispute. The true pendency period, thus, based on the actual "stay put" pendency period, was from November 18, 2010 until August 4, 2016 for six years. The panel, however, affirmed the District Court's erroneous conclusion, based on contract, that the pendency period ran from November 18, 2010 only until June of 2011, the date of the last invoice and cancelled check the parent submitted to the Board for reimbursement of her expenses paid for the educational services provided to the Student during the pendency period. In other words, the District Court impermissibly shifted the burden for the "stay put" pendency costs to the Parent, rather than placing the burden squarely on the Board, where it statutorily belonged. Instead, the District Court accepted the Board's claim, which was unsupported by the facts, that this was to be treated under School Comm. of *Burlington v. Department of Ed. of Mass.*, 471 U.S. 359, 370, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), and *Florence County School Dist. Four v. Carter, 510 U.S.* 7, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993).The Burlington/Carter cases authorize courts to reimburse parents for the cost of private-school tuition when a school district fails to provide a child a free appropriate public education, ("FAPE"), and the private-school placement is appropriate. That standard is substantially different from the standard for "stay put" violation reimbursement. Under Doe, the remedy for a "stay-put" violation is reimbursement (for the duration of the then-current educational placement from the date of the filing of the dispute until the dispute is finally adjudicated), or compensatory education, or both. In this case, this Court held that there was no FAPE violation, but held that there was a "stay-put" violation. The Second Circuit then held that because of the "stay-put" violation, the Parent was entitled to the "stay-put" reimbursement or compensatory education or both, and remanded to the District Court on that basis for calculation and payment. The District Court, however, erroneously calculated the reimbursement on the Burlington/Carter standard, (as if the Parent changed the

Student's placement, enrolled him in a private placement, and then sought reimbursement based on the Board's failure to provide FAPE), rather than on the Doe standard of reimbursement for a "stay-put" violation. Here, the record shows that the Board and the Parent agreed upon home placement for the Student for which the Board would pay the Parent reimbursement for certain services by qualified providers hand picked by the Board Appendix E. Thereafter, the Board developed an IEP in August 2010 which was not implemented and agreed by the parents, which the Parent rejected, and filed for a due process hearing (on November 18, 2010), invoking the "stayput" provision.[15] The Second Court correctly held (on August 4, 2016) that the "then-current" educational placement was the agreed upon home placement and ordered the "stay-put" funding to be calculated by the District Court for a period of six years. Thus, the pendency period for "stay-put" purposes ran from November 18, 2010 until August 4, 2016. The panel, on March 1, 2021 however, erroneously affirmed the District Court's decision that the length of the pendency period was from November 18, 2010 until only June, 2011. Appendix C. In doing so, not only did the panel's decision conflict prior panel's mandate issued on August 4, 2016 for the case No. 15-2798 regarding the pendency period, but it also, thereby, impermissibly shifted the Board's burden for the full value of the education provided to the Student during the pendency period cost of placement during the pendency period to the Parent for the lesser value of services the Parent was able to afford. Appendix A and Appendix C. The panel's erroneous decision concerning the length of the pendency period was based on the lesser value of the Parent's ability to pay as shown on the invoices submitted by the Parent for her provision of services, and not on the Board's burden to fund the full value of the education of the Student until the final conclusion of the dispute. Appendix A and Appendix C. Thus, regarding the length of the pendency period, the panel's decision stands in direct conflict with the case *Honig v. Doe*, (child "shall remain in [the] then current educational placement" pending

[15] When the parents are dissatisfied with the IEP, they have the right to challenge it under 20 U.S.C. § 1415 (2015); Id. at 369

completion of any review proceedings...); *T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.,* (school continues funding until the relevant administrative and judicial proceedings are complete."); and *Zvi D. v. Ambach,* (Stay-put is an automatic preliminary injunction...[funding continues] during pendency until all administrative and judicial proceedings are completed). The panel's order that affirmed the district court's decision that did not determine the length of the pendency period correctly clearly conflicted with the prior panel's order from the Second Circuit and from other U.S. Circuit Courts as well. Appendix A and Appendix C.

B. The Panel's decision affirming the District Court's decision in determination *of total value of the program* during the pendency under 20 U.S.C. § 1415(j) conflicts with the prior Panel's order of the Second Circuit and other U.S. Circuits Courts.

The panel's decision regarding the impermissible shifting of the burden from the Board to the Parent also warrants reconsideration in that it evidences a split among the Circuits, conflicting with prior panel's order from the Second Circuit and also conflicting with several other similar Circuit Court Decisions. For example:The panel's decision is in direct conflict with the decision in *Anchorage School Dist. v. M.P.,* 689 F.3d 1047 (9th Cir. 2012), in which that Circuit agreed that its District Court improperly shifted the burden for substantive compliance with the IDEA from a school board to a child's parents. In that case, the Ninth Circuit explained:

> "When parents are dissatisfied with any aspect of the educational services provided to their child, the IDEA authorizes them to pursue an administrative - and then, if necessary, a civil - remedy. 20 U.S.C. §1415(b)(6), (f)(1)(a), (i)(2)(A). During the pendency of administrative and civil proceedings, the statute permits parents to ensure that their child's educational placement is not disrupted without their consent by invoking the statute's "stay put" provision. Id. §1415(j); 34 C.F.R. §300.518(a). We have previously held that participating educational agencies cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents. *W.G. v. Board of Trustees of Target Range School Dist. No. 23,* the school district committed a procedural violation by failing to ensure parental participation in the development of their child's IEP...The school district argued that the parents were at fault because 'they left the IEP meeting, did not file a dissenting report,' and did not adequately communicate their concerns to the school district...We rejected the school district's rationale, concluding that it had an affirmative duty conduct a 'meaningful meeting with the appropriate parties...and that it failed to do so...Here, it is beyond dispute that M.P.'s parents were zealous advocates for their son...[the]parents filed four administrative complaints...and obtained a 'stay-put' order in connection with a then pending administrative proceeding....we are aware that this zealousness probably contributed to their strained

> relationship with the ASD. Yet it would be antithetical to the IDEA's purposes to penalize parents - and consequently children with disabilities - for exercising the very rights afforded to them under the IDEA... But the mere existence of the 'stay put' order did not excuse the ASD from its responsibility to have a statutorily compliant IEP in place... Indeed, to conclude otherwise would vitiate the purpose of the 'stay put' provision, which was designed to 9 '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 ex rel. Johnson v. Special Educ. Hearing Office, 287 F.3d 1176, 1181 (9th Cir. 2002) (quoting *Honig v. Doe,* 484 U.S. 305, 323, 108 S. Ct. 592, 98 L.Ed.2d 686 (1988))." Id., 1056.

Here, the panel affirmed the Board violated stay-put by not providing payment for the educational services as provided in the agreed upon home placement, the then current educational placement as found by the prior panel of the Second Circuit Court during the pendency period.[16] However, the Second Circuit panel placed the burden on the Parent for funding the stay-put placement, when that burden properly was on the Board. It did so by providing reimbursement to the Parent for the "stay-put" placement only in accordance with what the Parent could afford as shown by invoices and cancelled checks presented, instead of providing reimbursement to the Parent for the "stay-put" placement in accordance with what the Board agreed to pay for the then-current home placement.The panel overlooked the District Court's error on remand, when it stated that the "board's contractual duty to reimburse for the home program ceased after the parent rejected the independent consultant IEP for T.D. Thus, the District Court erroneously calculated the reimbursement based on "contract", and not on the statute "stay put" provision itself. Appendix C.

Pendency placement extended not until the Parent's funds ran out, but it extended until the relevant administrative and judicial proceedings were complete, on August 4, 2016. The result of the improper burden shifting to the Parent was that not only was the duration of the stay-put pendency period improperly calculated, but also the amount of reimbursement for the "stay-put" violation substantially reduced when it was based on the amount the Parent could afford to pay

[16] The reimbursement period ended only when the IEP was implemented or as the prior panel remanded until the dispute over the 2010-2011 IEP is not longer pending and the Board to pay that amount to Dervishi

only for ABA services, not for OT and speech services, rather than on the amount the Board agreed to pay for those services, which were in effect when "stay-put" was invoked. The Parent was penalized for being unable to fully afford to continue to fund private providers during six years of "stay put", that the school board was obligated to pay all along during the pendency, also T.D. was penalized for not receiving all his special education services during the six years of pendency. The panel's decision here is in direct conflict with the Second Circuit's decision in *Doe v. East Lyme Bd. Of Educ. 790 F.3d 440 (2d Cir. 2015)* ("appropriate equitable relief for a stay-put violation is reimbursement or compensatory education (or both) for the full value of services that the educational agency was required to fund, not the (lesser) value of services the Parent was able to afford...) Similarly, the panel's decision conflicts with: *the D.C. Circuit's decision in Olu-Cole v. E.L. Haynes Public Charter School,* 930 F.3d 519 (D.C. Cir. 2019) (The district court in this case wrongly denied a stay-put injunction because it placed the burden of proof on the student rather than the local educational agency; and *Board of Educ. of Community High Sch. Dist. No. 218 v. Illinois State Bd. of Educ.,* 103 F.3d 545, 548-550 (7th Cir. 1996) (flipping the heavy burden to the parent "dilute[d] th[at] statutory framework" and the robust procedural protections it extends to children with disabilities). The decision of the Second Circuit panel conflicted also with various other decisions made by this Circuit in similar cases. Most notably, it conflicts with this Court's decision in *Doe v. East Lyme Board of Education,* 962 F.3d 649 (Cir. 2020), and T.M. ex rel. *A.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 152 (2d Cir. 2014).* The duration of the "stay put" provision simply is not dependent on the amount of money a parent could afford to pay for the child's education during the pendency period. In Doe, this Court noted that the duration of the pendency period begins with invocation of the "stay put"provision, and ends only when the dispute is fully and finally adjudicated.

> "To that end, we again emphasize that once a party has filed an administrative due process complaint, the IDEA's stay-put provision provides that "during the pendency of any proceedings conducted pursuant to [20 U.S.C. § 1415] ... the child shall remain in the then-current educational placement of the child."

> 20 U.S.C. § 1415(j). In other words, the provision "seeks to maintain the educational status quo while the parties' dispute is being resolved." *T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 152 (2d Cir. 2014).* Thus, a school district is required "to continue funding whatever educational placement was last agreed upon for the child until the relevant administrative and judicial proceedings are complete." Id. at 171.

Similarly, the panel's decision in this case conflicts with its decision in *Mackey v. Board of Educ.* for Arlington Cent. Sch. Dist., 386 F.3d 158, 161 (2d Cir. 2004) (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). The panel's last decision issued on March 1, 2021 conflicts with existing case law ruled by the Second Circuit (the same court) at Mackey ex rel. *Thomas M. v. Bd. of Educ. for Arlington Cent. Sch.* Dist., 386 F.3d 158, 163 (2d Cir. 2004):

> "The IDEA offers federal funds to states that demonstrate, *inter alia*, that they have developed plans to assure "all children with disabilities residing in the state" a "free appropriate public education" ("FAPE"). 20 U.S.C. § 1412(a)(1)(A) (2000); see *Bd. of Educ. v. Rowley*, 458 U.S. 176, 180-81 (1982). To meet the IDEA requirements, a school district must provide each child who has a disability with "special education and related services," 20 U.S.C. § 1401(8), that are "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 203-04, 206-07. "The centerpiece of the IDEA's education delivery system is the individualized education program, or IEP," *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 197 (2d Cir. 2002) (internal quotations marks omitted), a document in which "[t]he particular educational needs of a disabled child and the services required to meet those needs" are "set forth at least annually," *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998) "During the pendency of special education proceedings, unless the school district and the parents agree otherwise, federal and state law require that the child remain in his or her then-current educational placement. See 20 U.S.C. § 1415(j) (the "stay-put" provision); 34 C.F.R. § 300.514(a)[1] ; N.Y. Educ. L. § 4404(4)(a). Parents should, however, keep in mind that if they "unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local officials, [they] do so at their own financial risk." *Sch. Comm. v. Dep't of Ed., 471 U.S. 359, 373-74 (1985).* A claim for tuition reimbursement pursuant to the stay-put provision is evaluated independently from the evaluation of a claim for tuition reimbursement pursuant to the inadequacy of an IEP. "[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." *Susquenita Sch. Dist. v. Raelee S.*, 96 F. 3d 78, 83 (3d Cir. 1996) (emphasis supplied, internal quotation marks omitted), cited with approval in *Bd. of Educ. v. Schutz*, 290 F.3d 476, 484 (2d Cir. 2002).z"

The panel's last decision conflicts with existing case law ruled by the Second Circuit at Jane *Doe v. E. Lyme Bd. of Educ. in Connecticut.* Docket No. 19-354 06-18-2020:

> "Appellant Jane Doe ("Doe") sued the East Lyme Board of Education (the "Board") on behalf of herself and her son, John Doe, under the Individuals with Disabilities Education Act ("IDEA" or the "Act"), alleging that the Board denied John a free appropriate public education ("FAPE") and violated the "stay-put" provision of the Act by refusing to pay for services mandated by John's individualized education plan ("IEP"). We previously held that the Board had provided John with an adequate IEP and a FAPE, and that John's private school placement had been inappropriate. We agreed, however, that the Board had violated the IDEA's "stay-put" provision. Thus, we vacated the reimbursement award and remanded for the purpose of calculating the total value of services specified in John's "stay-put" IEP and to structure a prospective, compensatory education award to remedy the Board's stay-put violation."

The panel's decision of March 1, 2021 conflicts with other appellate courts in the same issue. See *Hurry v. Jones, 734 F.2d 879 (1sr Cir. 1984)* and M.R and J.R parents of E.R v. Ridley School district in Pennsylvania; *Aaron M. v. Joseph Yomtoob* and Hawthorn School District No. 73, 40 IDELR 65 (II. 2003); *Michael M.*, 356 F. 3d, at 803, *Kevin T. v. Elmhurst Comm. Sch. Dist. No. 206*, No. 01 C 0005, 2002 WL 433061, *2 (N.D. Ill. March 20, 2002); cited with approval in *Bd. of Educ. v. Schutz*, 290 F.3d 476, 484 (2d Cir. 2002).z".

C. The Parent should be reimbursed for her time provided transportation to "stay-put"services, that the school board was obligated to pay all along during the pendency.

Based on the evidence presented at the trial on March 16, 2017, the plaintiff requested the district court to pay for my time driving T.D. to receive stay put services in the amount of 954 hours specified as: to Rehab association 924 hours, Communication Clinic of Connecticut, LLC

24 hours and to Dr. Bader in Valhalla, NY 10 hours. Spending my time to different locations to provide T.D. 's stay put services is a cost not wages and should be reimbursed. Example: Communication Clinic of Connecticut, LLC a qualified provider where T.D. received speech that was stopped by the district in June 2010 with Mr. Holland's decision and the family continued to drive T.D. there until March 2011. Appendix B pg. 15; Tr. 3.16. 2017 The school board did not offer me transportation or a driver. I requested the court to pay me at the minimum rate, following *Hurry v. Jones, 734 F.2d 879 (1sr Cir. 1984)* and *M.R and J.R parents of E.R v. Ridley School district in Pennsylvania.* The Court here did not consider the reimbursement as wages but as cost. The district court that reimbursed only for mileages and denied to reimburse for my time, contradicted the previous mentioned case law as . In Hurry *v. Jones,* the court held that parents who were performing a transportation function that the school district should have performed were entitled to reasonable compensation for their time and effort over and above their reimbursable transportation -related expenses. The Court affirmed an award of $4,600. Here too, I fulfilled a transportation function that the school board should have fulfilled. See *Aaron M. v. Joseph Yomtoob* and Hawthorn School District No. 73, 40 IDELR 65 (II. 2003). On November 28, 2003, Judge Pallmeyer ruled in favor of the parents regarding the reimbursement issue.[17] The panel erred that supported the district court's decision that denied my time provided transportation which conflict with other U.S. Court's decisions.

III. Whether compensatory education as prospective equitable relief is warranted given the Board's failure to abide by the automatic and unconditional pendency entitlement, for a period of almost six years.

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[17] "In her opinion, Judge Pallmeyer stated that allowing district reimbursement of monies paid during a "stay put" period would have a chilling effect on parents in IDEA cases: "Requiring parents to reimburse a school district that ultimately prevails in a challenge to its proposed IEP would make parents without financial resources hesitant to take advantage of the stay put protections." "We believe this case is an important victory for parents of students with special needs, as it preserves the intended purpose of the "stay-put" provision."

Compensatory education is an education benefit to the student. The purpose of compensatory education is not to punish districts for denying the student stay-put services, but rather to place the student in the position he would have been had the district provided the appropriate services in the first place. In *John M. v. Bd. Of Educ. of Evanston Twp. High Sch. Dist. 202*, the Northern District of Illinois found that compensatory services may be awarded to remedy a violation of the IDEA's stay-put provision, **even when all other IEP claims are resolved.** *John M. v. Bd. Of Educ. of Evanston Twp. High Sch. Dist. 202*, No. 05 C 6720, 2009 WL 691276 at *5-6 (N.D. Ill. March 16, 2009). On the one hand, "compensatory education" is an exceptional remedy that requires a school district to fund a child's education even after the child is no longer protected by the IDEA because he has either graduated or reached the age of twenty-one. In its decision, the District Court noted that the Parent has the opportunity to supplement the record to support an award for prospective compensatory education due to the gross violation of the "stay-put" provision by the Board. Appendix A at Pp. 38-51. Thus, the District Court did not deny the relief of compensatory education. The parent supplemented the records with very comprehensive evaluation done by Dr. Erik Mayville and speech evaluation done by Josephine Chen as Doc. #38 and # 56 as mentioned at the district court's decision. Appendix B. These assessments had more than enough information about T.D. 's needs, his functional level and performance, his scores in each area, age equivalent and recommendations on how to reduce the gaps demonstrated to T.D.The district court ignored these evaluations and ordered the parent to supplement records again. Appendix B. In my affidavit I requested for "an award of compensatory relief" for "defendant's failure to abide by the automatic and unconditional pendency entitlement" for over six years. Appendix E.

The panel erred that supported the district court's decision when stated the compensatory education was not yet requested because the records show that the Mother requested and provided sufficient information for the district court to order compensatory education for a student that was closer to aged from the school system and had lost six years of special education services in the most critical time, because of the Board's failure. Appendix C. The panel's decision here contradicts itself in *Doe v. E. Lyme Bd. of Educ., 790 F.3d at 456-57." Id., p. 38.* (Emphasis added.) "[W]hen an educational agency has violated the stay-put provision, compensatory education may-and generally should-be awarded to make up for any appreciable difference between the full value of stay-put services owed and the (reimbursable) services the parent actually obtained."

Compensatory education is awarded past a student's 22nd birthday

The purpose of compensatory educational services is to place the student in a position he or she would have been in if there had been no IDEA violations, a court can order adult compensatory services as necessary to cure a violation. *Michael M.*, 356 F. 3d, at 803, *Kevin T. v. Elmhurst Comm. Sch. Dist. No. 206*, No. 01 C 0005, 2002 WL 433061, *2 (N.D. Ill. March 20, 2002)(granting a free and appropriate public education until the child turns 21, as well as one additional year of compensatory education). The Eighth Circuit soundly rejected this argument, stating: We cannot agree with the defendants that they should **escape liability for these services simply because [the parent] was unable to provide them in the first instance;** we believe that such a result would be consistent neither with Burlington nor with congressional intent. Like the retroactive reimbursement in Burlington, imposing liability for compensatory educational services on the defendants "merely requires [them] to belatedly pay expenses that [they] should have paid all along." Here, as in Burlington, recovery is necessary to secure the child's right to a

free appropriate public education. We are confident that Congress did not intend the child's entitlement to a free education to turn upon her parent's ability to "front" its costs. Id. (quoting *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 370-71 (1985)) In 1990, the Third Circuit, in *Lester H. v. Gilhool*, PA Secretary of Education 916 F.2d 865 (3d Cir.1990), upheld a district court ruling that "awarded the plaintiff, Lester H., two and one half years of compensatory education beyond age 21, the statutory maximum specified in the EHA." *Lester H. v. Gilhool, 916 F.2d 865 (3rd Cir. 1990).*"[W]hen an educational agency has violated the stay-put provision, compensatory education may-and generally should-be awarded to make up for any appreciable difference between the full value of stay-put services owed and the (reimbursable) services the parent actually obtained." Doe, 790 F.3d at 456-57. Doc.#145 pg. 38. The child "is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem"); *Westendorp,* 35 F.Supp.2d at 1137 (holding that "where [plaintiff] was denied his IDEA rights for six academic years, the court will presume that he is entitled to six academic years of compensatory relief").Compensatory educational services can include an award of additional time at an appropriate residential or day placement, *Sanford School Dept*, 47 IDELR 176 at 16 (Maine State Educational Agency, Oct. 31, 2006) (ordering payment of 1 year of residential placement for a child with learning disabilities); *Draper v. Atlanta Independent School System*, 518 F.3d 1275 (March 6, 2008) (11th Cir. 2008)(ordering 3 years of private school for a student with learning disabilities); *Carbondale Elementary School District 95*, 23 IDELR 766 (Illinois State Educational Agency, Jan. 12, 1996)(ordering two years of private day school for failing to address dyslexia); *Chicago Public School*, 108 LRP 35213 (Illinois State Educational Agency, Apr. 17, 2008)(awarding two additional years at Hyde Park Day School as compensatory

education). Awards can also include reimbursement for the costs of private educational tutoring. *Heather D. v. Northampton Area School District*, 48 IDELR 67 (E.D. Penn, June 19, 2007)(awarding 2,428 hours of compensatory education at $75 an hour, creating a $182,100 compensatory education fund). Courts have indicated that compensatory awards should compensate, meaning they should provide more than what is required under an IEP. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 525 (C.A.D.C. 2005). and other case law as Reid ex rel. Reid, 401 F.3d at 522 (quoting G. ex rel. RG v. Fort Bragg Dependent Schs., 343 F.3d 295, 308 (4th Cir. 2003)); *Somoza v New York City Dept. of Educ.*, 538 F3d 106, 109 n.2 (2d Cir. 2008) ("'Compensatory education' is prospective equitable relief, requiring a school district to fund education beyond the expiration of a child's eligibility as a remedy for any earlier deprivations in the child's education.") (citing *Burr v. Sobol, 888 F.2d 258 (2d Cir. 1989)).*

REASONS FOR GRANTING THE PETITION

This case presents issues under the IDEA, 20 U.S.C. § 1400 et seq., concerning the validity of the stay put provision of the IDEA, 20 U.S.C. § 1415(j), and its implementing regulation 34 C.F.R. § 300.514(c). IDEA is an important civil rights statute for children with disabilities and is enforced by the Department's regulations and is authorized to promulgate regulations. See 20 U.S.C. § 1406. The Department also may refer IDEA matters to the Department of Justice for enforcement. See 20 U.S.C. §§ 1416(e)(2)(B)(vi) and 1416(e)(3)(D). The primary goals of IDEA are to protect the disabled and provide them with access to FAPE, which emphasizes special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A). The United States, for the proper interpretation of IDEA and its applicable regulations, has filed amicus briefs in a number of IDEA "stay put" cases; *Jane Doe v. E. Lyme Bd. of Educ. in Connecticut. Docket No. 19-354 06-18-2020;* Mackey ex rel. *Thomas M. v. Bd. of Educ. for*

Arlington Cent. Sch. Dist., 386 F.3d 158, 163 (2d Cir. 2004); See *Pardini v. Allegheny Intermediate Unit*, 2005 WL 2063876 (3d Cir. Aug. 29, 2005); *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195 (2d Cir. 2002). Other cases include; In *John M. v. Bd. Of Educ. of Evanston Twp. High Sch. Dist. 202*, the Northern District of Illinois found that compensatory services may be awarded to remedy a violation of the IDEA's stay-put provision, **even when all other IEP claims are resolved.** *John M. v. Bd. Of Educ. of Evanston Twp. High Sch. Dist. 202*, No. 05 C 6720, 2009 WL 691276 at *5-6 (N.D. Ill. March 16, 2009). The Second Circuit's decision that decided in my case is in conflict with the decisions of above and other appellate cases. The impact of this case will be felt by T.D. immediately and it will improve the quality of his life forever, as it will for those in his position.

CONCLUSION

For the foregoing reasons, the Parent respectfully asks that this Court issue a writ of certiorari to uphold the Second Courts Summary Order issued on August 4, 2016 that ordered six years of "stay-put" services for the students (T.D.) under 20. U.C.S 1415(j). To award compensatory education equal to the period of deprivation, to place T.D. in the position he would have been had the district provided the appropriate services during pendency in the first place, or both. Therefore, a writ of certiorari should be granted.

Respectfully Submitted

Shkelqesa Dervishi

Shkelqesa Dervishi

Date: May 24, 2021