IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COUNTY SCHOOL BOARD OF HENRICO COUNTY, VIRGINIA, Plaintiff,	)	
v.	)	Civil Action No. 3:04CV923
R.T., a minor, *et al.* Defendants.	)	

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN RESPONSE TO SCHOOL BOARD'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

Questions Presented

The United States will address the following questions raised by the Henrico County Board of Education's Second Motion for Partial Summary Judgment:

1. Whether the United States Department of Education's ("the Department") regulation 34 C.F.R. § 300.514(c) is contrary to the plain language of the Individuals with Disabilities Education Act ("IDEA"),[1] specifically 20 U.S.C. §§ 1412(a)(10)(C)(i),[2] 1415(i)(2)(C)(iii),[3] and 1415(j).

2. Whether 20 U.S.C. § 1415(j) requires a local education agency ("LEA") to maintain at

[1] Unless otherwise noted, the references to the IDEA are to the 2004 Reauthorization.

[2] Henrico argues that the regulation contradicts 20 U.S.C. § 1412(10)(C)(i), Henrico Summ. J. Mem. at 9, but the language cited by Henrico comes from 20 U.S.C. 1412(a)(10)(C)(i).

[3] Henrico appears to have cited the IDEA 1997 provision requiring "the preponderance of the evidence" at 20 U.S.C. § 1415(i)(2)(B)(iii). *See* Letter to Hon. J. Payne from J. T. Tokarz of Aug. 15, 2005, at 2. That language now appears at 20 U.S.C. § 1415(i)(2)(C)(iii).

LEA expense the private educational placement of a child agreed to by the state education agency ("SEA") and the parents during the pendency of the proceedings under 20 U.S.C. § 1415; and

3. Whether 20 U.S.C. § 1415(j), as interpreted by its implementing regulation 34 C.F.R. § 300.514(c), violates the Spending Clause of the United States Constitution.

Interests of the United States

This case presents issues under the IDEA, 20 U.S.C. § 1400 *et seq.*, concerning the validity of the stay put provision of the IDEA, 20 U.S.C. § 1415(j), and its implementing regulation 34 C.F.R. § 300.514(c). The IDEA is an important civil rights statute for children with disabilities and is enforced by the Department, which is authorized to promulgate regulations. *See* 20 U.S.C. § 1406. The Department also may refer IDEA matters to the Department of Justice for enforcement. *See* 20 U.S.C. §§ 1416(e)(2)(B)(vi) and 1416(e)(3)(D). The Department of Justice is filing an amicus brief in this case not on the basis of a referral for enforcement but rather to represent the Department's interest in defending the validity of one of the IDEA's most important procedural safeguards. Because of our interest in the proper interpretation of the IDEA and its applicable regulations, the United States has filed amicus briefs in a number of IDEA cases, including two recent cases involving the meaning of the stay put statutory provision. *See Pardini v. Allegheny Intermediate Unit*, 2005 WL 2063876 (3d Cir. Aug. 29, 2005); *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195 (2d Cir. 2002).

Statement of the Case

The first stated purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education ["FAPE"] that emphasizes special education and related services designed to meet their unique needs and prepare them for further

education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). To provide a FAPE, the special education and related services must, *inter alia*, "meet the standards of the State educational agency [SEA]" and must be "provided at public expense, under public supervision and direction, and without charge." *Id.* at § 1401(9)(A)-(B). These services must be provided pursuant to an individualized education program ("IEP"), *id.* at § 1401(9)(D), that is "reasonably calculated to enable the child to receive educational benefits," *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982).

The second stated purpose of the IDEA is "to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1)(B). Section 1415 of the IDEA mandates several procedural safeguards to achieve this purpose. One of these procedural safeguards is the "stay put" or "pendent placement" provision of the IDEA, 20 U.S.C. § 1415(j). This provision serves the IDEA's two primary purposes by ensuring that the rights of parents and their child to a FAPE are protected during administrative and judicial review of the child's educational placement. This provision states, in relevant part, that "during the pendency of any proceedings conducted pursuant to this section [1415], unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child." 20 U.S.C. § 1415(j).

The Department's regulation, 34 C.F.R. § 300.514, interprets the IDEA's stay put provision. Subsection 300.514(c) interprets the meaning of the statutory phrase, "unless the State or local educational agency and the parents otherwise agree," as follows: "If the decision of a hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate,

that placement must be treated as an agreement between the State or local agency and the parents for purposes of paragraph (a) of this section." 34 C.F.R. § 300.514(c). Paragraph (a) simply tracks the language of 20 U.S.C. § 1415(j). *See* 34 C.F.R. § 300.514(a).[4]

Plaintiff Henrico County Board of Education ("Henrico") has challenged the validity of 34 C.F.R. § 300.514(c) in this civil action appealing the decision of a Virginia hearing officer in favor of R.T.'s parents. The issue before the hearing officer was whether Henrico's November 2002 IEP, which would place R.T. at a public school called the Twin Hickory Elementary School, was appropriate for R.T. The parents had rejected this IEP and requested a state administrative hearing, which was held on August 15, 18, and 19, 2003. *See* R.T.'s Parents' Summ. J. Mem. on Counterclaim Counts I & II at 3. On November 4, 2002, R.T.'s parents gave Henrico notice that they would be enrolling R.T. in a private school called the Faison School. *See id.* R.T.'s parents enrolled him there on December 3, 2002, prior to the state hearing officer's decision issued on December 29, 2003. *See id.*

The state hearing officer's decision found that Henrico's November 2002 IEP denied R.T. a FAPE and that the Faison School constituted an appropriate placement. *See* Henrico Comp. Ex. 1 at 32-33. The hearing officer's order declared the parents "the prevailing parties" and directed Henrico to provide reimbursement to the parents for "tuition costs and related expenses at the Faison School." *Id.* at 34. The hearing officer did not limit this relief to the 2002-03 school year or any other time period. *See id*. To this date, Henrico has refused to pay

[4] 34 C.F.R. § 300.514(a) states: "Except as provided in § 300.526, during the pendency of any administrative or judicial proceeding regarding a complaint under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement."

for any of the expenses of educating R.T. at the Faison School. *See* R.T.'s Parents' Summ. J. Mem. on Counterclaim Counts I & II at 6.

Nearly a year later, on December 17, 2004, Henrico appealed the hearing officer's decision by filing this lawsuit. *See* Henrico Compl. Pursuant to 34 C.F.R. § 300.514(c) and 20 U.S.C. § 1415(j), R.T.'s parents filed a counterclaim seeking reimbursement of the costs of educating R.T. at the Faison school during the 2003-04 and 2004-05 school years and prospective relief for future school years until the Faison School ceases to be R.T.'s current educational placement. *See* R.T.'s Parents' Counterclaim at 10, 13-14. This Court decided to consider cross motions for partial summary judgment regarding the issue of reimbursement for this time period prior to reviewing the merits of the state hearing officer's decision. *See* Order of June 22, 2005. In its Second Motion for Partial Summary Judgment and its Opposition to R.T.'s parents' Motion for Summary Judgment on Counterclaim Counts I and II, Henrico argues that 34 C.F.R. § 300.514(c) is unenforceable because it contradicts the plain meaning of the IDEA and violates the Spending Clause of the Constitution. *See* Henrico Summ. J. Mem. at 3-17; Henrico Opp'n at 3-10. On August 18, 2005, this Court advised the United States that the validity of one of its regulations had been challenged and offered the United States the opportunity to express its views by filing an amicus brief on September 26, 2005, and by participating in oral argument on October 13, 2005.

Summary of Argument

The Department's regulation, 34 C.F.R. § 300.514(c), is enforceable because it is consistent with the plain meaning of 20 U.S.C. § 1415(j). The stay put provision requires maintenance of "the then-current educational placement" while proceedings under section 1415

are pending "unless the State or local educational agency and the parents otherwise agree." 20 U.S.C. § 1415(j). A state hearing officer's decision approving the parents' unilateral placement of their child in a private school as the appropriate educational setting constitutes an *agreement* between the SEA and the parents within the plain meaning of 20 U.S.C. § 1415(j). This agreement changes the child's "current educational placement" from the prior public setting to the private school.

The Department's regulation is valid because it merely codifies the plain meaning of the statutory language as well as Supreme Court and other precedent interpreting that language. If this Court, however, deems the statutory language ambiguous, the Department's interpretation of the statute is entitled to deference because the regulation is consistent with the purposes of the IDEA and the Department's authority thereunder. The purpose of the stay put provision is to protect the rights of parents and their children during administrative and judicial review of the child's placement, and the primary purpose of the IDEA is to make a FAPE available to all disabled children. 20 U.S.C. § 1400(d)(1)(a). The Department's interpretation of the stay put provision in 34 C.F.R. § 300.514(c) serves both purposes – it protects parents' rights to a FAPE through *pendente lite* maintenance of a placement agreed to by the SEA and the parents. The 2004 Reauthorization of the IDEA in no way limited the Department's ability to recodify this regulation because 34 C.F.R. § 300.514(c) is "necessary to ensure that there is compliance" with 20 U.S.C. § 1415(j) and does not "violate[] or contradict[] any provision of [the IDEA]." 20 U.S.C. § 1406(a)-(b). There is no contradiction between the regulation and 20 U.S.C. §§ 1412(a)(10)(C)(i) and 1415(i)(2)(C)(iii) because the former does not apply when the SEA has agreed to the private placement espoused by the parents, and the latter applies to this Court's

merits-based decision, not its decision of whether to issue an automatic stay put injunction.

Although Henrico disputes R.T.'s current educational placement in its motion for summary judgment and its opposition to R.T.'s parents' motion for summary judgment, Henrico appears to concede in its reply brief that the Faison School is R.T.'s current educational placement. *See* Henrico Reply at 4 ("there is *no* question that Faison is R.T.'s current placement"). Henrico maintains that this concession "does not mean that the School Board is obligated to pay for it before judicial review has been completed." *Id.* Henrico is entirely wrong in this respect. Once the current educational placement is determined, a school board must maintain the child in that placement at board expense while proceedings are pending. This obligation is consistent with the language and purposes of the IDEA and merely enforces Henrico's duty to provide R.T. with a FAPE, as determined by the SEA, during Henrico's appeal. Due to its failure to meet this duty, Henrico should provide R.T.'s parents *pendente lite* reimbursement for the 2003-04 and 2004-05 school years and prospective financial relief for the remainder of these proceedings.

The stay put provision of the IDEA is a valid exercise of Congress's Spending Power. Since its enactment in 1975, the provision's language has provided clear notice that if an SEA, by virtue of its hearing officer, agrees with the parents that a private school placement is appropriate, the pendent placement becomes the private school and the school board must maintain that placement at board expense while proceedings are pending. Additional notice of this requirement came in 1985 when the Supreme Court decided *School Committee of Town of Burlington v. Department of Education,* 471 U.S. 359, 372 (1985). Case law from the federal Courts of Appeals has only reinforced this notice. Since 1999, the Department's regulation 34

C.F.R. § 300.514(c) has provided unequivocal notice of a school board's duties under 20 U.S.C. § 1415(j). Faced with this longstanding notice, Henrico's reliance on the advice of a Virginia Department of Education (VDOE) official and an unpublished district court case was at best wishful thinking. *See* Henrico Summ. J. Mem at 18-22 (relying on affidavit of Judith Douglas and *Hallums* order and opinion).

I. 34 C.F.R. § 300.514(c) is Consistent with the Plain Meaning of the IDEA

The Department's regulation is enforceable because it is consistent with the plain meaning of "agree" in 20 U.S.C. § 1415(j) and does not exceed the Department's authority under 20 U.S.C. § 1406.

A. 34 C.F.R. § 300.514(c) passes the *Chevron* Test

Henrico's contention that 34 C.F.R. § 300.514(c) contradicts the plain meaning of "agree" in 20 U.S.C. § 1415(j) lacks merit because the regulation easily passes the *Chevron* test for analyzing an agency's construction of a statute. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The *Chevron* test involves two steps. The first step is to determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. Only "[i]f the statute is silent or ambiguous with respect to the specific issue" should the court move to the second step to decide "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

The precise question here is whether "the decision of a hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agree[ing] with the child's parents that a change of placement is appropriate," 34 C.F.R. § 300.514, constitutes an agreement between the SEA and parents within the meaning of 20 U.S.C. §

1415(j). Because the IDEA does not define the word "agree" in the statutory phrase "unless the State or local educational agency and the parents otherwise agree," 20 U.S.C. § 1415(j), this Court should "construe it in accord with its ordinary or natural meaning." *Smith v. U.S.*, 508 U.S. 223, 228 (1993). The plain meaning of the word "agree" is, *inter alia*, "to concur," "give mutual assent," and "approve or adopt." Black's Law Dictionary 43 (Abridged 6th ed. 1991). When an SEA delegates its power to determine whether a placement is appropriate to a hearing officer and that hearing officer "concur[s]" in a parent's placement of the child in private school, the hearing officer's decision inherently constitutes an "agreement" between the SEA and the parents under 20 U.S.C. § 1415(j).

The Department's common sense interpretation of the stay put provision enjoys ample support from the Supreme Court and other federal courts. *See Burlington*, 471 U.S. at 372 ("The [SEA's] decision in favor of the [parents] and the [private] placement would seem to constitute agreement by the State to the change of placement. The decision was issued in January 1980, so from then on the Panicos were no longer in violation of § 1415(e)(3).").[5] When issuing 34

[5] Cases preceding the 1999 issuance of 34 C.F.R. § 300.514(c) include: *St. Tammany Parish Sch. Bd. v. State of Louisiana*, 142 F.3d 776, 787 (5th Cir. 1998)("the district court did not abuse its discretion by concluding that, for purposes of § 1415(e)(3), 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)(holding that "from the point of the [state] panel decision forward . . . [child's] pendent placement, by agreement of the state, is the private school and Susquenita is obligated to pay for that placement"); *Clovis Unified Sch. Dist. v. California Office of Admin. Hearings*, 903 F.2d 635, 641 (9th Cir. 1990)(citing *Burlington* and holding that psychiatric hospital became pendent placement when hearing officer ruled for parents); *Bd. of Educ. of Montgomery Co. v. Brett Y.*, 959 F. Supp. 705, 713 (D. Md. 1997)(state administrative decision for parents constitutes agreement by state to change in placement); *Dept. of Educ. v. Mr. and Mrs. S.*, 632 F. Supp. 1268 (D. Hawaii 1986) (same). Decisions issued after the issuance of 34 C.F.R. § 300.514(c) include: *CJN v. Minneapolis Public Schs.*, 323 F.3d 630, 641-42 (8th Cir. 2003)(recognizing regulation but declining to apply it because state level decision was against parents); *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 197, 201 (2d Cir.

C.F.R. § 300.514(c) in 1999, the Department explained that the regulation was merely codifying this precedent:

> Paragraph (c) is based on long-standing judicial interpretation of the Act's pendency provision that when a State hearing officer's or State review official's decision is in agreement with parents that a change in placement is appropriate, that decision constitutes an agreement by the State agency and the parents for purposes of determining the child's current placement during subsequent appeals. *See, e.g., Burlington School Committee v. Dept. Of Educ.*, 471 U.S. 359, 371 (1985); *Susquenita School District v. Raelee S.*, 96 F.3d 78, 84 (3rd Cir. 1996); *Clovis Unified v. Office of Administrative Hearings*, 903 F.2d 635, 641 (9th Cir. 1990). Paragraph (c) of this section incorporates this interpretation. . . .

64 Fed. Reg. 12406, 12615 (Mar. 12, 1999). The body of precedent validating the Department's interpretation of "agree" in the stay put provision underscores the consistency between the statutory provision and the regulation.

Ignoring this precedent, Henrico insists that "both the parents and the local school board must concur or assent" to the change in placement. Henrico Summ. J. Mem. at 7. The use of the word "or" in the statutory phrase, however, makes clear that agreement between the school board and the parents is not needed when agreement between the state and the parents exists, as it does here. *See Burlington*, 471 U.S. at 372 ("the section calls for agreement by *either* the *State* or the *local educational agency*").[6] The statutory phrase is unambiguous in this respect; nonetheless,

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2002) (state review officer's decision for parents constitutes agreement to current placement); *Bd. of Educ. v. Schutz*, 290 F.3d 476, 484 (2d Cir. 2002), *cert. denied,* 537 U.S. 1227 (2003)(same); and *Escambia County Bd. of Educ. v. Benton*, 358 F. Supp.2d 1112, 1123-24 (S.D. Ala. 2005) (hearing officer's decision ordering school district to conduct a functional behavior assessment and convene a meeting to formulate a new IEP constituted agreement).

[6] Henrico's argument was explicitly rejected in *Board of Education of Oak Park & River Forest High School District No. 200 v. Illinois State Board of Education,* 10 F. Supp.2d 971, 978 (N.D. Ill. 1998)(rejecting school district's "argu[ment] that it did not agree to any change in [child's] placement, as evidenced by its appeals of the administrative decisions.").

Henrico asks this Court to find 34 C.F.R. § 300.514 invalid under *Chevron*'s second step on the grounds that it is "manifestly contrary to the statute." Letter to Hon. J. Payne from J. T. Tokarz of Aug. 15, 2005, at 1 (quoting *Taylor v. Progress Energy, Inc.*, 2005 U.S. App. LEXIS 14659, at *23 (4th Cir. July 20, 2005)). If this Court decides to apply the second step, "considerable weight should be accorded to [the Department's] construction of" 20 U.S.C. § 1415(j) when evaluating whether the Department's "regulation is based on a permissible construction" of the IDEA. *Chevron*, 467 U.S. at 844; *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 292 (1988) ("If the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute.").

The Department's regulation permissibly construes the meaning of the stay put provision because the regulation furthers the purposes of this provision and others in the IDEA. *See Gadsby by Gadsby v. Grasmick*, 109 F.3d 940, 952 (4th Cir. 1997) (second step requires looking beyond the statutory text "to some other source of legislative intent" such as "the structure[7] and purpose of the Act in which [the text] occurs") (citations omitted). In enacting the stay put provision, "Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students . . . from school" by ensuring that "in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts." *Honig v. Doe*, 484 U.S. 305, 323-24 (1988). Congress also "intended [the IDEA] to give handicapped children both an appropriate education and a free

[7] With respect to "the structure" of the IDEA, *Gadsby*, 109 F.3d at 952, the Supreme Court "note[d] that § 1415(e)(3) [§ 1415(j)'s predecessor] is located in a section detailing procedural safeguards which are largely for the benefit of the parent and the child," *Burlington*, 471 U.S. at 373.

one." *Burlington,* 471 U.S. at 372. The Department's interpretation of the stay put provision simultaneously furthers Congress's intent to protect parents' rights while ensuring that their child receives the FAPE determined by the SEA during the pendency of proceedings.[8] *Cf. Honig*, 484 U.S. at 325 n. 8 (finding IDEA's phrase "change in placement" ambiguous and deferring to the Department's interpretation thereof because it "comports fully with the purposes of the statute").

The fact that Congress has never amended the relevant language in the stay put provision[9] strongly suggests that the Supreme Court's and the Department's shared interpretation thereof was consistent with Congress's purposes in enacting the provision. *See Gadsby*, 109 F.3d at 952 ("Where statutory language is ambiguous, we may also look to legislative history for guidance as to legislative intent."). After the 1985 *Burlington* decision, Congress had four opportunities to reject the Supreme Court's interpretation of the stay put provision when Congress amended the statute in 1986, 1990, 1997, and 2004. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-98 (1979) (Congress is presumed to be aware of the law). In each of those four revisions, Congress

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[8] This regulation is easily distinguished from the one at issue in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 167-68 (2001) (holding "that the 'Migratory Bird Rule' is not fairly supported by the CWA [Clean Water Act]" because the term "navigable waters" did not cover "abandoned gravel pit" and the Rule contradicted agency's original interpretation of the CWA). As shown by Exhibits 4, 5, 6, and 7 to Henrico's second partial summary judgment motion, there is no contradiction between the Department's current regulation and its regulations interpreting the stay put provision that were issued prior to the 1999 version.

[9] The only amendment was "a technical clarification with respect to the application of the stay-put clause to section 615(k)(7) of the Act." H.R. Rep. No. 105-95, at 81-82 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 78-79. This 1997 amendment added the language "[e]xcept as provided in subsection (k)(7)" to the beginning of the provision. Pub. L. 105-17 § 615(j) (1997). This exception pertains to discipline proceedings and is not an issue in this case.

decided not to modify the stay put obligation,[10] but made many other amendments, such as adding a 1990 provision abrogating states' sovereign immunity to overturn a Supreme Court case[11] and two 1997 provisions codifying Supreme Court holdings.[12] *See* Pub. L. No. 99-457 (1986); Pub. L. No. 101-476 (1990); Pub. L. No. 105-17 (1997); Pub. L. No. 108-446 (2004). During the IDEA's 2004 Reauthorization process, Congress also could have amended the stay put provision if it disagreed with the Department's 1999 interpretation of the provision in 34 C.F.R. § 300.514(c).

B. 34 C.F.R. § 300.514(c) Does Not Exceed the Department's Regulatory Authority

Congress's amendment to the Department's rule-making authority in the 2004 Reauthorization of the IDEA in no way bars the Department from renewing 34 C.F.R. §

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[10] The 1997 House and Senate Reports explicitly reference retaining the stay put provision: "Key to these due process procedures is the law's 'stay put' provision, which this bill retains." H.R. Rep. No. 105-95, at 105, *reprinted in* 1997 U.S.C.C.A.N. 78, 103; *see also* S. Rep. No. 105-17, at 25 (1997)(same).

[11] In 1990, Congress added this provision to correct "the Supreme Court['s] misinterpret[ation of] Congressional intent" in *Dellmuth v. Muth*, 491 U.S. 223 (1989). H.R. Rep. No. 101-544, at 12 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1723, 1734. Congress considered tuition reimbursement but did not mention *Burlington. See* 136 Cong. Rec. S14407-02, S14408 (1990)(explaining that amendment "explicitly authorizes any aggrieved party to bring an action in State or Federal Court, including an action for tuition reimbursement," and "overturns . . . Dellmuth versus Muth.").

[12] The House bill "ma[d]e a number of changes to clarify the responsibility of public school districts to children with disabilities who are placed by their parents in private schools," including "specif[ying] that school districts may provide the special education and related services funded under part B on the premises of private, including parochial, schools." H.R. Rep. No. 105-95 at 92-93, *reprinted in* 1997 U.S.C.C.A.N. at 90. This change was "designed to implement the principle underlying the ruling of the Supreme Court in Zobrest v. Catalina Foothills School Dist." *Id; see also* S. Rep. No. 105-17 at 13 (same). Another change "codifie[d] the standard set by the Supreme Court in Honig v. Doe." H.R. Rep. No. 105-95, at 109, *reprinted in* 1997 U.S.C.C.A.N. at 107; S. Rep. No. 105-17, at 30 (same).

300.514(c). *See* 20 U.S.C. § 1406(a). The 2004 IDEA Reauthorization amended 20 U.S.C. § 1406 by, *inter alia*, adding the following language: "In carrying out the provisions of this title, the Secretary shall issue regulations under this title only to the extent that such regulations are necessary to ensure that there is compliance with the specific requirements of this title." *Id.* The Department's proposal to recodify 34 C.F.R. § 300.514(c), 70 Fed. Reg. 35,782, 35,809, 35,874 (June 21, 2005) (to be codified at 34 C.F.R. § 300.518), is consistent with this amendment because the regulation is "necessary to ensure that there is compliance" with 20 U.S.C. § 1415(j) by clarifying what constitutes agreement under the stay put provision. Henrico's noncompliance with 20 U.S.C. § 1415(j) shows why the regulation is necessary.

In prohibiting the Department from "implement[ing], or publish[ing] in final form, any regulation prescribed pursuant to this title that (1) violates or contradicts any provision of this title" in the 2004 IDEA Reauthorization, 20 U.S.C. § 1406(b), Congress merely articulated preexisting limits on any agency's rule-making authority. *See*, *e.g., Chevron*, 467 U.S. at 843-44. By placing this limitation under the subheading "(b) PROTECTIONS PROVIDED TO CHILDREN," Congress appears to have been concerned about regulations that might undermine these protections. Here there is no such concern because 34 C.F.R. § 300.514(c) maintains the protection afforded to children under 20 U.S.C. § 1415(j). Nor does any contradiction exist between the regulation and 20 U.S.C. §§ 1412(a)(10)(C)(i) and 1415(i)(2)(C)(iii). Section 1412(a)(10)(C)(i)[13] appears under the subheading "(C) Payment for education of children

[13] 20 U.S.C. § 1412(a)(10)(C)(i) provides: "If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not

enrolled in private schools without consent of or referral by the public agency" and therefore applies *only* to the period prior to the hearing officer's decision when R.T.'s placement at the Faison School was "without [the] consent" or agreement of the SEA. *Cf. Schutz*, 290 F.3d at 484 (rejecting similar argument because "the more reasonable interpretation is that § 1412(a)(10)(C)(ii) is addressed to those situations where the parents have not yet successfully challenged a proposed IEP"). As for "the preponderance of evidence" standard in 20 U.S.C. § 1415(i)(2)(C)(iii), it applies to this Court's merits-based decision, not to the instant decision of whether an automatic stay put injunction should issue.[14]

II. The Stay Put Provision Requires a School Board to Maintain the Then-Current Educational Placement At Board Expense While Proceedings Are Pending

Henrico argues that 20 U.S.C. § 1415(j) does not impose any affirmative reimbursement obligation on school boards during the pendency of judicial proceedings. Henrico Sum. J. Mot. at 3-5. This argument mischaracterizes the issue before this Court. The issue is not whether the stay put provision discusses reimbursement, but rather whether its requirement that the child "shall remain in the then-current educational placement" includes a duty to maintain that placement at board expense while proceedings are pending. 20 U.S.C. § 1415(j). If the stay put provision includes this duty and a board fails to meet it, an order for *pendente lite* reimbursement

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made a free appropriate public education available to the child in a timely manner prior to that enrollment."

[14] 20 U.S.C. § 1415(i)(2)(C)(iii) requires the court to "bas[e] its decision on the preponderance of the evidence" and to "grant such relief as the court determines is appropriate." If this Court decides that 20 U.S.C. § 1415(i)(2)(C)(iii) applies to the issue of whether a stay put injunction should issue, the preponderance of evidence before the Court supports granting the injunction sought by R.T.'s parents because the hearing officer ruled for the parents, R.T.'s current placement is the Faison School, and Henrico has not paid for any expenses at the Faison School since the hearing officer's decision but was required to do so under 20 U.S.C. § 1415(j).

is warranted.

A. 20 U.S.C. § 1415(j) Includes a Duty to Maintain the Placement at Board Expense

Henrico concedes that the stay put provision forbids a school board from "removing the child from his or her current placement during the pendency of proceedings." Henrico Summ. J. Mem. at 4 (quoting *Wagner v. Bd. of Educ. of Montgomery County*, 335 F.3d 297, 301 (4th Cir. 2003)). Because a board's refusal to fund a private placement agreed to by the SEA and the parents will effectively remove the child from that placement anytime the parents are unable to afford it, the board's duty to *maintain* the child in that placement under the stay put provision necessarily entails a duty to fund that placement. *See Zvi D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982) ("To cut off public funds would amount to a unilateral change in placement, prohibited by the Act."). Likewise, if a state hearing officer ordered a board to provide occupational therapy to a child in a public school, the board's refusal to provide such therapy during its appeal would impermissibly remove the child from the placement.

Henrico's duty to maintain and fund R.T.'s placement would be the same whether his placement were public or private because the stay put provision makes no exception for private schools. *See Susquenita*, 96 F.3d at 84 ("It is undisputed that once there is state agreement with respect to pendent placement, a fortiori, financial responsibility on the part of the local school district follows."); *Schutz*, 290 F.3d at 484 ("once the parents' challenge succeeds . . . , consent to the private placement is implied by law, and the requirements of § 1415(j) become the responsibility of the school district"). This Court should reject Henrico's attempt to insert a private school exception into the stay put provision. *See Honig*, 484 U.S. at 323 (rejecting state's attempt to read "dangerousness" exception into IDEA's stay put provision.)

B. The Duty to Maintain a Private Placement at Board Expense is Consistent with the IDEA's Purposes

Requiring school boards to fund a private placement agreed to by the SEA is consistent with not only the language but also the purposes and court interpretations of the stay put provision. The goal of the stay put provision is to "establish[] a student's right to a stable learning environment during what may be a lengthy administrative and judicial review." *Murphy*, 297 F.3d at 199; *see also Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Illinois State Bd. of Educ.*, 79 F.3d 654, 659-60 (7th Cir. 1996) (stay put provision is designed to "give the child's parents the choice of keeping the child in his existing program until their dispute with the school authorities is resolved").[15] The IDEA aims to ensure that the child's learning environment is "free" and "appropriate," and its provisions should not be "interpreted to defeat one or the other of those objectives." *Burlington*, 471 U.S. at 372.

The issue in *Burlington* was whether these two objectives were served by requiring the town to reimburse the parents retroactively for the period when they were in violation of the stay put provision. *Id.* at 367. *Burlington* did not need to address whether requiring a school board to fund a private placement *pendente lite* served these two goals because the town agreed to pay until the case was decided. *Id.* at 363-64. The Supreme Court held that retroactive reimbursement was appropriate because to hold otherwise would "force[] parents to leave the child in what may turn out to be an inappropriate educational placement or to obtain the

[15] Ignoring these cases and misquoting *Wagner*, Henrico argues that "the sole purpose of 20 U.S.C. § 1415(j) is to guarantee an injunction 'that prohibits a school board from removing the child from his or her current educational placement during the pendency of proceedings.'" Henrico Summ. J. Mem. at 4 (quoting 335 F.3d at 301); Henrico Reply at 3 (same except quoting "sole"). *Wagner*, however, does not include the word "sole" and does not support Henrico's contention.

appropriate placement only by sacrificing any claim for reimbursement." *Id.* at 372. Retroactive reimbursement also achieves compliance with the board's existing IDEA obligations by "merely requir[ing] the [school board] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." *Id.* at 370-71.

Burlington's reasoning applies with equal force to the issue of *pendent lite* reimbursement. Ordering a school board to fund a private placement that the state has deemed appropriate during the board's appeal of the state's decision simply requires the board to provide the free and appropriate education required by the IDEA. *See id.* at 373 ("The legislative history supports this interpretation, favoring a proper *pendente lite* placement pending the resolution of disagreements over the IEP . . . ."). If a school board were allowed to evade its duty to provide a FAPE by simply appealing an adverse administrative decision, the IDEA's primary goal would be defeated. *See Susquenita*, 96 F.3d at 84 (stay put provision should not be used "to force parents to maintain a child in a public school placement which the state appeals panel has held inappropriate"). Construing a school board's stay put obligation without a concomitant duty to fund the pendent placement also would impede this goal by leaving children of less affluent parents in settings that the state has declared inappropriate. *See id.* at 87 ("Without interim financial support, a parent's 'choice' to have his child remain in what the state has determined to be an appropriate private school placement amounts to no choice at all.").

C. Henrico's Selective Quotations from *Burlington* Do Not Bar *Pendent Lite* Relief

Henrico's selective quotations from *Burlington* fail to support its argument that 20 U.S.C. § 1415(j) does not require a school board to maintain a private pendent placement at board expense. The italicized language below, which was quoted by Henrico, merely explains the

Supreme Court's refusal to treat a parent's violation of the stay put provision as a waiver of reimbursement. Moreover, the quoted language is relevant to a parent's right to reimbursement only "at the conclusion of judicial proceedings," not during the pendency of judicial proceedings.

> We do not agree with the Town that a parental violation of § 1415(e)(3) constitutes a waiver of reimbursement. *The provision says nothing about financial responsibility, waiver, or parental right to reimbursement at the conclusion of judicial proceedings.* Moreover, if the provision is interpreted to cut off parental rights to reimbursement, the principal purpose of the Act will in many cases be defeated in the same way as if reimbursement were never available.

Burlington, 471 U.S. at 372 (emphasis added). Because Henrico's interpretation of section 1415(j), like Burlington's interpretation of its predecessor section 1415(e)(3), would defeat the IDEA's principal purpose of providing a "free" and "appropriate" education, this Court should reject it.

This Court also should reject Henrico's argument that *Burlington* bars R.T.'s parents from reimbursement for any interim period if this Court's merits-based decision holds that Henrico's IEP was appropriate. This argument rests on Henrico's incomplete quotation from *Burlington* which leaves out the following italicized language: "If the courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement for any interim period *in which their child's placement violated § 1415(e)(3)*." *Burlington*, 471 U.S. at 374 (emphasis added); *see* Henrico Summ. J. Mem. at 10 (omitting italicized language); Henrico Opp'n at 4 (same). Consistent with *Burlington*, R.T.'s parents may not obtain retroactive reimbursement for the time period between their unilateral placement of R.T. at the Faison School and the Virginia hearing officer's decision in their favor unless this Court rules in their favor on the merits. Even if R.T.'s parents were to

lose on the merits, *Burlington* in no way precludes his parents from obtaining *pendente lite* relief for the period after the hearing officer's decision, which found the Faison School appropriate, because at that point the Faison School became R.T.'s pendent placement and the parents were no longer violating the stay put provision.[16] *See* Henrico Reply at 4 (admitting that Faison School is R.T.'s current placement).

D. The Decisions from the Federal Courts of Appeals Support *Pendente Lite* Relief

The Courts of Appeals for the Second, Third, Fifth, and Ninth Circuits have upheld prospective tuition payment or *pendente lite* tuition reimbursement to parents for the costs of the pendent placement during the appeal of the state administrative decision in favor of the parents. The Second Circuit's holding that a state review board's ruling for the parents "required [the school board] to pay the costs of tuition at [a private school] during the pendency of the proceedings" relied on "the language, structure, and purpose of IDEA, the case law interpreting it, the agency's interpretation of it, and Congressional intent in establishing the Act's procedural safeguards." *Schutz*, 290 F.3d at 484; *see also Murphy,* 297 F.3d at 201 (affirming order requiring board to pay private tuition from date of state reviewing officer's decision "until such time as [child's] placement is changed in accordance with the terms of the IDEA"). The Fifth Circuit also considered the "IDEA's structure and purpose" when it affirmed an order directing

[16] Reimbursement for R.T.'s parents should date back to the date that the Virginia hearing officer's decision should have been issued if R.T.'s parents are not to blame for the delay. *See, Mackey v. Bd. of Educ. for the Arlington Cent. Sch. Dist.*, 386 F.3d 158, 164-65 (2d Cir. 2004) (deciding that use of actual date of state review officer's decision would be unfair to parents because delay was not fault of parents and remanding for determination of appropriate start date); *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 86 F. Supp.2d 354, 367 (S.D.N.Y. 2000), *aff'd*, 297 F.3d 195 (2d Cir. 2002) (using date state reviewing officer "should have rendered its decision" as start date for board's financial liability rather than decision's actual date, because issuance of decision was inexplicably delayed).

the SEA to fund a child's placement at an out-of-state residential facility while proceedings were pending. *St. Tammany Parish*, 142 F.3d at 785. The Third and Ninth Circuits relied largely on *Burlington*'s reasoning for their holdings that injunctions for *pendente lite* financial relief were appropriate under the stay put provision. *See Susquenita,* 96 F.3d at 86;[17] *Clovis*, 903 at 641.[18]

These cases recognize that the stay put provision represents "Congress' policy choice that all handicapped children, *regardless of whether their case is meritorious or not*, are to remain in their current educational placement until the dispute with regard to their placement is ultimately resolved." *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864-865 (3d Cir. 1996)(emphasis added). The Fourth Circuit's interpretation of 20 U.S.C. § 1415(j) also respects Congress's policy choice, and while this interpretation does not expressly discuss *pendente lite* financial relief,[19] it nonetheless supports holding Henrico financially responsible for R.T.'s pendent placement.

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[17] The Eleventh Circuit has yet to rule on the issue of *pendente lite* financial relief under the stay put provision, but cited *Susquenita* in support of its holding for a 30-day statute of limitations period for appeals of hearing officer decisions for reimbursement). *See Georgia State Dept. of Educ. v. Derrick C.*, 314 F.3d 545, 552 (11th Cir. 2002)(stating that "[p]arents need to know sooner, rather than later, whether they will be reimbursed so they can make educational decisions for their disabled children accordingly" and citing *Susquenita*, 96 F.3d at 87).

[18] Cases that have awarded *pendente lite* reimbursement for private tuition and discussed 34 C.F.R. § 300.514(c) include: *Murphy*, 297 F.3d at 200-201; *Schutz*, 290 F.3d at 484; *Escambia*, 358 F. Supp.2d at 1123-24; *Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea*, 353 F. Supp.2d 449, 456-58 (S.D.N.Y. 2005); *W. Platte R-II Sch. Dist. v. Wilson*, 2004 U.S. Dist. LEXIS 16889, *8 (D. Mo. 2004); *Bd. of Educ. of the Pine Plains Cent. Sch. Dist. v. Engwiller*, 170 F. Supp.2d 410, 414 (S.D.N.Y. 2001).

[19] The Fourth Circuit has discussed *Burlington* elsewhere, *see, e.g., Hall by Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 630 (4th Cir. 1985), and a published district court decision from the Fourth Circuit supported *pendente lite* relief. *See Brett Y.*, 959 F. Supp. at 713 ("the state administrative decision in favor of the [parents] constitutes 'agreement' by the State to a change in Brett's educational placement … within the meaning of the 'stay put' provision ..., thereby entitling the [parents] to a preliminary injunction requiring the Board to maintain Brett's placement … at the Board's expense").

> Section 1415(j) provides *simply* and *unequivocally* that the child "shall remain" in his or her "then-current education placement" "during the pendency of any proceedings conducted pursuant to this section." 20 U.S.C. § 1415(j). The utility of section 1415(j) is thus *easily understood*. It guarantees an injunction that prohibits a school board from removing the child from his or her current placement during the pendency of the proceedings. The injunction is automatic; the party seeking it need not meet the usual requirements for obtaining preliminary injunctive relief. Thus, when presented with an application for section 1415(j) relief, a district court should simply determine the child's then-current educational placement and *enter an order maintaining the child in that placement.*

Wagner, 335 F.3d at 301 (citation omitted)(emphasis added). A stay put injunction against a school board to maintain a child in a private placement that did not require the board to fund the placement would provide hollow relief because many parents would not be able to afford the private placement.[20]

To support its argument against *pendente lite* relief, Henrico quotes selectively from the Fourth Circuit's decision in *Wagner*. *See* Henrico Summ. J. Mem. at 4-5. When read in context, the italicized language below quoted by Henrico serves only to explain the Fourth Circuit's refusal to read into section 1415(j) a requirement that school districts offer an alternative, equivalent placement when the "then-current educational placement" is no longer available.

> What was in error was the district court's conclusion that, upon a finding of unavailability, it should, pursuant to section 1415(j), seek out alternative placements by ordering the School Board to propose such. *By its terms, section 1415(j) does not impose any affirmative obligations on a school board; rather, it is totally prohibitory in nature.* Moreover, section 1415(j) makes no exception for cases in which the "then-current educational placement" is not functionally

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[20] Henrico contends that injunctions providing prospective or *pendente lite* financial relief would give parents an incentive to prolong judicial proceedings. *See* Henrico Summ. J. Mem. at 11. This argument ignores that the stay put provision and 34 C.F.R. § 300.514(c) operate only prospectively; they require *future* maintenance of the placement agreed to by the parents and the state hearing officer during the school board's appeal of that placement. As the initiator of the appeal under such circumstances, the board can file a prompt appeal and move to expedite the appeal if necessary. Here, Henrico waited nearly a year to file its appeal.

> available. In other words, the question of availability is entirely irrelevant to the task of identifying the child's then-current educational placement, and it is only the current placement, available or unavailable, that provides a proper object for a "stay put" injunction. . . .

Wagner, 335 F.3d at 301 (emphasis added). Finding the stay put provision inapplicable to the facts before it, the Fourth Circuit had no reason to consider whether this provision requires a school board to pay for a pendent placement. To the extent the Fourth Circuit viewed the stay put provision as "totally prohibitory in nature," this interpretation is consistent with the provision's prohibition against school board removal of the child from the pendent placement, which inherently requires the board to maintain that placement at board expense as explained above.

III. 20 U.S.C. 1415(j) is a Valid Exercise of Congress's Spending Power

Henrico attempts to dismiss the cases undermining its position on the grounds that none considered whether 34 C.F.R. § 300.514(c) violates the Spending Clause of the Constitution. Henrico's Spending Clause challenge is misdirected at the *regulation*, instead of the stay put *statutory* provision, because the Spending Clause applies only to Congress, not to agencies. *See* U.S. Const. art. I, § 8 cl. 1 ("The Congress shall have the power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be Uniform throughout the United States."). For purposes of this brief, the United States assumes that Henrico intended to challenge 20 U.S.C. §1415(j), as interpreted by 34 C.F.R. § 300.514(c), as violative of the Spending Clause.

The IDEA provides federal funds to SEAs, which in turn distribute such funds to LEAs,

on the basis of certain conditions. In exchange for IDEA funds, grant recipients agree to comply with all of the IDEA's provisions and implementing regulations. *See* 20 U.S.C. § 1412. Pursuant to its Spending Power, Congress may condition the receipt of federal funds provided it does so "clearly and unambiguously." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).[21] As the Supreme Court has explained, "Just as a valid contract requires offer and acceptance of its terms, [t]he legitimacy of Congress' power to legislate under the spending power ··· rests on whether the [recipient] voluntarily and knowingly accepts the terms of the 'contract.'" *Barnes v. Gorman,* 536 U.S. 181, 186 (2002) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Thus, to survive a Spending Clause challenge, the stay put provision must provide clear notice that a school board is required to maintain a private pendent placement at board expense when a state hearing officer agrees with a parent that the private school is appropriate.

The stay put provision provides school boards with ample notice of their obligation to maintain the pendent placement at board expense.[22] As the Supreme Court has observed, "[t]he

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[21] *Dole* establishes four limitations on Congress's exercise of the Spending Clause power: (1) it must be in pursuit of "the general welfare;" (2) it "must [be done] unambiguously;" (3) it must be related "to the federal interest in particular national projects or programs;" and (4) it must not violate other Constitutional provisions. 483 U.S. at 207-08. We do not address limitations (1), (3), and (4) because Henrico's Spending Clause challenge raises only limitation (2).

[22] Henrico disputes the sufficiency of the notice, citing *Virginia Department of Education v. Riley*, 106 F.3d 559, 561 (4th Cir. 1997), one of the few cases to uphold a Spending Clause challenge, which was then overturned in the 2004 Reauthorization of the IDEA. *See* 143 Cong. Rec. E972-01, at E972 (2004)(discussing amendment to overturn *Riley*). The issue in *Riley* was whether VDOE had adequate notice of a duty to provide a FAPE to disabled children who were expelled for reasons unrelated to their disabilities. The Fourth Circuit held that states were required only to provide "a right" to FAPE under 20 U.S.C. § 1412(1) and that this right can be forfeited "by criminal activity or serious misconduct unrelated to their disabilities." *Riley*, 106 F.3d at 568. While VDOE could legitimately argue that it did not know it had a duty to send a tutor to prison to serve a student convicted of a felony murder, *see id.* at 562, Henrico cannot

language of § 1415(e)(3) is unequivocal" and provides a "clear directive": "It states plainly that during the pendency of any proceedings initiated under the Act, unless the state or local educational agency and the parents or guardian of a disabled child otherwise agree, 'the child *shall* remain in the then current educational placement.'" *Honig,* 484 U.S. at 323 (quoting with emphasis added § 1415(e)(3), the predecessor to § 1415(j)). This directive gives school boards clear notice that they must maintain children in their pendent placements at board expense and that an agreement between the SEA and the parents specifies the pendent placement for which the school boards are financially responsible. In this respect, the stay put provision stands in sharp contrast with the merely precatory language that was held insufficient to impose an obligation on fund recipients in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).[23]

In *Pennhurst*, the Court concluded that the provision at issue "express[ed] a congressional preference," not a *condition* on the receipt of federal funds. 451 U.S. at 19. Here,

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plausibly argue that it did not know a state hearing officer's decision for the parents constituted an agreement between the SEA and the parents under the stay put provision.

[23]*Pendente lite* relief in the form of prospective tuition payments or tuition reimbursement to parents does not present a *Pennhurst* problem for the reasons given in *Jackson v. Birmingham Board of Education*, 125 S. Ct. 1497, 1509 (2005), and *Davis v. Monroe County Board of Education,* 526 U.S. 629, 642, 650 (1999). In *Birmingham*, the Court explained that "Pennhurst does not preclude private suits for intentional acts that clearly violate Title IX" and upheld a private right to damages for retaliation on the grounds that retaliation constitutes intentional sex discrimination even though Title IX does not proscribe retaliation explicitly. 125 S. Ct. at 1509. In *Davis*, the Court rejected the school board's *Pennhurst* argument and recognized a private right to damages for peer-on-peer sexual harassment even though Title IX does not mention sexual harassment. 526 U.S. at 650. *Pendent lite* financial relief under the stay put provision does not constitute damages, but the rationale for rejecting the *Pennhurst* argument is the same: Henrico's refusal to maintain R.T.'s current placement at board expense constitutes a clear, intentional violation of the stay put provision.

there is no dispute that LEAs must comply with the stay put provision in return for federal funds. Rather, Henrico disputes having notice that its stay put obligations apply when a state hearing officer rules in favor of the parents. Henrico, however, had clear notice that an agreement between the SEA and the parents regarding a child's placement invoked the stay put obligations. This notice is not rendered insufficient simply because the provision did not delineate types of agreement between the SEA and parents. *See Bennett v. Kentucky Dept. of Educ.*, 470 U.S. 656, 665-66 (1985) (finding sufficient notice under *Pennhurst* when statute clearly imposed some conditions on federal funds and stating that Congress need not specifically proscribe each condition in statute).

Due to the contractual nature of Spending Clause statutes like the IDEA, "[a] funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract." *Barnes*, 536 U.S. at 187. Applying the "contract-law analogy" to Spending Clause statutes, the Supreme Court has recognized that "a recipient may be held liable [for damages] to third-party beneficiaries for intentional conduct that violates the clear terms of the relevant statute." *Id.* (citing *Davis*, 526 U.S. at 642). Reimbursement to third-party beneficiary parents under the stay put provision is not damages; it is more akin to an injunction for specific performance. *See Burlington*, 471 U.S. at 370-71 (reimbursement is not damages because it "merely requires the Town to belatedly pay expenses that it should have paid all along"). Injunctions are a traditional remedy for breach of contract, *see Barnes*, 536 U.S. at 187, and raise

fewer notice concerns than monetary damages.[24] The absence of the word "reimbursement" in 20 U.S.C. §1415(j) and 34 C.F.R. § 300.514(c) is not fatal to the notice requirement. The Supreme Court has recognized injunctions and damages as available relief under Spending Clause statutes that contain no express remedies and for conduct that the statute never explicitly mentions. *See, e.g., Davis*, 526 U.S. at 649 (holding that Title IX recipients had adequate notice of liability for compensatory damages for peer-on-peer sexual harassment even though Title IX does not mention harassment); *Cannon*, 441 U.S. at 705 & n. 38 (recognizing injunctive relief under Title IX).

In analyzing Henrico's Spending Clause challenge, this Court may consider whether the IDEA's language, as well as court and agency interpretations of that language, gave Henrico adequate notice. *See Birmingham,* 125 S. Ct. at 1509-10*; Davis,* 526 U.S. at 640-44. Since the 1985 *Burlington* decision, recipients of IDEA funds have had notice that a state education panel's decision in favor of a parent's private placement constitutes an agreement between the state and parent that changes the pendent placement. *See Birmingham*, 125 S. Ct. at 1509 ("Funding recipients have been on notice . . . since 1979, when we decided *Canon*"). The numerous cases upholding *pendente lite* financial relief when states have ruled for parents have provided more than ample notice to IDEA funding recipients of their duty to fund pendent placements. *See supra* discussion at 9 n. 5 and 19-20*; see also Birmingham*, 125 S. Ct. at 1510 (finding courts of appeals cases gave notice). The Department's issuance of 34 C.F.R. § 300.514(c) in 1999 and its

[24] Injunctive relief does not raise the Supreme Court's "central concern" under the Spending Clause that a federal fund recipient have notice of its potential liability for monetary damages. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) (discussing central concern underlying *Pennhurst*, 451 U.S. at 28-29, *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60, 73 (1992), and *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983)).

recent proposal to recodify the same language telegraphed to funding recipients the consequences of a state hearing officer's decision in favor of the parents. *See* 64 Fed. Reg. at 12,411, 12,615;[25] 70 Fed. Reg. at 35,809, 35,874*; see also Birmingham*, 125 S. Ct. at 1510 (finding the Department regulations gave recipients notice); *Davis*, 526 U.S. at 643-44 (same).

In light of all this notice, Henrico's reliance on the affidavit of a VDOE official and an unpublished order rejecting a preliminary injunction motion for pendente relief was misguided. *See* Henrico Summ. J. Mem. at 18-21. VDOE had no authority to relieve Henrico of its federal stay put duties. In exchange for IDEA funds, VDOE assured the Department that Virginia would comply with all requirements of the IDEA and its applicable regulations. *See* VDOE FY05 application for IDEA funds of May 6, 2005 (Tab 1). The Department even demanded VDOE's compliance with 34 C.F.R. § 300.514 on a prior occasion. *See* Letter from the Department to VDOE of Mar. 27, 2000 (Ex. 3 to R.T.'s Parents' Summ. J. Mem.). Shortly after the Department learned of Judith Douglas's Affidavit in this case, the Department reminded VDOE of its duty to comply with 34 C.F.R. § 300.514 and notified VDOE that its reliance on the *Hallums* case "is misplaced." Letter from the Department to VDOE of Aug. 19, 2005 (Tab 2).

VDOE's and Henrico's reliance on *Hallums* is misplaced for several reasons. First, neither the order denying the parents' motion for a preliminary injunction nor the merits-based opinion finding for the school board addresses 34 C.F.R. § 300.514 or 20 U.S.C. § 1415. *See Prince William County Sch. Bd. v. Hallums*, No. 02-1005-A (E.D. Va. Nov. 13, 2002 Order &

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[25] The Department explained that 34 C.F.R. § 300.514(c) "shifts responsibility for maintaining the parent's proposed placement to the public agency while an appeal is pending in those instances in which the State hearing officer or State review official determines that the parent's proposed change of placement is appropriate." 64 Fed. Reg. at 12615.

Aug. 12, 2003 Op.) at Exs. 8 & 11 to Henrico Summ. J. Mot. Second, the court based its refusal to grant reimbursement on the parents' failure to provide adequate notice to the school board of their decision to move the child to the private school. *See* Henrico Summ. J. Mot. Ex. 8 at 20-22. Notice is not an issue in R.T.'s case, and the court's refusal in *Hallums* rested on a "limitation on reimbursement" specified in 20 U.S.C. § 1412(a)(10)(C)(iii)(I) not on a conclusion that reimbursement was never warranted when a parent unilaterally moves a child into private school and a state administrative decision upholds that placement. *Id.* Third, although the school board raised a Spending Clause challenge, the court never discussed this issue in its order or opinion. Fourth, these unpublished district court decisions are not binding on this Court. Lastly, Henrico and VDOE were not parties in *Hallums*.

Conclusion

For the foregoing reasons, the United States respectfully asks this Court to uphold 20 U.S.C. § 1415(j) and 34 C.F.R. § 300.514(c) as valid exercises of Congress's and the Department's authority. The United States also supports an injunction requiring Henrico to fund R.T.'s placement at the Faison School for the remainder of these proceedings and to reimburse R.T.'s parents for the costs of the Faison School retroactive to the date that the hearing officer's decision should have been issued.

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DATED: September __, 2005

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN RESPONSE TO SCHOOL BOARD'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT was served by first class mail on September ___, 2005, on the following counsel:

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