Autism, *Burlington*, and Change: Why It Is Time for a New Approach to the IDEA's Stay-Put Provision

Michael A. Brey[*]

ABSTRACT: The "stay-put provision" of the Individuals with Disabilities Education Act ("IDEA") serves as an "automatic preliminary injunction" to prevent any change in a student's then-current educational placement until the student's parents and the local educational agency (usually a school district) resolve a dispute over the student's education through administrative and judicial proceedings. The stay-put provision not only prevents schools from excluding students, but also prevents students from being whipsawed between placements as the school district and parents appeal adverse decisions.

Today, the proper application of the stay-put provision continues to be hotly contested, most recently in the circuit split identified by the Third Circuit's decision in M.R. v. Ridley School District. *Critical to—but not disputed in—*Ridley School District *is the one-sentence dictum regarding the stay-put provision's agreement exception from the 1985 Supreme Court case* School Committee of Burlington v. Department of Education. *Although the Burlington dictum was not binding precedent and is easily distinguished, lower courts applied it with such reflexivity that the U.S. Department of Education eventually promulgated a regulation for no other stated reason than to codify "this longstanding judicial interpretation." Surprisingly, however,* Burlington*'s interpretation of the agreement exception has rarely been scrutinized or justified. As a result and for the first time, this Note comprehensively scrutinizes the* Burlington *dictum and its possible rationales, and concludes that it is time for the courts and the Department of Education to abandon the dictum in light of recent changes to*

* J.D. Candidate, The University of Iowa College of Law, 2016; B.S., B.A., University of Utah, 2013. Thank you to Amanda Beggs, Peter Chalik, Josh Feil, Vince Geis, Jessica Donels, Josh Irwin, Dylan McKinnon, Emily Summers, Kimberly Topel, and the many *Iowa Law Review* editors and student writers for their helpful comments and suggestions; thank you to my mother and father for their tireless dedication to students and for teaching me in life and in love; and special thanks to Matthew, my "buddy," for inspiring this Note.

the IDEA and the unnecessary instability it creates for students with disabilities—especially those with autism spectrum disorder.

I. INTRODUCTION

The "stay-put provision" of the Individuals with Disabilities Education Act ("IDEA")[1] is central to the due process protections provided to students with disabilities.[2] Under the IDEA, states must provide students with disabilities a "free [and] appropriate public education" ("FAPE").[3] Because parents and school districts[4] must collaborate to determine and develop a FAPE for each individual student, disputes frequently arise.[5] To resolve these disputes, the IDEA provides for administrative and judicial proceedings.[6] In the meantime, however, the student must still receive an education.[7] As a result, the stay-put provision acts as an "automatic preliminary injunction"[8] that prevents any change in the student's educational placement "until all such proceedings have been completed."[9] In this way, the stay-put provision: (1) prevents schools from excluding students with disabilities (as was historically the case);[10] and (2) protects students from being whipsawed between placements as school districts and parents exhaust due process proceedings.[11]

Today, the stay-put provision "impacts to some degree virtually every case involving an administrative challenge under the IDEA."[12] Accordingly, it continues to be one of the most contentious and litigated aspects of the IDEA.[13] For example, there is currently a circuit split over whether the stay-

---

1. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105–17, § 615(j), 111 Stat. 37, 93 (codified at 20 U.S.C. § 1415(j) (2012)); *see also infra* Part II.C (discussing the stay-put provision).

2. As disability laws have evolved, so have the words we use to describe the individuals they protect. Patrick J. Devlieger, *From Handicap to Disability: Language Use and Cultural Meaning in the United States*, 21 DISABILITY & REHABILITATION 346, 347 (1999). This Note will, whenever possible, use the "people first" language of "persons with disabilities." *See id.* at 347–48 (observing that the now-common phrase "persons with disabilities" emphasizes that "disability is only part of identity"). Nevertheless, because courts and legislatures regularly used now-outmoded terms like "handicapped," the use of such terms is inevitable when discussing the development of disability law. *See id.* at 347 (noting that the term is "no longer used" in legislation and official documents).

3. 20 U.S.C. § 1415(b)(1); *see also infra* Part II.B.1 (discussing the FAPE requirement).

4. For purposes of this Note the terms "school district" and "local educational agency" are used interchangeably. *See* 20 U.S.C. § 1415(j) (exclusively using "local educational agency").

5. *See infra* Part II.B.2 (discussing the collaborative process of developing an "individualized education program" to implement a FAPE); *see also infra* Part II.B (noting that the requirements of the IDEA provide "ample room" for parents and school districts to disagree).

6. 20 U.S.C. § 1415(e).

7. *See infra* Part II.B.5 (discussing the due process protections provided by the IDEA); *see also infra* Part II.C (discussing how the stay-put provision provides for the student's education during dispute resolution).

8. Joshua A. v. Rocklin Unified Sch. Dist., 559 F.3d 1036, 1037 (9th Cir. 2009).

9. 20 U.S.C. § 1415(j).

10. *See infra* Part II.A (discussing how schools historically excluded students with disabilities).

11. *See infra* Part II.C.1 (discussing the purposes of the provision).

12. Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78, 82 (3d Cir. 1996).

13. HOWARD FULFROST ET AL., FAGEN FRIEDMAN & FULFROST, LLP, IDEA DUE PROCESS SURVIVAL GUIDE: A STEP-BY-STEP COMPANION FOR ADMINISTRATORS AND ATTORNEYS 5:1 (2008).

put provision operates through judicial appeals or whether it ceases to operate after a trial court's review of prior administrative proceedings.[14] In early 2015, the Supreme Court considered whether to grant certiorari to review one of the cases which created this circuit split, but ultimately denied the petition.[15]

Critical to—but not disputed in—the circuit split is the Supreme Court's interpretation of the stay-put provision's agreement exception in the 1981 case *School Committee of Burlington v. Department of Education* ("the *Burlington* interpretation" or "the *Burlington* dictum").[16] The agreement exception provides that a student may change educational placements if "the State or local educational agency and the parents . . . agree" to the change.[17] In *Burlington*, the Supreme Court noted—in one sentence of passing dictum[18]—that a decision in a state administrative proceeding in favor of the parents' request for change "would seem to constitute [such an] agreement by the State to the change of placement."[19] However, the Court never justified the *Burlington* dictum and has never revisited the issue.[20] Moreover, lower courts have applied it with such reflexivity[21] that the U.S. Department of Education

---

Some of the earliest cases arising under the IDEA and decided by the Supreme Court considered the stay-put provision. *See* Honig v. Doe, 484 U.S. 305, 308 (1988) (considering whether the stay-put provision barred school officials from excluding a student with disabilities "for dangerous or disruptive conduct growing out of their disabilities"); Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 367 (1985) (considering whether the stay-put provision bars reimbursement to a parent who unilaterally places the student in a private school).

14. *Compare* M.R. v. Ridley Sch. Dist., 744 F.3d 112 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 2309 (2015), *and* Joshua A. v. Rocklin Unified Sch. Dist., 559 F.3d 1036 (9th Cir. 2009), *with* Andersen v. District of Columbia, 877 F.2d 1018 (D.C. Cir. 1989), *and* Kari H. v. Franklin Special Sch. Dist., Nos. 96-5066, 96-5178, 1997 WL 468326 (6th Cir. Aug. 12, 1997) (per curiam). For a discussion of the circuit split, see Part II.C.2.

15. *See Ridley Sch. Dist.*, 135 S. Ct. 2309 (denying certiorari); *see also infra* Part II.C.2.

16. *See Burlington*, 471 U.S. at 372; *see also infra* Part II.C.2 (explaining that the *Burlington* interpretation of the agreement exception is critical to the circuit split because the interpretation's consequences were central to a circuit's analysis).

17. 20 U.S.C. § 1415(j) (2012).

18. *See infra* note 141 and accompanying text (explaining the significance of dicta).

19. *Burlington*, 471 U.S. at 372; *see also infra* Part III.B.

20. *See Burlington*, 471 U.S. at 372; *infra* Parts III.B, III.E.

21. *See, e.g.*, Bd. of Educ. v. Schutz, 290 F.3d 476, 482 (2d Cir. 2002) ("In *Burlington*, the Court observed that an administrative decision in favor of the parents 'would seem to constitute agreement by the State to the change of placement' . . . . Other courts have followed this understanding of the relevant statutes." (quoting *Burlington*, 471 U.S. at 372)); St. Tammany Par. Sch. Bd. v. Louisiana, 142 F.3d 776, 787 (5th Cir. 1998) ("Consistent with *Burlington*, . . . the Review Panel decision constituted an 'agreement' between the State and the [parents] . . . ."); Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78, 84 (3d Cir. 1996) ("Susquenita argues that a pendent placement appropriate at the outset of administrative proceedings is fixed for the duration of the proceedings and cannot be altered by an administrative ruling in the parents' favor. Accepting this position would contravene the language of the statute and the holding in *Burlington*."); Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings, 903 F.2d 635, 641 (9th Cir. 1990) ("The Supreme Court [in *Burlington*] said that the agency's decision in the parents'

("DOE") eventually promulgated a regulation to codify it because it was a "longstanding judicial interpretation."[22] Aside from a few attempts by lower courts to justify the *Burlington* dictum, the courts and the DOE continue to adhere to the *Burlington* interpretation for no other apparent reason than the precedent they created by following the dictum in the first place.[23]

Because the *Burlington* interpretation creates unjustifiable and unnecessary instability for students with disabilities[24]—especially those students with autism spectrum disorder,[25] this Note argues that it is time for the courts and the DOE to abandon *Burlington*'s interpretation of the stay-put provision's agreement exception.[26] To begin, Part II explores the genesis of the IDEA, its fundamentals, and the purposes of the stay-put provision. Next, Part III analyzes the *Burlington* interpretation of the stay-put provision's agreement exception and identifies the unnecessary instability and complications it creates for students with disabilities, especially those with autism spectrum disorder. Part III then considers the few arguments lower courts have put forward while adhering to the interpretation and concludes that, whatever justifications for the interpretation may have existed at the time of *Burlington*, those justifications no longer exist today. Finally, Part IV argues that courts and the DOE can and should abandon *Burlington*'s interpretation of the stay-put provision's agreement exception. Part IV also argues that Congress should amend the stay-put provision to restrict the power of state administrative decisions to change a student's placement before appeals are exhausted to those situations where a student's then-current educational placement is grossly inadequate.

II. IDEA ORIGINS AND FUNDAMENTALS

Before one can understand the instability created by the *Burlington* interpretation, one must first understand the broad contours and requirements of the IDEA. Accordingly, this Part explores the genesis of special education law, briefly explains the fundamentals of the IDEA, and introduces the basics of the stay-put provision. Specifically, Part II.A chronicles the historical treatment of students with disabilities and how the Civil Rights Movement became a catalyst for the IDEA. Part II.B then briefly

---

favor 'would seem to constitute an agreement by the State to the change of placement.' . . . We reach the same conclusion here.").

22. Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,710 (Aug. 14, 2006) (codified at 34 C.F.R. § 300.518(d) (2015)) (explaining that the regulation was promulgated because it was "longstanding judicial interpretation"); *see also* 34 C.F.R. § 300.518(d) (codifying the *Burlington* dictum).

23. *See Susquenita Sch. Dist.*, 96 F.3d at 82; Cty. Sch. Bd. of Henrico Cty. v. RT, 433 F. Supp. 2d. 692, 710 (E.D. Va. 2006) (citing *Susquenita Sch. Dist.*, 96 F.3d at 82); *see also infra* Parts III.B, III.E.

24. *See infra* Part III.C.2.

25. *See infra* Part III.D.

26. *See infra* Part IV.

examines each of the IDEA's substantive guarantees and procedural protections: (1) the right to a free appropriate public education; (2) individualized education programs; (3) the requirement to educate students with disabilities in the least restrictive environment; (4) the provision of other related services; and (5) the right to due process. Finally, Part II.C discusses the stay-put provision, its purposes, and its practical application.

A. THE HISTORICAL TREATMENT OF STUDENTS WITH DISABILITIES AND THE PUSH FOR CHANGE

Until the latter half of the 20th century, public schools routinely excluded students with disabilities.[27] Legislatures deemed many children "uneducable" and codified standards for identifying and excluding such students from schools.[28] Courts, like the Illinois Supreme Court in 1958, held that their state constitution's educational guarantees were inapplicable to students with disabilities because they were "unable to receive a good common school education."[29] Even school districts in academic centers like Cambridge, Massachusetts, excluded students because they believed that they were "too weak-minded to derive profit from instruction."[30]

However, the Civil Rights Movement of the 1950s and 1960s helped empower the parents of children with disabilities to fight for equal educational opportunity.[31] Indeed, "the rhetoric and practice of segregation (familiar from the battle over racial equality) was central to the experience of families with disabled children."[32] Armed with the equal protection

---

27. Gary L. Monserud, *The Quest for a Meaningful Mandate for the Education of Children with Disabilities*, 18 ST. JOHN'S J. LEGAL COMMENT. 675, 683 (2004).

28. Pa. Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 282 n.3 (E.D. Pa. 1972) ("The State Board of Education shall establish standards for temporary or permanent exclusion from the public school of children who are found to be uneducable and untrainable in the public schools." (quoting 24 PA. STAT. AND CONS. STAT. ANN. § 13-1375 (West 1972))); Esposito v. Barber, 181 A.2d 201, 202 (N.J. Super. Ct. Law Div. 1962) (noting that New Jersey law classified children "into three groups, two of which" included "educable" and "trainable").

29. Monserud, *supra* note 27, at 685 (quoting Dep't of Pub. Welfare v. Haas, 154 N.E.2d 265, 270 (Ill. 1958)) ("While this constitutional guarantee applies to all children in the State, it cannot assure that all children are educable. . . . Existing legislation does not require the State to provide a free educational program, as a part of the common school system, for the feeble minded or mentally deficient children who, because of limited intelligence, are unable to receive a good common school education."(quoting *Dep't of Pub. Welfare*, 154 N.E.2d at 270)).

30. *Id.* at 683 (quoting Watson v. City of Cambridge, 32 N.E. 864, 864 (Mass. 1893)).

31. Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 423, 426–27 (2012); *see also* Monserud, *supra* note 27, at 687 ("Progress for the disabled came about mainly as a spin-off of the civil rights movement which sought equal treatment for African-American children in public schools."); *id.* at 685–86 (citing State *ex rel.* Beattie v. Bd. of Educ., 172 N.W. 153, 154–55 (Wis. 1919)) (noting that even students with normal intelligence, but with physical disabilities, were excluded from schools because they "were deemed a nuisance").

32. Chopp, *supra* note 31, at 427 (noting that educators often equated nonwhite children and children who spoke foreign languages with disability).

arguments that were so successful in landmark cases like *Brown v. Board of Education*,[33] parents and organizations representing students with disabilities took to the courts and won important victories for special education.[34]

These courtroom victories—most notably in *P.A.R.C. v. Pennsylvania* and *Mills v. Board of Education*—won the attention of Congress,[35] and in 1975, Congress passed the Education for All Handicapped Children Act ("EAHCA").[36] Congress found that "more than half of the [eight million] handicapped children in the United States [did] not receive appropriate educational services which would enable them to have full equality of opportunity," and that one million were "excluded entirely from the public school system."[37] To remedy these problems (among others), the EAHCA established the fundamentals that still define special education law today.[38]

Since Congress passed the EAHCA in 1975, it has amended and expanded the law numerous times.[39] In 1986, Congress amended the EAHCA to include infants and toddlers with disabilities.[40] In 1990, Congress changed the name of the law to the Individuals with Disabilities Education Act ("IDEA").[41] In 1997, Congress expanded the IDEA to provide services for students with disabilities graduating from high school and transitioning into

33. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

34. *See* Monserud, *supra* note 27, at 687; *see also Brown*, 347 U.S. at 493 ("[W]here the state has undertaken to provide [public education, it] . . . must be made available to all on equal terms."); Mills v. Bd. of Educ., 348 F. Supp. 866, 876 (D.D.C. 1972) ("The defendants are required by the Constitution of the United States . . . to provide a publicly-supported education for these 'exceptional' children."); Pa. Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257, 1259 (E.D. Pa. 1971) (per curiam) (finding that "all mentally retarded persons are capable of benefiting from a program of education and training").

35. S. REP. NO. 94-168, at 7 (1975) (noting that legislation for the Education for All Handicapped Act "followed a series of landmark court cases" such as "*Brown v. Board of Education*[,] . . . *Pennsylvania Association for Retarded Children v. Pennsylvania*[,] and *Mills v. Board of Education of District of Columbia*").

36. Education for All Handicapped Children Act of 1975, Pub. L. No. 94–142, 89 Stat. 773. In 1990, the Education for All Handicapped Children Act of 1975 was renamed to the Individuals with Disabilities Education Act. Chopp, *supra* note 31, at 424 n.1.

37. Education for All Handicapped Children Act of 1975 § 3(b)(3)–(4).

38. Andrea Blau, *The IDEIA and the Right to an "Appropriate" Education*, 2007 BYU EDUC. & L.J. 1, 2.

39. *See* Monserud, *supra* note 27, at 690.

40. Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99–457, § 101, 100 Stat. 1145, 1145; *see also* U.S. OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP'T OF EDUC., HISTORY: TWENTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA (n.d.), http://www.ed.gov/policy/speced/leg/idea/history.pdf ("[T]he 1986 Amendments . . . mandated that states provide programs and services from birth.").

41. Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101–476, § 901, 104 Stat. 1103, 1141–42; *see also* U.S. OFFICE OF SPECIAL EDUC. PROGRAMS, *supra* note 40.

adult life.[42] Most recently in 2004, Congress amended and refined the IDEA to be in accordance with the No Child Left Behind Act of 2001.[43]

B. BASIC REQUIREMENTS OF THE IDEA

Despite these changes to the IDEA over the past 40 years, its fundamentals remain more or less the same today as they did in 1975.[44] As well as being a "civil rights statute," the IDEA grants federal funds to states to educate students "with disabilities[,] and requires, as a condition for the receipt of such funds, the provision of a free appropriate public education."[45] This Subpart outlines the main conditions of the IDEA—codified in title 20 of the U.S. Code—that states must accept in order to receive these funds. Specifically: (1) Part II.B.1 outlines the requirement for states to provide a "free appropriate public education" to students with disabilities; (2) Part II.B.2 identifies the "individualized education program" as the collaborative process and mechanism for determining and implementing a student's education; (3) Part II.B.3 describes the requirement for states to provide a FAPE to students in the "least restrictive environment"; (4) Part II.B.4 explains the other "related services" that states may be required to provide to certain students with disabilities; and (5) Part II.B.5 outlines the due process protections guaranteed under the IDEA and the procedures that states must provide to students with disabilities to resolve disputes with local education agencies.

For purposes of this Note, these conditions are important to understand because they provide ample room for parents and school districts to disagree. Disputes frequently arise because these conditions often compete with one another, and parents and school districts may prioritize certain conditions

---

42. U.S. OFFICE OF SPECIAL EDUC. PROGRAMS, *supra* note 40. *See generally* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105–17, 111 Stat. 37.

43. Alex J. Hurder, *Left Behind with No "IDEA": Children with Disabilities Without Means*, 34 B.C. J.L. & SOC. JUST. 283, 283 (2014). The amended IDEA is at Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108–446, 118 Stat. 2647. The most recent amendments to the IDEA "change[d] references in Federal law to mental retardation to references to an intellectual disability." Rosa's Law, Pub. L. No. 111–256, 124 Stat. 2643, 2643 (2010) (codified in scattered sections of 20 U.S.C. §§ 1400–1450 (2012)). Otherwise, the IDEA remains the same as it was in 2004. *Cf.* 20 U.S.C. §§ 1400–1450.

44. *See, e.g.*, Monserud, *supra* note 27, at 690 ("Since the Act's enactment in 1975 one fact has been constant: *a child with a disability has a right to a free and appropriate public education* . . . ."); *see also* 20 U.S.C. §§ 1400–1450.

45. RICHARD N. APLING & NANCY LEE JONES, CONG. RESEARCH SERV., RL32716, INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): ANALYSIS OF CHANGES MADE BY P.L. 108–446, at 1 (2005); *see also* 20 U.S.C. § 1400(c)(3) ("Since the enactment and implementation of the [EAHCA], this chapter has been successful in ensuring children with disabilities . . . access to a free appropriate public education . . . .").

over other conditions.[46] And where disputes arise, the stay-put provision is needed to protect the student.

1. Free Appropriate Public Education

Section 1401 defines a "free appropriate public education," in part, as "special education and related services that": (1) "have been provided at public expense, under public supervision and direction, and without charge"; and (2) "are provided in conformity with the individualized education program required under" the IDEA.[47] Left with a sparse definition, courts have tried to determine exactly what a FAPE entails.[48]

The seminal Supreme Court case interpreting the FAPE requirement is the 1982 case *Board of Education v. Rowley*.[49] In *Rowley*, the Supreme Court found that:

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer *some* educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education.[50]

---

46. For example, in *Susquenita*, the school district believed that the student would be better served in a public school so that she could interact with her nondisabled peers. Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78, 79–80 (3d Cir. 1996); *see also infra* Part II.B.3 (discussing the requirement to educate students with disabilities in the "least restrictive environment"). As *Susquenita* demonstrates, disputes under the IDEA often involve the parties prioritizing different requirements. *See Susquenita*, 96 F.3d at 79 ("Although the private school is dedicated to the education of students with learning disabilities and therefore represents a more restrictive placement, we find that [the student's] current needs in learning outweigh her need for integration with nondisabled peers.").

47. 20 U.S.C. § 1401(9). For purposes of this Note, some of the statutory requirements of a free appropriate public education—that it "meet the standards of the State educational agency" and "include an appropriate preschool, elementary school, or secondary school education in the State involved"—have been omitted. *See id.*

48. *See, e.g.*, Bd. of Educ. v. Rowley, 458 U.S. 176, 200–01 (1982); *see also* Ronald D. Wenkart, *The* Rowley *Standard: A Circuit by Circuit Review of How* Rowley *Has Been Interpreted*, 247 WEST'S EDUC. L. REP. 1, 1–2 (2009) (reviewing the different standards that circuit courts have adopted to measure whether a student is receiving a FAPE).

49. *Rowley*, 458 U.S. at 200–01. At least one lower court doubts whether the standard set forth in *Rowley* still applies in light of Congress' amendments to the statute since the case was decided. N.B. *ex rel.* C.B. v. Hellgate Elementary Sch. Dist., 541 F.3d 1202, 1213 n.3 (9th Cir. 2008). However, one commentator notes that the Supreme Court, "in reviewing the 2004 amendments to the IDEA, did not question the *Rowley* standard for providing a free appropriate public education. Nor did the Supreme Court in its most recent IDEA cases question or overrule the *Rowley* standard." Wenkart, *supra* note 48, at 6.

50. *Rowley*, 458 U.S. at 200–01 (emphasis added); *see also* Wenkart, *supra* note 48, at 5 (quoting *Rowley* and stating that the court found "that the intent of the statute was to open the

However, since *Rowley*, there has been disagreement among the circuit courts regarding *how much* of an educational benefit a FAPE requires, or in other words, where the "basic floor of opportunity" begins.[51] Most circuits have held that, under *Rowley*, a FAPE must only provide "some educational benefit."[52] In contrast, the Third Circuit has held that a FAPE must provide a "meaningful educational benefit."[53] Nevertheless, there is universal agreement that a FAPE requires "more than mere access to the schoolhouse door," but that a FAPE does not require the school to provide the maximum educational benefit possible.[54]

Additionally, a FAPE does not necessarily require that the student with disabilities receive an education in a public school.[55] Courts have consistently held that a student may receive a FAPE in a private school at public expense.[56]

2. Individualized Education Program

The "individualized education program" ("IEP") is "[t]he primary vehicle for delivery of a FAPE."[57] Section 1414 states that an IEP is a "written statement" and requires an IEP to include the student's "levels of academic achievement and functional performance," the student's "annual goals," how the student's "progress toward meeting the annual goals . . . will be measured," and what the school will provide to the student in order to facilitate those goals.[58] Moreover, the IDEA requires that a "team" develop the IEP.[59] The IEP team is made up of, among others, the student's parents, the student's special education teacher, a representative of the school, and "whenever appropriate, the child with a disability."[60] In this way, the IDEA

---

door of public education to disabled children, but not to guarantee any particular level of education once inside").

51. *See* Wenkart, *supra* note 48, at 23.

52. *Id.* at 6–17.

53. *Id.* at 17 (citing Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988)).

54. *Id.* at 17–18, 29.

55. *See* Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 232 (2009) (noting that, under the IDEA, "a court may require the district to reimburse the parents for the cost of the private education").

56. *See, e.g.*, *id.* at 233 (holding that the IDEA does not "categorically prohibit reimbursement for private-education costs if a child has not 'previously received special education and related services under the authority of a public agency'" (quoting 20 U.S.C. § 1412(a)(10)(C)(ii) (2006)); Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7, 9–10 (1993) (holding that a court may order a school district to reimburse parents for private school tuition even if the private school does not meet all IDEA requirements); Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 372–73 (1985) (holding that parents' violation of the stay-put provision did not bar reimbursement of private school tuition).

57. Fayette Cty. Bd. of Educ. v. M.R.D., 158 S.W.3d 195, 199 (Ky. 2005).

58. 20 U.S.C. § 1414(d)(1)(A)(i) (2012).

59. *Id.* § 1414(d)(1)(B).

60. *Id.*

emphasizes that determining and executing a student's IEP is a collaborative process.[61] Although an IEP is not a contract, it is a legal document—negotiated and revised by the IEP team members—created to ensure that a student with a disability receives a particular battery of educational services.[62]

3. Least Restrictive Environment

Under § 1412, school districts receiving federal funds must provide a FAPE to students with disabilities in the "least restrictive environment" ("LRE").[63] This requirement prevents schools from unnecessarily segregating or excluding students with disabilities from other students, and in this way, clearly draws inspiration from the Civil Rights Movement.[64] Although the LRE requirement does not prohibit separating students with disabilities from other students in the school, the requirement creates a presumption in favor of inclusion, "rebuttable only with clear evidence of educational necessity" to separate the student from others.[65]

4. Related Services

Section 1401 states that a FAPE consists of "special education and related services."[66] Because the definition of "related services" is broad, an example is instructive.[67] In *Cedar Rapids Community School District v. Garret F.*, the Supreme Court held that the IDEA required a school "to provide a ventilator-dependent student with certain nursing services during school hours."[68] Although medical services like the services in *Cedar Rapids* are traditionally not the province of public schools, the Court reasoned that they were related services under the IDEA, because without them the student would not have been able to remain in school.[69]

---

61. *See generally* Chopp, *supra* note 31 (discussing the tension between "free" and "appropriate" and the resulting impact on the collaborative nature of the IDEA).

62. *See generally* Bonnie Spiro Schinagle, *Considering the Individualized Education Program: A Call for Applying Contract Theory to an Essential Legal Document*, 17 CUNY L. REV. 195 (2013) (discussing using contract language to enhance parent protections during IEP formulations).

63. 20 U.S.C. § 1412(a)(5).

64. *See* Rebecca Weber Goldman, Comment, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 U. DAYTON L. REV. 243, 243–44, 260 (1994).

65. *Id.* at 262.

66. 20 U.S.C. § 1401(9).

67. *See id.* § 1401(26) (setting out the full statutory definition of "related services").

68. Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66, 68–69 (1999).

69. *See id.* at 79 ("Under the statute, our precedent, and the purposes of the IDEA, the District must fund such 'related services' in order to help guarantee that students like Garret are integrated into the public schools.").

5. Procedural Protections

Finally, § 1415 provides dispute resolution and due process protections if, for example, the parents reject an IEP as inadequate or cannot come to an agreement with the other IEP team members about what the IEP should contain.[70] In this way, the IDEA provides mechanisms for parents and school districts to resolve disputes that may arise during the collaborative process.[71] Chief among these protective mechanisms are: (1) the right to state administrative due process; and (2) the right to bring civil actions in state or federal court to review state administrative decisions.[72]

First, because the IDEA is an "exercise in cooperative federalism," each state must create its own administrative review process in order to receive federal funds.[73] This process differs from state to state, with 40 states and the District of Columbia, employing a one-tier system and ten states employing a two-tier system.[74] However, in every circumstance, states must provide an opportunity for an impartial due process hearing where parties may present evidence supporting their side of the dispute.[75] A party may file a complaint to request this due process hearing, after which the parties have a 30-day resolution session to resolve the dispute.[76] If, during that the 30-day resolution session, the parties do not come to an agreement, the parties may proceed to a due process hearing, and the state administrative official must render a decision within 45 days of the conclusion of the 30-day resolution session.[77] If "[a]ny party [is] aggrieved by the findings and decision" obtained through this process, they may then file an administrative appeal or an action in a state court or in a federal district court to review the State's decision, depending on whether the state has a one- or two-tier review system.[78]

During this process of administrative and judicial review, however, the student must still receive an education. Additionally, what is to happen to the student if, for example, the administrative hearing makes one decision, but a court makes the opposite decision? Is the school district supposed to immediately implement the administrative hearing decision, even if a court

---

70. *See* 20 U.S.C. § 1415(f)(1); *see also* Monserud, *supra* note 27, at 698.

71. *See generally* Chopp, *supra* note 31 (discussing the collaborative scheme of the IDEA).

72. *See* 20 U.S.C. § 1415 (delineating IDEA's due process procedures).

73. Monserud, *supra* note 27, at 698 (emphasis omitted); *see also id.* at 691.

74. Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL'Y STUD. 3, 5 tbl.1 (2010). A one-tier system provides only one administrative hearing, while a two-tier system provides two administrative hearings. For example, in a two-tier system, the first hearing may be conducted by a single hearing officer; if the parents or the school district disagree with the hearing officer's decision, they may appeal that decision to a state educational board. In a one-tier system, if the parents or the school district disagree with the first decision, they must go straight to court to seek review.

75. 34 C.F.R. § 300.512 (2015).

76. *Id.* § 300.510.

77. *Id.* § 300.515.

78. 20 U.S.C. § 1415(i)(2)(A) (2012).

may just overturn it? This dilemma is what the stay-put provision seeks to address.

C. THE STAY-PUT PROVISION

The stay-put provision is found in § 1415(j) and activates at the moment a due process complaint is filed.[79] It serves to protect the student while the parents and the school district resolve their dispute over how to best educate the child.[80] In its entirety, it provides:

> Except as provided in subsection (k)(4),[81] *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*, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.[82]

This Subpart explores the purposes behind and the application of the stay-put provision. Specifically, Part II.C.1 examines the twofold mission of the stay-put provision. Then Part II.C.2 considers some of the difficulties inherent in applying the stay-put provision in its current form: (i) identifying the student's then-current educational placement; and (ii) whether the stay-put provision operates through judicial appeals.

1. Purposes of the Stay-Put Provision

The purposes of the stay-put provision are, at least, twofold. First, the provision prevents schools from unilaterally excluding students with disabilities. Second, the provision provides stability for students by requiring the student to "stay put" until the resolution of a dispute between the student's parents and a school district.

The first purpose arises from the historical exclusion of students with disabilities from public schools.[83] In *Burlington*, the Court stated that "at least one purpose" of the stay-put provision was to prevent schools from denying

79. *Id.* § 1415(j); *see also* Perry A. Zirkel, *"Stay-Put" Under the IDEA: An Annotated Overview*, 286 WEST'S EDUC. L. REP. 12, 16 (2013) (stating that the stay-put provision is "[i]napplicable unless and until filing for a request for an impartial hearing").

80. *See infra* Part II.C.1 (discussing the purposes of the stay-put provision).

81. Subsection (k) gives school personnel the authority in unique circumstances to—at least temporarily and pursuant to strict conditions and procedures—change the placement of a student with disabilities who violates school rules or poses a danger to other students. *See* 20 U.S.C. § 1415(k). Besides the agreement exception, this is the only exception that the stay-put provision allows. *See id.* § 1415(j).

82. *Id.* § 1415(j) (emphasis added).

83. *See supra* Part II.A.

students an education, as the schools did in cases like *P.A.R.C.* and *Mills*.[84] The Court reaffirmed this purpose in *Honig v. Doe*.[85]

The Supreme Court has not addressed the second purpose—providing stability to students with disabilities during due process proceedings—but this purpose is nonetheless firmly established by the lower courts.[86] Moreover, the earliest hearings that Congress held when considering the IDEA were replete with evidence and testimony that students with disabilities—especially those with autism spectrum disorder—are especially vulnerable to the negative effects of change.[87] Contemporary research on the effects of change on children continues to support this conclusion.[88] As a result, courts continue to recognize stability as a purpose of the stay-put provision.[89]

2. Applying the Stay-Put Provision

Despite the simple purposes of the stay-put provision, applying the provision is often difficult. This Subpart identifies two of those difficulties, namely: (i) identifying changes in the student's then-current educational placement; and (ii) whether the stay-put provision operates through the completion of judicial appeals.

i. Identifying the Student's "Then-Current Educational Placement"

Identifying the student's then-current educational placement can be "something of an inexact science."[90] Generally, case law holds that the then-

84. Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 373 (1985); *see also* Mills v. Bd. of Educ., 348 F. Supp. 866, 878–83 (D.D.C. 1972); Pa. Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257, 1259–67 (E.D. Pa. 1971) (per curiam).

85. Honig v. Doe, 484 U.S. 305, 327 (1988).

86. *See, e.g.*, M.R. v. Ridley Sch. Dist., 744 F.3d 112, 124–25 (3d Cir. 2014) ("[O]ur expressly stated understanding [is] that the stay-put provision is designed to ensure educational stability for children with disabilities until the dispute over their placement is resolved, 'regardless of whether their case is meritorious or not.'" (emphasis omitted) (quoting Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996))), *cert. denied*, 135 S. Ct. 2309 (2015); Joshua A. v. Rocklin Unified Sch. Dist., 559 F.3d 1036, 1040 (9th Cir. 2009) ("[T]he stay put provision acts as a powerful protective measure to prevent disruption of the child's education throughout the dispute process."); Ashland Sch. Dist. v. V.M., 494 F. Supp. 2d 1180, 1182 (D. Or. 2007) ("The stay-put provisions [sic] strive to ensure the child is not treated as a ping-pong ball, ricocheting between placements with each new ruling in the dispute between parents and school.").

87. *See, e.g.*, *Education for the Handicapped, 1973: Hearings Before the Subcomm. on Handicapped of the Comm. on Labor & Pub. Welfare on S. 896, S. 6, S. 34, and S. 808*, 93d Cong. 328 (1973) (citing Robert G. Aug & Billie S. Ables, *A Clinician's Guide to Childhood Psychosis*, 47 PEDIATRICS 327, 328 (1971)) (entering into the record an article detailing, inter alia, an autistic student's "[o]bsessive insistence on sameness"); *id.* at 584 (statement of Nanette Fabray MacDougall, Chairman, National Advisory Committee on Education of the Deaf) (stating that students need effective teachers in order to overcome the effects of change).

88. *See infra* Part III.D.

89. *See supra* note 86 and accompanying text.

90. Bd. of Educ. of Cmty. High Sch. Dist. No. 218 v. Ill. State Bd. of Educ., 103 F.3d 545, 548 (7th Cir. 1996).

current educational placement is the last effective IEP for the student.[91] However, in other circumstances, the case law identifies the placement as falling "somewhere between the physical school attended by a child and the abstract goals of a child's IEP."[92] Thus, for example, in circumstances where the student is unilaterally placed by a parent in a private school, but the last effective IEP for the student specifies a program in a public school, identifying the student's then-current educational placement is not a straightforward task. Additionally, students may not have ever had an effective IEP before a dispute arises.[93]

Moreover, it is sometimes difficult to determine whether a particular change constitutes a change to a student's then-current educational placement under the meaning of the stay-put provision. For example, if a student receives the same educational program in a different classroom or a different school, does that constitute a change in placement? What if the student had to change schools because the entire school was shut down due to financial considerations outside of the IEP team's control? Does a parent's unilateral placement of a student in a private school constitute a change in placement forbidden by the stay-put provision?

ii. Applying the Stay-Put Provision Through Judicial Appeals

The last difficulty identified by—and most critical to—this Note currently divides the courts of appeals: whether the stay-put provision operates after the case has progressed into the judicial review process. This Subpart briefly explains this division between the courts of appeals, and then explains why this circuit split is relevant to this Note's consideration of the *Burlington* Court's interpretation of the stay-put provision's agreement exception.

First, the courts of appeals are divided as to whether the stay-put provision operates through judicial appeals or whether it ceases to operate after a trial court reviews the state administrative decision. The D.C. Circuit and the Sixth Circuit have said that the stay-put provision only applies until the judgment of a trial court, and thus, the word "proceedings" in the provision does not encompass judicial appeals.[94] More recently, however, the Ninth and Third Circuits disagreed and held that the stay-put provision applies until the end of all proceedings, *including* often-lengthy judicial appeals.[95]

Although not disputed in this circuit split, the *Burlington* interpretation of the stay-put provision's agreement exception has tremendous bearing on

91. *See* Zirkel, *supra* note 79, at 14.

92. *Cmty. High Sch. Dist.*, 103 F.3d at 548.

93. *See* L.M. v. Capistrano Unified Sch. Dist., 556 F.3d 900, 903 (9th Cir. 2009).

94. *See generally* Kari H. v. Franklin Special Sch. Dist., Nos. 96-5066, 96-5178, 1997 WL 468326 (6th Cir. Aug. 12, 1997) (per curiam); Andersen v. District of Columbia, 877 F.2d 1018 (D.C. Cir. 1989); *see also* 20 U.S.C. § 1415(j) (2012).

95. *See generally* M.R. v. Ridley Sch. Dist., 744 F.3d 112 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 2309 (2015); Joshua A. v. Rocklin Unified Sch. Dist., 559 F.3d 1036 (9th Cir. 2009).

its resolution. As this Note will explain in Part III.B, the *Burlington* Court's interpretation of the agreement exception eventually gained traction in the lower courts, and for this reason, the DOE promulgated a regulation codifying the interpretation.[96]

This regulation plays a significant role in the circuit split. In early 2015, the Supreme Court considered whether to resolve the split by granting review of the Third Circuit's decision in *M.R. v. Ridley School District*.[97] The respondent–parents in *Ridley School District* argued that, had the regulation promulgating the *Burlington* interpretation of the agreement exception existed at the time of the D.C. Circuit's decision, there would be no circuit split at all.[98] They argued that if the regulation existed at that time, the D.C. Circuit would have made the same decision as the Third Circuit and held that the stay-put provision continues to operate until the end of all proceedings.[99] The D.C. Circuit would have recognized that the regulation already introduced too much instability to students, and as a result, would have been unwilling to create more instability by concluding that the stay-put provision ceases to operate before the conclusion of judicial appeals.[100] This is, of course, raises the question: Why was that regulation promulgated, and why even adhere to the *Burlington* interpretation in the first place?[101]

III. THE DICTUM AND INSTABILITY OF THE *BURLINGTON* INTERPRETATION

Having considered the broad contours of the IDEA and its stay-put provision, this Note now turns to examine the instability created by the *Burlington* court's interpretation of the stay-put provision's agreement exception. First, Part III.A considers Congress's possible rationales for

96. *See* 34 C.F.R. § 300.518(d) (2015); *see also* Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,710 (Aug. 14, 2006) (codified at 34 C.F.R. § 300.518(d) (2015)) (explaining that the regulation was promulgated because it was "longstanding judicial interpretation"); *infra* Part III.B.

97. *See Ridley Sch. Dist.*, 125 S. Ct. at 2309 (denying certiorari).

98. *See* Respondents' Brief in Opposition at 16, *Ridley Sch. Dist.*, 125 S. Ct. 2309 (No. 13-1547), 2014 WL 4351544. The respondents did not attempt to argue that the Sixth Circuit's decision would have been different because the Sixth Circuit's decision was unpublished, and therefore, not precedential. *Id.* at 17 & n.6.

99. *See id.* at 16.

100. *See id.*

101. Notably, respondents did not argue that the regulation and the *Burlington* interpretation were incorrect. *See id.* at 14–17. This is likely due to the fact that respondents were parents, and as a result, the *Burlington* interpretation gave responsibility of funding the student's private placement to the school district when the hearing officer decided in the parents' favor. *See* M.R. v. Ridley Sch. Dist., 744 F.3d 112, 116 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 2309 (2015). On the merits, the Third Circuit found that the school district provided the student with a FAPE and reversed the hearing officer's decision. *Id.* at 128. However, the Third Circuit held, pursuant to *Burlington* and its progeny, that the school district was not entitled to reimbursement of the private school tuition. *See id.* at 125–28. The tuition and related costs totaled $57,658.38. Petition for a Writ of Certiorari at 9, *Ridley Sch. Dist.*, 125 S. Ct. 2309 (No. 13-1547), 2014 WL 2902200.

creating the agreement exception. Second, Part III.B examines how the *Burlington* Court interpreted the agreement exception. Third, Part III.C identifies the general instability and the complications created by the *Burlington* interpretation of the agreement exception, and Part III.D examines how this instability poses unique challenges for students with autism spectrum disorder. Finally, Part III.E considers the few justifications lower courts have put forward for the *Burlington* interpretation and concludes that those justifications can no longer justify the instability that the interpretation creates for students with disabilities.

A. THE STAY-PUT PROVISION'S AGREEMENT EXCEPTION

The stay-put provision's agreement exception provides that, "unless the State or local educational agency and the parents otherwise agree," the student must remain in her educational placement "during the pendency of any proceedings."[102] In other words, the student can only move from the placement she was in at the time due process proceedings were initiated if: (1) the dispute's proceedings conclude; or (2) the State *or* the school district agree with the parents to change the student's placement.[103]

Certainly, allowing the school district and the parents to change the student's placement during proceedings makes sense in light of the IDEA's collaborative scheme to have the school district and parents—both members of the IEP team—determine the student's education.[104] If both the school district and the parents agree that the student would be better served by a change in placement during the dispute, there is little reason to keep the student in a placement that no one agrees is proper. In this situation, the parties to the dispute—those who intimately know the student's needs and disabilities—agree that the status quo is inadequate.[105]

However, allowing the "State" to also make this agreement with the parents is curious for a number of reasons. First, the State and the school district are in fundamentally different positions during a dispute.[106] The school district is a party to the dispute, and the State provides the administrative apparatus to resolve that dispute.[107] Second, if the school district is not willing to make the same agreement with the parents that the State is willing to make, the school district will likely just challenge the State's

102. 20 U.S.C. § 1415(j) (2012).

103. *See id. But see supra* note 81 (discussing the other exception provided under subsection (k)).

104. *See generally* Chopp, *supra* note 31 (explaining that the IDEA is intended to promote collaboration between parents and schools).

105. In *Burlington*, the school district and the parents both agreed that the status quo was inadequate. *See infra* Part III.C.1.

106. *See* 20 U.S.C. § 1415 (detailing the due process protections that states must provide to adjudicate disputes between school districts and parents).

107. *See id.*

agreement in court.[108] Thus, any agreement made between the parents and the State may be fleeting because the school district has the right to judicial review.[109] Indeed, unlike the school district and the parents, the State can never definitively end proceedings; the only instance that a State administrative decision ends the dispute is when one of the parties declines to seek judicial review.[110]

Unfortunately, the legislative history of the stay-put provision provides little explanation why Congress included the State in the agreement exception. Early models for the stay-put provision did not include the agreement exception.[111] Moreover, neither the bill that first passed the House nor the bill that first passed the Senate included the agreement exception in its current state.[112] In fact, that language first appeared in the bill drafted and presented by the conference committee.[113] Regrettably, the conference report does little to explain its addition.[114]

Although not expressly referring to the agreement exception, the best evidence for why the conference committee included the agreement exception in the stay-put provision comes from a statement made on the Senate floor by Senator Robert Stafford:

> The conferees are cognizant that an impartial due process hearing may be required to assure that the rights of the child have been completely protected. We did feel, however, that the placement, or change of placement should not be unnecessarily delayed while long and tedious administrative appeals were being exhausted. Thus, the conference adopted a flexible approach to try to meet the needs of both the child and the State.[115]

---

108. For example, under the IDEA, school districts must supplement federal and state money with their own funds. 34 C.F.R. § 300.202 (2015).

109. 20 U.S.C. § 1415(i)(2)(A).

110. This conclusion follows from the fact that all state administrative hearings are reviewable in court. *See id.* As a result, only the parents and the school district can definitively end proceedings by either: (1) declining to appeal an administrative decision; or (2) prevailing in court. *See id.*

111. *Compare* Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 373 (1985) (noting that the provision grew out of *P.A.R.C.* and *Mills*), *with* Mills v. Bd. of Educ., 348 F. Supp. 866, 876 (D.D.C. 1972), *and* Pa. Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 302 (E.D. Pa. 1972).

112. *Compare* S. REP. NO. 94-168, at 49–53 (1975) (original Senate bill text), *and* H.R. 8804, 94th Cong. § 614 (1975) (enacted) (original House bill), *with* Education for All Handicapped Children Act of 1975, Pub. L. No. 94–142, § 3(b), 89 Stat. 773, 774–75 (1975) (showing the bill as passed by both chambers after conference).

113. *See generally* sources cited *supra* note 112.

114. 121 CONG. REC. 36,627 (1975). The conference explained only that the new language of § 1415(j) was drafted merely as a clarification. *Id.* at 36,629.

115. *Id.* at 37,412 (statement of Sen. Robert Stafford (R-VT)).

However, this statement does nothing to answer the current question at hand: *Why* include the "State" in the agreement exception?[116]

B. SCHOOL COMMITTEE OF BURLINGTON V. DEPARTMENT OF EDUCATION

Against this backdrop, the Supreme Court commented on the agreement exception in *School Committee of Burlington v. Department of Education.*[117] *Burlington* considered the case of Michael Panico, an elementary school student with learning disabilities.[118] Although Michael had received special education services at Memorial School—a public school—since first grade, it became clear by third grade to both his parents and the school district that Memorial was not meeting his needs.[119] As a result, Michael's parents and the school district agreed that he needed to change schools.[120] However, they disagreed over *where* Michael should transfer.[121]

During the summer after third grade, the school district proposed an IEP "placing Michael in a highly structured class of six children with special academic and social needs" at another public school.[122] Michael's father rejected this proposal and requested a due process hearing.[123] While proceedings were pending, Michael's parents took him to be evaluated by specialists at Massachusetts General Hospital.[124] The specialists recommended that Michael attend "a highly specialized" private school.[125] Acting on this recommendation, Michael's father enrolled him at the private school "at his own expense."[126]

After several administrative hearings, the state concluded that the school district's proposed IEP was inadequate and ruled in favor of Michael's parents.[127] The state further ordered the school district to reimburse Michael's parents for the tuition expenses that they had already incurred as well as to fund Michael's continued placement at the private school.[128]

---

116. *See infra* text accompanying notes 177–78 (suggesting that one reason for including the State in the agreement exception was for situations where the State was directly providing services to a student, and was, thus, a party to the dispute).

117. Sch. Comm. of Burlington v. Dep't of Educ. 471 U.S. 359 (1985).

118. *Id.* at 361.

119. *Id.* at 361–62.

120. *Id.* at 362.

121. *Id.* This disagreement stemmed from differences over "the source and exact nature of Michael's learning difficulties." *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 363.

128. *Id.*

Unsurprisingly, the school district sought review of the decision in federal court.[129]

Subsequent appeals eventually brought the case before the Supreme Court.[130] The Court granted certiorari to consider two issues, only one of which arose under the stay-put provision.[131] That issue concerned whether the stay-put provision "bars such reimbursement to parents who reject a proposed IEP and place a child in a private school without the consent of local school authorities."[132] In other words, the Court considered whether parents are still entitled to reimbursement after they "violate" the stay-put provision by changing the student's placement without first agreeing with the school district to the change. The Court held that the stay-put provision does not bar such reimbursement when parents "violate" the stay-put provision.[133]

However, before coming to this conclusion, the Court took "note" of the agreement exception.[134] The following is the entirety of its discussion:

> As an initial matter, we note that the section calls for agreement by *either* the *State or* the *local educational agency*. The [state administrative] decision in favor of the [parents] and the [private school] placement would seem to constitute agreement by the State to the change of placement. The decision [in favor of the parents] was issued in January 1980, so from then on the [parents] were no longer in violation of [the stay-put provision]. This conclusion, however, does not entirely resolve the instant dispute because the [parents] are also seeking reimbursement for Michael's expenses during the fall of 1979, prior to the State's concurrence in the [private school] placement.[135]

At this point it is important to point out, as the Court did, that this conclusion—that the state administrative decision in favor of the parents constituted an "agreement" under the agreement exception, and therefore, the parents were no longer in violation of the stay-put provision after the "agreement"—could not resolve the dispute in *Burlington*.[136] In light of the Court's ultimate holding that violating the stay-put provision does not bar reimbursement of private school tuition, deciding whether the parents actually violated the stay-put provision—and when they were "no longer" in

129. *Id.*
130. *Id.* at 363–67.
131. *Id.* at 367.
132. *Id.*
133. *Id.* at 372.
134. *Id.*
135. *Id.*
136. *See id.*

violation—was unnecessary for the decision.[137] Simply, the Court had no need to consider whether the parents violated the stay-put provision when it concluded that violations do not affect the issue that the Court granted certiorari to consider—reimbursement.[138]

In fact, when presented with the same argument, the First Circuit—which the Supreme Court affirmed—explicitly stated it "need not rule on [the agreement exception] claim" to decide the *Burlington* case.[139] As a result, the Supreme Court never granted certiorari to consider the agreement exception,[140] and the Supreme Court's statement regarding the agreement exception in *Burlington* constituted clear, nonbinding dictum.[141]

Eventually, however, the Court's dictum found life in the lower courts.[142] The lower courts adhered to the dictum with such reflexivity that, in 1999, the DOE promulgated a regulation to codify *Burlington*'s interpretation of the agreement exception.[143] The DOE stated that "[t]he basis for [promulgating the] regulation is the longstanding judicial interpretation" established by *Burlington* and its progeny.[144] Indeed, "[w]hat started as an off-handed statement now has the power of precedent—it became holding just because it was said so often."[145]

---

137. *See infra* note 141 and accompanying text (discussing how unnecessary pronouncements in a judicial opinion do not constitute binding precedent).

138. *See Burlington*, 471 U.S. at 367.

139. Town of Burlington v. Dep't. of Educ., 736 F.2d 773, 799 (1st Cir. 1984) ("The [parents] and the State also argue that they 'otherwise agree[d]' within the meaning of the [stay-put provision] . . . . We need not rule on this claim, however . . . ."), *aff'd sub nom. Burlington*, 471 U.S. 359.

140. *See Burlington*, 471 U.S. at 367 ("We granted certiorari . . . *only* to consider the following two issues: whether the potential relief available under [the IDEA] includes reimbursement to parents for private school tuition and related expenses, and whether [the stay-put provision] bars such reimbursement to parents who reject a proposed IEP and place a child in a private school without the consent of local school authorities. We express no opinion on any of the many other views stated by the Court of Appeals." (emphasis added) (citation omitted)).

141. A statement of dictum in a court's opinion, as opposed to a case holding, is not binding precedent—meaning that courts are not obligated to follow that dictum in future cases. Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 221 (2010). Distinguishing between a statement of dictum and a case holding, however, can be difficult. *Id.* at 220. "A holding is generally thought of as those parts of a judicial opinion that are 'necessary' to the result. Dictum, on the other hand, is anything in a judicial opinion that is *not* the holding." *Id.* at 223 (footnote omitted).

142. *See supra* note 21 and accompanying text.

143. *Compare* 34 C.F.R. § 300.513 (1998) (containing no agreement exception regulation), *with* 34 C.F.R. § 300.514(c) (1999) (adding the regulation). Today, the regulation may be found at 34 C.F.R. § 300.518(d) (2015).

144. Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,710 (Aug. 14, 2006) (codified at 34 C.F.R. § 300.518(d) (2015)) (citing *Burlington*, *Susquenita*, and *Clovis*).

145. Stinson, *supra* note 141, at 236 (footnote omitted) (discussing, generally, how a statement of dictum can reach the level of precedent).

C. BURLINGTON'*S INADVERTENT INSTABILITY*

The *Burlington* Court's interpretation of the stay-put provision's agreement exception was harmless—in that case. However, in other situations, the *Burlington* interpretation vitiates the stay-put provision's purpose to provide stability for students with disabilities. This Subpart explains why.

1. The Innocuity of the *Burlington* Interpretation in *Burlington*

Burlington involved the unique situation where both the parents and the school district agreed that the student's then-current educational placement was inadequate.[146] In fact, neither the parents nor the school district ever argued that the student should "stay put."[147] On the contrary, each party argued that the student *should* change schools, and the dispute only centered on *which* school the student should transfer to.[148] Thus, the consequences of change and instability were, for the most part, inevitable.[149]

Because change and instability were inexorable from its analysis, the *Burlington* Court likely felt little need to justify its dictum. Arguably, the parents *and the school district*—as opposed to the parents *and the State*—had already invoked the agreement exception by agreeing that a change was necessary long before *Burlington* reached the Supreme Court for decision. As a result, the State's so-called agreement with the parents could be said not to be an agreement *to change* placements, but instead a decision by the State determining *how to execute* the agreement to change placements already made between the parents and the school district.

In this way, *Burlington* is easily distinguishable from cases where a change in placement is not already a foregone conclusion. Whether the student should "stay put" was never at issue in *Burlington*, so even if the *Burlington* interpretation was binding precedent, lower courts could have straightforwardly applied the holding only to those cases where change was already agreed upon.[150]

2. The Instability of the *Burlington* Interpretation in Other Situations

Although *Burlington*'s interpretation of the agreement exception was not binding precedent and is easily distinguishable, lower courts extended *Burlington*'s interpretation of the stay-put provision to cases where "staying

146. *See* Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 362 (1985).

147. *See id.*

148. *Id.*

149. *See id.*; *see also infra* Part III.D (discussing some of the consequences that change can have for students with certain disabilities).

150. *See supra* note 141 and accompanying text (discussing nonbinding dictum and the statement in *Burlington*).

put" is at issue,[151] and the DOE codified this interpretation.[152] This Subpart examines the consequences of applying the *Burlington* interpretation to those situations where changing the student's educational placement is not inevitable.

Consider the following scenario where the parents believe that their child—who currently receives special education services in a public school—would be better served in a private school. Furthermore, consider the scenario with the assumptions and hindsight that: (1) at all times, the school district complied with the IDEA and provided the student with a FAPE; (2) the school district will ultimately prevail in court; and (3) the student will, in the end, receive special education services in the public school where she started. As will be explained below, these assumptions are important to consider because they are the inverse of the assumptions implicit in the justifications put forward by lower courts for the *Burlington* interpretation.[153]

In this scenario, the student—we will call her Ashley—is receiving special education services in a public school. However, her parents are dissatisfied with the education provided by the public school and believe that Ashley would be better served in a private school. The school district, however, believes that she is better served in her current school. While Ashley is still in the public school, her parents request a due process hearing under the IDEA to resolve the disagreement and, therefore, trigger operation of the stay-put provision.[154] Here, the public school is unambiguously her then-current educational placement.[155]

If the hearing officer agrees with *the school district*, Ashley's placement remains unaffected if her parents decide to appeal the hearing officer's decision. As intended, Ashley "stays put" in the public school while her parents take their case to court. In light of the provision's purpose to provide students with stability, this is the proper result—especially considering the assumption that the school district will ultimately prevail in court.[156] Ashley never has to

151. *See supra* note 21 and accompanying text (discussing lower courts' application of the *Burlington* interpretation).

152. 34 C.F.R. § 300.518(d) (2015).

153. By considering the inverse of the lower courts' assumptions, the faults of the *Burlington* interpretation in other circumstances become more apparent.

154. *See* Zirkel, *supra* note 79, at 16; *see also* 20 U.S.C. § 1415(j) (2012) (applying provision "during the pendency of any proceedings"); *supra* Part II.C (quoting the entirety of the provision).

155. *See supra* Part II.C.2.i (explaining that the then-current educational placement typically falls somewhere between the student's last effective IEP and the location the student is receiving services). Because Ashley is in the same location where she is receiving services under her last effective IEP, her then-current educational placement is unambiguous.

156. *See supra* Part II.C.1 (discussing the purposes of the stay-put provision).

change her placement, and thus, the stay-put provision accomplishes its goal of minimizing disruption to her education.[157]

However, if the hearing officer agrees with Ashley's parents' request for a change in placement, her then-current educational placement changes to reflect that agreement.[158] That is, the private school now becomes Ashley's placement under § 1415(j) because "the State" and her parents "agreed" to change Ashley's placement under *Burlington*.[159] With the benefit of our hindsight that the school district will win on appeal and that Ashley will ultimately return to the public school, this result seems incongruent with the purpose of the stay-put provision.[160] Indeed, instead of *never* experiencing an unnecessary and disruptive change to her education, Ashley now experiences *two* disruptive changes: once when she moves from the public school to the private school after the administrative hearing, and again when the administrative hearing's decision is overturned by a court.[161]

D. INSTABILITY'S EFFECTS ON STUDENTS WITH AUTISM SPECTRUM DISORDER

Having established that the *Burlington* interpretation may force students with disabilities to undergo unnecessary and disruptive changes to their education, what effects do these changes have on students with autism spectrum disorder ("ASD")? A change in environment and routine can be stressful for even the most well adjusted adults;[162] this Subpart examines the unique challenges that unnecessary changes pose for students with ASD.

Students with ASD, more than other students, "often do best with routine" and stability in their day-to-day lives.[163] Indeed, students with ASD may be extremely inflexible, "insist[ing] on eating the same exact meals every day or taking the same exact route to school. A slight change in a specific routine can be extremely upsetting. Some . . . may even have emotional outbursts, especially when feeling angry or frustrated or when placed in a new

157. In the scenario where Ashley's parents *win* in court, Ashley would then only undergo one change. Thus, the stay-put provision still accomplishes its goal and restricts changes to her education to the one that is necessary and lasting. *See supra* Part II.C.1.

158. *See, e.g.*, Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 372 (1985).

159. *See id.*

160. *See supra* Part II.C.1.

161. In *Ridley School District*, respondents to the petition for certiorari also noted the disruption that the *Burlington* interpretation (in the form of the DOE regulation) creates. *See* Respondents' Brief in Opposition, *supra* note 98, at 16 ("Mary would have ping-ponged two times between the two settings, assigned twice to the special classroom (under the IEP and after the district court's decision) and twice to the 'mainstream' classroom (after the administrative decision and after the court of appeals' decision) . . . .").

162. *See generally* Thomas H. Holmes & Richard H. Rahe, *The Social Readjustment Rating Scale*, 11 J. PSYCHOSOMATIC RES. 213 (1967). This seminal article identifies and rates life changes and their association with illness.

163. *See What Is Autism Spectrum Disorder?*, NAT'L INST. MENTAL HEALTH, http://www.nimh.nih.gov/health/topics/autism-spectrum-disorders-asd/index.shtml (last visited Nov. 13, 2015).

or stimulating environment."[164] In fact, even transitioning between activities during a school day can be extremely challenging.[165]

Managing the anxiety of students with ASD is essential for successful learning.[166] Predictability reduces this anxiety, and strategies, like using a visual schedule, "establish routines [that help] keep the student focused, productive and informed of what is coming next."[167] Students with ASD often must rely on visual supports in their environment to communicate their needs—visual supports that inherently change when a student with ASD changes educational placements.[168]

Moreover, students with ASD often struggle to develop social relationships, and "[s]upporting social interaction is an important piece of the student's educational plan."[169] Students with ASD may struggle to understand their peers and, as a result, struggle to understand appropriate social behavior.[170] In order to help students with ASD develop "social understanding" and corresponding social skills, educators must have time to help the student "build foundations and scaffold [social] skills in appropriate developmental sequence, expecting growth through supports [and] practice."[171] For even the most socially competent, relationships are built on time and trust; for students with ASD that already struggle to develop social relationships in ideal circumstances, having the time to develop social relationships and the trust necessary for those relationships is all the more important.

Because of these challenges that students with ASD face, changes to a student's educational placement should not be made unless they are necessary. Indeed, changing a student's placement does not happen in a vacuum; there will almost certainly always be negative consequences or challenges (at least in the short term), so changes should be carefully justified. As a result, we now return to answer the question at the heart of this Note: Are there any arguments justifying the instability that the *Burlington* interpretation creates for students with disabilities?

E. INADEQUATE RATIONALIZATIONS FOR THE BURLINGTON *INTERPRETATION*

The Supreme Court did not put forward any justifications for the *Burlington* interpretation in detail, so this Subpart considers that question by examining the few rationalizations put forward by lower courts in following

164. *Id.*

165. Janet Schmit et al., *Effects of Using a Photographic Cueing Package During Routine School Transitions with a Child Who Has Autism*, 38 MENTAL RETARDATION 131, 131 (2000).

166. *See generally* AUTISM SPEAKS, FAMILY SERVICES SCHOOL COMMUNITY TOOL KIT (2012).

167. *Id.* at 94.

168. *See id.* at 83.

169. *Id.* at 86.

170. *Id.*

171. *See id.*

the *Burlington* interpretation. First, Part III.E.1 examines whether the language of the statute compels the interpretation. Second, Part III.E.2 considers whether preventing the student from languishing in an inadequate placement throughout the "ponderous" review process justifies the interpretation.

1. Statutory Language

In *Burlington*, the Court stated that the stay-put provision "calls for agreement by *either* the *State or* the *local educational agency*. The [state administrative] decision in favor of the [parents] . . . would seem to constitute agreement by the State to the change of placement."[172] In *Susquenita School District v. Raelee S.*, the Third Circuit stated that to read the agreement exception otherwise "would contravene the language of the statute."[173] But is this truly the only acceptable reading of the stay-put provision's agreement exception?

The *Burlington* Court's reading of the agreement exception appears to depend on the statute's use of the disjunctive "or."[174] That is, because the statute says that "the State *or* [the] local educational agency"[175] can agree with the parents to a change in placement, *either* can make the agreement—even when both may be involved and even when both may have different viewpoints.[176] Thus, the *Burlington* Court reads the agreement exception as providing a *concurrent* power in both the State and the school district.

However, the use of the disjunctive "or" does not necessarily provide both the State and the school district concurrent powers to make the agreement. Rather, the use of the "or" may simply indicate that whoever is in dispute with the parents—be it the State "or" the school district, depending on who is directly providing services to the child—has the power to agree with the parents to change placements.[177] In fact, the IDEA specifically contemplates and provides for situations where a state agency directly administers schools—that is, situations where there is no school district (or, in the IDEA's terminology, "local educational agency").[178]

To understand why the use of the disjunctive "or" does not require concurrent power, one need only consider a previous version of the stay-put

172. Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 372 (1985).

173. Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78, 84 (3d Cir. 1996).

174. *See Burlington*, 471 U.S. at 372.

175. 20 U.S.C. § 1415(j) (2012) (emphasis added).

176. *See supra* note 108 and accompanying text.

177. *See* 20 U.S.C. § 1414(d)(2)(A) ("At the beginning of each school year, each local educational agency, State educational agency, or other State agency, *as the case may be*, shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program . . . ." (emphasis added)).

178. *Id.*

provision. In 1975, when Congress first passed the IDEA,[179] the agreement exception contained a second use of the disjunctive "or."[180] At that time, the agreement exception read that the student was to stay put "unless the State or local educational agency and *the parents or guardian* otherwise agree."[181] In fact, this is the version of the agreement exception that the Supreme Court construed in *Burlington.*[182] Indeed, parents are not always the custodial guardians of students with disabilities, and there are situations where parents may disagree with the guardian's decisions for the student.[183] Certainly, the use of the disjunctive "or" between "parents" and "guardian" did not bestow concurrent powers for both parents and guardians to make agreements at the same time. Rather, a more natural reading of the agreement exception would be that parents may make agreements when they are the guardians of the student, and in situations where the guardians of the student are not the student's parents, the guardians are empowered to make the same agreements.

Consider the chaos that would result if courts applied the *Burlington* interpretation of the word "or" to both sides of the "and" in that version of the agreement exception.[184] That is, what would occur in a situation where both the State and the school district had concurrent power to make agreements with either the parents or the guardians, who also had concurrent power to make agreements to change the student's placement? The State could agree with the parents to change the placement, and then, theoretically, the school district and the guardians could agree to change the placement back. Or the school district could agree with the parents to change the placement, and the State could then agree with the guardians to change the placement back. More permutations of this situation abound, but the point is clear: The *Burlington* interpretation of "or" between "the State or local educational agency" could never have been rationally applied to the "or" between "parents or guardians." In other words, under the *Burlington* interpretation, the word "or" must have two different meanings within the same sentence. Under *Burlington*, the first "or" grants concurrent power to the State and the local agency, while the second "or" grants only one such power.

---

179. As explained in note 36, *supra*, the IDEA did not receive its current name until the 1990s.

180. Education for All Handicapped Children Act of 1975, Pub. L. No. 94–142, § 615(e)(3), 89 Stat. 773, 789.

181. *Id.* (emphasis added). The words "or guardian" disappeared from the stay-put provision during Congress' comprehensive overhaul of the IDEA in 1997. *Compare id.*, *with* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105–17, § 615(j), 111 Stat. 37, 93.

182. *See* Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 371 (1985) (citing to and quoting the version of the stay-put provision passed in 1975).

183. For example—and for one reason or another—a student's guardian may be the student's grandmother and the student's parent may still play a role in the student's life.

184. *See* Education for All Handicapped Children Act of 1975 § 615(e)(3) (stating "unless the State *or* local educational agency *and* the parents *or* guardian otherwise agree" (emphasis added)).

Additionally, the stay-put provision states it shall be effective during the "pendency of any *proceedings*"—plural.[185] Adopting the *Burlington* interpretation renders the statute's use of the plural "proceedings" unnecessary in at least 41 states (including the District of Columbia) because most states have adopted a one-tier system for administrative hearings.[186] That is, the first proceeding under the IDEA—and the proceeding that "agrees" to change the student's placement—is the state administrative hearing contemplated in *Burlington*.[187] As a result, the stay-put provision would only be effective from the time parents request the due process hearing to the time the "proceeding"—singular—concludes.

In *Susquenita*, the Third Circuit seemed to overlook that the language of the stay-put provision provides for its operation through plural proceedings.[188] After stating that the court was constrained to adhere to the *Burlington* interpretation, the Third Circuit stated that not adhering to the interpretation "would [unacceptably] mean that the [state administrative] decision in favor of the parents is of no practical significance unless and until it is affirmed by a decision that cannot be or is not appealed."[189] Ironically, § 1415 contains language that requires exactly what the Third Circuit felt so constrained to avoid in *Susquenita*: "[D]ecision[s] made in a hearing . . . shall be final, *except* that any party involved in such hearing may appeal such decision . . . ."[190]

2. The "Ponderous" Review Process

Some courts have argued that the *Burlington* interpretation of the agreement exception is necessary in order to prevent students with disabilities from languishing in inadequate placements while school districts and parents exhaust the "ponderous" review process.[191] In other words, these courts argue that a student will be deprived of a FAPE for too long unless the student can change placements in accordance with the state administrative decision. This argument fails today for three reasons: (1) the argument relies on implicit and unfounded assumptions; (2) the argument conflates the ultimate purpose of the IDEA with the facilitating role that the stay-put provision plays to achieve that purpose in the least disruptive way possible; and (3) recent amendments to the IDEA have significantly shortened the length of the once "ponderous" review process.

---

185. 20 U.S.C. § 1415(j) (2012) (emphasis added).

186. Zirkel & Scala, *supra* note 74, at 5 tbl.1.

187. *Cf. supra* Part II.B.5 (discussing the hearing process under the IDEA).

188. *See* Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78, 84 (3d Cir. 1996).

189. *Id.*

190. 20 U.S.C. § 1415(i)(1)(A) (emphasis added).

191. *Susquenita Sch. Dist.*, 96 F.3d at 87 (quoting Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 370 (1985)); *see also* Cty. Sch. Bd. of Henrico Cty. v. RT, 433 F. Supp. 2d 692, 710 (E.D. Va. 2006).

First, the argument assumes too much and confuses the provision of a FAPE with the purpose of the stay-put provision. The argument relies on the unstated assumption that, if an administrative hearing agrees that a change of placement is in the best interest of the student, the administrative hearing has made the correct decision.[192] It further assumes that if the student remains in the first placement until the end of proceedings, the student will not receive a FAPE.[193] It also assumes that the benefits of changing placements, no matter how marginal such benefits may turn out to be, will outweigh the consequences of disrupting the student. Clearly, with these assumptions, the *Burlington* interpretation is correct.

However, as demonstrated in the scenario in Part III.C.2, one only need to consider the inverse of these assumptions in order to see that the *Burlington* interpretation fails to ensure that students promptly get a FAPE. In that scenario, Ashley is *removed* from the school that is providing her a FAPE.[194] Moreover, even if the private school was providing Ashley a *better* FAPE, the increase in educational benefits she received until the completion of proceedings do not necessarily outweigh the disruptive consequences of the unnecessary changes to her placement. Indeed, many students with disabilities—especially those with ASD—may experience more harm with the change than improvements.[195]

Second, these assumptions conflate a FAPE with the purpose of the stay-put provision. The stay-put provision is intended to operate separately from the IDEA's mandate to provide students with a FAPE. Particularly, the stay-put provision operates to protect the student *while the student's FAPE is disputed.* The stay-put provision does not purport to *be the ends* of the IDEA, but is rather a *means* to achieving the IDEA's ends in the least disruptive way possible.[196]

Third, and finally, the review process is not nearly as "ponderous" and lengthy as it once was. The district court in *County School Board of Henrico County v. RT* justified its adherence to the *Burlington* interpretation as follows:

> "[T]he review process is ponderous," often taking a year or more. That, unfortunately, is an understatement because the losing party has up to a year to file for judicial review of the hearing officer's decision. While parents are not likely to engage in such a lengthy delay, the [school district] would have significant motivation to delay filing an appeal of an adverse decision if the [school district] had no

192. For example, the district court in *Henrico County* stated that if a school district was not immediately required to fund the change to a private school endorsed by the state administrative decision "the child would receive an appropriate education only if the parents could afford to pay for the private school education during the [school district's] appeal of an adverse [administrative] decision." *Henrico Cty.*, 433 F. Supp. 2d at 710.

193. *See supra* notes 188–90 and accompanying text.

194. *See supra* Part III.C.2.

195. *See supra* Part III.D.

196. *See supra* Part II.C.1 (discussing the purposes of the stay-put provision).

> obligation to fund the private placement during the year before an appeal has to be filed and during the ensuing appeal.[197]

While losing parties did have up to a year to file for judicial review at the time of *Henrico County*, Congress has since amended the IDEA.[198]

Currently, the IDEA provides that a losing party has "90 days from the date of the decision of the hearing officer to bring . . . [a civil action for judicial review], or, if the State has an explicit time limitation for bringing such action under this subchapter, in such time as the State law allows."[199] In case there was any doubt, state laws do not undermine this new time limitation; only four states have elected to set a time limitation longer than 90 days.[200] In fact, 14 states require a time limitation *shorter* than 90 days.[201] Consequently, the district court's argument in *Henrico County*—that waiting until the end of proceedings to change the student's placement would be unduly lengthy—loses significant, if not all, force.[202]

IV. ABANDON, REPEAL, AND AMEND: RESTORING STABILITY FOR STUDENTS WITH DISABILITIES

Having established that the *Burlington* interpretation unjustifiably creates instability for students with disabilities, this Subpart proposes three different—but not necessarily mutually exclusive—solutions. First, the courts could simply abandon the *Burlington* interpretation. Second, the DOE could repeal the regulation codifying the *Burlington* interpretation. Finally,

---

197. *Henrico Cty.*, 433 F. Supp. 2d at 709 (citation omitted) (quoting Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 370 (1985)).

198. *See* 20 U.S.C. § 1415(i)(2)(B) (2012).

199. *Id.*

200. The following states have elected to set a time limitation longer than 90 days: Illinois (120 days); Maryland (120 days); New York (four months); and Virginia (180 days if civil action is brought in state court, but 90 days if civil action is brought in federal court). *See* 105 ILL. COMP. STAT. 5/14-8.02a(i) (2014); MD. CODE ANN., EDUC. § 8-413(j) (LexisNexis 2014); N.Y. EDUC. LAW § 4404 3(a) (McKinney 2010 & Supp. 2015); 8 VA. ADMIN. CODE § 20-81-210(T)(1) (2011).

201. The following 14 states have a shorter time limitation: Alabama (notice of intent to appeal must be filed within 30 days of administrative decision, and then appeal must be filed within 30 days of notice of intent); Alaska (30 days); Arizona (35 days); Connecticut (45 days); Hawaii (30 days); Idaho (an appeal may be filed up to 42 days after a hearing officer's decision, but if an appeal is not filed within 14 days of the hearing officer's decision, the decision goes into immediate effect); Indiana (30 days); Kansas (30 days); Missouri (45 days); New Mexico (30 days); North Carolina (30 days); Rhode Island (30 days); Tennessee (60 days); and Wisconsin (45 days). *See* ALASKA STAT. § 44.62.560 (2014); ARIZ. REV. STAT. ANN. § 12-904(A) (2003 & Supp. 2014); CONN. GEN. STAT. § 4-183(c) (2013); KAN. STAT. ANN. § 72-974(b)(1) (2002 & Supp. 2014); MO. REV. STAT. § 162.962(3) (2000 & Supp. 2014); N.C. GEN. STAT. § 115C-109.9(a) (2013); TENN. CODE ANN. § 4-5-322(b)(1)(A) (2011 & Supp. 2014); WIS. STAT. § 115.80(6) (2013–14); ALA. ADMIN. CODE r. 290-8-9.08(c)(16) (Supp. 2013); HAW. CODE R. § 8-60-70 (LexisNexis 2010); IDAHO ADMIN. CODE r. 08.02.03.109(05)(g) (2015); 511 IND. ADMIN. CODE 7-45-9(a) (2014); N.M. CODE R. § 6.31.2.13(I)(24) (LexisNexis 2012); 21-2-54:E R.I. CODE R. § 300.516(b) (LexisNexis 2013).

202. *See Henrico Cty.*, 433 F. Supp. 2d at 710.

Congress could amend the stay-put provision to restrict the power of state administrative decisions to change a student's placement to those situations where the student's then-current educational placement is plainly and grossly inadequate.

First, the courts should abandon the *Burlington* interpretation and refuse to apply it to future cases. As explained above, the *Burlington* interpretation of the stay-put provision's agreement exception was not initially binding precedent—it only became binding precedent after the lower courts reflexively repeated it so many times—and it is easily distinguished.[203] Moreover, key rationales put forward by lower courts in applying the *Burlington* interpretation like the "ponderous" review process either no longer exist or appear significantly weaker today than they were before.[204] On these grounds, courts could rightfully refuse to continue adhering to the *Burlington* interpretation.

Nevertheless, courts may be reticent to contravene the DOE's regulation, even though the basis for the regulation was the courts' continued adherence to the *Burlington* interpretation in the first place.[205] For this reason, a second solution would be for the DOE to repeal the *Burlington* interpretation from its regulations. In this way, the DOE could demolish a significant barrier to courts seeking to abandon the interpretation.[206]

Finally, Congress has amended the stay-put provision before, and it can do it again.[207] In fact, the IDEA is currently long overdue for reauthorization, so now is as good a time as ever to revise the stay-put provision.[208] Congress should provide an express standard for when an administrative decision may immediately change a student's placement so that students are not left to languish in plainly inadequate placements until the termination of appeals. Concededly, there will be situations where the benefits of a new placement will clearly outweigh the negative effects of a change. For example, a student that requires medical services[209] that a school cannot or is unwilling to provide

---

203. *See supra* Part III.B.

204. *See supra* Part III.E.2 (discussing the "ponderous" review process).

205. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (recognizing "the principle of deference to administrative interpretations" of statutes); *see also supra* notes 142–45 and accompanying text (discussing how the "longstanding judicial interpretation" led to the regulation).

206. *See, e.g.*, *Chevron*, 467 U.S. at 844.

207. *See supra* notes 179–83 and accompanying text (discussing how "or guardian" was removed from the stay-put provision by the 1997 IDEA amendments). Congress has also amended the stay-put provision to provide exceptions for student discipline. *See supra* note 81 (discussing 20 U.S.C. § 1415(k) (2012)).

208. *See generally* NAT'L SCH. BDS. ASS'N, INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): EARLY PREPARATION FOR REAUTHORIZATION (2014), https://www.nsba.org/sites/default/files/reports/IDEAIssueBrief_10_2_14.pdf.

209. *See supra* Part II.B.4 (discussing other "related services" guaranteed to students with disabilities).

will almost certainly receive a net benefit from a change in educational placements.

For circumstances like these, Congress should amend the stay-put provision with a "gross inadequacy standard." This standard would restrict the power of state administrative decisions to *immediately*[210] change a student's educational placement to those situations where the student's then-current educational placement is grossly inadequate, and staying in that placement for much longer would clearly harm the student. This standard would, more carefully than the *Burlington* interpretation, sift students from inadequate placements where the student would clearly benefit from a change. Moreover, it would avoid changing the placements of students who would not benefit much from a change, or worse, find a change more harmful than beneficial.[211] In other words, a gross inadequacy standard would help to alleviate the courts' concerns about the "ponderous" review process by better balancing (1) the need to provide a FAPE to students with disabilities as soon as reasonably possible with (2) the need to provide as much stability in student's education as is reasonably possible.[212]

In other circumstances, however, the question is closer as to whether the student is receiving a FAPE in the student's then-current educational placement. For example, in *Ridley School District*, the parents and the school district disagreed over which reading system would *most* benefit the student.[213] In these situations, the placement would not meet the gross inadequacy standard, and the stay-put provision would continue to operate through the review process. The state administrative decision would merely find that the current placement is inadequate and agree that the student's placement should change, but that such change should occur only after *all* proceedings conclude or the parties decline to appeal. The state administrative decision does not satisfy the gross inadequacy standard because the closeness of the dispute raises the specter of a harmfully disruptive judicial reversal.[214] In this way, the stay-put provision protects the student from an unnecessary change

210. A state administrative decision would still, of course, change a student's educational placement when the decision is not appealed or is affirmed in court. *See* 20 U.S.C. § 1415(i).

211. *See supra* Part III.D.

212. *See supra* Part III.E.

213. Ridley Sch. Dist. v. M.R., 680 F.3d 260, 266 (3d Cir. 2012). In *Ridley School District*, the school district advocated a program called "Project Read," while the parents wanted the school district to hire someone to implement "The Wilson Reading System." *Id.*

214. The state administrative decision in *Ridley School District* found that the student's reading program was "inadequate," but after judicial review and appeals, the district court and the Third Circuit reversed the state administrative decision. *See id.* at 267; *see also id.* at 275 ("[The student's] IEP was 'reasonably calculated to enable [her] to receive meaningful educational benefits in light of [her] intellectual potential.' Ridley was not required to choose the reading program based on the optimal level of peer-reviewed research, or to implement the specific program requested by Parents." (citation omitted) (quoting Chambers v. Sch. Dist. of Phila. Bd. of Educ., 587 F.3d 176, 182 (3d Cir. 2009))).

if a court ultimately reverses the state administrative decision's finding of inadequacy.

V. CONCLUSION

The courts and the DOE never needed to be—and should not be—wed to the *Burlington* interpretation of the stay-put provision's agreement exception. Despite valid concerns about students with disabilities not receiving a FAPE during the dispute resolution process, these concerns rely on faulty assumptions and can be assuaged by more incisive amendments to the stay-put provision. Most importantly, however, the *Burlington* interpretation of the agreement exception unnecessarily and intolerably disrupts the education of students with disabilities, especially those with autism spectrum disorder. In order to provide stability to students—one of the primary purposes of the stay-put provision—it is now time for the courts, the DOE, and Congress to abandon the *Burlington* interpretation.