No. 06-3274
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UNITED STATES COURT OF APPEALS

## STATEMENT OF THE IDENTITY AND INTEREST OF THE AMICI

## CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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## INTRODUCTION

As a condition of receiving federal financial assistance, the Individuals with Disabilities Education Improvement Act of 2004 ("the IDEIA" or "the Act") requires States to ensure that all children with disabilities have access to a "free appropriate public education" ("FAPE") that provides special education and related services designed to meet the children's unique needs. 20 U.S.C. § 1400(d)(1)(A). To achieve FAPE, the IDEIA requires state and local educational agencies to meet certain substantive and procedural conditions. Honig v. Doe, 484 U.S. 305, 310, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). Substantively, the particulars of a child's educational program must be set forth in an "Individualized Education Program" ("IEP") designed by school officials in collaboration with the child's parents. 20 U.S.C. § 1414. The IEP is considered "the primary vehicle" for implementing Congress' goals in enacting the IDEIA. Honig at 311. A child's IEP sets out his or her educational needs, identifies goals and objectives, specifies the special education and related services the child will receive, and establishes the setting in which the education and services will be delivered. 20 U.S.C. § 1414(d). Procedurally, the statute sets forth "safeguards" to ensure that a student's rights are preserved through the process of developing and implementing an IEP. 20 U.S.C. § 1415. These safeguards include a hearing procedure for parents to use when they dispute the IEP developed for the student. Id.

At the heart of the present case is the application of one of the procedural safeguards of the IDEIA. Commonly known as the "stay-put" provision, Section 1415(j) of the Act requires that, during a dispute between the school district and a child's parents, the child remain in his or her "then-current educational placement" unless otherwise

agreed upon by the parties or ordered by the court. 20 U.S.C. § 1415(j). This provision is considered an automatic injunction. Honig v. Doe, 484 U.S. at 326-327. In the present case, the Court has been asked to determine the meaning of the phrase "then-current educational placement" in the context of a student who matriculates from one school district to another and claims he is entitled to services or methods of instruction that were not specified in his IEP.

In its September 26, 2006, decision, the district court held "[b]ecause the stay-put provision uses the term 'then-current educational placement' instead of 'then current IEP,' the stay-put provision covers more than just the four corners of the last-agreed upon IEP." John M. *ex Rel.* Christine M. v. Evanston Township High School District, 2006 WL 2796420 at 5 (N.D. Ill. 2006). Using its expanded definition of "then-current educational placement," the district Court ordered the Defendants/Appellants to go beyond the provisions in the IEP and provide services and educational methodologies that were neither specified in the student's IEP nor regularly available in the school district.

In reviewing the district court's decision, this Court requested that the DOE offer its opinion as to the meaning of the "then-current educational placement" of a student during a dispute. On May 22, 2007, the DOE filed its brief, stating that "then-current educational placement" was intended by Congress to refer to the services and goals provided in a student's IEP, as the IEP is the centerpiece of IDEA. Specifically, DOE has opined that the district court erred in ordering co-teaching as part of the stay-put placement because co-teaching was not referenced in the IEP. The DOE did not, however, fully address the meaning of the term "then-current educational placement" as

regards disputes involving students transferring from one school or district to another. Because of the significance of this issue, the amici seek leave to file this brief.

This case has far-reaching implications for all school districts that accept transfer students, as well as those states that matriculate students through separate elementary and high school districts, such as Illinois, Wisconsin, Montana, Arizona, California, Missouri, Massachusetts, and New Jersey. By looking outside of the IEP for the "then-current educational placement" of a child, the district court's decision imposes unpredictable and apparently unspecified obligations on school districts, denying them the participation in students' educational planning conferred by Congress and the Courts. See Beth B. v.

a swimming pool, that student might receive adaptive P.E. in the pool. When the child matriculates to the high school district, or transfers schools, the new school district must develop a new IEP. If the parents dispute the new IEP, the student's "then-current educational placement" would be the IEP developed by the middle school. The Amici do not dispute that the high school must implement the IEP and provide 20 minutes per week of adaptive P.E. However, under the district court's decision, the high school or receiving school would be required to provide adaptive P.E. in a swimming pool, even if it does not have one, because that was the manner in which the service was provided in the prior district.

The amici's position is that the phrase "then-current educational placement" in Section 1415(j) of IDEIA means the goals and services articulated in a student's IEP, and not the methodologies used to reach those goals or other particular trappings of classes in which the child participated in the prior school district. Because it is the IEP which is the legal document governing the child's claim to FAPE, and because the IEP sets forth the legal obligations of the school district, it must be the IEP which defines "placement." This position is supported by the plain language of the statute, the regulations, prior case law, and Spending Clause analysis. Moreover, the district court's ruling in this case could require all school districts in stay-put situations to provide unwritten, and possibly inappropriate or even impossible services when students make a variety of transitions, which is not a good outcome for parents and students or school districts.

## ARGUMENT

### I. IDEIA Requires The Definition Of "Then-Current Educational Placement" To Remain Within The Four Corners Of The IEP.

A. The Statute Requires That Educational Placement Be Defined By The IEP.

According to the Supreme Court in Arlington Central School District Board of Education v. Murphy, the courts must presume that Congress means what it says in a statute. 126 S.Ct. 2455, 165 L.Ed.2d 526 (2006). An examination of the language of the IDEIA and its implementing regulations demonstrates that Congress did not comprehend the definition of "then-current educational placement" to include anything other than the educational goals and services identified in the IEP.

Section 1415(j) states:

> …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). Nothing in this section requires a school district to look outside the four corners of an IEP to determine the placement of a student as the district court held. Nevertheless, the IDEIA did not statutorily define the phrase.

In the absence of a clear statutory definition of the "then-current educational placement", the Court must defer to the interpretation of the agency charged with the administration of the statute unless that interpretation is arbitrary, 9dcIictious or,ry, 9dcIicg-"Tc.4

interpretation of the statute, and in particular to the definition of "educational placement".

Section 300.116(b) of the Federal Regulations implementing the IDEIA states:

> In determining the educational placement of a child with a disability … each public agency must ensure that … (b) the child's placement (1) [i]s determined at least annually; *(2) [i]s based upon the child's IEP*

therapy), the amount of such services and their manner of delivery (such as direct or

services and methodologies beyond those set forth in the IEP, an extension never proposed or endorsed by this Court.

In Board of Education of Community High School District No. 218, 103 F.3d at 548, as in this case, the Court was required to determine the meaning of "then-current educational placement." In doing so, the Court examined the student's IEP, but the Court did not look beyond the IEP. The Court specifically held that "the IEP, which sets forth the child's educational level, performance, and goals, *is the governing document for all educational decisions concerning the child*." Id. at 546 (emphasis added). Further, the Court held that "…the meaning of 'educational placement' falls somewhere between the physical school attended by the child and the abstract goal of a child's IEP." Id. at 549. According to the Court, therefore, placement may mean something less than everything specified in the IEP document, but it does not extend beyond the requirements of the IEP. In District 218, the Court found that the general contours of the IEP could be implemented by an alternative placement, and that the alternative placement therefore met the requirements for stay-put. Thus, District 218 illustrates that overall achievement of the IEP, and nothing more, determines whether a school district has provided the equivalent of the "then-current educational placement."

Casey K. v. St. Anne Community High School District No. 302, 400 F.3d 508 (7th Cir. 2005), affirms the notion that "then-current educational placement" must be found within the IEP. In Casey K., a special education student was placed in a private school by the elementary school district as part of a settlement agreement. The high school district met with the parents and, over the parents' objections, adopted an IEP that required that the student return to the public school. Before the student matriculated to

## II. If the "Then-Current Educational Placement" Represents Something Beyond the IEP, Then The IDEIA Violates The Spending Clause of the U.S. Constitution.

Article I, § 8 of the United States Constitution gives Congress the power to fix the terms on which it will disburse federal mone

a dispute between the school district and the child's parents over the child's IEP. As demonstrated above, through reviewing the statute, the regulations, and previous case law, the States have clear notice that a student's "educational placement" would be found in the student's IEP. To impose otherwise, as the district court suggests, would create precisely the burden of "unspecified proportions and weight" that Garrett F. forbids. Cedar Rapids School District v. Garrett F. 526 U.S. at 84.

Similarly, school districts cannot reasonably be expected to assume obligations that are not contained within the IEP. The IEP is the school district's "contract" with disabled students and sets out in detail all educational services for which the student is entitled. Imposing such additional obligation places an undue burden on the school district to predict which "outside" arrangements are of such importance that they must be carried over. For example, under the district court's approach, one student might claim that during the stay-put period he should be educated with the same set of textbooks used in his prior district, even if the entire class is learning from a different set of books, which addresses the subject in an entirely different manner. Another student might claim that she is entitled to change classes every 40 minutes, as she did in her prior district, even though the new school district operates on a 50 minute period schedule. The district court's opinion gives receiving school districts no way to gauge which elements of the student's non-IEP programming must be continued, and no ability to predict the extent or cost of those unspecified obligations.

Further, in Arlington Central School District Board of Education, 126 S.Ct. 2455, 2458, 165 L.Ed.2d 526 (2006), the Court held that, to determine the constitutionality of an application of the IDEIA, courts must examine the IDEIA from the perspective of a

state official engaged in the process of deciding whether the State should accept the federal funds and the obligations that go along with those funds. In this case, the district court did not interpret the statute from the perspective of a State official engaged in the process of deciding whether or not to accept federal funds. The district court did not narrowly construe the IDEIA to avoid placing an undue burden on States. The district court did not look to the statute, the regulations, and the case law to determine what notice the States received before entering into a "contract" with Congress. Instead, the district court, without considering any of these requirements, and without providing any clear rationale, re-interpreted "then-current educational placement" to mean some unspecified amount and type of services and programming beyond the IEP. This interpretation obligates States to requirements for which they did not bargain and could not anticipate. Because the district court's interpretation of the statute would constitute a violation of the Spending Clause, it must be rejected and the district court's decision reversed.

## III. Policy Reasons Support Defining The "Then-Current Educational Placement" Within the Four Corners of the IEP.

There are numerous practical and policy considerations that support defining the "then-current education placement" within the four corners of the IEP. First, as the DOE explains in its brief, the IEP contains all of the obligations of the school district in providing services to a particular child. Looking beyond the IEP document for other "obligations" that might exist causes needless uncertainty for school officials. Second, methodology was not intended to become part of the IEP and is appropriately left to the discretion of the school district. Finally, because of the recognized expertise of school districts in effectuating educational decisions, they are entitled to reasonable deference in exercising educational discretion in implementing a student's IEP.

### A. Looking Beyond the IEP for the "Then-Current Educational Placement" of a Child Causes Needless Uncertainty.

As explained in section I.A, supra, the IEP outlines the parties' plan for the education of a student with disabilities. The IEP is a comprehensive document which contains all of a school district's obligations with respect to a particular child. The district court's order, however, requires school districts to look beyond the IEP in some nebulous, unspecified manner, to determine the "then-current educational placement" of a special education student. This position creates uncertainty among school districts with respect to what their obligations are to a particular child. School districts will not know if the next student who enrolls will require them to build a swimming pool, hire a particular teacher or aide, or provide other services that may not be available in the school. If the district court's position is upheld, classrooms will be held hostage to the vagaries of particular transfer students and the minutiae of their prior school's programming, and the

receiving school district's planning and budgeting processes will be paralyzed. Furthermore, parents will also suffer from this lack of predictability, since they will have no way to ascertain, without resorting to legal action, which of the non-IEP services or supports their children receive are to be continued by the receiving school district. Transition from one school district to another will become mired in these controversies, which will lead to an unnecessary and harmful increase in special education litigation.

The position of the statute and regulations, one that this Court and others have previously articulated, is that the "then-current educational placement" is to be defined by reference to the student's IEP. This position eliminates any uncertainty, as the IEP spells out the obligations of the school district and the rights of the child clearly. Such a position minimizes disputes, and allows both sides the predictability they need to program successfully for special education students entering a new school district.

B. Methodology Is Not Considered A Part of the IEP and Is Appropriately Left To the Discretion of the School District.

In its decision, the district court ordered the school district to utilize a particular methodology called "co-teaching." The co-teaching methodology was apparently used by the elementary school district, but was not identified in the IEP.[1] This Court has clearly held that methodology is not to be considered part of a student's IEP. Lachman v. Illinois State Board of Education, 852 F.2d 290, 294 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). Rather, methodology is left to the educational judgment of the school staff.

[1]Co-teaching requires one regular education teacher and one or more special education teachers to teach the same class of students with diverse needs. Co-teaching is one of many collaborative teaching methodologies that can be employed by a school district to meet the educational needs of special education students. See, Larry Bartlett, Successful Inclusion For Educational Leaders, Pearson Education, Inc. (2002).

Accordingly, the district court's specification of a particular methodology in the context of stay-put contradicts this Court's decision in Lachman.

In Lachman, the Court addressed the responsibility for the determination of educational methodology. Id. at 297. The Lachman Court held that the primary responsibility for choosing the educational method most suitable to fit the child's needs was left by the IDEIA to state and local educational agencies in cooperation with the parents of the child. Id. The Court held:

> The purpose of the Act was to open the door of public education to handicapped children by means of specialized educational services rather than to guarantee any particular substantive level of education once the child was enrolled… Courts must avoid imposing their own views of preferable educational methods upon the responsible authorities. Once it is shown that the Act's requirements have been met, questions of methodology are for resolution by the responsible authorities.

Lachman at 292. *See also*, Beth B. v. Van Clay, 282 F.3d at 499 (holding that the school official's decision about how to best educate a child is based on expertise that the courts cannot match).

In this case, the district court imposed its own views upon the high school district, ordering the high school district to implement the methodology the district court thought most appropriate. This action by the district court ignored the mandate of the Lachman Court that questions of methodology be left to the responsible authorities and not the courts. Again, the district court had no authority for such imposition.

the success of the public education system "relies necessarily upon the discretion and judgment of school administrators and school board members…" Wood v. Strickland, 420 U.S. 308, 326, 992 S.Ct. 992, 43 L.Ed.2d 214 (1975). This premise is especially true when special education is involved. See Heather S. v. State of Wisconsin, 125 F.3d 1045, 1057 (7th Cir. 1997) (holding that the court "must defer to trained educators").

This deference to school districts is written into the IDEIA. The IDEIA clearly assigns the responsibility for formulating a disabled child's educational program to the state and local agencies. 20 U.S.C. §1414. In Board of Education v. Rowley, 458 U.S. at 207, the Supreme Court held, "[i]n the face of such a clear statutory directive, it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories…" The Rowley Court stressed that "courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy'". Id. *at* 208, citing Independent School Dist. v. Rodriguez, 411 U.S. 1, 42, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). As a result, the Supreme Court cautioned, "courts must be careful to avoid imposing their view of preferable educational methods upon the States." 458 U.S. at 207.[2]

Contrary to the position articulated by the district court, the current school district must be permitted to make these educational decisions when implementing any student's IEP. This district is legally responsible for implementing the IEP, and its staff is charged

[2] Following this mandate from the Supreme Court, this Court has repeatedly emphasized its obligation to defer to the educational judgment of school districts. For example, in Brookhart v. Illinois State Board of Education, 697 F.2d 179, 182 (7th Cir. 1983), "[w]e note at the outset that in analyzing these claims deference is due the School District's educational and curricular decisions...and the courts will interfere with educational policy decisions only when necessary to protect individual statutory or constitutional rights."; Heather S. v. State of Wis., 125 F.3d 1045 (7th Cir. 1997), "A court is particularly incapable of making such judgments which is why it must defer to trained educators…".

any incoming student must receive. This would not only produce absurd results, it would violate the intent of the statute, which is to give a student clear rights articulated in his IEP. Further, if the IDEIA were interpreted to mandate such uncertainty, it would violate the Spending Clause. For these reasons, this Court should hold that the term "then-current educational placement" is limited to the goals and services of a student's IEP, and does not include every methodology, teaching tool or practice a prior teacher or school district has chosen to use.

For the reasons set forth above, the Court should reverse the district court's order.

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Respectfully submitted,

Nancy Fredman Krent

Nancy Fredman Krent
Attorney for Amici
National School Boards Association
Illinois Association of School Boards
Illinois Association of School Administrators
Illinois Alliance of Administrators of Special Education

Nancy Fredman Krent
Stephanie E. Jones
John DiJohn
HODGES, LOIZZI, EISENHAMMER, RODICK & KOHN
3030 Salt Creek Lane, Suite 202
Arlington Heights, IL 60005
(847) 670-9000
(847) 670-7334 (fax)

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,974 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in Times New Roman Font Size 12.

3. The electronic version of this brief, which has been sent to the Court online via the Court's upload procedures, has been scanned with Symantic Antivirus Version 10.0.2.2000 and is virus-free.

Nancy Fredman Krent

Attorney for Amici

Dated: May 30, 2007

## CERTIFICATE OF SERVICE

I certify that on May 30, 2007, two copies of the foregoing Brief for The National School Boards Association, Illinois Association of School Boards, Illinois Association of School Administrators, and the Illinois Alliance of