18-35229

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANCHORAGE SCHOOL DISTRICT,

Appellant,

—v.—

M.G.; BETSY GOUDREAU; BRIAN GOUDREAU; PERKINS SCHOOL FOR THE BLIND, Intervenor,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR ALASKA

BRIEF FOR *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC. AND NATIONAL DISABILITY RIGHTS NETWORK IN SUPPORT OF APPELLEE

CATHERINE MERINO REISMAN
ELLEN SAIDEMAN
SELENE ALMAZAN-ALTOBELLI
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC.
PO Box 6767
Towson, Maryland 21285
(844) 426-7224

Attorneys for Amici Curiae Council of Parent Attorneys and Advocates, Inc. and National Disability Rights Network

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 the following disclosure is made on behalf of these entities:

Council of Parent Attorneys and Advocates

The National Disability Rights Network

1. No amicus is a publicly held corporation or other publicly held entity;

2. No amicus has parent corporations; and

3. No amicus has 10% or more of stock owned by a corporation.

By: Selene Almazan-Altobelli
SELENE ALMAZAN-ALTOBELLI
Attorney for Amici Curiae
Council of Parent Attorneys and Advocates, Inc.
The National Disability Rights Network

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STATEMENT OF INTEREST OF THE AMICI CURIAE[1]

Council of Parent Attorneys and Advocates (COPAA) is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties.

COPAA's primary goal is to secure appropriate educational services for children with disabilities in accordance with national policy. COPAA does not represent children, but provides resources, training, and information for parents, advocates, and attorneys to assist them in obtaining the free appropriate public education (FAPE) such children are entitled to under the Individuals with Disabilities Education Act (IDEA or Act), 20 U.S.C. § 1400 *et seq*. [2]

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[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *Amici* state that: (A) there is no party, or counsel for a party in the pending appeal who authored the amici brief in whole or in part; (B) there is no party or counsel for a party in the pending appeal who contributed money that was intended to fund preparing or submitting the brief; and (C) no person or entity contributed money that was intended to fund preparing or submitting the brief, other than *Amici* and their members.

[2] "Improving educational results for children with disabilities is an essential element of [the U.S.] national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1).

COPPA's attorney members represent children in civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates, in seeking to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) (Section 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504) and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. (ADA).

COPAA brings to the Court the unique perspective of parents, advocates, and attorneys for children with disabilities. Many children with disabilities experience significant challenges. Whether these children eventually gain employment, live independently, and become productive citizens depends in large measure on whether they secure their right to the free appropriate public education guaranteed under the IDEA and other educational policies. Indeed, the core of the IDEA is its codified goal that "all children with disabilities have available to them a free appropriate public education 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).

The National Disability Rights Network (NDRN) is the non-profit membership association of protection and advocacy (P&A) agencies that is located in all 50 states, the District of Columbia, Puerto Rico, the United States Territories,

and includes a P&A affiliated with the Native American Consortium which includes the Hopi, Navajo and Piute Nations in the Four Corners region of the Southwest. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in various settings. The P&A system is the nation's largest provider of legally-based advocacy services for persons with disabilities.

NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, and works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination. Education cases make up a large percentage of the P&A networks' casework. P&A agencies handled over 10,000 education matters in the most recent year for which data is available. These education matters include claims under IDEA, Section 504, and the ADA.

Because of their work involving education of students with disabilities, *Amici* are intimately familiar with the critical importance of IDEA's stay put requirement, § 1415(j), for children with disabilities. IDEA's stay put provision provides stability for children while the adults use the legal process to resolve disputes, and, when parents prevail in due process hearings, it enables children to receive FAPE pending the appellate proceedings. *Amici* believe that the district court correctly applied the statutory stay put mandate, and its decision should be affirmed.

Appellees, M.G., have given consent to the filing of this brief. *Amici* attempted to obtain consent from Anchorage School District but were unsuccessful, as counsel for Anchorage School District initially indicated he would not consent unless he was first given an opportunity to review a draft of the amici curiae brief. When a second attempt was made to obtain consent without any conditions, he was not available to respond to that request.

Amici adopts the Statement of Facts contained in Appellee's Brief at. 3-11.

Amici adopts the Statement of the Issue contained in Appellee's Brief at 3.

SUMMARY OF ARGUMENT

IDEA's stay put requirement is a unique statutory protection created by Congress to protect students with disabilities, operating as an automatic injunction to maintain a student in the "then-current educational placement." 20 U.S.C. § 1415(j). As both the Supreme Court and this Court have recognized, once a parent has prevailed at a due process hearing, the placement ordered by the hearing officer becomes the "then-current educational placement." *Burlington Sch. Comm. v. Mass. Dep't of Ed.*, 471 U.S. 359, 372 (1985)*; Clovis Unified Sch. Dist. v. Calif. Office of Admin. Hearings*, 903 F.2d 635, 639 (9th Cir. 1990).

This case involves the appropriate placement for a student with multiple disabilities, including cognitive impairments, autism, and gastrointestinal issues, who was also going blind. After a full hearing on the question of the appropriate

placement, on May 30, 2017, the Hearing Officer held that a residential placement, the Perkins School for the Blind (Perkins), was the appropriate placement and ordered the school district to fund it through February 18, 2018.[3] While the Hearing Officer anticipated the parties would be able to agree either on a new placement or a continued placement at Perkins within the next nine months, the order did not identify any placement other than Perkins as appropriate. Because Perkins was the only placement found to be appropriate for the student by the hearing officer, it is the "then-current educational placement" for the purpose of stay put while the school district pursues its appeal of that decision. Therefore, the school district is obligated to fund the placement at Perkins until there is a final decision on the merits that relieves it of that obligation or the parties otherwise agree to another placement.

ARGUMENT

I. CONGRESS ENACTED IDEA'S STAY PUT PROVISION TO PROTECT STUDENTS WITH DISABILITIES

When Congress first enacted IDEA,[4] it had "ample evidence" that legislation was needed to ensure that all children with disabilities "have available to them . . . a

[3] Perkins, the first school for the blind in the United States, has been serving students since 1832 and has expertise in addressing students with multiple disabilities in addition to blindness.

[4] The statute's first name was the Education of the Handicapped Act (EHA), Pub. L. 101-476 § 901(a), 104 Stat. 1141. But "for simplicity's sake – and to avoid 'acronym overload,'" this brief uses IDEA throughout to refer to both EHA and IDEA. *See Endrew F. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994, n.1 (2017).

free appropriate public education . . . and to assure that the rights of" children with disabilities "and their parents or guardians are protected." *Honig v. Doe*, 484 U.S. 305, 309 (1988). The Supreme Court noted that "one out of every eight of these children were excluded from the public-school system altogether, §1400(b)(4); many others were simply 'warehoused' in special classes or were neglectfully shepherded through the system until they were old enough to drop out." *Id.* (citing H.R. Rep. No. 94-332, p. 2 (1975)). The stay put provision was enacted as a critical element of the due process rights of children and their parents.

IDEA conferred upon students with disabilities "an enforceable substantive right to public education in participating States." *Id.* at 310. Congress created the Individualized Education Program (IEP) as the "centerpiece of the statute's educational delivery system" and "repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation" both in developing the IEP and in assessing its effectiveness." *Id.* at 311.

While Congress hoped that parents and school districts would collaborate to develop appropriate educational programs for children with disabilities, it anticipated that sometimes parents and school districts would disagree, and, for those instances, it established dispute resolution procedures for parents and school districts. Those procedures include due process hearings, state level reviews and "both the parents and the local educational agency may seek further judicial review

and, where that proves unsatisfactory, may file a civil action in any state or federal court." *Honig*, 484 U.S. at 312; *see also* 20 U.S.C. § 1415(f), (g) & (i).

Congress recognized that these administrative procedures could be lengthy and that it would be important to provide protections for children's education in the interim. Congress, therefore, enacted the "stay put" or pendency provision, which is automatic upon the filing of a due process petition pursuant to 20 U.S.C. § 1415(f). Section 1415(j) states:

> Except as provided in subjection (k)(4), 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 . . .

The stay put right is a critical part of the IDEA; it was included in the first iteration of the Act. *See Honig,* 484 U.S. at 324. The Supreme Court noted in *Burlington* that, "Where as in the present case review of a contested IEP takes years to run its course – years critical to a child's development – important practical questions arise concerning interim placement of the child and financial responsibility for that placement." *Burlington*, 471 U.S. at 361.

Importantly, stay put "functions as an 'automatic' preliminary injunction, meaning that the moving party need not show the traditionally required factors (e.g., irreparable harm) in order to obtain preliminary relief." *Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036 (9th Cir. 2009); *see also Drinker ex rel Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864 (3d Cir. 1996). As the Third Circuit has noted, this

provision "impacts to some degree virtually every case involving an administrative challenge under the IDEA. A child's placement during the course of administrative and judicial review typically has great significance for all concerned." *Susquenita Sch. Dist. v. Raelee S. by Heidi S.*, 96 F.3d 78, 82 (3d Cir. 1996).

In *Honig*, the Supreme Court was confronted with the question of whether there was an implicit exception to the stay put mandate for students who were dangerous. *Honig*, 484 U.S. at 308. The Supreme Court responded finding the statutory language "unequivocal" and barred schools "from changing that placement over the parent's objection until all review proceedings are completed." *Id.* at 324. However, the Supreme Court noted that the statute "allowed for interim placements where parents and school officials were able to agree on one." *Id.* at 324-25. The Court specifically found that "Congress very much wanted to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school." *Id.* Therefore, Congress enacted this provision to "deny school officials their former right to 'self-help,' and directed that in the future the removal of students could be accomplished only with the permission of the parents or, as a last resort, the courts." *Id.* at 323-24. Accordingly, in *Honig*, the Supreme Court upheld the district court's order enjoining the state and local defendants "from indefinitely suspending respondent or otherwise unilaterally altering his then current placement." *Id.* at 328. The Court then held that

school officials could seek injunctive relief from the stay put provision only "by showing that maintaining a student in his or her placement is substantially likely to result in injury either to himself or herself, or to others." *Id.*

In response to *Honig*, Congress revised IDEA to provide narrow time-limited exceptions to the stay put provision for students who carry or possess weapons or drugs or cause serious bodily injury to others, 20 U.S.C. § 1415(k)(1)(G), and also provided that a hearing officer could order changes in placement when a parent or local educational agency believes that "maintaining the current placement of the child is substantially likely to result in injury to the child or to others." 20 U.S.C. § 1415(k)(3)(B). *See Joshua A.*, 559 F.3d at 1039, n.1. But apart from these limited exceptions concerning school safety, IDEA's stay put provision continues to provide an "automatic" injunction requiring school districts to provide the "then-current placement" to students with disabilities pending a final decision on the merits.

II. WHEN PARENTS PREVAIL AT A DUE PROCESS HEARING AND ESTABLISH THAT THE SCHOOL DISTRICT HAS NOT PROVIDED FAPE, THE STAY PUT PLACEMENT SWITCHES TO THE PROGRAM THAT PROVIDES FAPE, AS ORDERED BY THE HEARING OFFICER

The Supreme Court first confronted the stay put provision in *Burlington*. The Supreme Court rejected the school district's argument that stay put barred parents from obtaining reimbursement for a unilateral placement made by the parents while the due process proceeding was pending. *Id.* at 373-74. The Court noted that the

parents had prevailed at the due process hearing, with the hearing officer's decision in favor of the parents, holding that the school district was required to fund the private placement that the parents had made unilaterally. The Court emphasized that § 1415(j) applies "unless the State or local educational agency and the parents otherwise agree," and stated that the hearing officer's "decision in favor of the [parents] and the Carroll School placement would seem to constitute agreement by the State to the change of placement." *Id.* at 372.

Relying on *Burlington*, this Court held that, when a parent prevailed at a hearing and obtained a placement, the school district was responsible for the cost of that placement as the stay put placement following that decision. *Clovis Unified Sch. Dist.*, 903 F.2d at 639. The Third Circuit came to the same conclusion in *Raelee*, stating, "The decision of the Supreme Court in *Burlington* established that a ruling by the education appeals panel in favor of the parents' position constitutes agreement for purposes of section 1415[(j)]." *Raelee*, 96 F.3d at 83. The Third Circuit emphasized that "The IDEA was enacted to guarantee handicapped children a *free* and appropriate education . . ." *Id.* at 86. The court noted that parents who disagree with an IEP proposal face a difficult choice: to have the child remain in an inappropriate placement or pay for the program they deem appropriate. The court noted, "This choice is real only for those parents who have the financial wherewithal to pay for alternative placements." *Id.* at 86. Therefore, "the school district's

responsibility should begin when there is an administrative or judicial decision vindicating the parents' position." *Id.* Further, "[t]he purpose of the Act, which is to ensure that every child receive a 'free and appropriate education' is not advanced by requiring parents, who have succeeded in obtaining a ruling that a proposed IEP is inadequate, to front the funds for continued private education." *Id.* at 86-87.

In contrast, stay put does not apply if the court or hearing officer has not made a determination on the merits as to whether the school district's placement is appropriate. *See L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 912-13 (9th Cir. 2009). Thus, courts deny stay put for private placements ordered solely due to school districts' procedural errors. *See Leonard v. McKenzie*, 869 F.2d 1558, 1564 (D.C. Cir 1989) (private placement is not stay put placement where hearing officer found that school district's proposed placement was appropriate but allowed one year of tuition reimbursement due to procedural errors); *see also Zvi v. Ambach*, 694 F.2d 904, 908 (2d Cir. 1982) (denying stay put because hearing officer ordered tuition reimbursement for procedural violation, namely failure to have a physician present at the classification meeting).[5]

[5] Both *Leonard* and *Zvi* were decided prior to the 2004 amendments to IDEA, which required that the hearing officer's decision be made on substantive grounds and sharply limited relief for matters alleging procedural violations. *See* 20 U.S.C. § 1415(f)(3)(E).

This Court has held that the stay put placement continues while an appeal is pending before this Court. *Joshua A.*, 559 F.3d at 1040. This Court noted that because the application of stay put is automatic, it "requires no specific showing on the part of the moving party, and no balancing of the equities by the court," and this fact "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." *Id.*; *see also M.R. v. Ridley Sch. Dist.*, 744 F.3d 112, 125 (3rd Cir. 2014).

As this Court emphasized, "the stay put provision acts as a powerful protective measure to prevent disruption of the child's education throughout the dispute process." *Id.* Similarly, the Third Circuit has described the statute's important mission as "to guarantee educational stability for all children with disabilities until there is a final ruling on placement." *See M.R.*, 744 F.3d at 126. Stability is particularly important for students with autism, as such students "often struggle with transitions, which may lead to problem behaviors such as verbal and physical aggression, tantrums, noncompliance and self-injury." Devender R. Banda, et al, *Activity Schedules: Helping Students with Autism Spectrum Disorders in General Education Classrooms Manage Transition Issues*, 41 Teaching Exceptional Children 16, 17 (2009).

III. STAY PUT IS CRITICAL FOR PROTECTING STUDENTS BECAUSE MOST PARTENTS CANNOT AFFORD TO FUND A UNILATERAL PLACEMENT OR OTHER APPROPRIATE EDUCATIONAL SERVICES UNTIL A FINAL DECISION ON THE MERITS

Congress knew full well that, for most parents, the cost of a placement is an insuperable barrier to appropriate educational services if public funding is not provided. Most families of children receiving special education services have limited resources, both because of family income and because of the strain that raising a child with a disability can have on a family's finances. In fact, one-quarter of students with IEPs have families with incomes below the poverty line and two-thirds have family incomes of $50,000 or less.[6] For that reason, most parents cannot afford a unilateral placement, and only a few can locate placements that are willing to accept students without up-front payments for educational services.[7] As a result, for many, even if they prevail at a hearing and obtain an order for a private school placement, the student will be unable to attend unless public funding is provided.

As the Third Circuit noted, placing the burden on families to front the cost of appropriate educational services is "overwhelming." *Raelee,* 96 F.3d at 87. The court stated, "Families without means would be hard pressed to pay for private

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[6] Elisa Hyman, *et al.*, *How IDEA Fails Families without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 Am. U. J. Gender Soc. Pol'y & L 107, 112-13 (2011). *See also* Kelly D. Thomason, Note, *The Costs of a "Free" Education*, 57 Duke L.J. 457, 483-84 (2007).

[7] Hyman, 20 Am. U. J. Gender Soc. Pol'y & Law at 121.

education in what will almost invariably be the significant time lapse between a ruling in their favor and the ultimate close of litigation." *Id.* Thus, "[t]he prospect of reimbursement at the end of the litigation turnpike is of little consolation to a parent who cannot pay the toll at the outset." *Id.*

As the case law demonstrates, stay put is often litigated when a school district is seeking to reduce the costs of a placement or to avoid funding a new placement or service won by parents at a hearing. *See, e.g., Joshua A.*, 559 F.3d at 1040 (stay put order requiring district to co-fund forty hours of in-home education); *Clovis,* 903 F.2d at 639 (stay put order requiring school to pay for student's hospitalization).

Here, the District's brief makes clear that its principal concern with the placement ordered by the hearing officer at Perkins is the expense associated with the placement. *See e.g.*, (Appellant Anchorage School District's Brief, at 1, 2, 3, 6, 7, 10, 17, 25, 37). And while cost was certainly a main issue in the hearing on the merits of the claim, the Hearing Officer ultimately found that there was inadequate evidence to compare the cost of Perkins with the cost at the District's preferred residential placement in Maryland. *In re M.G.*, HR 17-09 at 10, 12 (SEA June 7, 2017). Regardless, IDEA does not provide an exception to stay put based on the cost of the current educational placement. *See* § 1415(j).

Without the opportunity to obtain a publicly-funded program that provides FAPE with a victory at a due process hearing level, few parents would find a due

process hearing useful, as very few could afford to fund a private placement through the conclusion of the appellate process. And those who could not afford any unilateral placement would not have the prospect of appropriate services starting once they prevailed at the due process level. Instead, parents would be forced to either maintain their child in an inappropriate placement waiting for ultimate victory or to move to a different school district or state in the hope that they could obtain an appropriate program. *See e.g., Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 751 (2017) (family moved when school district would not accommodate student's service animal).

Education is a key component of childhood development. For children, being stuck in an inappropriate placement for years can have tremendous costs that can never be remedied. *See Burlington*, 471 U.S. at 361. *Amici* have seen students permanently lose out on opportunities to develop their abilities because they did not receive the appropriate education at the right time.

IV. THE DISTRICT COURT CORRECTLY HELD THAT THE PLACEMENT THAT THE HEARING OFFICER FOUND PROVIDED FAPE, WAS THE STAY PUT PLACEMENT, AND REJECTED THE SCHOOL DISTRICT'S EFFORT TO MOVE THE STUDENT TO A PROGRAM THAT HAD NOT BEEN FOUND BY THE HEARING OFFICER TO PROVIDE FAPE

Here, the district court carefully reviewed the Hearing Officer's order and found that it provided a single placement: The Perkins School. The district court noted that, although the Hearing Officer ordered the District to pay for the student's

attendance at Perkins for a specific period of time, May 1, 2017 through February 17, 2018, she did not order a second placement after that time elapsed nor did she find that there was another appropriate placement. *See* (Order, at p. 2). As a result, the "then-current educational placement" is Perkins.

The Hearing Officer's decision in the instant case did not create a multi-stage IEP; rather, it found only one placement appropriate, Perkins. Thus, the entitlement to the automatic stay put was secured on June 7, 2017 when the Hearing Officer issued her decision in favor of the parents. Therefore, *N.E. by and through C.E and P.E. v. Seattle School District,* 842 F.3d 1093, 1094-95 (9th Cir. 2016), is inapplicable here.

In *N.E.*, this Court held that "a partially implemented multi-stage IEP, as a whole, is a student's then current educational placement." *Id.* at 1097. The *N.E.* case, however, involved a May 2015 IEP that had two stages, one for the remainder of the 2014-2015 school year, and a second one with a new placement, a self-contained class, to begin with the new academic year, 2015-2016.[8] *Id.* at 1094. The

[8] The two-stages of the IEP in *N.E.* reflected two different academic years. As *Amici* are well aware, because of the administrative difficulties in scheduling IEP meetings for all students during the academic year when teachers and other school staff are available to participate in IEP meetings, IEPs often to have two stages, one for the remainder of the current school year and a second stage for the forthcoming school year. The IEP for the new academic year must be developed before the school year starts because IDEA regulations mandate that a school district have an IEP in effect at the start of the new school year. Thus, 34 C.F.R. § 300.323(a) provides, "[a]t the beginning of each school year, each public agency must have in effect, for

family filed for a due process hearing in September challenging the district's decision to implement the self-contained class and asserted that stay put prevented the district from implementing the self-contained class. *Id.* at 1095.

This Court held that N.E.'s May IEP had already been implemented, and thus, the start date for the second stage had passed by the time the parents requested due process, so the self-contained class for 2015-16 was the "then-current educational placement" for the purpose of stay put under § 1415. *Id.* Accordingly, the placement became effective at the end of the 2014-15 academic year, as "[t]he status quo at the time of the hearing request was the anticipated entry into the self-contained program." *Id.* at 1098.

In this case, the parents prevailed at the due process proceedings, which makes it very different from *N.E.*, in which this Court was concerned that the parents had filed their due process challenge after the second stage of the IEP had been scheduled to start. *N.E.*, 843 F.3d at 1097. This Court expressed concern that a decision otherwise would allow parents to wait until a new school year was scheduled to take affect and "enforce the terms of a preferred old IEP during the course of a new school year while their due process appeal is being litigated" and "undermine the cooperative process envisioned by the IDEA." *Id.*

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each child with a disability within its jurisdiction, an IEP." 34 C.F.R. § 300.323(a). This regulation is, like stay put, designed to ensure stability and continuity for educating students with disabilities.

Here, given the parents' victory in due process and the school district's decision to continue the controversy by appealing the hearing officer's decision on the merits,[9] those concerns are inapplicable. *Amici* are concerned that the district's position would encourage school districts to evade a hearing officer's order and deny a child the benefits of the child's parents hard-won victory, namely, a timely free appropriate public education. Further, when a school district has appealed the parents' victory, the matter is in litigation and beyond the ordinary collaborative process.

In fact, given the short time frame of the district court's order, the school district's decision to appeal indicates that the district believed that Perkins was the stay put placement. If it thought that there would automatically be a transition to an in-state placement as of February 17, 2018, there was little point in appealing. It was unlikely that the district would obtain a court decision on the merits before February 17, 2018, and once the student returned to Alaska for school, the appeal would be moot, as the hearing officer declined to award any compensatory education. *See* (*In re M.G.*, Order, at p. 14).

If an administrative decision establishes a stay put placement, the student is entitled to maintain that placement until the parents agree to a change, even if the

[9] *Amici* have found that school districts frequently decide to accept hearing officer decisions when parents appeal and do not appeal.

school district subsequently offers a program deemed appropriate by the hearing officer. For example, in one case, the district court held:

> The Hearing Officer's decisions that the District did not offer appropriate IEPs at the beginning of the 2013-14 school year effectively endorse parents' initial decision to enroll the twins at [the private school] and makes [the private school] the twins' pendent placement for purposes of § 1415(j) . . . . Under the stay put provision, and the Court of Appeals' decision in *M.R.*, the District is obligated to fund the twins' education at ASUA for the entirety of the 2013-14 school year even though the Hearing Officer also found that the District offered the twins a FAPE in December 2013.

Sch. Dist. of Philadelphia v. Kirsch, 2015 U.S. Dist. LEXIS 160471, at **58-59 (E.D. Pa. Nov. 30, 2015), *aff'd in relevant part and rev'd in part on other grounds*, 2018 U.S. App. LEXIS 2819 (3d Cir. 2018).[10]

As noted at the beginning of this section, the hearing decision in this case only provided for a single educational program for the student (Perkins), and it did not specify a particular placement as appropriate after February 17, 2018. (*In re M.G.*, Order, at pp. 13-14). Rather, it set out a process for the parties to follow in determining the appropriate placement, and it specifically contemplated that there would be at least two options considered for placement: continued placement at Perkins and transition to an unidentified educational program in Alaska. *Id.* Thus, the decision stated that the Hearing Officer expected the parties to "collaborate to

[10] The Third Circuit did not review the stay put decision because the school district did not appeal from application of the stay put provision under these circumstances. *Kirsch*, 2018 U.S. App. LEXIS 2819, at *28 n.10.

determine if he is ready to return to ASD or would benefit from increased time at Perkins."

The Hearing Officer was well aware that it was possible that the parties would continue to disagree about the placement, and specifically stated, "If there is a disagreement, parents will have their rights under the IDEA to pursue a remedy." *Id.* at 14. And one of those rights is to continued placement at Perkins pending the completion of litigation over the disagreement between the parties. *See* §1415(j).

Further, because this case involves a hearing officer's order of placement following a hearing, cases involving placements obtained through settlement agreements are inapplicable here. As *Amici* know well, because stay put requires a school to maintain that placement until litigation is concluded, which could take years, stay put is often a sticking point in settlement negotiations. Schools often strongly prefer to have the prior public-school placement as the stay put placement rather than a private school. Thus, rather than agree to an IEP providing for a private school, schools commonly agree only to reimburse tuition for a particular time period, so once that period ends, pendency reverts to the original public-school placement.

Because of the importance of stay put following a parent's victory in due process, just this week the Third Circuit held that pendency is implied in a 10-day settlement offer under 20 U.S.C. § 1415(i)(3)(D)(i). *Rena C. v. Colonial Sch. Dist.*,

2018 U.S. App. LEXIS 12461, **15-17 (3rd Cir. May 14, 2018). The Third Circuit held that, "by agreeing, without limitations, to pay tuition at a private school, the school district, as the local educational agency, agrees that the private school placement is appropriate and that paying tuition there fulfills its obligation to provide a free and appropriate public education. *Id.* at *18. Therefore, such a placement becomes the stay put placement. *Id.* As a result, this new decision casts doubt on the continued validity of the district court's decision in *K.L. v. Berlin Borough Bd. of Educ.*, 2013 U.S. Dist. Lexis 111047, at *13 (D.N.J. Aug. 7, 2013).

Additionally, courts have recognized that, to obtain a settlement agreement on tuition reimbursement or on placement at a private school, parents may compromise their rights under stay put for public funding for subsequent periods of time. *See N.W. v. Boone Cty. Bd. of Educ.*, 763 F.3d 611, 618 (6th Cir. 2014) (settlement agreement provided that the parties did not agree on the educational placement); *Verhoeven v. Brunswick Sch. Comm.*, 207 F.3d 1 (1st Cir. 1999) (settlement agreement was limited to temporary placement); *K.L.*, 2013 U.S. Dist. Lexis 11047, at *13; *G.M. v. Drycreek Jt. Elem. Sch. Dist.*, 2010 U.S. Dist, Lexis 136187, at *5 (E.D. Cal. 2010) (settlement agreement limited contract with specific reading instructor to one academic year)[11]. Courts therefore have recognized that the parents

[11] The court also held that the change at issue was personnel (choice of reading instructor) and not the type of change that constitutes that a change in placement, so

may agree to waive the stay put placement in a settlement agreement as part of the bargain to obtain their desired placement.

Nevertheless, for those parents who do not negotiate a settlement agreement which defines the stay put placement, and instead who prevail in a due process hearing with a hearing officer finding that the school district's proposed placement is inappropriate, the parents' placement becomes the stay put placement. Thus, for stay put to provide children with any meaningful protection, it is essential that the term "then-current educational placement" apply only to an actual placement, and not to something as amorphous as a new transitional program to be created for the student following additional assessments, as discussed in the Hearing Officer's order. Accordingly, *Amici* remain very concerned that a decision from this Court reversing the district court's decision would serve to permit school districts to evade the requirements of stay put without first proving to a hearing officer or a court that its proposed program would provide the student with FAPE.

V. CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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stay put did not apply at all. *G.M. v. Drycreek Joint Elem. Sch. Dist.*, 2010 U.S. Dist. LEXIS 136187.

Dated: May 16, 2018

Respectfully submitted,

By: /s/ Selene Almazan-Altobelli
SELENE ALMAZAN-ALTOBELLI
CATHERINE MERINO REISMAN
ELLEN SAIDEMAN
Council of Parent Attorneys and Advocates, Inc.
P.O. BOX 6767
Towson, Maryland 21285
(844) 426-7224
Counsel for Amici Curiae
Council of Parent Attorneys and
Advocates, Inc. and National
Disability Rights Network

CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. 29 AND 32(a)(7)(C) AND CIRCUIT COURT RULE 32-1 FOR CASE NUMBER 18-35229

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached amici brief is proportionately spaced, has a typeface of 14 points and contains 5,574 words.

Dated: May 16, 2018

/s/ Selene Almazan-Altobelli
SELENE ALMAZAN-ALTOBELLI
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on May 16, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF if they are registered users, or if they are not, by serving a true copy and correct copy at the addresses below.

Disability Law Center of Alaska
Mark Regan
3330 Arctic Blvd., Suite 103
Anchorage, Alaska 99503

Gregory Scott Fisher
Davis Wright Tremaine LLP
Suite 1100
188 W. Northern Lights Boulevard
Anchorage, AK 99503

/s/ Selene Almazan-Altobelli
SELENE ALMAZAN-ALTOBELLI
Attorney for Amici Curiae