
IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOHN M., by his parents and,)	On Appeal from the United States
And next friends, CHRISTINE M.)	District Court for the Northern District
And MICHAEL M.,)	of Illinois, Eastern Division
)	
Plaintiffs-Appellees,)	
)	
vs.)	Case No. 05 C 6720
)	The Honorable James F. Holderman
BOARD OF EDUCATION OF,)	Judge Presiding
EVANSTON TOWNSHIP HIGH)	
SCHOOL DISTRICT 202, <i>et al.</i>)	
)	
Defendants-Appellants.)	

BRIEF OF AMICI CURIAE COUNCIL OF PARENT ATTORNEYS AND ADVOCATES,
INC., THE NATIONAL DISABILITY RIGHTS NETWORK, THE CENTER FOR LAW AND
EDUCATION, EQUIP FOR EQUALITY, TASH, THE NATIONAL DOWN SYNDROME
CONGRESS, AND THE NATIONAL DOWN SYNDROME SOCIETY IN SUPPORT OF
UPHOLDING THE LOWER COURT’S DECISION IN FAVOR OF APPELLEES

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INTEREST OF AMICI CURIAE

The Council of Parent Attorneys and Advocates Inc. (COPAA) is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. Maintaining that the key to effective educational programs for children with disabilities lies in collaboration between parents and educators as equal parties, COPAA focuses on providing training and resources for advocates and attorneys to help each child obtain the free appropriate public education (FAPE) guaranteed by the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities in Education Improvement Act (collectively, “IDEA”), 20 U.S.C.A. § 1400 *et seq.* (West 2000 & Supp. 2006). COPAA brings to this Court the unique perspective of parents and advocates for children with disabilities in legal disputes with public schools about the implementation of a stay-put order and has first-hand, practical experience and insight to share with this Court about the challenges faced by such children, whose educational success depends on the right to secure the FAPE promised by the IDEA.

The National Disability Rights Network (NDRN) is the membership association of protection and advocacy (“P&A”) agencies that are located in all 50 states, the District of Columbia, Native American community, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa and the Northern Marianas Islands). P&As are authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings. Through individual case representation and systematic advocacy in 2006, P&As served over 74,700 persons with disabilities. This case is of particular interest to NDRN because of the impact it will have on the educational life of students with disabilities who seek due process to enforce their IDEA rights.

The Center for Law and Education (CLE) is a national advocacy organization that works with parents, advocates and educators to improve the quality of education for all students, and in particular, students from low-income families and communities. CLE has been a recognized leader in advancing the rights of students with disabilities—from federal policy through state and local implementation. CLE focuses on bringing together disability rights and school reform, to help ensure, for example, that specialized instruction and support services provided through individualized education programs (IEPs), assessment practices, placement decisions, etc., are aimed at overcoming the barriers for students with disabilities to meeting high standards, rather than lower expectations. CLE presented an amicus position to the court on the stay-put provision in *Honig v. Doe*, 484 U.S. 305 (1988).

Equip for Equality (EFE) is an independent, not for profit organization which administers federally-mandated P &A services for the State of Illinois. EFE's mission is to advance the human and civil rights of children and adults with physical and mental disabilities. EFE provides referral, self advocacy assistance, and legal representation to people with disabilities throughout the state; achieves changes in legislation, policies, and programs that impact people with disabilities; and has state and federal oversight powers over public and private service providers for people with disabilities. EFE's special education clinic receives hundreds of calls from parents of children with disabilities seeking representation in disputes with school districts and represents children who are seeking to retain or obtain integrated settings. The IEP is a central component of these cases and EFE has a great deal of experience assisting parents in securing appropriate IEPs for their children.

TASH is an international membership association advancing human rights and inclusive communities through research, education, and advocacy. TASH members are people with

disabilities, family members, fellow citizens, advocates and professionals working together to create change and build capacity so that all people no matter their perceived level of disability are included in all aspects of society. TASH believes that no one with a disability should be forced to live, work, or learn in a segregated setting; that all individuals deserve the right to direct their own lives.

The National Down Syndrome Congress (NDSC) is an organization of thousands of family members and hundreds of local parent support groups throughout the United States. Our purpose is to create a national climate in which all people will recognize and embrace the value and dignity of people with Down syndrome by promoting full participation of people with Down syndrome in all aspects of community life. NDRN promotes the availability of and access to a full range of opportunities and/or resources that meet individual and family needs.

The National Down Syndrome Society (NDSS) is a nonprofit organization with more than 200 affiliates nationwide representing the more than 350,000 Americans who have this genetic condition. NDSS is a national leader in supporting and enhancing the quality of life, and realizing the potential of all people with Down syndrome and demonstrates this commitment through education, research and advocacy initiatives that benefit people with Down syndrome and their families.

SUMMARY OF ARGUMENT

The stay-put provision of the IDEA requires immediate preservation of the status quo—the freezing of the immediately past moment in time. The stay-put provision “ensure[s] the educational needs of a child are met during the pendency of any proceedings conducted pursuant to the IDEA.” *Peter G. v. Chicago Public Sch. Dist. No. 299 Bd. of Educ.*, No. 02 C 0687, 2002 U.S. Dist. LEXIS 7716 at *16 (N.D. Ill. Apr. 30, 2002). The IDEA requires continuation of the

“then-current educational placement of the child.” 20 U.S.C. § 1415(j). Thus, when services were provided in the then-current educational placement of the child, the status quo under the IDEA also requires that they be provided under the stay-put.

Maintaining the status quo of a student’s then-current educational placement minimizes the potential for harm to a student with disabilities resulting from unnecessary disruption of his orderly educational process. A disruption in needed educational services for students who already are grappling with learning challenges almost assuredly can impede educational progress and may even lead to regression. The IDEA also codifies Congress’s recognition that a FAPE requires an individualized educational program (IEP) developed through a collaborative process among parents, educators, and others. The IDEA’s mandate that the school district continue the services required by the then-current educational placement promotes this paradigm of collaborative development of that placement, and precludes the district from imposing its unilateral judgments as to what constitutes a FAPE for the child. *See* 20 U.S.C. § 1414(d)(1)(B). If a school district could unilaterally choose not to preserve the status quo during the stay-put period, the IDEA’s explicit requirements would be eviscerated, and the IDEA’s collaborative scheme involving parents, educators, and others in the process of determining the IEP would be subverted.

Particularly for cases such as this one, when a child with disabilities is further challenged by a transition to a new school, Congress designed its legislative mandate so as to avoid unnecessary disruption of the educational process by crafting a bright line rule—maintenance of the status quo. This straightforward requirement minimizes uncertainty by parents and educators alike as to how the district must ensure the child’s entitlement to a FAPE during the pendency of the administrative process or judicial proceedings. The standard ensures consistency of the

services the school must provide while it awaits the outcome of these proceedings. It also precludes the school district's effective exclusion of the participation not only by the child's parents but also by the educators who, in designing and implementing the then-current educational placement, are most familiar with the child's educational deficiencies and have explored efficacious attention to his needs through a statutorily prescribed process.

Because the IDEA has no specific statutory requirement that an IEP specify in writing every detail of a child's educational placement, the IEP document may not recite with specificity the services a school must maintain during the stay-put. This, however, does not excuse a school district from maintaining the status quo. Details not listed on the face of the IEP document are not to be ignored under the stay-put analysis, as nothing in the IDEA limits the school's stay-put inquiry to the written words in an IEP; to the contrary, the statute's automatic injunctive enforcement mechanism for the stay-put obligates the district to continue all of the services provided in the then-current educational placement. Only by ensuring continuation of all of the requirements of the student's IEP, regardless of whether they are expressly written on the face of the IEP, does the school district duly preserve the status quo and comply with the statutory stay-put. To hold otherwise would be to countenance violation of the stay-put by authorizing the school district to fashion a unilateral interim IEP and circumvent the statutorily-mandated process of collaborative determination of the student's educational plan.

ARGUMENT

I. STAY-PUT IS AN INJUNCTIVE ORDER DESIGNED TO PRESERVE THE STATUS QUO.

As the U.S. Supreme Court observed, in furtherance of the goals of the IDEA to ensure a FAPE for all disabled children, "the Act [IDEA] establishes a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any

decisions with which those parents disagree.”¹ *Honig v. Doe*, 484 U.S. 305, 308 (1988). The Court went on to observe that “[a]mong these safeguards is the so-called ‘stay-put’ provision, which directs that a disabled child ‘shall remain in [his or her] then current educational placement’ pending completion of any review proceedings, unless the parents and state or local educational agencies otherwise agree.” *See id.* (citation omitted); *see generally* 20 U.S.C. § 1400 *et seq.* (West 2000 & Supp. 2006).²

The stay-put provision expressly requires that “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 statutory language is “unequivocal [, stating] ... plainly that during the pendency of any proceedings initiated under the IDEA, 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 v. Doe*, 484 U.S. at 323 (quoting 20 U.S.C. § 1415(j)) (emphasis supplied by Court).³

¹ The IDEA’s text, purposes and clear statutory language demonstrate the importance of the meaningful participation of the parent and student along with the school in all significant decisions under the IDEA. The IDEA and are replete with references to the role and rights of parents as well as students in every critical point of the statutory scheme. *See, e.g.*, 20 U.S.C.A. § 1400(c)(2), (3), (5) (acknowledging the economic and other hardships parents have experienced in order to obtain an appropriate education for their children with disabilities); *id. at* § 1400(d)(1)(B) (ensuring in the statement of purposes the protection of both “the rights of children with disabilities and parents of such children”); *id. at* § 1414 (placing parents in a prominent role in the creation of an IEP for each child with a disability); *id. at* § 1406(b) (forbidding the narrowing by rule the rights of parental consent to the specific programs developed); *id. at* § 1414 (requiring states to reimburse parents in some circumstances). Thus the IDEA’s scheme redundantly contemplates and confirms that the rights and responsibilities of parent and child are coextensive with the school, *Winkelman v. Parma City School District*, No. 05-983, 2007 U.S. LEXIS 5902, demonstrating the key partnership of parents in the process of determining an appropriate education for their children with disabilities.

² Neither the statute nor the legislative history defines the term, “then-current educational placement.” *D. v. Ambach*, 694 F.2d at 906 n.5 (2d Cir. 1982); *see also Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990).

³ Emphasizing the precision with which school districts must adhere to stay-put orders, courts have recognized a right to sue for collateral injury in the form of reimbursement or compensatory education for stay-put violations. *See, e.g., Maine Sch. Admin. Dist. No. 35 v. Mr. R.*, 321 F.3d 9, 17-18 (1st Cir. 2003);

The stay-put provision effectively has the force of an automatic preliminary injunction. *See, e.g., Doe v. Maher*, 793 F.2d 1470, 1486 (9th Cir. 1986) (noting that section 1415(j) does not even list any exceptions to its “automatic injunction,” and ruling that school officials could not avoid the stay-put provision through a unilateral determination that a child should be suspended indefinitely even when he allegedly threatened to disrupt the educational process), *aff’d in part and modified in part on other grounds sub nom. Honig v. Doe*, 484 U.S. 305; *see also John T. ex rel. Paul T. v. Delaware County Intermediate Unit*, 318 F.3d 545, 556 (3d Cir. 2003); *D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982) (explicitly describing the stay-put provision as “in effect, an automatic preliminary injunction”); *Wagner v. Bd. of Edu. of Montgomery Cty.*, 335 F.3d 297, 301 (4th Cir. 2003) (emphasizing the automatic nature of the injunctive relief of a stay-put order as a quick and complete order to preserve the status quo for both the parents and the school). This Court likewise has expressly noted courts’ characterization of the stay-put as an “automatic injunction” applicable whenever the statutory criteria of § 1415(e)(3) are met, absent a compelling reason not to enforce it.⁴ *Casey K. v. St. Anne Cmty. High Sch. Dist. No. 302*, 400 F.3d 508, 511, 513 (7th Cir.), *cert. denied sub nom. St. Anne Cmty. High Sch. Dist. No. 302 v. Norman K.*, 546 U.S. 821 (2005); *Rodiriecus L. v. Waukegan Sch. Dist. No. 60*, 90 F.3d 249, 253 (7th Cir. 1996).

The automatic injunction of the stay-put has a number of significant effects. First, it requires courts to ensure preservation of the status quo – to freeze the educational program in place under the then-current educational placement. *See, e.g., Wagner*, 335 F.3d at 302

Indep. Sch. Dist. No. 284 v. A.C., 258 F.3d 769, 774-75 (8th Cir. 2001); *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 890 (9th Cir. 1995).

⁴ As this Court has also observed, “[t]he effect of this interpretation is to make a violation of the stay-put provision punishable by contempt.” *Id.*; *see also Board of Edu. of Oak Park and River Forest High Sch. Dist. 200 v. Illinois State Bd. of Edu.*, 79 F.3d 654, 657 (7th Cir. 1996) (confirming that the stay-put is enforceable through sanctions typically imposed for violation of an injunction and noting that the stay-put order “has not only the form of an injunction but also the bite that a real injunction has”).

(condemning any result that “contravenes the statutory mandate and turns the statute on its head by transforming a tool for preserving the status quo into an implement for change”); *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864 (3rd Cir. 1996) (citing several appellate cases for the premise that the purpose of the stay-put provision is to “preserve the status quo”). Following this rationale, “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. This approach supports the purposes of the IDEA by minimizing unnecessary disruption during the pendency of any adjudications under the Act. Second, the automatic injunction of the stay-put carefully integrates the IDEA’s purposes and text, maintaining the IDEA’s balance of power between the school district and the family of a child with disabilities, and ensuring that their respective perspectives are taken into account. As the U.S. Supreme Court explained, “Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students.” *Honig v. Doe*, 484 U.S. at 323 (emphasis in original). The Court noted that “[i]n so doing, Congress did not leave school administrators powerless ...; it did, however, deny school officials their former right to ‘self-help,’ and directed 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.” *Id.* at 324.

II. A DETERMINATION OF THE STATUS QUO FOR STAY-PUT REQUIRES A FACT-DRIVEN EVALUATION OF THE SERVICES PURSUANT TO THE THEN-CURRENT EDUCATIONAL PLACEMENT.

IDEA requires that a child remain in his or her “then-current educational placement” during the pendency of any administrative or judicial proceeding, unless the state or local agency and the parents of the child mutually agree otherwise. 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a). Although IDEA does not define “educational placement” in the statute, the longstanding position of the Department of Education (DOE) is that “placement refers to the

provision of special education and related services rather than a specific place, such as a specific classroom or specific school.” 71 Fed. Reg. 46,540 (August 14, 2006). This Circuit has established a fact-driven analysis of a “current educational placement,” characterizing it as “something more than the actual school attended by the child and something less than the child’s ultimate educational goals, recogniz[ing] within the term enough room to encompass [a student’s] experience.” *Board of Edu. of Community High Sch. Dist. No. 218 v. Illinois State Bd. of Edu.*, 103 F.3d 545, 549 (7th Cir. 1996). The mandate that the child remain in the then-current educational placement at the time of the stay-put order means that the child must continue to receive *the same special education* and related *services* used to implement the goals of the previously-agreed IEP. *See Spilsbury v. District of Columbia*, 307 F. Supp. 2d 22, 27 (D.C. Cir. 2004) (rejecting a narrow construction of “current educational placement” to mean little more than the “literal school building” in a reimbursement dispute); *see also Mackey v. Board of Edu. for the Arlington Central Sch. Dist.*, 386 F.3d 158, 163 (2d Cir. 2004) (rejecting any “unilateral change” in placement during stay-put).

Significantly, the IDEA language refers a school district to the “then-current educational placement,” *see* 20 U.S.C. § 1415(j), rather than the term “IEP,” certainly available to Congress in drafting this section. Similarly, the IDEA does not authorize school districts to exercise discretion to interpret the term “current education placement,” but rather presumes strict, factual adherence to it. *See Thomas v. Cincinnati Bd. of Edu.*, 918 F.2d 618 (6th Cir. 1990) (explaining Congress did not intend a prospective IEP to govern the Act’s stay-put provision “as opposed to an operational placement” since it did not use the defined term IEP). The DOE’s contrived approach, arrogating discretion to the school district to circumvent the collaborative process of determining the child’s educational placement, undermines the structure of the IDEA and

eliminates the purposes of stay-put.⁵ It is incumbent upon courts when disputes such as the instant action arise to faithfully ensure preservation of the statutorily-required status quo and enforce the broader “current educational placement” as the standard for determining whether stay-put has occurred.⁶

Consistent with this requirement, courts uniformly have determined the status quo by looking to the special education services in place in the then-current educational placement. *See, e.g., Thomas v. Cincinnati Bd. of Edu.*, 918 F.2d at 625-26 (defining the ‘current educational placement’ as “the operative placement under which the child is actually receiving instruction at the time the dispute arises”); *see also Drinker v. Colonial Sch. Dist.*, 78 F.3d 859 (adopting the “operative placement analysis even when an IEP is in effect to determine the definition of the “current educational placement.”) In *Thomas* and *Drinker*, the courts, of course looked to the IEP to help inform their understanding of the existing programs, but neither court excluded consideration of other relevant indicia of the child’s placement, eschewing exclusive focus on the written IEP document itself. Whether the particular services are noted in writing on the IEP is

⁵ In the instant action, the services in issue, i.e., “co-teaching services,” were in fact clearly specified in writing on the IEP. (R. at 138 (requiring “Support in classroom (consult, team teaching, assistance, etc.)” across all academic areas -- Language, Reading, Mathematics, Social Studies, Arts, Physical Education, Library, and Speech/Resource subjects). “Co-teaching” plainly includes “team teaching” and similar assistance. *See, e.g., Friend, Marilyn and Cook, Lynne, Interactions, Collaboration Skills for School Professionals* (2d ed. Longman Pub. 1996) at Chapter 3, p. 44-50. Certainly a school district may not suspend or terminate services indisputably in place during the then-current educational placement merely because they were described on the IEP by a synonym, or as in the instant case, with even more specificity than the services the school district seeks to withhold.

⁶ In addition to imposing faithful adherence to the child’s educational plan by the school district, the stay-put likewise prevents even “well-intentioned parents” from unilaterally selecting their preferred interim placement for their child. *See, e.g., Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1133 (9th Cir. 2003) (“the ‘stay-put’ provision is meant to preserve the status quo”); *J.O. v. Orange Township Bd. Of Education*, 287 F.3d 267, 272 (3rd Cir. 2002) (under § 1415(j), “stay-put orders are designed to maintain the status quo during the course of proceedings”); *Verhoeven v. Brunswick Sch. Comm.* 207 F.3d 1, 3 (1st Cir. 1999)(“§ 1415(j) is designed to preserve the status quo pending resolution of challenge proceedings under the IDEA”). *Aaron M. v. Yomtoob*, 2003 U.S. Dist. LEXIS 21252, at *6 (D. Ill. 2003) (“the stay-put provision [under § 1415(j)] is meant to preserve the status quo”); *Petties v. District of Columbia*, 238 F. Supp. 2d 114, 116 (D.D.C. 2002) (re-enforcing the IDEA’s rejection of school district’s attempt to make “unilateral changes” to a student’s educational program during stay-put merely because a family chose to exercise their due process rights to challenge those very changes).

not determinative as to whether they are in fact part of the child’s individualized educational plan then in place. “[T]he dispositive operative factor in deciding a child’s ‘current educational placement’ should be the [plan that is] *actually functioning* when the ‘stay put’ is invoked.” *Drinker*, 78 F.3d at 867 (emphasis supplied). In *Escambia Cty. Bd. of Edu. v. Benton*, 358 F. Supp. 2d 1112, 1121 (D. Ala. 2005), for instance, the court observed that by requiring preparation of a new IEP for the student, the student’s then-current educational placement would be altered. By definition, substituting services for those in place under the previously-agreed IEP is a change to the child’s then-current educational plan in violation of a stay-put.

The DOE suggests that the stay-put provision must be clear enough to “leave issues of educational methodology primarily to the educators and not to the federal courts.” DOE at p. 22. Exclusive reliance on the written IEP document with tacit discretion conferred exclusively on the school district to determine matters not noted on the document simply is not consistent with the IDEA’s language, the interpretative case law, or the appropriate goal of preserving a reliable and consistent standard for courts to follow when disputes arise. The DOE solution would permit a dramatic modification of the previously agreed-upon placement to suit the needs, opinions and preferences of only one participant of the old IEP team – the school district. Under the DOE’s scheme, the school district could contravene the prior IEP team and impose its own preferences simply by “interpreting” any requirements of the IEP that were not expressly detailed thereon. This would create an exception to stay-put that would swallow the rule.

Further emphasizing this faulty analysis is DOE’s own regulations directing an IEP team to make a case-by-case determination of whether “methodology” should appear in an IEP document at all. In its comments to the IDEA’s regulations, the DOE states, “consistent with section 614(d)(i)(A)(ii)(I) of the Act, we cannot interpret section 614 of the Act to require that all

elements of a program provided to a child be included in an IEP.” 71 Fed. Reg. 46,665 comment (August 14, 2006). The DOE explains, “[T]he Department’s longstanding position on including instructional methodology in a child’s IEP is that it is an IEP Team’s decision.” *Id.*

Omission of any facts relating to existing services in a current educational placement from the IEP neither excuses nor precludes maintenance of the status quo. A court’s duty is to preserve the status quo by requiring the services of the then-current educational placement – regardless of whether they are explicitly denoted on the face of the IEP. This approach comports with the IDEA’s purpose and is faithful to its paradigm of addressing the child’s educational needs through collaborative deliberation amongst parents, teachers, and others.

III. RELINQUISHING CONTROL OVER WHAT CONSTITUTES STAY-PUT TO A SCHOOL DISTRICT THREATENS THE IDEA’S GUARANTEE OF A FAPE.

Permitting a school district to unilaterally decide what should be in the stay-put IEP, without adequate, collaborative, and deliberative assessment of the methodology that had been in place, not only contravenes Congress’s intent that the terms of a stay-put control, but risks harm to the child’s educational success. *See, e.g., Burr v. Ambach*, 863 F.2d 1071, 1076 (2d Cir. 1988) (describing the stay-put provision as protecting against an even worse placement during the pendency of review proceedings). Perhaps most dangerously, it opens the door to a school district ignoring the child’s special needs and the carefully fashioned plan by those familiar with him, and simply adding the child to a pre-existing program designed and resource-invested for other students with disabilities. All protections under the IDEA- including stay-put - impose a critical individualized consideration of each child’s educational placement as opposed to a unilateral decision by a school district that could last through a lengthy court battle. *See generally Deal v. Hamilton County Bd. of Edu.*, 392 F.3d 840, 864-865 (6th Cir. 2004) (“A ‘one size fits all’ approach to special education will not be countenanced by the IDEA.” ... [A] child’s

“individual characteristics, including demonstrated response to particular types of educational programs” must be considered); *see also Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 177 (3d Cir. 1988) (noting that the “system of procedural protection only works if the state devises an individualized program and is willing to address the handicapped child’s ‘unique needs’”) (quoting 20 U.S.C. § 1401(16)).

The DOE fails to rebut the important policies underlying this approach. Amici respectfully submit that this Court should not condone an inference that permits a school district to freely determine what the implementation should be – exercising discretion to eschew the carefully crafted educational program developed through a statutorily-mandated collaborative process. Stay-put prevents a school district from trying to evade its duties during the stay-put period merely because some effort may be required to ascertain the factual circumstances that were not stated on the written IEP. It is important that schools are not able to exploit an IEP’s permissible lack of written specificity as a means of evading the stay-put and eliminating its preservation of the status quo. Such a result might have the perverse effect of encouraging school districts to refrain from noting the factual details on the written IEP in order to maximize their own flexibility to disregard the educational services in place for the child with special needs. Such a result is wholly inconsistent with the stay-put provision and counter to the IDEA’s overall objective to ensure a FAPE for children.

The cases cited by the DOE do not support its radical interpretation that a school district is somehow unburdened by adherence to the “current educational placement” when the district determines that an IEP is not, in its unilateral judgment, explicit. In *Cordrey v. Euckert*, 917 F.2d 1460, 1469 (6th Cir. 1990), for example, the Sixth Circuit held that there was no stay-put violation where a school agreed expressly and in writing to provide extended school year

services only for the limited purpose of “avoid[ing] litigation and not to admit any legal obligation.” The matter before this Court does not concern a settlement agreement, which, as an agreement among the parties permissibly could modify the placement during the stay-put. *See* 20 U.S.C. § 1414(j).

Similarly unavailing is the DOE’s overstatement of the Ninth Circuit’s holding in *Gregory K. v. Longview*, 811 F.2d 1307 (9th Cir. 1987), which the DOE mischaracterizes this case as allowing a district to interpret and reject services that are not stated explicitly in the four corners of the IEP where that IEP lacked explicit mention of tutoring as stay-put service. DOE at p. 16. The DOE misses the point that in *Gregory*, there was ample evidence that the tutoring, though in place at the time of the due process request, was a service unrelated to any of the student’s disabilities. The case did not turn on the construction of the IEP, but rather on the fact that there was no current educational placement in effect at the time of the stay-put order.

The DOE’s citation to the Tenth Circuit ruling in *Erickson v. Albuquerque Pub. Sch.*, 199 F.3d 1116, 1121 (10th Cir. 1999), also is misplaced. The DOE relies on the decision for the proposition that where the IEP does not specify the modality of a type of treatment (in this case occupational therapy), the stay-put provision allows a school district unfettered discretion to determine and implement the services. However, the Tenth Circuit, citing this Court’s analysis in *Board of Edu. Community High Sch. Dist. No. 218 v. Illinois State Bd. of Edu.*, 103 F.3d 545, 549 (7th Cir. 1996) engaged in a factual determination as to whether the required current educational placement had been continued and determined that it had. The analogy to the facts of the case below would not permit a substitution or elimination of the co-teaching services delivered to John M. pursuant to the then-current placement. Rather, consistent with the Tenth Circuit’s ruling, the school district would be permitted to engage a different teacher or to refine

the co-teaching methodology. This distinction is critical because the same co-teaching services, a component of the then-current educational placement, would be delivered during the stay-put. *Erickson* does not invite a court to abandon the spirit of stay-put; rather, the Tenth Circuit confirms that courts should engage in a fact-driven inquiry and direct the school district to look backwards to employ the methodology of the current educational placement from which the family sought appeal as a frozen moment in time.

Amici urge this Court to enforce the educational plan framework already in existence in the legislatively-mandated stay-put provision. Permitting a school district to substitute equally qualified personnel to deliver the same type of service (here, co-teaching) may well be reasonable. In contrast, it is appropriate to forbid a school district from unilaterally eliminating the co-teaching service itself. When the language of an IEP states the goals of a service but omits specific written reference to the particular “how to” steps needed to reach those goals, the school district is by no means excused from assuring effective and diligent implementation of the goals and abandon the services that had been in place to implement the goals. Amici recognize that education, like the environment in which it is cultivated, is not static and that some variation in specific services may be inevitable. That is why courts position the stay-put provision as a parallel to an injunctive order – to minimize that variation during the stay-put period. The stay-put is violated, however, when an educational placement is changed at the unilateral discretion of the school district, instead of preserving the IDEA’s promise that during stay-put the child continue to receive services in place under the then-current educational placement.

CONCLUSION

For the reasons set forth above, Amici respectfully request that this Court require full compliance during the stay-put period of the then-current educational plan for children with

disabilities, including with respect to the services utilized to implement the plan even if they are not apparent from the face of the then-current written IEP. Accordingly, Amici support that the Court find in favor of John M.

Respectfully submitted,

/s/

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CIRCUIT RULE 31(e) CERTIFICATION

In compliance with Cir. Rule 31(e), the undersigned, furnishes the following:

I, Erin M. Maus, hereby certify:

1. That Amici Curiae's Brief complies with Cir. Rule 31(e)(2) and does not contain a virus. This verification is made in reliance on the TrendMicro Antivirus System computer software program detailing that the file was scanned and that no virus was detected.

Dated: June 22, 2007

/s/

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CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32(a)(7)(C)

The undersigned counsel of record for Council of Parent Attorneys and Advocates, Inc., National Disability Rights Network, The Center for Law and Education, Equip For Equality, TASH, The National Down Syndrome Congress and The National Down Syndrome Society, certifies in accordance with FRAP 32(a)(7)(C) that the contains 5,957 words, and therefore complies with the type-volume limitations set forth in Circuit Rule 32(a)(7)(B). In counting the number of words, I have relied on the word count of the word-processing system used in preparation of the brief and included all text from the Jurisdictional Statement beginning on page 1 to the ending language of the footer block on page 16.

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