

# COURTS MISINTERPRET “STAY PUT” PROVISION OF INDIVIDUALS WITH DISABILITIES EDUCATION ACT: DID CONGRESS REALLY INTEND TO TAKE SERVICES AWAY FROM CHILDREN WITH DISABILITIES?

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## I. INTRODUCTION

The Individuals with Disabilities Education Act (IDEA) was first implemented by Congress in 1975 in response to a growing national concern that at the time there were more than eight million children with disabilities in the United States—one million of whom were excluded entirely from the public school system.<sup>1</sup> More than thirty years and several amendments later, the U.S. Department of Education reports that “[t]he majority of children with disabilities are now being educated in their neighborhood schools in regular classrooms with their non-disabled peers” and “[h]igh school graduation rates and employment rates among youth with disabilities” have dramatically increased.<sup>2</sup> The IDEA has made significant improvements in the quality of life for children with disabilities over the past thirty years, but today Congress and parents of children with disabilities are looking for better results.<sup>3</sup> As described by the U.S. Department of Education, “[the IDEA] issued a national challenge to ensure access to education for all children with disabilities, [and] the 1997 Amendments to IDEA articulated a new challenge to improve results for these children and their families.”<sup>4</sup>

In order for the IDEA to facilitate better results for children with disabilities, it is crucial for the courts to interpret IDEA provisions with Congress’s intent in mind when the statutory provision’s plain language would bring about absurd results. Currently, federal circuit courts disagree over the definition of a phrase in the “stay put” provision, a procedural safeguard placed in the IDEA to protect the rights of children with disabilities during a placement dispute. At issue between the circuit courts is what “then-current educational placement” of a child is when the child has an Individualized Family Service Plan (IFSP) under Part C of the IDEA and the parents and school district cannot agree on the child’s first

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1. See OFFICE OF SPECIAL EDUC. & REHABILITATIVE SERVS., U.S. DEP’T OF EDUC., HISTORY: TWENTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA, [hereinafter U.S. DEP’T OF EDUC.], *available at* <http://www.ed.gov/policy/speced/leg/idea/history.pdf> (discussing the origins and evolution of IDEA).

2. *Id.*

3. See *id.* (stating that the “IDEA must build on its previous support for *equality of access* and continue to expand and strengthen its support for *quality programs and services*”).

4. *Id.*

Individualized Education Plan (IEP) under Part B of the IDEA. Federal circuit courts should honor Congress's intent and find that the "then-current educational placement" of a child in this situation is determined by the child's IFSP.

The lives of children with disabilities are significantly impacted by federal circuit courts' interpretations of the IDEA's stay put provision. This Note will focus on autism. The effect of IDEA interpretations on autism is of utmost importance because autism is the fastest-growing developmental disability in the United States and has no known cure.<sup>5</sup> Individuals with autism are resistant to change and once they become comfortable in their environment, any sudden changes or unanticipated new expectations will cause them extreme stress and confusion.<sup>6</sup> For this reason, children with autism would be adversely impacted by an interpretation of the stay put provision that strictly follows the plain language of the statute—thus ignoring Congress's intent. The result of the plain language interpretation of the statute would be to rush the child into a new educational environment—likely without any treatment—while the dispute between the parents and the school continues.

## II. IDEA HISTORY AND BACKGROUND

The IDEA was first passed as Public Law 94-142 in 1975 and was originally entitled the Education for All Handicapped Children Act of 1975 (EAHCA).<sup>7</sup> The Act had four main purposes: (1) to guarantee all children with disabilities "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs;" (2) to protect the rights of children with disabilities and their parents; (3) "to assist States and localities [in providing] for the education of all children [with disabilities];" and (4) "to assess and assure the effectiveness of efforts to educate all [children with disabilities]."<sup>8</sup> As described by the U.S. Department of Education, Public Law 94-142 was a result of Congress's "concern for two groups of children: the more than 1

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5. See Autism Society of America, What is Autism: Facts and Stats, [http://www.autism-society.org/site/PageServer?pagename=about\\_what\\_is\\_factsstats](http://www.autism-society.org/site/PageServer?pagename=about_what_is_factsstats) (last visited Mar. 8, 2009) [hereinafter Facts and Stats].

6. See Autism Society of America, Understanding and Evaluating Your Options, [http://www.autism-society.org/site/PageServer?pagename=life\\_treat\\_options](http://www.autism-society.org/site/PageServer?pagename=life_treat_options) (last updated Jan. 24, 2008) [hereinafter Understanding and Evaluating].

7. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773.

8. *Id.* § 601(c), 89 Stat. at 775.

million children with disabilities who were excluded entirely from the education system and the children with disabilities who had only limited access to the education system and were therefore denied an appropriate education.”<sup>9</sup>

*A. Development of the IDEA Through Key Amendments*

Since 1975, the IDEA has gone through many amendments in response to national concerns regarding access to education for all children with disabilities.<sup>10</sup> The 1986 Amendments made states responsible for providing services to children with disabilities from birth.<sup>11</sup> Congress then enacted the 1991 Amendments to ensure a smooth transition for children with disabilities from early intervention services to special education services in preschool programs.<sup>12</sup> Congress also first specifically identified autism as a disability in the 1991 Amendments.<sup>13</sup> Other amendments, such as the 1983 Amendments,<sup>14</sup> the 1990 Amendments that changed the Act’s name to the IDEA,<sup>15</sup> and the 1997 Amendments<sup>16</sup> “supported initiatives for transition services from high school to adult living.”<sup>17</sup> Most recently, the 2004 amendments changed the Act’s name to “Individuals with Disabilities Education Improvement Act.”<sup>18</sup> Because the Act is most commonly known as the IDEA, it will be referred to by that name throughout this Note.

*B. The “Stay Put” Provision and Part B of the IDEA*

The “stay put” provision in Part B of the IDEA was part of the

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9. U.S. DEP’T OF EDUC., *supra* note 1 (internal quotations omitted).

10. *See, e.g., id.* (discussing the evolution of the IDEA).

11. *See* Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, sec. 101, § 671(b), 100 Stat. 1145.

12. Education of the Handicapped Act Amendments of 1991, Pub. L. No. 102-119, sec. 5, § 613(a)(15), 105 Stat. 587, 591.

13. *See* H.R. REP. NO. 102-198, at 32 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 310, 340 (defining “children with disabilities”).

14. Individuals with Disabilities Education Act Amendments of 1983, Pub. L. No. 98-199, 97 Stat. 1357.

15. Individuals with Disabilities Education Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103.

16. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37.

17. U.S. DEP’T OF EDUC., *supra* note 1.

18. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647.

EAHCA in 1975. At the time, Congress was not providing for early intervention services and was only considering funding for special education and related services to children between the ages of three and twenty-one years old—school-age children.<sup>19</sup> The stay put provision in Part B of the IDEA states:

[D]uring 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.<sup>20</sup>

1. *Part B's Individualized Education Plan*

Part B requires school districts to work with the parents of a child with a disability to prepare an IEP.<sup>21</sup> The Autism Society of America calls the IEP “the cornerstone for the education of a child with a disability.”<sup>22</sup> A child’s IEP contains his or her special education plan and goals for the school year, outlines services that child needs to help meet those goals, and includes a method of evaluating the child’s progress.<sup>23</sup> A child’s IEP must be evaluated at least once a year and a parent may request a review or revision of his or her child’s IEP at any time.<sup>24</sup> When an IEP meeting is held, the following individuals must be invited:

[1] One or both of the child’s parents[,] [2] the child’s teacher or prospective teacher[,] [3] a representative of the public agency (local education agency), other than the child’s teacher, who is qualified to provide or supervise the provision of special education[,] [4] the child, if appropriate[,] [5] other individuals at the discretion of the parent or agency (such as a physician,

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19. See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, sec. 5, § 612(2)(B), 89 Stat. 773, 780.

20. 20 U.S.C. § 1415(j) (2006).

21. See *id.* § 1414(a)(1)(D).

22. Autism Society of America, Individualized Education Plan (IEP), [http://www.autism-society.org/site/PageServer?pagename=life\\_edu\\_IEP](http://www.autism-society.org/site/PageServer?pagename=life_edu_IEP) (last visited Mar. 8, 2009) [hereinafter IEP].

23. § 1414(d).

24. *Id.* § 1414(d)(4)(A).

advocate, or neighbor).<sup>25</sup>

### C. Part C of the IDEA

As previously mentioned, Part B has been included in the IDEA since the Act was passed in 1975 and provides special education and other related services to school-age children.<sup>26</sup> In the 1986 Amendments, Congress added Part C to the IDEA, which provides services for infants and toddlers with disabilities before they reach school age.<sup>27</sup> It is important to note that Part C of the IDEA was originally called Part H; however, for clarity purposes, it will be called Part C throughout this discussion.<sup>28</sup>

#### 1. Part C's IFSP

Under Part C, states are to identify infants and toddlers with disabilities, provide early intervention services to those children and their families, and develop IFSPs to identify each child's developmental needs and the particular services necessary to meet those needs.<sup>29</sup> IDEA defines "infants and toddlers [with disabilities]" as children from birth to age two who are in need of early intervention services because they "are experiencing developmental delays . . . in one or more of the following areas: [c]ognitive development, physical development, language and speech development, psychosocial development, or self-help skills," or they have been diagnosed with a "physical or mental condition which has a high probability of resulting in developmental delay."<sup>30</sup> A multidisciplinary team that includes family members and two or more professionals is responsible for evaluating the infant or toddler and making this determination.<sup>31</sup>

An IFSP guides the early intervention process for children with disabilities and their families.<sup>32</sup> The IFSP must be in writing and contain

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25. IEP, *supra* note 22.

26. See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, sec. 5, § 611, 89 Stat. 773, 776.

27. Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, 100 Stat. 1145.

28. See *id.*

29. *Id.*

30. *Id.* §§ 672(1)(A), (B), 100 Stat. at 1146.

31. See Learning Disabilities Association of America, Guidelines for the Individualized Family Service Plan (IFSP) Under Part C of the IDEA (Jan. 2002), <http://www.ldanatl.org/aboutld/professionals/guidelines.asp>.

32. Mary Beth Bruder, *The Individual Family Service Plan (IFSP)* 1 (Inst. Of

statements of the following: (1) the child's present levels of development; (2) the family's concerns relating to the child's development; (3) the goals for the child and the methods for achieving those goals; (4) the specific early intervention services necessary to meet the child's and family's unique needs; (5) the natural environments where services will be provided; (6) the duration of services; (7) the names of service providers who will implement the plan and coordinate with other agencies and individuals; and (8) the steps to encourage the child's transition to preschool or other appropriate services.<sup>33</sup>

An IFSP differs from an IEP in several ways.<sup>34</sup> First, the IFSP centers on the child's family rather than on the child.<sup>35</sup> Second, it focuses on natural environments such as the child's home and community settings, including "parks, childcare, and gym classes."<sup>36</sup> Third, the IFSP includes activities with multiple agencies outside the scope of Part C in order to integrate the child's services.<sup>37</sup> Finally, it identifies a service coordinator that assists the family during the "development, implementation, and evaluation of the IFSP."<sup>38</sup>

## 2. *Part C's "Stay Put" Provision*

The passage of the 1986 Amendments revealed that "Congress recognized that certain special education needs could be mitigated if children's developmental disabilities were addressed before they reached the age of 3."<sup>39</sup> As in Part B, Congress enacted a stay put provision for parents who disagreed with a proposed change in services provided to their infants and toddlers with disabilities to ensure that those services would be maintained during any dispute.<sup>40</sup> The stay put provision included in Part C states:

During the pendency of any proceeding or action involving a

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Educ. Scis., Working Paper No. E605, 2000), *available at* [http://www.education.com/reference/article/Ref\\_Individual\\_Family/](http://www.education.com/reference/article/Ref_Individual_Family/).

33. *See id.* at 2–3.

34. *Id.* at 3.

35. *See id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *D.P. v. Sch. Bd. of Broward County*, 483 F.3d 725, 734 (11th Cir. 2007).

40. *See* Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, sec. 101, § 680(7), 100 Stat. 1145, 1152.

complaint, unless the State agency and the parents or guardian otherwise agree, the child shall continue to receive the appropriate early interventions services currently being provided or if applying for initial services shall receive the services not in dispute.<sup>41</sup>

Statistics provided by the U.S. Department of Education show that thousands of families across the United States use early intervention services under Part C of the IDEA.<sup>42</sup> By the end of 2005, approximately 294,000 infants and toddlers were receiving early intervention services.<sup>43</sup> In addition, in 2004 approximately 108,000 infants and toddlers “transitioned out of Part C . . . because they were Part B eligible.”<sup>44</sup>

### III. AUTISM AND THE IDEA

The public schooling of all children with disabilities who require special education services is governed by the IDEA.<sup>45</sup> Each disability classification represented in the general disability definition presents a unique challenge and deeply affects the families involved. However, the discussion in this Note will focus on autism. Viewing the IDEA provisions from an autism perspective allows one to see clearly the damaging effects on a child with a disability and the child’s family when courts choose to follow the plain language of the IDEA without considering legislative intent.

#### A. Autism Statistics and Characteristics

Statistics on autism prevalence are alarming. Autism is the fastest-growing developmental disability, increasing at a rate of between ten and seventeen percent each year and occurring in 1 out of every 150 births.<sup>46</sup> The Autism Society of America (ASA) estimates the number of individuals with autism in the United States will reach four million in the

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41. *Id.*

42. *See* NAT’L EARLY CHILDHOOD TECHNICAL ASSISTANCE CTR., FPG CHILD DEV. INST., UNIV. OF N.C., PART C UPDATES (Joan Danaher et al. eds., 2007) (compiling information for Part C of IDEA).

43. *Id.* at 91 (citation omitted).

44. *Id.* at 123 (citation omitted).

45. *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773.

46. Autism Society of America, What are Autism Spectrum Disorders? (June 5, 2009), [http://www.autism-society.org/site/PageServer?pagename=about\\_what\\_is\\_hereinafter\\_Autism\\_Spectrum\\_Disorders](http://www.autism-society.org/site/PageServer?pagename=about_what_is_hereinafter_Autism_Spectrum_Disorders) [hereinafter Autism Spectrum Disorders].



next decade.<sup>47</sup> Autism is more common among children than Down syndrome, diabetes, cancer, cystic fibrosis, hemophilia, and sickle-cell disease.<sup>48</sup> Currently, autism costs the United States \$90 billion every year, ninety percent of which is spent in adult services.<sup>49</sup> In ten years, the ASA estimates the annual cost of autism will be between \$200 and \$400 billion.<sup>50</sup> The ASA also reports that the cost of lifelong care for individuals with autism can be reduced by two-thirds with early diagnosis and intervention, which indirectly puts significant pressure on the IDEA for results.<sup>51</sup>

In order to understand the relationship between the IDEA and autism, a basic understanding of autism is necessary. The ASA defines autism as “a complex developmental disability that typically appears during the first two years of life and is the result of a neurological disorder that affects the functioning of the brain.”<sup>52</sup> Autism is called a “spectrum disorder” because there are different forms of autism ranging from mild to severe.<sup>53</sup> However, all of these forms of autism can be defined by a certain set of behaviors that individuals with autism may display in any combination and with varying degrees of severity.<sup>54</sup> “Autism is characterized by impaired social interaction, problems with verbal and nonverbal communication, and unusual, repetitive, or severely limited activities and interests.”<sup>55</sup>

Although there is no cure for autism, there are therapies,

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47. *Id.*

48. See Angela D. Liese et al., SEARCH for Diabetes in Youth Study Group, *The Burden of Diabetes Mellitus Among US Youth: Prevalence Estimates from the SEARCH for Diabetes Youth Study*, 118 PEDIATRICS 1510, 1514 (2006) (diabetes statistics); NAT'L CANCER INST., SEER CANCER STATISTICS REVIEW 1975–2004 § XXVIII (L.A.G. Ries et al. eds., 2007), available at [http://seer.cancer.gov/csr/1975\\_2004/results\\_merged/sect\\_28\\_childhood\\_cancer.pdf](http://seer.cancer.gov/csr/1975_2004/results_merged/sect_28_childhood_cancer.pdf) (cancer statistics); National Human Genome Research Institute, Specific Genetic Disorders (Apr. 14, 2009) <http://www.genome.gov/10001204> (Down syndrome, cystic fibrosis, sickle-cell, and hemophilia statistics).

49. Facts and Stats, *supra* note 5 (citation omitted)

50. *Id.*

51. *Id.*

52. Autism Spectrum Disorders, *supra* note 46.

53. See Autism Society of America, Characteristics of Autism (Jan. 23, 2008), [http://www.autism-society.org/site/PageServer?pagename=about\\_what\\_is\\_char](http://www.autism-society.org/site/PageServer?pagename=about_what_is_char) [hereinafter Characteristics of Autism].

54. *Id.*

55. National Institute of Neurological Disorders & Stroke, Autism Fact Sheet (Apr. 24, 2009), [http://www.ninds.nih.gov/disorders/autism/detail\\_autism.htm](http://www.ninds.nih.gov/disorders/autism/detail_autism.htm).

medications, and behavioral interventions that can lessen specific symptoms and help an individual with autism reach his or her highest potential.<sup>56</sup> In fact, with appropriate services, some children with autism develop to a level at which they are indistinguishable from their classmates without autism.<sup>57</sup> Most individuals with autism respond best to highly structured educational programs specifically designed to meet their needs.<sup>58</sup> Experts agree that treatment should begin as early as possible because early intervention “results in improved outcomes in most young children with [autism].”<sup>59</sup> With appropriate, consistent, and early intervention, it is possible for children with autism to become self-sufficient, as opposed to “permanent financial and emotional burdens on their families and on the public treasury.”<sup>60</sup>

*B. Congress Makes Autism Research and Education a National Priority*

In the years following the 1991 Amendments to the IDEA, Congress started passing legislation that made autism a national priority. Under the Children’s Health Act of 2000, the National Institutes of Health (NIH) were ordered to expand and intensify autism research and create an Interagency Autism Coordinating Committee to coordinate autism research and related efforts within the Department of Health and Human Services.<sup>61</sup> In 2004, the IDEA was amended in order “to encourage the Department of Education to support programs to train special education teachers in autism disorders . . . and programs providing technical assistance and in-service training to schools and personnel servicing children with autism spectrum disorders.”<sup>62</sup> Most recently, the Combating Autism Act of 2006 was enacted with the purpose of “increas[ing] funding for autism research, detection and intervention and to promote interagency coordination of autism-related activities through the NIH.”<sup>63</sup> Congress

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56. *See id.*

57. *See* Brief of Amicus Curiae Autism Speaks in Support of Petitioners at 23, D.P. *ex rel.* E.P. v. Sch. Bd. of Broward County, 128 S. Ct. 1080 (2007) (No. 07-613).

58. *See* NAT’L INST. OF MENTAL HEALTH, NAT’L. INSTS. OF HEALTH, AUTISM SPECTRUM DISORDERS 18 (2008), *available at* <http://www.nimh.nih.gov/health/publications/autism/complete-index.shtml>.

59. *Id.* at 13 (citation omitted).

60. Brief of Amicus Curiae Autism Speaks in Support of Petitioners, *supra* note 57, at 11.

61. *See* 42 U.S.C. § 284g (2000).

62. Brief of Amicus Curiae Autism Speaks in Support of Petitioners, *supra* note 57, at 8 (citation omitted).

63. *Id.* (citing Combating Autism Act of 2006, Pub. L. No. 109-416, 120 Stat.

noted the importance of early intervention services for children with autism by stating that “children with autism spectrum disorder identified early and enrolled in early intervention programs show significant improvements in their language, cognitive, social, and motor skills, as well as in their future educational attainment and decreased need for special education services.”<sup>64</sup>

### C. *Autism Individualized Education Plans*

Parents of children with disabilities rely on the IDEA to get their children needed services. Because autism is a spectrum disorder that manifests itself differently in each affected individual, there is no one-size-fits-all approach to treatment; therefore, it is important to try several approaches to find the one that works best for that individual.<sup>65</sup> The ASA states that “whatever the level of impairment, the educational program for an individual with autism should be based on the unique needs of the student.”<sup>66</sup> This makes the IEP portion of the IDEA crucial to the educational development and progress of a student with autism. According to the ASA, “[e]ducational planning for students with autism often addresses a wide range of skill development, including academics, communication and language skills, social skills, self-help skills, behavioral issues, and leisure skills.”<sup>67</sup>

### D. *Autism Individualized Family Service Plans*

Autism can be “reliably detected by the age of 3 years, and in some cases as early as 18 months.”<sup>68</sup> In fact, recent studies suggest that in the future, children with autism may be accurately diagnosed by one year of age or younger.<sup>69</sup> Parents are typically the first to notice a delay in their child’s development compared to that of other children.<sup>70</sup> As soon as autism is detected, treatment should begin.<sup>71</sup> Interventions for a child

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64. S. REP. NO. 109-318, at 10 (2006).

65. See Autism Society of America, Unique Needs and Abilities, [http://www.autism-society.org/site/PageServer?pagename=life\\_edu\\_unique](http://www.autism-society.org/site/PageServer?pagename=life_edu_unique) (last visited Apr. 1, 2009).

66. *Id.*

67. *Id.*

68. NAT’L INST. OF MENTAL HEALTH, *supra* note 58, at 2 (citation omitted).

69. *Id.*

70. *See id.*

71. *See id.*

younger than three years of age should “target specific deficits in learning, language, imitation, attention, motivation, compliance, and initiative of interaction” and should “[i]nclude[] . . . behavioral methods, communication, occupational and physical therapy along with social play interventions.”<sup>72</sup>

#### IV. “CURRENT EDUCATIONAL PLACEMENT” IS A CHILD’S IFSP IF THERE IS NO VALID IEP

Under Part B of the IDEA, if the school district and parents of a child with a disability cannot agree on an IEP, parents have the right to invoke the stay put provision, which allows the child to stay in his or her “then-current educational placement.”<sup>73</sup> Similar to Part B, during a dispute under Part C of the IDEA, parents have the right to invoke the stay put provision to allow the infant or toddler to continue to receive the appropriate early intervention services currently being provided.<sup>74</sup> If the dispute is over what would be the child’s first IEP, the child is to receive the services not in dispute.<sup>75</sup> Therefore, whether under Part B or Part C, Congress intended that services being provided under the IDEA would continue to be provided if a dispute occurred regarding a child’s proper placement.<sup>76</sup>

At issue between the circuit courts is what the “then-current educational placement” of a child is when a child has an IFSP under Part C of the IDEA and the parents and school district cannot agree on a child’s first IEP.<sup>77</sup> Because the IDEA does not define “then-current educational

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72. *Id.* at 20.

73. *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, sec. 5, § 615(e)(3), 89 Stat. 773, 789.

74. *See* Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, sec. 101, § 680(7), 100 Stat. 1145, 1152.

75. *See id.*

76. *See id.*; § 615(e)(3), 89 Stat. at 789.

77. *See* D.P. *ex rel.* E.P. v. Sch. Bd. of Broward County, 483 F.3d 725, 730 (11th Cir. 2007) (holding that the IDEA does not entitle children with disabilities to continue receiving services pursuant to their IFSPs until their valid IEPs are put in place); Pardini v. Allegheny Intermediate Unit, 420 F.3d 181, 192 (3d Cir. 2005) (holding that a child’s IFSP is his or her “then-current education placement” for purposes of the “stay put” provision); Drinker *ex rel.* Drinker v. Colonial Sch. Dist., 78 F.3d 859, 867 (3d Cir. 1996) (citing Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625–26 (6th Cir. 1990)) (holding current educational placement to mean the operative placement usually functioning at the time the “stay put” provision of the IDEA was invoked).

placement,” federal circuit courts have been struggling to determine its meaning in different situations.<sup>78</sup> The Ninth Circuit has defined it to mean “typically the placement described in the child’s most recently implemented IEP.”<sup>79</sup> In *Drinker ex rel. Drinker v. Colonial School District*, the Third Circuit interpreted it to mean “the operative placement actually functioning at the time . . . when the stay put provision of the IDEA was invoked.”<sup>80</sup> And yet another circuit, the Sixth Circuit, has defined it as “the [placement at the time of] the previously implemented IEP.”<sup>81</sup> The Third Circuit in *Pardini v. Allegheny Intermediate Unit* became the first federal circuit court to decide a child’s IFSP is his or her “then-current education placement” for purposes of the stay put provision when the child has an IFSP under Part C of the IDEA and the parents and school district cannot agree on a child’s first IEP.<sup>82</sup>

*A. The IDEA Should Be Read in Its Context to Allow for a Smooth Transition Between Part C and Part B*

Two years after the Third Circuit’s *Pardini* decision, the Eleventh Circuit called the case “incorrectly decided” in *D.P. ex rel. E.P. v. School Board of Broward County*.<sup>83</sup> The Eleventh Circuit relied on what it called the “plain language of the ‘stay put’ provision” to determine that “the IDEA does not entitle [disabled children] to continue receiving services pursuant to their IFSPs until . . . valid IEPs are put in place for them.”<sup>84</sup> The Eleventh Circuit also noted that its decision is in line with the Department of Education’s interpretation of the statute.<sup>85</sup> The appellants (parents) in this case argued that through the use of the disjunctive “or,” the statute provided alternative placements for the children.<sup>86</sup> Therefore, the appellants believed their children could have been placed in the public

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78. See 20 U.S.C. § 1415(j) (2006).

79. *Johnson ex rel. Johnson v. Special Educ. Hearing Office*, 287 F.3d 1176, 1180 (9th Cir. 2002) (citing *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990)).

80. *Drinker*, 78 F.3d at 867 (citing *Sch. Comm. Of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 372–74 (1985)).

81. *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990) (citation omitted).

82. *Pardini v. Allegheny Intermediate Unit*, 420 F.3d 181, 192 (3d Cir. 2005).

83. *D.P. ex rel. E.P. v. Sch. Bd. of Broward County*, 483 F.3d 725, 730 (11th Cir. 2007).

84. *Id.* at 730.

85. See *id.*

86. *Id.* at 729.

school program or could have remained in their then-current educational placement.<sup>87</sup> The court disagreed with the parents and found the disjunctive “or” provided alternatives that were mutually exclusive.<sup>88</sup> Therefore, if the education agency and the parents could not agree on a placement for the child, which alternative applies depends only on “whether the child is applying for initial admission to a public school.”<sup>89</sup> “If the child is not applying for initial admission, he [must] remain in his existing educational placement. Or, if the child is applying for initial admission, he [must] be placed in the public school program.”<sup>90</sup> Therefore, the Eleventh Circuit found the children could not continue receiving services under their IFSPs.<sup>91</sup>

Judge Barkett’s dissenting opinion in *Broward County* is the correct interpretation of the stay put provision when a child has an IFSP and the child’s parents and the school district cannot agree on the child’s first IEP.<sup>92</sup> Judge Barkett stated that “[a]lthough we are generally to apply a statutory provision’s plain language, we must read the language in context, and consider the statute’s overarching purpose in order to avoid absurd results.”<sup>93</sup> Judge Barkett noted that when read individually, both Part C and Part B prohibit “the disruption of services during a placement dispute.”<sup>94</sup> In addition, Congress intended there to be a smooth transition from Part C to Part B.<sup>95</sup> Therefore, applying the stay put provision to reach a completely opposite result—the withdrawal of current services to a disabled child when he or she reaches school age—is absurd.<sup>96</sup> Judge Barkett found the majority’s holding to be inconsistent with the court’s reasoning in *M.M. ex rel. C.M. v. School Board of Miami-Dade County*.<sup>97</sup> In *Miami-Dade*, the court found that “‘early intervention’ services . . . may also constitute ‘special education and related services’ for purposes of

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87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *See id.* at 730.

92. *Id.* at 732 (Barkett, J., dissenting) (stating that a child’s current educational placement is his IFSP when he has had an IFSP under Part C of the IDEA and the parents and school district cannot agree on the child’s first IEP).

93. *Id.* (footnotes omitted).

94. *Id.*

95. *See id.*

96. *Id.*

97. *Id.* at 736 (citing *M.M. ex rel. C.M. v. Sch. Bd. of Miami-Dade County (Miami-Dade)*, 437 F.3d 1085 (11th Cir. 2006)).

establishing eligibility for reimbursement for private school expenses when a child is denied a FAPE.”<sup>98</sup> FAPE is the acronym for Free and Appropriate Public Education.<sup>99</sup> If early intervention services may constitute special education services for purposes of establishing eligibility for reimbursement under the IDEA, then under the stay put provision they may also be a child’s current educational placement.<sup>100</sup> Therefore, a child’s ISFP can constitute the child’s current educational placement when a child’s parents and school district cannot agree on the child’s first IEP.

### 1. *Smooth Transition Crucial to the Development of Children with Autism*

A smooth transition between Part C and Part B is crucial in the development of a child with autism.<sup>101</sup> Unfortunately, the window of opportunity for a child with autism to receive early intervention services is small.<sup>102</sup> “As the child grows older, he or she will ‘have a far more difficult time learning the skills that he needs to function in life.’”<sup>103</sup> In addition, “children with autism have a profound ability to regress” and if intensive treatment is not maintained consistently, “you have to go back and reinvent the wheel . . . basically retool.”<sup>104</sup> Because the window of opportunity is larger when a child with autism is younger, the stay put provision is most important for younger children who are transitioning from Part C to Part B.<sup>105</sup>

### B. *History of the IDEA Shows Congress’s Intent to Provide Continuous Services to Children with Disabilities*

In 1975, Congress was only thinking about school-aged children when it enacted Part B’s stay put provision.<sup>106</sup> “The dual purposes of this

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98. *Id.* (footnote omitted).

99. *Miami-Dade*, 437 F.3d at 1095 (citation omitted).

100. *See id.* at 1098 (holding that receiving services through an early intervention program constitutes receiving special education and related services for purposes of the IDEA).

101. Brief of Amicus Curiae Autism Speaks in Support of Petitioners, *supra* note 57, at 18–19.

102. *Id.* at 2–3.

103. *Id.* at 17 (quoting *J.H. ex rel. J.D. v. Henrico County Sch. Bd.*, 326 F.3d 560, 565 (4th Cir. 2003)) (footnote omitted).

104. *J.H. ex rel. J.D. v. Henrico County Sch. Bd.*, 395 F.3d 185, 190 (4th Cir. 2005) (quoting expert testimony) (internal quotations omitted).

105. Brief of Amicus Curiae Autism Speaks in Support of Petitioners, *supra* note 57, at 18.

106. *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-

procedural safeguard were clear: to guarantee access to public school, on the one hand, and to maintain special education services where those were already being provided, on the other.”<sup>107</sup> Although Congress was not thinking about infants and toddlers with disabilities when it enacted Part B’s stay put provision, it is clear Congress would not want the stay put provision to be used to take services away from a child with a disability during a dispute.<sup>108</sup>

1. *1986 Amendments to the IDEA*

It was not until 1986 that Congress enacted Part C of the IDEA, complete with its own stay put provision to ensure services for children with disabilities would be maintained during a dispute.<sup>109</sup> The 1986 Amendments indicate that Congress wanted services for children with disabilities to be uninterrupted by requiring a smooth transition between Part C and Part B. First, Congress required IFSPs to include “the steps to be taken supporting the transition of the handicapped toddler to services provided under part B.”<sup>110</sup> Second, Congress required case management services as early intervention services to facilitate “the development of a transition plan to preschool services, where appropriate.”<sup>111</sup> Third, when different agencies were providing services, Congress found it was “essential that the agencies coordinate their efforts to transition the child to the special education system operated by the local educational agency.”<sup>112</sup> At this point, Congress also understood that it was very important for placement disputes to be resolved quickly “because an infant’s development is rapid” and “undue delay could be potentially harmful.”<sup>113</sup>

2. *1991 Amendments to the IDEA*

The 1991 Amendments to the IDEA eliminate any doubt concerning Congress’s intention to ensure a smooth transition from Part C to Part B.

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142, sec. 3, § 601(c), 89 Stat. 773, 775.

107. D.P. *ex rel.* E.P. v. Sch. Bd. of Broward County, 483 F.3d 725, 733 (11th Cir. 2007) (Barkett, J., dissenting).

108. *See id.*

109. Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, 100 Stat. 1145.

110. *Id.* § 677(7), 100 Stat. at 1150.

111. H.R. REP. NO. 99-860, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2401, 2408.

112. H.R. REP. NO. 99-860, at 6.

113. H.R. REP. NO. 99-860, at 14.



These amendments made changes to Parts B and C “to facilitate the development of a comprehensive ‘seamless’ system of services for children, aged birth to 5, inclusive, and their families” to ensure “a smooth transition for children moving from early intervention programs under [Part C] to preschool programs under part B.”<sup>114</sup> In the House Report, Congress emphasized “it is critical that there will be no gap in services when a child turns three.”<sup>115</sup>

To ensure a smooth transition, the 1991 Amendments provide that: (1) state educational agencies are to establish policies and procedures to allow for a smooth transition from services under Part C to services under Part B;<sup>116</sup> (2) an IEP or an IFSP must be in effect by the time a child with a disability turns three years old;<sup>117</sup> (3) with parents’ consent, educational agencies may continue to use IFSPs as IEPs for children between the ages of three and five;<sup>118</sup> (4) preschool grants may be used to provide a FAPE to a disabled child who will turn three years old during the school year;<sup>119</sup> (5) personnel must be trained to coordinate transition services for children with disabilities who are moving from Part C to Part B;<sup>120</sup> (6) transition arrangements that involve the families of children with disabilities must be available;<sup>121</sup> and (7) parents or guardians have the right to determine whether their child will accept or refuse an early intervention service under Part C without the threat of having to give up other early intervention services.<sup>122</sup>

### *C. Relevant Case Law Supports the Conclusion that Existing IFSPs Can Constitute Current Educational Placement*

In *Drinker*, the Third Circuit held that a child’s existing IFSP can constitute the child’s current educational placement when the child has an IFSP and the parents and the school district cannot agree on the child’s

114. H.R. REP. NO. 102-198, at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 310, 313.

115. H.R. REP. NO. 102-198, at 7.

116. *See* Individuals with Disabilities Education Act Amendments of 1991, Pub. L. No. 102-119, sec. 5, § 613(a)(15), 105 Stat. 587, 591.

117. *See id.*

118. *See id.* § 614(a)(5), 105 Stat. at 591.

119. *See id.* § 619(c)(2)(B), 105 Stat. at 591.

120. *Id.* § 676(b)(8)(D), 105 Stat. at 596.

121. *Id.* § 678(a)(8), 105 Stat. at 598.

122. *Id.* § 680(3), 105 Stat. at 598.

first IEP.<sup>123</sup> “Because the [current educational placement] connotes preservation of the status quo, it refers to the operative placement actually functioning at the time the dispute first arises.”<sup>124</sup> When a “dispute arises before any IEP has been implemented, the ‘current educational placement’ will be the operative placement under which the child is actually receiving instruction at the time the dispute arises.”<sup>125</sup> Therefore, if a child’s first valid IEP has not been implemented, a child’s current educational placement will be the child’s IFSP.

The Third Circuit in *Pardini* agreed with *Drinker* and found that “where . . . the dispute arises before any IEP has been implemented, the current educational placement will be the operative placement under which the child is actually receiving instruction at the time the dispute arises.”<sup>126</sup> Rather than simply looking at the plain language of the stay put provision, the Third Circuit looked to congressional intent, the IDEA, and the IDEA’s amendments to reach its holding.<sup>127</sup> The Third Circuit found that “Congress has clearly recognized that realities dictate that there must often be significant overlap in services provided under Part C and Part B.”<sup>128</sup> Section 1414(d)(2)(B) of Title 20 of the United States Code “specifically states that ‘an individualized family service plan . . . may serve as the IEP’ when appropriate.”<sup>129</sup> In addition, the sharing of funds in certain circumstances between Part C and Part B helped convince the Third Circuit that an IFSP can serve as an IEP if the parents agree.<sup>130</sup>

## V. FINANCIAL BURDENS OF PRIVATE EDUCATION SERVICES

The Eleventh Circuit’s decision in *Broward County* leaves families of children with autism carrying the financial burden of paying for appropriate, private educational services during the pendency of a

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123. *Drinker ex rel. Drinker v. Colonial Sch. Dist.*, 78 F.3d 859 (3d Cir. 1996).

124. *Id.* at 867 (quoting *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625–26 (6th Cir. 1990)).

125. *Id.* (quoting *Thomas*, 918 F.2d at 625–26).

126. *Pardini v. Allegheny Intermediate Unit*, 420 F.3d 181, 190 (3d Cir. 2005) (quoting *Drinker*, 78 F.3d at 867) (internal quotations omitted).

127. *See id.* at 185–87.

128. *Id.* at 186.

129. *Id.* (quoting 20 U.S.C. § 1414(d)(2)(B) (2000)).

130. *See id.* (“Part C funds can be used from the child’s third birthday to the beginning of the following school year. . . . Conversely, a state can use Part B funds to provide services to a child who is not yet eligible for preschool early intervention services and therefore would not ordinarily qualify for funding under Part B.” (citing 20 U.S.C. § 1438(3) (2000))).

dispute.<sup>131</sup> The majority in *Broward County* found that “aggrieved parents can simply pay for private educational services on their own during the pendency of the placement dispute, and then sue to recover those expenses if it is later determined that the school denied the child a FAPE.”<sup>132</sup> Although there may be some parents who can afford and find appropriate private services, for most families this is not an adequate remedy.<sup>133</sup> One study found that families of children with autism reported skipping meals, “depleting their savings, emptying their 401K plans, selling stocks,” and filing for bankruptcy to pay for their child’s therapy.<sup>134</sup> For families of children with autism, costs of private therapy “can reach or exceed \$50,000 a year.”<sup>135</sup> When compared with the median income of \$48,201 for an American household in 2006, the harsh reality becomes clear: Many families will not be able to afford the necessary private services for their child if a dispute occurs.<sup>136</sup> Even if parents are insured, services for children with autism are often not covered by private health insurance.<sup>137</sup>

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131. See D.P. *ex rel.* E.P. v. Sch. Bd. of Broward County, 483 F.3d 725, 730 (11th Cir. 2007) (holding that the IDEA does not entitle children with disabilities to continue receiving services under their IFSPs until valid IEPs are put in place).

132. *Id.* at 736 n.12 (Barkett, J., dissenting).

133. See *id.* (quoting Sch. Comm. of Burlington v. Dep’t of Educ. Of Mass., 471 U.S. 359, 370 (1985)) (“While the Supreme Court has noted that conscientious parents who have adequate means and who are reasonably confident of their assessment will often choose [to pay for private educational services on their own during the pendency of the placement dispute,] this is no remedy for parents who do not have the financial means to pay for private educational services in the first place.”) (citation and internal quotations omitted).

134. University of Missouri-Columbia, *Financial Struggles Plague Families of Children with Autism*, SCIENCE DAILY, Feb. 29, 2008, <http://www.sciencedaily.com/releases/2008/02/080229105843.htm>.

135. BROOKINGS INST. & HELP GROUP, CONFERENCE REPORT: AUTISM AND HOPE 5 (2006), available at [http://www.brookings.edu/~media/Files/events/2005/1216health%20care/20051216autism\\_conference\\_report.pdf](http://www.brookings.edu/~media/Files/events/2005/1216health%20care/20051216autism_conference_report.pdf).

136. CARMEN DENAVAS-WALK ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2006 4 (2007), available at <http://www.census.gov/prod/2007pubs/p60-233.pdf>.

137. See, e.g., AUTISM SPECTRUM DISORDER EXPERT WORKING GROUP, INTERAGENCY AUTISM COORDINATING COMM., AUTISM SPECTRUM DISORDERS ROADMAP (2005), available at <http://iacc.hhs.gov/reports/2005/services-subcommittee-report-may16.shtml> (explaining that autism spectrum disorders are “considered by [private health insurers] as a non-medical condition to be handled by the educational system[] or a mental health condition with limited coverage”); Milt Freudenheim, *Battling Insurers Over Autism Treatment*, N.Y. TIMES, Dec. 21, 2004, at C1 (“Insurers have long raised objections about the very nature of autism treatment.”).

Being a parent of a child with autism is an unpaid, full-time job.<sup>138</sup> According to the president of the Organization for Autism Research, “[n]early 60 percent of moms of kids with disabilities are unemployed; between 10 and 20 percent of fathers, too.”<sup>139</sup> Therefore, for families affected by autism, the financial burden weighs heavily. Those families who cannot afford private services will have to accept the services proposed by the school district, if the school district has even offered any.<sup>140</sup> Then they must wait “until they can challenge [the services] through the Act’s often-lengthy administrative and judicial proceedings—all the while watching their child’s window of opportunity drawing ever-nearer to closed.”<sup>141</sup>

## VI. CONCLUSION

Congress’s intent when it enacted the stay put provisions in Part B and Part C of the IDEA is clear—to prevent the disruption of services to children with disabilities. Therefore, the correct application of “then-current educational placement” of the stay put provision, when a child has an existing IFSP and the child’s parents and school district cannot agree on the child’s first IEP, is the child’s IFSP. However, federal circuit courts continue to read the stay put provision incorrectly with interpretations of “then-current educational placement” that disrupt and take away services. Not only do these interpretations contradict Congress’s intent, but they take away opportunities for children living with disabilities to progress and reach their highest potential. Families of children with autism may have to watch helplessly as their child’s window of opportunity grows smaller while they wait for a potentially lengthy dispute to be resolved. Children living with autism cannot get that time back. Therefore, it is crucial that courts look to Congress’s intent rather than the plain language of the IDEA to determine a child’s current educational placement.

Valerie Boland\*

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138. See Kristina Chew, *Job Title: Autism Mom*, AUTISM VOX, Aug. 4, 2006, <http://www.autismvox.com/job-title-autism-mom/>.

139. *Id.*

140. Brief of Amicus Curiae Autism Speaks in Support of Petitioners, *supra* note 57, at 22.

141. *Id.*

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