No. 11-15085
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

G. M., a minor, by and through his Guardian ad litem, Kevin R. Marchese, an individual, and Lyndi Marchese, an individual; et al.,

Plaintiffs -Appellants,

v.

DRYCREEK JOINT ELEMENTARY SCHOOL DISTRICT; et al.,
Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of California
Case No. 2:10-cv-00944-GEB

BRIEF OF AMICI CURIAE DISABILITY RIGHTS ADVOCATES, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, AND DISABILITY RIGHTS CALIFORNIA IN SUPPORT OF PLAINTIFF-APPELLANTS G.M. ET AL., AND IN SUPPORT OF REVERSAL

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TABLE OF CONTENTS

I. Introduction 1

II. The Statutory Purpose Of The Stay-Put Provision Is To Provide Stability In Education 4

III. Before Issuang An Order Affecting The Stay-Put, A District Court Must Consider The Factors For A Preliminary Injunction, Or Find That A Statutory Exception Applies 6

A. Absent A Statutory Exception, A Court Must Weigh The Factors For a Preliminary Injunction Before Issuing An Order Affecting A Stay-Put 7

B. Statutory Exceptions Affecting the Stay-Put Invocation Are Rare, And Inapplicable To The Matter Before the Court 8

IV. The Two Exceptions To Stay-Put Invoked By The District Court Do Not Extend To Their Use By The District Court 10

1. IDEA Does Not Support the District Court's Exclusion of "Temporary" Annual Placements From Stay-Put's Protections 10

B. No General Exception Regarding Providers Limits The Requirement That A Child's Educational Program Remain the Same Under Stay-Put 15

I. Conclusion 19

TABLE OF AUTHORITIES

Cases

Drinker v. Colonial Sch. Dist.,
78 F.3d 859 (3d Cir.1996) 5, 6

G.M. ex rel. v. Dry Creek Elementary School et al.,
Case No. 2:10-cv-0094-GEB-GGH, Dkt. 41....................3

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

Johnson v. Special Educ. Hearing Office,
287 F.3d 1176 (9th Cir. 2002) .... passim

Joshua A. ex rel. Jorge A. v. Rocklin Unified School District,
2007 WL 2389868 (E.D.Cal. Aug. 20, 2007) 17, 18

Joshua A. ex rel. Jorge A. v. Rocklin Unified School District,
559 F.3d 1036 (9th Cir. 2009) 2, 6, 9, 17

L.M. v. Capitrano Unified Sch. Dist.,
556 F.3d 900 (9th Cir. 2009) 5

N. Kitsap Sch. Dist. V. K.W. ex rel. C.W.,
130 Wash.App. 347 (2005)....................6

N.D. ex rel. parents acting as guardians ad litem v. Hawaii Dept. of Educ.,
600 F.3d 1104 (9th Cir. 2010) 3, 7, 15

Thomas v. Cincinnati Bd. of Educ.,
918 F.2d 618 (6th Cir.1990) 5

Verhoeven v. Brunswick Sch. Committee,
207 F.3d 1 (1st Cir. 1999).................... 10, 12, 13, 14

Winter v. Natural Res. Def. Council, Inc.,
129 S. Ct. 365 (2008)....................7, 8

Statutes

20 U.S.C. § 1414(4)(A)....................11

20 U.S.C. § 1415(j).................... passim

20 U.S.C. § 1415(k)....................8

Federal Rules of Appellate Procedure

Fed. R. App. P. 32(a)(7)(C)....................20

Regulations

34 C.F.R. § 300.518(a)....................1, 5

BRIEF OF *AMICI* CURIAE

I. INTRODUCTION

The Individuals with Disabilities Education Act ("IDEA") provides elaborate review procedures to protect the rights of children with disabilities and their parents or guardians. *Honig v. Doe*, 484 U.S. 305, 309 (1988) (explaining Congress's remedial intent in passing IDEA's procedural protections). The 'stay-put' provision at issue in this case "governs the placement of a child while these often lengthy review procedures run their course." *Id.* at 312 (1988). The provision requires that the child remain in his current educational placement during the pendency of any proceedings. 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a). More than 6.6 million students with disabilities receive services under IDEA. [1] Stay-put provides a critical insurance policy for those children, protecting their daily lives from disruption when guardians and school districts dispute their appropriate educational program.

For children most affected by disabilities, not infrequently what is under dispute is whether the school district has staff qualified to meet the student's intensive service needs, or whether the student requires the services of a contracted

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[1] For the number of students receiving services under IDEA, see IDEA Data Accountability Center, funded by the United States Department of Education to collect and provide public access to data from the states, available at https://www.ideadata.org/TABLES33RD/AR_1-1.xls (last visited June 14, 2011).

private provider.[2] From the perspective of parents of students with disabilities, such battles raise the financial stakes of the stay-put. This financial aspect "pits the parents of the child, understandably anxious to secure the child's effective education, against a school district conscious of its educational mission and of its limited funds." *Joshua A. ex rel. Jorge A. v. Rocklin Unified School District*, 559 F.3d 1036, 1037 (9th Cir. 2009). In situations where the child's current educational placement includes a contracted private provider, "refusing to enforce the stay-put provision during the appeals process would force parents to choose between leaving their children in an education setting which potentially fails to meet minimum legal standards, and placing the child in private school at their own cost. Congress sought to eliminate this dilemma through its enactment of § 1415 (j)." *Id.* at 1040. From a student's perspective, refusing to enforce the terms of a stay-put threatens his right to appropriate opportunities to learn, places him at risk of irreparable harm, and disrupts the familiar fabric of his daily, educational program,

[2] *See Parents Battle School Districts For Special Support: Decisions on Intensive Services Create an Educational Divide*, *New York Times*, May 20, 2011, A19A, available at http://www.nytimes.com/2011/05/20/education/20bcspecialneeds.html (last visited June 14, 2011).

including its setting, level of inclusion, method of instruction, and training of personnel.[3]

On review before this Court is whether the district court properly granted a school district's motion for an order that allows the school district to evade the requirements of stay-put by discontinuing the use of a private provider. *G.M. ex rel. v. Dry Creek Elementary School et al.*, Case No. 2:10-cv-0094-GEB-GGH, Dkt. 41 (filed Dec. 10, 2010) (hereafter "Order"). In granting the school district's motion, the district court failed to apply the factors for a motion for preliminary injunction. *See N.D. ex rel. parents acting as guardians ad litem v. Hawaii Dept. of Educ.*, 600 F.3d 1104, 1112 (9th Cir. 2010) (motion for order affecting the stay-put invocation was subject to the balancing test required for preliminary injunctions); *Johnson v. Special Educ. Hearing Office*, 287 F.3d 1176, 1180 (9th Cir. 2002). It further failed to assess whether the school district could discontinue the services of the private provider and nonetheless replicate the "current educational placement." Instead, the district court relied on two, narrow exceptions to enforcement of the terms of a stay-put, which the district court inflated to swallow the rule: (1) an exception regarding placements that are "temporary," which the district court extended to define placements subject to review after one year, Order at *3-4; and

[3] While not at issue in this case, the impact of this disruption is particularly severe for children on the autism spectrum or with bipolar disorder who have inflexibility and have behavioral reactions to a change in their routine.

(2) an exception on the basis that certain changes involving the provider do not change the educational placement, which the district court extended to hold that *any* change involving the provider does not fall within the meaning of changes to the "current educational placement" under section 1415(j). Order at *4-5. The law does not support either exception as defined and applied in this case.

Because the district court's misapprehension of the law governing section 1415(j) threatens the procedural and substantive rights and stability of students with disabilities, DRA, DREDF, COPAA, and Disability Rights CA have sought leave to file this brief as *amici curiae*. It is the position of *amici* that the school district's motion required the court to weigh the factors for issuance of a preliminary injunction, and to determine that discontinuing use of the private provider would not significantly change the setting, level of inclusion, methodology, or other essential aspects of the educational program G.M. receives as part of the stay-put placement. That the placement was subject to review after one year and that the service at issue concerns the use of a particular provider do not negate the rules concerning stay-put placement. The district court's order should be reversed.

II. THE STATUTORY PURPOSE OF THE STAY-PUT PROVISION IS TO PROVIDE STABILITY IN EDUCATION

The section of IDEA regarding stay-put provides:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

20 U.S.C. § 1415(j); see also 34 C.F.R. § 300.518(a) (regulation implementing same).

IDEA does not define the phrase "current educational placement." Courts have generally held that the phrase means the placement set forth in the child's last implemented Individualized Education Program ("IEP"). *L.M. v. Capitrano Unified Sch. Dist.*, 556 F.3d 900, 902-903 (9th Cir. 2009), citing *Johnson*, *supra*, at 1180 ("typically the placement described in the child's most recently implemented IEP"); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir.1990) ("[the placement at the time of] the previously implemented IEP"); *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 867 (3d Cir.1996) ("the dispositive factor in deciding a child's 'current educational placement' should be the [IEP] ... actually functioning when the 'stay-put' is invoked.") (internal quotation marks and citation omitted).

The "general policy behind IDEA [] is to keep from disturbing the child throughout the statutory process designed to resolve disputes between the school district and the child's parents or guardians over where the child can receive the appropriate educational opportunities." *N. Kitsap Sch. Dist. V. K.W. ex rel. C.W.*,

130 Wash.App. 347, 373 (2005). The stay-put provision, like other protections in IDEA, aims to minimize disturbance and turmoil in a student's education; it requires “placements that provide stability in education.” *Johnson v. Special Educ. Hearing Office*, 287 F.3d 1176, 1181 (9th Cir. 2002)

III. BEFORE ISSUANG AN ORDER AFFECTING THE STAY-PUT, A DISTRICT COURT MUST CONSIDER THE FACTORS FOR A PRELIMINARY INJUNCTION, OR FIND THAT A STATUTORY EXCEPTION APPLIES

A motion for stay-put functions as an “automatic” preliminary injunction. *Joshua A.*, *supra*, 559 F.3d 1036, 1037 (9th Cir. 2009) (citing *Drinker ex rel. Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864 (3d Cir. 1996). Because it is automatic, a party seeking a stay-put need not demonstrate the required factors for a preliminary injunction in order to obtain relief. *Id*. The automatic nature of a stay-put order “evidences Congress’s sense that there is a heightened risk of irreparable harm inherent in the premature removal of a disabled child to a potentially inappropriate educational setting. In light of this risk, the stay-put provision acts as a powerful protective measure to prevent disruption of the child’s education throughout the dispute process.” *Id.* at 1040.

A. Absent A Statutory Exception, A Court Must Weigh The Factors For a Preliminary Injunction Before Issuing An Order Affecting A Stay-Put

While automatic, stay-put is indeed a preliminary injunction. Once in place, it needs to be treated that way. Therefore, any party seeking an order of the court with respect to a stay-put, whether to extend its application or modify its contours, must show that the requested action is warranted under the traditional preliminary injunction factors. *See N.D. ex rel. parents acting as guardians ad litem v. Hawaii Dept. of Educ.*, 600 F.3d 1104, 1112 (9th Cir. 2010) (motion for an order that "affected the stay-put invocation, not the stay-put invocation itself" was subject to the balancing test required for preliminary injunctions); *Johnson v. Special Educ. Hearing Office*, 287 F.3d 1176, 1180 (9th Cir. 2002) ("a request to enjoin a preexisting 'stay-put' order is handled appropriately by the district court's application of traditional preliminary injunction analysis."); *Honig,* 484 U.S. 305 (1988) at 328, FN 10 (approving of district court's analysis, which "weighed the relative harms to the parties and found that the balance tipped decidedly in favor of respondent.").

Under the preliminary injunction standards recently articulated by the Supreme Court, a school district seeking an order with respect to a stay-put must establish that it is likely to succeed on the merits; that it is likely to suffer irreparable harm in the absence of preliminary relief; that the balance of equities

tips in its favor; and, that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008). All four factors must support the requested injunction or modification thereof. *Id.* at 375-76. As the Supreme Court emphasized in *Winter*, a preliminary injunction is an "extraordinary remedy" and requires "a clear showing that the [moving party] is entitled to such relief." *Id.*

Consistent with the extraordinary nature of the relief, courts have narrowly tailored the conditions under which school districts may alter the student's placement under the stay-put. In the seminal case of *Honig v. Doe*, 484 U.S. 305 (1988), a school district asked the Supreme Court to read a "dangerousness" or exigency exception into the stay-put provision to allow schools to exclude students who posed a threat to their peers. The Court denied the school district's request. The Court held that a court can change a child's placement notwithstanding the stay-put provision only upon a showing "that maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others." *Honig* at 484 U.S. 305, 328 (1988).

B. Statutory Exceptions Affecting the Stay-Put Invocation Are Rare, And Inapplicable To The Matter Before the Court

A handful of statutory exceptions to the stay-put provision passed by Congress subsequent to *Honig* allow school districts to change a student's placement without appealing the change to the court. These exceptions are

inapplicable to the instant matter, because they involve threats such as carrying weapons or causing serious bodily injury. *See* 20 U.S.C. § 1415(k). Cases which warrant a modification of the status quo, whether through demonstration of a statutory exception or a judicial showing under the traditional preliminary injunction requirement of irreparable harm, remain extremely rare. *See Joshua A.*, 559 F.3d 1036, 1039 ("The present case—*as with most cases where the stay-put provision applies*—does not involve exigency, nor does it involve a child who shows a likelihood of causing harm to himself or to others.")(emphasis added.)

The district court did not consider the factors for a preliminary injunction in granting the school district's motion for an order authorizing the school district's position that the stay-put educational placement does not require the participation of the private provider. Nor did the district court consider or establish an available statutory exception allowing this modification to the stay-put. By failing to apply the strict legal standards for an order modifying the stay-put, the district court undercut the heightened sense of imminent risk that the stay-put provision aims to address. The Order should therefore be reversed.

IV. THE TWO EXCEPTIONS TO STAY-PUT INVOKED BY THE DISTRICT COURT DO NOT EXTEND TO THEIR USE BY THE DISTRICT COURT

1. IDEA Does Not Support the District Court's Exclusion of "Temporary" Annual Placements From Stay-Put's Protections

As described in the Order, the IEP in this matter relevant to a determination of the current educational placement is an IEP incorporating a settlement agreement, both of which date from October 2008. Order at *2-*3. The Settlement Agreement designates a placement that includes the services of a private provider, Suzanne Coutchie, for the following school year. Order at *2-*3. ("The settlement agreement states: 'For the 2008-2009 school year District will contract with Suzanne Coutchie, Educational Therapist/Reading Specialist, to provide fifteen (15) hours per week of direct one-to-one reading intervention services to [G.M.], per the District's standard in-session school calendar for students beginning on the first day of school, August 11, 2008.") The IEP incorporates the Settlement Agreement by reference, stating that G.M "will receive 15 hours per week of individual instruction following the district's academic calendar from an educational specialist pursuant to the terms of the Settlement Agreement reached between the district and the parents." Order at *3. The IEP includes a provision for annual review: "The IEP team will reconvene for the annual review in May 2009 to review [G.M.'s] progress and discuss any concerns."

The district court found that "these documents evince that the parties 'never intended' G.M.'s placement with [the private provider] 'to be anything more than a temporary placement'" and that therefore "it cannot be said that [the private provider] is G.M.'s 'current educational placement' under the 'stay-put' provision of IDEA." Order at *3, *4 citing *Verhoeven v. Brunswick Sch. Committee*, 207 F.3d 1, 9 (1st Cir. 1999). The district court asserted that "The policy behind section 1415(j) supports an interpretation of 'current educational placement' that excludes *temporary placements* like [G.M.'s] placement'" with the private provider. Order at *4, citing *Verhoeven*, 207 F.3d at 10 (emphasis added). Through this holding, the district court invents a rule that an IEP that states that an aspect of the student's educational program will be for the coming year and reviewed at the end of the year defines a "temporary placement" that is excluded from the definition of "current educational placement" under section 1415(j).

The district court's holding conflicts with IDEA's annual review requirements. IDEA requires the review and, where necessary, revision of the IEP at least once a year in order to ensure that local agencies tailor the statutorily required 'free appropriate public education' to each child's unique needs. *Honig* at 311; 20 U.S.C. 1414(4)(A) ("The local educational agency shall ensure that…the IEP Team reviews the child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved;

and revises the IEP as appropriate…”). Thus, all current educational goals, and services supporting those goals, are temporary under IDEA. In turn, any service that lasts the term of an IEP (one year) is *ipso facto* not a “temporary placement” excluded from the definition of “current educational placement” under the law.

No qualification regarding “temporary placements” exists in IDEA’s stay-put provision or its supporting regulations. Rather, the district court imported the concept of an excluded “temporary placement” from dicta in a First Circuit case, *Verhoeven ex rel. Verhoeven v. Brunswick School Committee*, 207 F.3d 1 (1st Cir. 1999). No federal court within this jurisdiction has previously applied *Verhoeven* or its reasoning regarding “temporary placements.” This case presents no reason to do so.

The holding in *Verhoeven* was under the “otherwise agree” exception to the “stay-put” provision. *See* 1415(j) (“During the pendency of any proceedings conducted pursuant to this section, *unless the State or local educational agency and the parents otherwise agree*….”) As the Supreme Court has explained that exception:

> Recognizing that [review] proceedings might prove long and tedious, the Act’s drafters did not intend [the stay-put provision] to operate inflexibly…and they therefore allowed for interim placements where parents and school officials are able to agree on one.

Honig at 324.

In *Verhoeven*, the parents and school officials agreed to submit their dispute over a pendency placement to a hearing officer. The First Circuit held that the district court did not err in ruling that because they had done so, the case falls within the "otherwise agree" exception to the stay-put provision. *Verhoeven*, *supra*, 207 F.3d at 7. By agreeing to allow the hearing officer to choose the interim placement, the Verhoevens opted out of their stay-put rights. *Id* at 8.

In dicta, the First Circuit continued by examining specific facts that it found supported a conclusion that the parties had expressly agreed that the placement invoked under stay-put was a "temporary placement" and that the parties agreed the student would return to the placement sought by the school district the following year. *See Verhoeven* at 3 ("The parties agreed that '[t]he purpose of this *temporary placement* is to use the 1997-1998 school year to effectively transition P.J….to the high school setting at the Brunswick High School for the 1998-1999 school year.")(emphasis added). The First Circuit reasoned that given this express agreement that the placement should end, to continue it would "actually change the agreed-upon status quo, not preserve it." *Id*. at 10. The court indicated that though the issue was "not dispositive," it was "important that parents be given fair warning that an *explicitly understood temporary placement* is at least a risky basis for claiming 'stay-put' protection." *Id*. (emphasis added). It clarified that it did not

"formally resolve the issue in the abstract" and that there were "numerous factual variations that could affect the outcome." *Id.*

Even were this dicta in *Verhoven* the law of the Ninth Circuit, the First Circuit's reasoning would not apply to the facts before the district court. The Settlement Agreement does not place G.M. with a private provider expressly for a "temporary placement," but rather places him with the provider consistent with the annual review provision of IDEA. Order at *2 ("The settlement agreement states: 'For the 2008-2009 school year...'"). The IEP asserts that "The IEP team will reconvene for the *annual review* in May 2009" and that "the goal will be to *gradually* re-integrate [G.M.] into the school setting…." Order at *3 (emphasis added). The terms of the IEP suggest an open-ended placement, subject to the typical annual review, rather than one with a pre-determined end date.

Moreover, the district court's application of *Verhoeven* invalidates the stay-put protections of IDEA, generally, in holding that placements for one year and subject to annual review, are for that reason "temporary placements" and excepted from stay-put protection. The requirement of annual review means that *all* educational placements pursuant to IDEA are subject to such review. The district court's holding essentially finds that students waive the right to invoke stay-put regarding the placement described in the IEP, *ex ante*, merely by agreeing to annual review of that placement. Such a result is entirely inconsistent with the

purpose of both the stay-put and annual review provisions of IDEA. This Court should decline to adopt such an application of *Verhoeven* as the law of the Ninth Circuit.

B. No General Exception Regarding Providers Limits The Requirement That A Child's Educational Program Remain the Same Under Stay-Put

The district court in this matter further concluded that the school district's discontinuance of the private provider was not "the type of change which constitutes a change in educational placement in contravention of the stay-put provision." Order at *4 The district court relied on the Ninth Circuit's recent statement that the "then-current educational placement" provision in section 1415(j) "means the general educational program of the student." Order at *4, citing *N.D. ex rel. parents acting as guardins ad litem v. Hawaii Dept. of Educ.*, 600 F.3d 1104, 1116 (9th Cir. 2010).

The district court does not explain why determining the "general educational program" does not include consideration of the provider. The Ninth Circuit's analysis in *N.D.* of what constitutes the "general educational program" supports the need to take into account the provider of services. In *N.D.*, the Ninth Circuit held that the district court properly applied the test for issuance of a preliminary injunction in denying students an order to stop the defendant from implementing furlough days that would shut down schools. The students argued that the

furloughs constituted a change in their then-current educational placement. The *N.D.* court defined "educational placement" as follows:

> We hold that "educational placement" means the general educational program of the student. More specifically, we conclude that under the IDEA a change in educational placement relates to whether the student is moved from one type of program-i.e., regular class-to another type-i.e., home instruction. *A change in the educational placement can also result when there is a significant change in the student's program even if the student remains in the same setting.*

600 F.3d at 1116 (emphasis added).

Thus, pursuant to *N.D.*, a determination of whether a change of provider results in a change to the child's educational placement for purposes of stay-put, requires that the court look at the specifics of the child's educational program and determine whether a change in the provider results in a significant change in the student's program.

There may be circumstances under which a change in provider is unlikely to change significantly the student's program. For example, when two teachers employed by the same district in the same school, using the same lesson plans and methodology and classroom, substitute for one another, it is unlikely that a court, assessing the facts under the test for issuance of a preliminary injunction, would

find that the student's program had significantly changed.[4] Where, as here, the factual contentions underlying the dispute over the stay-put provider, are the same contentions underlying the dispute over whether the child is receiving a free and appropriate public education, a court must address those contentions in determining whether a change in provider would change the child's current educational placement. Thus, a court must look at such factors as whether the substituted provider would provide instruction in the same setting, whether a home or classroom; would provide instruction in a less or more inclusive setting; would be able to provide instruction of a particular type or level specified in the IEP or otherwise identifiable as the last agreed upon educational methodology from the entirety of the evidence such as notes of an IEP meeting. The district court erred in failing to look at such specifics and allowing blanket substitution of providers under G.M.'s stay-put.

Although unpublished, the Eastern District's recent decision in *Joshua A.*, upheld on review by this Court, offers a persuasive analysis of the role of providers in the current educational placement. *See Joshua A. ex rel. Jorge A. v. Rocklin Unified School District*, 2007 WL 2389868 (E.D.Cal. Aug. 20, 2007); *Joshua A. ex rel. Jorge A. v. Rocklin Unified School District*, 559 F.3d 1036 (9th Cir. 2009)

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[4]Also, where the child advances within the same school setting from middle school to high school during the pendency of stay-put, the providers might change.

(holding that stay-put extended to appeal proceedings). In *Joshua A.*, the school district sought to change the student's special education service provider from Therapeutic Pathways, a non-public agency (NPA), to a different, unspecified NPA provider. The school district maintained that changing service providers would not alter the status quo because the plaintiff would still be receiving the same treatment at home through a non-public provider.

The court began by noting that the purpose of statute is that "the stay-put requirement should allow the student to maintain the status quo, to the extent possible, until the finality of the student's placement has been reached. *Joshua A.*, 2007 WL 2389868 at *2, citing *Johnson*, *supra*, 287 F.3d at 1180. It reasoned:

> "the plain language of the statute requires Plaintiff to remain in his 'then current educational placement.' Altering the NPA would require Plaintiff to change from one program to another, with different staffing, facilities and knowledge of Plaintiff's specific disability. This disruption appears to be exactly what Congress intended to avoid through § 1415(j).

Joshua A., 2007 WL 2389868 (E.D.Cal.) at *3.

Here, as in *Joshua A.*, there has been "no review into whether the yet unidentified [alternative] proposed by Defendant would comply with the IEP or would provide adequate services." *Id.* at *4. While the school district could move to alter the stay-put order to allow the district to substitute a new provider, to do so the school district would need to comply with the rules set out in *Johnson* and meet

the traditional preliminary injunction standards. *Joshua A*., 2007 WL 2389868 (E.D.Cal.) at *3. Because it did not do so, the district court erred in granting the school district's motion.

I. CONCLUSION

For these reasons, *amici curiae* DRA, DREDF, COPAA, and Disability Rights CA respectfully urge this Court to reverse the district court's Order, and to fashion an appropriate remedy.

June 15, 2011 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the attached brief is proportionately spaced, has a typeface of at least 14 points and, including headings and footnotes, contains 4,313 words.

/s/ Anna R. Levine _________
Anna R. Levine

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June 2011, the foregoing Brief for *Amici Curiae* was filed with the Court's ECF system, and accordingly was served electronically on all parties.

/s/ Anna R. Levine _________
Anna R. Levine