No.

In the Supreme Court of the United States

D.P. ON BEHALF OF E.P., D.P., AND K.P.; AND L.P. ON BEHALF OF E.P., D.P., AND K.P.,
Petitioners,

v.

SCHOOL BOARD OF BROWARD COUNTY, FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Individuals with Disabilities Education Act provides funding for the special education of children with disabilities. Early intervention services for children from birth until age three are funded under Part C of the Act, and special education and related services for children ages three to twenty-one under Part B. Both Part B and Part C contain stay-put provisions that, during administrative or judicial review of a school board's proposed educational placement for a child, "bar[] schools * * * from changing [a child's] placement over the parent's objection until all review proceedings [are] completed." *Honig* v. *Doe*, 484 U.S. 305, 324 (1988). Part B's stay-put provision states that "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). The question presented is:

When a three-year-old child transitions from early intervention services under Part C to preschool services under Part B, does Part B's stay-put provision entitle the child to continue receiving those early intervention services as his or her "then-current educational placement" until the completion of review proceedings concerning the school board's proposed preschool program for the child?

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JURISDICTION

The judgment of the court of appeals was entered on April 3, 2007. A timely petition for rehearing was denied on July 11, 2007. *Id.* at 50a. On October 3, 2007, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including November 8, 2007. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 615(j) of the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(j), provides in pertinent part:

> (j) MAINTENANCE OF CURRENT EDUCATIONAL PLACEMENT — * * * [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.

STATEMENT

The Individuals with Disabilities Education Act ("IDEA") provides funding to States for special educational services for children with disabilities. Between birth and age three, children with disabilities are eligible for early intervention services under Part C of the IDEA. When a child turns three, he becomes eligible for preschool services under Part B of the IDEA and continues to be eligible for those services until age twenty-one.

Congress in the IDEA specifically addressed situations in which there is a dispute between a child's parents and school officials regarding the sufficiency under the Act of the services that the school district plans to provide a child with disabilities. By including stay-put provisions in Part B and Part C, Congress prohibited local educational officials from altering over a parent's objection the services provided to a child until the local educational officials obtain a ruling that their proposed new plan complies with the requirements of the Act. The question here is whether Part B's stay-put provision entitles a child who has turned three, and therefore "aged out" of Part C, to continue receiving the services that had been provided under Part C when his parents have challenged the Part B plan proposed by school officials as inadequate under the IDEA.

The Eleventh Circuit held that the stay-put provision does not apply, and the parents accordingly must either accept the services, if any, that the state or local educational agency has proposed for the child, or enroll him in public school without any special accommodation for his disability. That determination squarely conflicts with a decision of the Third Circuit holding that the stay-put provision does enti-

tle a child entering Part B to continuation of previously-provided early intervention services during the pendency of a dispute. This confusion regarding the services owed three-year-olds under the IDEA imposes heavy costs for children and school districts alike. The decision below is also wholly inconsistent with the plain language of the stay-put provision and with Congress's explicit decision to protect children and their parents against unilateral changes in services by school districts. Moreover, Congress recognized the critical importance of providing services to children with disabilities in their early years and expressly mandated a "smooth and effective transition" for children moving from Part C to Part B. 20 U.S.C. § 1412(a)(9). The decision of the court below, by contrast, ensures an abrupt and ineffective transition for such children. This Court should grant review to resolve the acknowledged conflict among the lower courts regarding this issue and to correct the Eleventh Circuit's erroneous interpretation of the Act.

A. Statutory Background

Congress enacted the IDEA to fulfill "our 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). Part B of the IDEA provides funds to States for special education and related services for children ages three to twenty-one. *Id.* §§ 1411-19. Part C provides funds for early intervention services for children from birth until age three. *Id.* §§ 1431-44.

Part B was revised in 1975 to "assure that all handicapped children have available to them * * * a free appropriate public education which emphasizes special education and related services designed to

meet their unique needs." Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, sec. 3, § 601(c), 89 Stat. 773, 775. School districts receiving Part B funds must evaluate children between the ages of three and twenty-one with disabilities and provide each with an individualized education program ("IEP") that is reviewed each year. 20 U.S.C. § 1414. The IEP must assess the child's current educational performance, articulate measurable educational goals, and specify the special education and related services the school will provide. *Id.* § 1414(d)(1)(A).

In 1986, Congress added Part C to the IDEA to address the developmental disabilities of handicapped infants and toddlers. See Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, sec. 101(a), 100 Stat. 1145, 1145-55 (codified as amended at 20 U.S.C. §§ 1431-44). Congress recognized that a child's need for special educational services could be mitigated if his developmental disabilities were addressed before reaching school age. 20 U.S.C. § 1431(a)(2). Part C requires States to identify and evaluate children under the age of three with disabilities and provide early intervention services pursuant to an individualized family service plan ("IFSP"). *Id.* §§ 1435-36.

Parts B and C each "establish[] a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any decisions with which those parents disagree." *Honig* v. *Doe*, 484 U.S. 305, 308 (1988). School districts must involve parents in the development of the services plan for a child and respond to concerns expressed by par-

ents during that process. 20 U.S.C. §§ 1414(d)(3)(A)(ii) & 1436(d)(2). Parents have the right to examine any records relating to their child. *Id.* §§ 1415(b)(1) & 1439(a)(4). Parents must also receive written prior notice of any changes in the services plan for their child. *Id.* §§ 1415(b)(3) & 1439(a)(6). If parents believe the proposed services for their child are inadequate, they are entitled to an administrative hearing regarding the proposed plan. *Id.* §§ 1415(f) & 1439(a)(1). Parents may file a complaint in district court if aggrieved by the administrative decision. *Id.* §§ 1415(i)(2)(A) & 1439(a)(1).

Parts B and C also each contain a procedural safeguard, known as a "stay-put provision," designed to prevent disruptions in services during the pendency of administrative or judicial proceedings seeking review of changes in services proposed by the school district. *Id.* §§ 1415(j) & 1439(b). At issue in this litigation is Part B's stay-put provision, which provides that:

> [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.

Id. § 1415(j). Unless the parents and the school district agree to an interim placement, the stay-put provision "requires a child to remain in his or her 'then-current educational placement' during the pendency of an IDEA hearing." *Schaffer* v. *Weast*,

546 U.S. 49, 59 (2005). In creating this procedural safeguard, Congress sought to "bar[] schools, through the stay-put provision, from changing [a child's] placement over the parent's objection until all review proceedings were completed." *Honig*, 484 U.S. at 324. The stay-put provision "merely preserves the status quo." *Schaffer*, 546 U.S. at 65 n.1 (Ginsburg, J., dissenting).

Congress in 1991 amended the IDEA "to facilitate the development of a comprehensive 'seamless' system of services for children, aged birth to 5, inclusive, and their families." H.R. Rep. No. 102-198, at 4 (1991). Congress's goal was to prevent a "gap in services when a child turns three." *Id.* at 7. As a result of these and later amendments, the IDEA expressly mandates that children with disabilities "experience a smooth and effective transition" from Part C to Part B, and that an IEP be "developed" and "implemented" by a child's third birthday. 20 U.S.C. § 1412(a)(9). It also allows a child's existing IFSP under Part C to serve as his IEP under Part B if he turns three in the middle of the school year. *Id.* § 1414(d)(2)(B).

B. Factual Background

E.P., D.P., and K.P. are triplets born on January 4, 2001, residing with their parents in Broward County, Florida. Each has been diagnosed with a serious autism spectrum disorder. Prior to the triplets' third birthday, they began receiving Part C early intervention services from Florida's Early Intervention Program. App., *infra*, 27a.

The triplets turned three on January 4, 2004, "aged out" of Part C, and became eligible for services under Part B. *Id.* at 2a. Notwithstanding the statu-

tory requirement that a school district develop a Part B IEP prior to a child's third birthday (20 U.S.C. § 1412(a)(9)), respondent had not proposed IEPs for the triplets. App., *infra*, 27a. The parents accordingly requested that respondent continue the services authorized in the triplets' IFSPs until valid IEPs were developed. Respondent refused. *Ibid*. Because no appropriate special education services were offered to the triplets, petitioners were forced to continue these services at their own expense. *Ibid*.

On January 6, 2004, two days after the triplets' third birthday, their parents filed an administrative complaint with the Florida Division of Administrative Hearings requesting that the triplets continue to receive services under their IFSPs pursuant to Part B's stay-put provision (20 U.S.C. § 1415(j)) until valid IEPs were in place. App., *infra*, 3a. The parents separately sought an independent educational evaluation for the triplets in connection with the preparation of the IEPs, as authorized by 20 U.S.C. § 1415(b)(1). App., *infra*, 83a.

Nearly one month later, respondent—without acting on the parents' request for an independent educational evaluation—convened a meeting to formulate IEPs for the children. *Ibid.* Respondent subsequently proposed "temporary IEPs" for the triplets that would expire after six months. Petitioners informed respondent that they would not consent to the temporary plans. *Id.* at 44a. On August 17, 2004, petitioners filed a second administrative complaint, seeking a declaration that the temporary IEPs were invalid and again requesting that the triplets continue to receive the services that had been provided under Part C until valid Part B IEPs were in place. *Ibid.*

C. Proceedings Below

The state administrative law judge hearing the parents' first administrative complaint ruled that Part B's stay-put provision did not provide for continuation of the services that had been provided to the children under Part C. App., *infra*, 52a-77a. The parents then filed this action in the United States District Court for the Southern District of Florida pursuant to 20 U.S.C. § 1415(i)(2)(A), seeking an order directing the school district to continue those services. App., *infra*, 26a-42a. While that case was pending, the administrative law judge hearing the second complaint also denied the parents' request for continuation of the services. *Id.* at 79a-105a. The parents filed a second action in the district court with respect to that determination. *Id.* at 43a-49a.

1. ***The District Court's Decision.*** The district court agreed with both administrative determinations, rejecting the parents' claim that the stay-put provision required continuation of the services that had been provided under Part C. *Id.* at 26a-49a. The court held that the appropriate placement for a child under the stay-put provision "depends upon whether the child has or has not been admitted to public school." *Id.* at 36a. Because the triplets had not previously been admitted to public school, the court determined that the "clear language" of the stay-put provision established that the public school program was the only available interim placement under the stay-put provision. *Id.* at 38a. If a child's parents withhold consent to the public school program, "a pendency placement is simply not provided." *Ibid.* The court concluded that the "'then-current educational placement' of the triplets [was] not relevant" to a resolution of the issue. *Id.* at 37a.

2. *The Court Of Appeals' Decision.* A divided panel of the court of appeals affirmed. *Id.* at 1a-25a. The majority held that that "the IDEA does not entitle the triplets to continue receiving services pursuant to their IFSPs until such time as valid IEPs are put in place for them." *Id.* at 9a.

The majority cited "the plain language of the 'stay put' provision" in reaching its decision. *Ibid.* It reasoned that the alternatives in the stay-put provision that are separated by the word "or" were "mutually exclusive." *Id.* at 8a. According to the majority, the alternative applicable in a particular case "depends on one fact only—whether the child is applying for initial admission to a public school. If the child is not applying for initial admission, he shall remain in his existing educational placement. *Or*, if the child is applying for initial admission, he shall be placed in the public school program." *Id.* at 8a (emphasis in original).

Because the triplets had never been admitted to a public school, the majority determined that they were applying for initial admission to a public school. *Ibid.* It concluded that the only interim placement available to the triplets accordingly was the public school program. *Ibid.*

The court acknowledged that its decision was "at odds" with precedent in the Third Circuit on this precise issue—precedent that the majority deemed "incorrectly decided." *Id.* at 9a. The majority pointed out that its decision conformed to the Department of Education's interpretation of the statute, but expressly disavowed any reliance on the agency's interpretation in reaching its conclusion. *Id.* at 9a-11a.

Judge Barkett dissented, stating that the "IDEA cannot reasonably be read to permit th[e] result" reached by the majority. *Id.* at 15a (Barkett, J., dissenting). Judge Barkett first found no support in the statute for the majority's conclusion that existing IFSPs cannot constitute a "current educational placement." *Id.* at 22a. Observing that Eleventh Circuit precedent held that Part C early intervention services constituted special education, Judge Barkett concluded that such services qualified as a child's existing "educational placement" within the meaning of the statute. *Id.* at 22a-24a.

In Judge Barkett's view, the majority's contrary holding led to an "absurd" result inconsistent with the overall statutory scheme. *Id.* at 14a-15a. Pointing out that Parts C and B each contain stay-put provisions that prohibit the disruption of services during a placement dispute and that the statute explicitly mandates a smooth transition from one part to the other, Judge Barkett concluded that "it would be absurd to apply the 'stay put' provision in a manner that reaches the completely opposite result: the *withdrawal* of existing services to a disabled child when she reaches school age." *Id.* at 14a (emphasis in original).

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's interpretation of the stay-put provision squarely conflicts with a decision of the Third Circuit. Both courts of appeals relied on the provision's plain meaning, but—as the Eleventh Circuit acknowledged—they reached opposite conclusions regarding the provision's applicability to children with disabilities transitioning from Part C to Part B.

The issue of the proper interpretation of the stay-put provision is a question of substantial national importance. Over one hundred thousand children with disabilities exit Part C and enter Part B each year. During those transitions, disputes frequently arise over the appropriate Part B placement for a child. Without resolution of the question presented, those disputes will continue to result in irreparable harm to children and unnecessary costs for school districts.

Finally, the Eleventh Circuit's decision is wrong. It is contrary to the plain language of the stay-put provision and inconsistent with the structure of the IDEA. If that decision is permitted to stand, Congress's express requirement of a smooth transition for children with disabilities moving from Part C to Part B—and its commitment to ensuring parental involvement in decisions regarding those services—will be seriously undermined. Review by this Court is therefore plainly warranted.

A. There Is A Clear, Acknowledged Conflict Among The Courts Of Appeals Regarding The Scope Of The Stay-Put Provision.

The courts of appeals have reached squarely conflicting conclusions regarding the question presented in this case. Faced with the identical issue decided by the Eleventh Circuit here, the Third Circuit reached the opposite result, holding that the stay-put provision entitles a child to continue receiving services authorized in a Part C IFSP until a valid Part B IEP is in place. *Pardini* v. *Allegheny Intermediate Unit*, 420 F.3d 181, 192 (3d Cir. 2005). Indeed, the Eleventh Circuit explicitly acknowledged that its decision was "at odds with the Third Circuit's holding

in *Pardini*," a case the Eleventh Circuit stated "was incorrectly decided." App., *infra*, 9a.

Pardini involved a child with cerebral palsy who received early intervention services under Part C. An IEP was not in place when the child turned three because the school district and the parents disagreed about the content of the plan. *Pardini*, 420 F.3d at 182-83. The school district terminated the child's services. Invoking the stay-put provision, the parents argued that their child was entitled to continuation of the services that had been provided under Part C until the dispute over her initial IEP was resolved. *Id.* at 183.

The Third Circuit held that the plain language of Part B's stay-put provision entitled the child to continuation of the services that had been provided under Part C because those services constituted a "current educational placement" protected under the provision. *Id.* at 192. It determined that the "plain meaning of 'current educational placement' refers to the 'operative placement actually functioning at the time the dispute first arises.'" *Ibid.* (quoting *Thomas* v. *Cincinnati Bd. of Educ.*, 918 F.2d 618, 625-26 (6th Cir. 1990)). The court concluded that the child's "operative placement consisted of the services she was receiving under her IFSP." *Ibid.*

Like the court below (see App., *infra*, 9a-11a), the Third Circuit did not rely on the Department of Education's interpretation of the provision in reaching its decision. It found the agency's contrary interpretation of the statute unpersuasive in light of the "plain meaning of 'current educational placement.'" *Pardini*, 420 F.3d at 192.

In the present case, the Eleventh Circuit expressly disagreed with the Third Circuit's interpretation of the stay-put provision in *Pardini*. Rejecting the parents' claim that the triplets' IFSPs constituted their "then-current educational placement[s]," the Eleventh Circuit held that the applicability of the stay-put provision "depends on one fact only—whether the child is applying for initial admission to a public school." App., *infra*, 8a.

The Third and Eleventh Circuits thus fundamentally disagree about the plain meaning of the stay-put provision. That disagreement has produced a clear, acknowledged conflict among the courts of appeals on the question presented in this case.

B. This Case Involves An Issue Of Substantial National Importance.

The question presented here regarding the applicability of the stay-put provision to children transitioning from Part C to Part B arises with considerable frequency. Moreover, the inevitable result of the decision below—erroneously depriving young children of services they need—will impose very significant adverse effects upon these children, school districts, and society, the precise results that Congress recognized and sought to avoid by enacting the stay-put provision. Given the frequency with which the issue arises and the substantial interests at stake, the question presented is sufficiently important to warrant this Court's attention.

1. ***Disputes over appropriate Part B placements arise frequently in the over one hundred thousand transitions from Part C to Part B that occur each year.***

Over one hundred thousand children transition from Part B to Part C of the IDEA each year.[1] For many of these children, the transition is marked by a dispute between parents and school districts over the services that the school district must provide to satisfy its obligation under Part B. Indeed, state and local officials often fail to meet the statutory deadlines that ensure a smooth transition. U.S. Gov't Accountability Office, *Individuals with Disabilities Education Act*: *Education Should Provide Additional Guidance To Help States Smoothly Transition to Preschool*, GAO-06-26, at 27-29 (Dec. 2005).

A study commissioned by the Office of Special Education Programs ("OSEP") of the U.S. Department of Education found that nearly one-third (30%) of children receiving early intervention services experienced a gap between the end of Part C services and the beginning of Part B services—with the average gap lasting 4.6 months.[2] When asked about the level of effort it took to obtain Part B preschool ser-

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[1] IDEAdata.org, Infants and Toddlers Ages Birth Through 2 Served Under IDEA, Part C, Who Exited Part C Programs, https://www.ideadata.org/tables30th/ar_7-8.xls (last visited Nov. 7, 2007).

[2] Elaine Carlson & Amy Shimshak, *Transitions from Early Intervention to Preschool and Preschool to Elementary School*, *in* Joy Markowitz et al., Preschoolers with Disabilities: Characteristics, Services and Results 37 (2006), *available at* https://www.peels.org/Docs/PEELS Final Wave 1 Overview Report.pdf.

vices from the school district, one-third of all parents (32%) answered either "some" or "a lot."[3]

Not surprisingly, a number of these disputes have found their way into federal court—like the present case and *Pardini*—raising questions regarding the scope of Part B's stay-put provision. See, *e.g.*, *Johnson* v. *Special Educ. Hearing Office*, 287 F.3d 1176 (9th Cir. 2002); *Case* v. *Allegheny Intermediate Unit*, No. 2:07-cv-374, 2007 U.S. Dist. LEXIS 47001 (W.D. Pa. June 28, 2007); *R.C. ex rel. R.J.C.* v. *Carmel Cent. Sch. Dist.*, No. 06 Civ. 5495, 2007 U.S. Dist. LEXIS 43697 (S.D.N.Y. June 13, 2007); *T.H.* v. *Bd. of Educ.*, No. 98 C 4633, 1998 U.S. Dist. LEXIS 19110 (N.D. Ill. Dec. 3, 1998).

But these federal cases represent only the tip of the iceberg with respect to disputes regarding the applicability of the stay-put provision in the context of children transitioning from Part C to Part B. State educational agencies have addressed a large number of controversies concerning the application of Part B's stay-put provision and reimbursement for parents' expenses.[4]

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[3] *Ibid.*

[4] See, *e.g.*, *Hunstville City Bd. of Educ.*, No. 00-120, 34 IDELR 278 (Ala. SEA Jan. 11, 2001); *L.A. Unified Sch. Dist.*, No. SN03-01391, 40 IDELR 201 (Cal. SEA Aug. 19, 2003); *San Gabriel Unified Sch. Dist.*, No. SN 648-00, 32 IDELR 248 (Cal. SEA May 2, 2000); *DeKalb County Sch. Sys.*, No. OSAH-DOE-SE-0011353-44-JPS, 33 IDELR 49 (Ga. SEA Feb. 18, 2000); *Prince George's County Pub. Sch.*, No. 98-MSDE-PGEO-OT-000470, 3 ECLPR 224 (Md. SEA July 3, 1998); *Bd. of Educ. of the Carmel Cent. Sch. Dist.*, No. 06-009, 5 ECLPR 61 (N.Y. SEA Mar. 20, 2006).

Even these decisions understate the problem. Many parents of children with disabilities lack the resources to litigate their entitlement to invoke the stay-put provision. Families of children with disabilities are overrepresented among low income populations. The National Early Intervention Longitudinal Study ("NEILS") commissioned by the Department of Education's OSEP found that 28% of families receiving early intervention services under Part C were at or below the federal poverty level, and another 23% were within 101% to 200% of the federal poverty level. Kathleen Hebbeler et al., *Early Intervention for Infants and Toddlers with Disabilities and Their Families: Participants, Services, and Outcomes* 5-10 (2007), *available at* http://www.sri.com/neils/pdfs/NEILS_Report_02_07_Final2.pdf.

Public interest organizations are able to provide only limited assistance to families of children with disabilities. For example, in 2005, the Alabama Disabilities Advocacy Program could respond to only 13% of the 905 requests for special education case advocacy it received; similarly, in 2006, the Ohio Legal Rights Service was able to provide assistance to less than 3% of the 595 requests it received. Brief of Autism Society of America et al. as Amici Curiae Supporting Petitioners at 7, *Winkelman* v. *Parma City Sch. Dist.*, 127 S. Ct. 1994 (2007) (No. 05-983). The Legal Services Corporation estimates that four out of every five families of children with disabilities who apply for public legal services fail to receive them because resources are simply not available. Brief of Council of Parent Attorneys and Advocates Inc. et al. as Amici Curiae Supporting Petitioners at 12, *Winkelman*, 127 S. Ct. 1994 (No. 05-983) (citing Paula L. Hannaford-Agor, *Helping the Pro Se Liti-*

gant: A Changing Landscape, 39 Ct. Rev. 8, 8 (2003)).[5]

Moreover, early intervention services are expensive, costing an average of over nine hundred dollars per child every month. Hebbeler et al., *supra*, at 5-13. Given the choice between paying for litigation and paying for services—a choice made particularly stark in jurisdictions like the Eleventh Circuit, where Part B's stay-put provision has been interpreted to permit the withdrawal of services during the pendency of a dispute—many parents, not surprisingly, choose services for their children. That even more of the disputes over the transition from Part C to Part B have not been litigated simply reflects the real-world financial situation of many families of children with disabilities.

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[5] Representation by private counsel is not available at affordable rates. A survey by the Council of Parent Attorneys and Advocates, Inc., found that attorneys handling IDEA cases typically charge $150 to $450 an hour, that the majority of these practitioners required their clients to pay a retainer averaging $3000, and that the total matter cost for each case ranged from $10,000 to over $100,000. Brief of Council of Parent Attorneys and Advocates Inc. et al. as Amici Curiae Supporting Petitioners at 9 n.4, *Winkelman* v. *Parma City Sch. Dist.*, 127 S. Ct. 1994 (2007) (No. 05-983) (citation omitted). The IDEA's fee-shifting provision does not provide sufficient incentive for attorneys to take cases raising the issue presented here: because a ruling on the applicability of the stay-put provision is not a ruling on the merits, the winning party is not entitled to attorneys' fees. See *J.O. ex rel. C.O.* v. *Orange Twp. Bd. of Educ.*, 287 F.3d 267 (3d Cir. 2002); *Bd. of Educ. of Oak Park* v. *Nathan R.*, 199 F.3d 377, 382 (7th Cir. 2000) ("[I]nvocation of the stay-put provision of the IDEA does not entitle the party to attorneys' fee."). The availability of fees would depend on prevailing on the underlying challenge to the school district's proposed IEP.

2. ***The withdrawal of existing services during the transition from Part C to Part B results in irreparable harm to children and unnecessary costs for school districts.***

Congress specifically recognized in the IDEA the importance of providing services to children with disabilities during their early years. The statute emphasizes the need "to enhance the development of infants and toddlers with disabilities, to minimize their potential for developmental delay, and to recognize the significant brain development that occurs during a child's first 3 years of life." 20 U.S.C. § 1431(a)(1). See also S. Rep. No. 94-168, at 18 (1975) ("[I]dentifying and providing services to preschool children who are handicapped is critical to assuring that these children are assisted early in life so that their handicapping conditions do not delay their educational development.").

Moreover, the statute recognizes the importance of avoiding abrupt changes in the services provided to children with disabilities, not only through the stay-put provisions themselves, but also by mandating that "[c]hildren participating in early intervention programs assisted under [Part C], and who will participate in preschool programs assisted under [Part B], experience a smooth and effective transition to those preschool programs." 20 U.S.C. § 1412(a)(9).

Congress's focus on the importance of ensuring that young children with disabilities receive appropriate services under the Act is supported by numerous studies confirming the positive effects of early intervention services. The federal government's NEILS report found that early treatment of many children with disabilities can largely ameliorate the effects of

those disabilities. Hebbeler et al., *supra*, at 5-3 to -4. Indeed, more than one-third (37%) of children who had formerly received early intervention services under Part C did not require preschool special education services, and 42% did not require special education services in kindergarten. *Ibid.* Early intervention services thus can and do serve as a preventative measure, in addition to offsetting the long-term consequences of many disabilities.

Access to early intervention services is particularly important for children with autism, a disability that afflicts one in 150 children. See Ctrs. for Disease Control and Prevention, *Prevalence of the Autism Spectrum Disorders in Multiple Areas of the United States, Surveillance Years 2000 and 2002*, http://www.cdc.gov/ncbddd/dd/addmprevalence.htm (last visited Nov. 7, 2007). The Government Accountability Office's 2005 report on children with autism states that "the general agreement is that early diagnosis followed by appropriate treatment can improve outcomes for later years for most children with" an autism spectrum disorder. U.S. Gov't Accountability Office, *Special Education: Children With Autism*, GAO-05-220, at 13 (Jan. 2005).

A recent Massachusetts Bureau of Special Education Appeals case demonstrates the adverse effects on a child with autism of withdrawing services during the transition from Part C to Part B. *Boston Pub. Sch. Dist.*, No. 07-4997, 5 ECLPR 61 (Mass. SEA July 6, 2007). There, because of the school district's delay in creating and implementing an IEP, the child—who had been receiving services under Part C—did not receive services for three months following his third birthday. The Independent Hearing Officer ("IHO") found, on the basis of an affidavit from

the child's parents and a letter from three physicians, that during the three months the child did not receive services, there was "deterioration in his behavior" and the child's "aggressive and explosive behaviors that had been improving with Early Intervention services, worsened again." *Id* at 5. The IHO ordered the school district to provide additional services beyond the normal threshold required by the IDEA to compensate for the harm caused by the withdrawal of services. *Id*. at 6.

The inevitable result of the Eleventh Circuit's interpretation of the statute will be a similar abrupt change in the services provided to many children while the disputes between parents and school districts over the proper elements of children's Part B IEP plans are resolved. In some cases, the parents ultimately will prevail, and the gap in services will have been wholly unjustified. But it may not be possible to undo the adverse effects on those children of a withdrawal of services that—as Congress recognized and as the Massachusetts example shows—can inflict very substantial, and sometimes irreversible, harm when the withdrawal occurs at a crucial phase in the child's development.

These adverse consequences will of course be visited primarily on the child and his family. But society too bears a burden—in terms of the added costs of services for disabled adults[6]—if it fails to provide a

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[6] *E.g.*, California Legislative Blue Ribbon Commission on Autism, *A Comprehensive Service System for Adults with Autism Spectrum Disorders*, Sept. 2006, *available at* http://senweb03.senate.ca.gov/autism/documents/meetingsevents/Revised_COMPREHENSIVE%20SERVICES%20FOR%20ADULTS.pdf (discussing costs of services for autistic adults).

child with those services that will best ameliorate the future effects of that child's disabilities. Given these very significant consequences, the question presented plainly warrants this Court's attention.

Resolving the question presented regarding the stay-put provision also will benefit school districts. Confusion among administrative law judges and courts has prevented local educational agencies across the country from having a clear understanding of their obligation to provide services during the pendency of proceedings. A decision by this Court would eliminate uncertainty and give school districts a clear indication of their obligations. Moreover, a clear rule would eliminate the need for both school districts and parents to expend funds litigating the issue.

C. The Eleventh Circuit's Interpretation Of Part B's Stay-Put Provision Is Wholly Inconsistent With The Plain Language Of The Stay-Put Provision And The Structure Of The IDEA.

The Eleventh Circuit clearly erred in holding that the stay-put provision does not permit continuation of the services provided under Part C when a child "ages out" of Part C and there is a dispute between the parents and the school district regarding the appropriate Part B plan for the child. The text and structure of the statute instead compel the conclusion that a parent may opt for continuation of services until the school board obtains a determination that its new proposed plan complies with the requirements of the statute.

1. ***The plain language.***

The "beginning point" of statutory interpretation "must be the language of the statute." *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). Part B's stay-put provision 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.

20 U.S.C. § 1415(j). This Court has recognized that "[t]he language of [the stay-put provision] is unequivocal. It states plainly that during the pendency of any proceedings initiated under the Act, unless the state or local educational agency and the parents or guardian of a disabled child otherwise agree, 'the child *shall* remain in the then current educational placement.'" *Honig* v. *Doe*, 484 U.S. 305, 323 (1988) (emphasis in original). Until there is a determination that the new services plan proposed by the school district complies with the Act, the child is thus entitled to continuation of the "then-current educational placement."[7]

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[7] Of course, "local educational agencies, as well as parents, have the right to present complaints" and obtain a determination that the educational agency's proposal complies with the Act. S. Rep. No. 108-185, at 37 (2003). See 20 U.S.C. § 1415(b)(6).

When the child is "applying for initial admission to a public school," the provision provides the parents with a second option for interim placement pending resolution of the dispute regarding the child's IEP. "[W]ith the consent of the parents," the child "shall * * * be placed in the public school program" until the dispute is resolved. 20 U.S.C. § 1415(j).

For parents with a child transitioning from Part C to Part B, the stay-put provision thus offers a choice. During the pendency of a dispute, the parents may choose between keeping their child in his then-current educational placement under Part C or allowing him to enter public school. When parents withhold consent to their child's placement in a public school program, the provision entitles the child to "stay put" in his then-current educational placement under Part C.

Here, the triplets were transitioning from Part C to Part B when a dispute over their proper educational placement arose. The parents have not reached agreement with respondent on an interim placement for the triplets. Nor have they consented to placement of their children in a public school program. The application of the stay-put provision is therefore clear: the triplets "shall remain in [their] then-current educational placement"—namely, the services that had been provided under Part C—"until all [the] proceedings have been completed."

The Eleventh Circuit's contrary conclusion rested on its view that the Third Circuit in *Pardini* had "incorrectly decided" that an IFSP constitutes an "educational placement" for purposes of stay-put, as well as on the Eleventh Circuit's determination that the sole option for children applying for initial admission to public school is placement in a public school pro-

gram. App., *infra*, 8a-9a. Neither conclusion is consistent with the plain meaning of the stay-put provision.

First, the Third Circuit was correct in concluding that services provided pursuant to a Part C IFSP fall squarely within the plain meaning of "educational placement." See *Pardini*, 420 F.3d at 191. The Act requires each IFSP to contain a substantial educational component. In particular, each IFSP must address various educational needs of the child, including his "cognitive development," his "pre-literacy and language skills," and his "transition * * * to preschool or other appropriate services." 20 U.S.C. § 1436(d). See also *id.* § 1432(4)(C)(ii) (listing "cognitive development" among the areas in which "early intervention services" under Part C address). In addition, the IDEA explicitly includes "special *educators*" among the "qualified personnel" who may provide "early intervention services" to children with disabilities pursuant to an IFSP. *Id.* § 1432(4)(F)(i) (emphasis added). Given this statutory definition, an IFSP plainly is an "educational placement" that falls within Part B's stay-put provision.

Indeed, the Act itself recognizes that Part C IFSPs and Part B IEPs are often interchangeable; for a child aged three to five, "the individualized family service plan may serve as the IEP of the child." *Id.* § 1414(d)(2)(B). That is because, although the method of administration of services provided under the two types of plans may differ, the services themselves are similarly educational in nature. Compare *id.* § 1414(d)(1)(A) (defining an IEP), with *id.* § 1436 (defining an IFSP). The line that the Eleventh Circuit drew between the two types of plans is thus entirely arbitrary; because IEPs obviously constitute "educa-

tional placement[s]," IFSPs necessarily must qualify as well.

Second, the stay-put provision does not make placement in a public school program the sole option for children applying for initial admission to public school. To be sure, the provision contains a disjunctive "or" separating the two alternatives: maintaining the then-current educational placement and placing the child in a public school program. But nothing in the language of the provision suggests that the two alternatives are mutually exclusive. The first clause does not make the option of maintaining the then-current educational placement available only if the child is not applying for initial admission to public school. Thus, contrary to the assertions of the Eleventh Circuit, the clause does not state: "*If the child is not applying for initial admission*, he shall remain in his existing educational placement." App., *infra*, 8a (emphasis added).

Similarly, Congress could have provided in the second clause that the *sole* interim placement option available to children applying for initial admission to public school was the public school program. But it did not include the word "sole" in the provision. And the placement of the "if" after the disjunctive "or" confirms Congress's intention to make only the availability of the second alternative, placement in a public school, turn upon whether the child is applying for initial admission to public school.

Accordingly, children with disabilities always have the option of "staying put" in their then-current educational placement; if they are applying for initial admission to public school they may instead choose to attend public school. Children who are applying for initial admission to public school who do not have

a then-current placement may choose to attend public school pending a final decision on the IEP.

Under the provision's plain terms, therefore, the triplets are entitled to continue receiving the services they were provided under Part C, even though they are applying for initial admission to public school.

2. ***The statutory structure.***

Just last Term, this Court recognized that "a proper interpretation of the [IDEA] requires a consideration of the entire statutory scheme." *Winkelman* v. *Parma City Sch. Dist.*, 127 S. Ct. 1994, 2000 (2007). Consideration of the entire statutory scheme confirms what the plain language of the stay-put provision says: children transitioning from Part C to Part B are entitled to continue receiving the services specified in their IFSPs during the pendency of review proceedings.

The structure of the IDEA leaves no doubt that Congress meant to ensure continuous provision of services to children with disabilities. Part C's stay-put provision entitles a child to remain in his then-current IFSP if a dispute over his Part C placement arises after he has already begun receiving early intervention services. 20 U.S.C. § 1439(b). Similarly, Part B's stay-put provision entitles a child to remain in his then-current IEP if a dispute over his Part B placement arises after he has already begun receiving special education and related services. *Id.* § 1415(j).

The IDEA's concern with continuity extends to transitions from one category of services to another. When a child applies for initial services under Part C, for instance, Part C's stay-put provision provides that the child "receive the services not in dispute"

during the pendency of review proceedings. *Id.* § 1439(b). When a child transfers from one school district to another, Section 1414(d)(2)(C) requires that the new school district provide "services comparable to those described in the previously held IEP" until the district implements an IEP of its own for the child. *Id.* § 1414(d)(2)(C)(i)(I). And when a child turns sixteen, Section 1414 requires that his IEP include "transition services" designed "to facilitate the child's movement from school to post-school activities." *Id.* §§ 1401(34) & 1414(d)(1)(A)(i)(VIII).

The IDEA devotes special attention, moreover, to the transition from Part C to Part B. Section 1412(a)(9) requires explicitly that States adopt policies to ensure that "[c]hildren participating in early intervention programs assisted under [Part C], and who will participate in preschool programs assisted under [Part B], experience a smooth and effective transition to those preschool programs." *Id.* § 1412(a)(9). To make certain that children with disabilities do not encounter a gap in services when they "age out" of Part C, Section 1412(a)(9) also mandates that an IEP be "developed" and "implemented" by a child's third birthday, and that a "transition planning conference" be arranged by the lead agency responsible for administering services under Part C. *Ibid.* The child's Part C service coordinator may even be present at the initial IEP meeting "to assist with the smooth transition of services." *Id.* § 1414(d)(1)(D).

Requiring Part B services to be ready when a child turns three is one way the IDEA ensures a smooth transition from Part C; allowing Part C services to continue past a child's third birthday is another. If a child turns three in the middle of the

school year, Section 1414(d)(2)(B) allows his existing IFSP to serve as his IEP. Part C services may continue until the child enters elementary school. *Id.* § 1435(c)(1). By making the division between Parts C and B flexible, the IDEA minimizes disruptions in services that would otherwise occur when a child turns three—disruptions that would produce a significant adverse impact on the child's educational development.

In addition to ensuring a continuous provision of services for children with disabilities, the statutory scheme ensures parental involvement in the decisions regarding those services. The IDEA mandates that parents play "'a significant role'" in developing their child's IEP. *Winkelman*, 127 S. Ct. at 2000 (quoting *Schaffer* v. *Weast*, 546 U.S. 49, 53 (2005)). Parents must be included as members of the team charged with putting together their child's IEP (20 U.S.C. § 1414(d)(1)(B)), and in "any group that makes decisions on the educational placement of the child" (*id.* § 1414(e)). Furthermore, the "concerns" of the parents regarding "the education of their child" must be considered in developing the IEP (*id.* § 1414(d)(3)(A)(ii)), and "information about the child" provided by the parents must be considered in revising it (*id.* § 1414(d)(4)(A)(ii)).

"The statute also sets up general procedural safeguards that protect the informed involvement of parents in the development of an education for their child." *Winkelman*, 127 S. Ct. at 2000. Indeed, the statute requires state and local agencies to "establish and maintain procedures * * * to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education." 20

U.S.C. § 1415(a). These procedures must include "[a]n opportunity for the parents of a child with a disability to examine all records relating to such child" (*id.* § 1415(b)(1)), and "[w]ritten prior notice to the parents of the child" of any proposals to change the child's educational placement (*id.* § 1415(b)(3)). If "procedural inadequacies * * * significantly impede[] the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child," the statute authorizes "a hearing officer * * * [to] find that a child did not receive a free appropriate public education." *Id.* § 1415(f)(3)(E)(ii).

Read in light of the statute as a whole, Part B's stay-put provision simply cannot bear the construction placed upon it by the Eleventh Circuit. If interpreted to prevent a child transitioning to Part B from continuing to receive Part C services during a placement dispute, the stay-put provision would create an anomalous gap in services when the child turns three. Instead of "facilitat[ing] the development of a comprehensive 'seamless' system of services for children, aged birth to 5, inclusive" (H.R. Rep. No. 102-198, at 4 (1991)), the provision would "punish[] children whose disabilities have been detected and addressed early under the statute, leaving them with no accommodation pending resolution of a placement dispute" (App., *infra*, 15a (Barkett, J., dissenting)). And instead of ensuring "a smooth transition for children moving from early intervention programs under part [C] to preschool programs under part B" (H.R. Rep. No. 102-198, at 4 (1991)), the provision would cause "the *withdrawal* of existing services to a disabled child when she reaches school age," even when it is the school district's fault that a valid IEP is not ready (App., *infra*, 14a (Barkett, J., dissenting)

(emphasis in original)). Given Congress's clear commitment in the language and structure of the statute to a continuous provision of services, these results would be absurd.

Furthermore, the Eleventh Circuit's approach would present parents with a cruel dilemma: either acquiesce in an inadequate IEP for their child, or risk having much needed services for their child withdrawn altogether. By discouraging parents from invoking their procedural rights, the provision would essentially grant state and local educational agencies "the *unilateral* authority" to determine the child's Part B placement—the precise result that Congress sought to prevent. *Honig*, 484 U.S. at 323 (emphasis in original).

Because the Eleventh Circuit's interpretation of the stay-put provision would lead to such absurd results, it should be rejected. A proper interpretation of the provision—one that accords with both the text and the structure of the IDEA—would enable children transitioning from Part C to Part B to continue receiving early intervention services during the pendency of a dispute.[8]

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[8] Although both the court below and the Third Circuit in *Pardini* adverted to the Department of Education's longstanding view that the stay-put provision does not authorize continuation of services that had been provided pursuant to Part C (see pages 9 & 12 *supra*), neither court relied on the Agency's interpretation of the statute.

The Department in 1999 issued a regulation implementing its interpretation of the Part B stay-put provision—first adopted in 1997—that a child transitioning from Part C to Part B is not entitled to continue the services he had been receiving under Part C during the pendency of a dispute over his Part B placement. Letter to Klebanoff, 28 IDELR 478 (Department of

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Education, Office of Special Education Programs, July 1, 1997); 64 Fed. Reg. 12,406, 12,558 (Mar. 12, 1999); 34 C.F.R. § 300.514(b) (2006) ("If the [due process] complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings."). The Department revised the regulation in 2006 to reiterate its position. See 34 C.F.R. § 300.518(c) (2007); App., *infra*, 10a-11a.

The courts of appeals' conflicting views regarding the plain meaning of the provision provide no basis for finding the provision ambiguous. *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2514-15 (2007) (Scalia, J., concurring). Rather, the courts of appeals correctly refused to defer to the Department's interpretation given the lack of ambiguity. *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

D.P., o.b.o. E.P., D.P. and K.P.,
L.P., o.b.o. E.P., D.P. and K.P.,
Plaintiffs-Appellants,
v.
SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, Defendant-Appellee.

L.M.P., o.b.o. E.P., D.P. AND K.P.,
Plaintiff-Appellant,
v.
SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, Defendant-Appellee.

Nos. 05-15188, 05-15193.

April 3, 2007, Filed

Before EDMONDSON, Chief Judge, and BARKETT and COX, Circuit Judges.

COX, Circuit Judge:

We consider in these consolidated appeals whether the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., ("IDEA") requires a school board to continue providing services to children who have reached three years of age pursuant to Individualized Family Service Plans previously developed for those children under Part C of the IDEA until such time as Individualized Educational Plans are developed for the children under Part B of

the IDEA. We conclude that it does not. Therefore, we affirm the district court's judgments of dismissal.

I. BACKGROUND & PROCEDURAL HISTORY

D.P., E.P., and K.P. are autistic triplets who live with their parents (collectively, "Appellants") in Broward County, Florida. Prior to their third birthday, the triplets received individualized care under the Early Intervention Program administered under Part C of the IDEA. The services provided the triplets under Part C of the IDEA were provided pursuant to Individualized Family Service Plans ("IFSPs"). Pursuant to IFSPs, disabled infants and toddlers may be provided with developmental services such as speech, occupational, and physical therapy services; medical services for diagnosis and evaluation purposes; and social work services. 20 U.S.C. § 1432(4)(E). While IFSPs may include an educational component, they do not necessarily include such a component. *Id.*

On January 4, 2004, the triplets turned three and "aged out" of the Part C program. At the same time, they became eligible for services under Part B of the IDEA. Part B of the IDEA guarantees free appropriate public education ("FAPE") to disabled children older than three. Services provided under Part B of the IDEA are generally provided pursuant to Individualized Educational Plans ("IEPs") rather than IFSPs. IEPs differ from IFSPs in that they are focused on the educational needs of disabled children. 20 U.S.C. § 1414(d)(1)(A). However, at the time the triplets turned three, no IEPs had been developed for them.

On January 6, 2004, the Appellants initiated an administrative action by filing a due process complaint pursuant to the IDEA's provisions. The due process complaint alleged that the School Board of Broward County ("the Board") was contemplating modifying the services provided in the triplets' last IFSPs and sought an injunction requiring the Board to continue the services in the IFSPs. Appellants purported to invoke the "stay put" provision in Part B of the IDEA, 20 U.S.C. § 1415(j). On January 9, 2004, an Administrative Law Judge ("ALJ") held a telephone conference with the parties to the administrative action during which the parties agreed that no evidentiary hearings were necessary as the dispute presented only questions of law that could be resolved on papers submitted by the parties. After the matter had been fully briefed, the ALJ issued an order holding that the "stay put" provision did not require the Board to provide services pursuant to the triplets' last IFSPs. The ALJ denied Appellants' requests for injunctive relief, for reimbursement of the costs Appellants had incurred in continuing the services previously provided under the IFSPs, and for attorneys' fees and costs. Appellants appealed the ALJ's order to the federal district court in a case styled *D.P. and L.P., on behalf of E.P., D.P., and K.P. v. School Board of Broward County* ("*D.P. I*"). The complaint in *D.P. I* requested a declaration that the Board must continue the services provided to the triplets pursuant to the IFSPs, an injunction requiring the Board to do so, and reimbursement of the costs Appellants had incurred in continuing the services previously provided under the IFSPs.

On August 17, 2004, while *D.P. I* was still pending in the district court, Appellants filed another due

process complaint alleging, among other things, that the Board had failed to have IEPs in place for the triplets on their third birthday and that, instead, the Board belatedly had developed temporary IEPs for the triplets. The temporary IEPs proposed placement of the triplets in the Baudhuin Preschool for pre-kindergarten children with autism. Appellants alleged that the temporary IEPs were invalid by reason of the parents' refusal to consent to them. This second administrative action sought a declaration that the temporary IEPs were invalid and an injunction requiring the Board to provide the triplets with services pursuant to their last IFSPs until valid IEPs were in place. It also sought reimbursement from the Board for the costs that the parents had incurred in continuing the services previously provided under the IFSPs. Appellants requested that the ALJ first resolve (without an evidentiary hearing) the legal issues of whether the temporary IEPs were invalid and, if so, what remedy was due. After receiving briefing on those questions, the ALJ determined that the temporary IEPs were invalid because the parents had never consented to them. However, the ALJ also found that nothing in the IDEA or Florida law obligated the Board, as a result of the parents' refusal to consent to the temporary IEPs, to provide the triplets with the Early Intervention Services they had been receiving previously under Part C of the IDEA. The ALJ denied Appellants' requests for reimbursement. Finally, the ALJ ordered Appellants to file a statement indicating whether, in light of the resolution of the threshold questions, Appellants believed there to be any remaining unresolved issues in their action. Appellants filed no such statement. Instead,

they filed a complaint in the district court challenging the ALJ's decision.

The second district court case was styled *L.M.P. on behalf of D.P., K.P., and E.P. v. School Board of Broward County* ("*D.P. II*"). In *D.P. II*, Appellants claimed that the Board failed to provide the triplets with FAPE as required by the IDEA. Appellants asked the district court to declare the temporary IEPs invalid, order the Board to reimburse Appellants for the costs they had incurred in continuing the services formerly provided under the IFSPs, order the Board to continue the services provided under the IFSPs, and award Appellants attorneys' fees and costs.

The Board moved to dismiss *D.P. I* and *D.P. II*, arguing in both cases that Appellants' claims failed as a matter of law because neither the IDEA nor any other provision of law requires the Board to continue to provide services to the triplets pursuant to their IFSPs until valid IEPs are in place.

On March 8, 2005, the district court granted the Board's motion to dismiss the complaint in *D.P. I* pursuant to Fed.R.Civ.P. 12(b)(6). On August 19, 2005, the district court granted the Board's motion to dismiss in *D.P. II*, also for failure to state a claim upon which relief can be granted. Judgment was entered for the Board in both cases. Appellants appealed both judgments to this court, and we consolidated the cases on appeal.

II. CONTENTIONS OF THE PARTIES & ISSUES ON APPEAL

Appellants contend that the IDEA entitles the triplets to continued services pursuant to their IFSPs until valid IEPs are put in place for them. Appellants further contend that, because the parents did not

consent to the temporary IEPs proposed by the Board, there are no valid IEPs for the triplets. They argue that the district court erred in refusing to issue an injunction requiring the Board to provide the services previously provided under the IFSPs.

The Board contends that the IDEA imposes no duty to continue to provide services under IFSPs to children who have reached age three. The Board also argues that, according to the plain language of the IDEA's " stay put" provision, because the triplets have never enrolled in public school, the proper placement for them while an IEP is not yet in place is the public school program.

III. STANDARD OF REVIEW

We review de novo the district court's grant of a motion to dismiss under Fed.R.Civ.P. 12(b)(6) for failure to state a claim, accepting the factual allegations in the complaint as true and construing them in the light most favorable to the plaintiff. *Glover v. Liggett Group, Inc.*, 459 F.3d 1304, 1308 (11th Cir.2006) (citing *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir.2003)). Dismissal is appropriate " when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action." *Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir.1993).

IV. DISCUSSION

In the orders granting the motions to dismiss, the district court relied on the plain language of the pendency, or "stay put," provision of the IDEA to hold that the statute does not require the Board to provide the services that had previously been provided under the IFSPs. We have said, "'In construing a statute we must begin, and often should end as

well, with the language of the statute itself.' . . . Where the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it said." *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) (quoting *Merritt v. Dillard*, 120 F.3d 1181, 1185 (11th Cir.1997) (other citations omitted)).

The " stay put" provision, which governs during the course of all administrative and judicial proceedings regarding a child's proper placement under Part B of the IDEA, says:

> Maintenance of current educational placement
>
> [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.

20 U.S.C. § 1415(j).

Appellants contend that, through use of the disjunctive "or," the statutory provision provides alternative placements for the triplets. According to Appellants, while their due process requests were pending, the triplets could have been placed in the public school program or they could have remained in their then-current educational placement. Appellants cite a Third Circuit case, *Pardini v. Allegheny Intermediate Unit*, 420 F.3d 181 (3d Cir.2005), to support their contention that the triplets "then-current educational placement" was the last IFSP from the Early Intervention Program.

We find Appellants' argument unpersuasive in light of the unambiguous language of the statute. The disjunctive "or" does indeed provide alternatives; but, contrary to Appellants' contention, the alternatives separated by the "or" are mutually exclusive. As the district court stated, if the educational agency (here, the Board) and parents do not agree to a placement for the child, which of the other two alternatives applies depends on one fact only-whether the child is applying for initial admission to a public school. If the child is not applying for initial admission, he shall remain in his existing educational placement. Or, if the child is applying for initial admission, he shall be placed in the public school program. We reach this conclusion based upon the placement of the disjunctive coordinating conjunction-between the two alternatives, but before the imperative, "if applying for initial admission to a public school [the student] shall . . . be placed in the public school program."

In this case, Appellants do not contest the fact that the triplets have never been admitted to a public school program. Therefore, the triplets are "applying for initial admission to a public school." And, in the absence of an agreement otherwise between the Board and the triplets' parents, the only placement available to the triplets is the public school program. The district court properly held that the fact that the parents withheld consent to placement in the program offered by the public school (pursuant to the temporary IEPs) does not create another option for the triplets. Without the parents' consent, the triplets cannot be placed in the public school program; but, they are not entitled to an alternative placement pursuant to the statute. In other words, the IDEA

does not entitle the triplets to continue receiving services pursuant to their IFSPs until such time as valid IEPs are put in place for them.[1]

We acknowledge that our decision is at odds with the Third Circuit's holding in *Pardini*. We think that case was incorrectly decided. As stated above, we base our conclusions on the plain language of the "stay put" provision. We do note, however, that our interpretation of the statute is consistent with that of the Department of Education. The implementing

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[1] The dissent maintains that our holding requires the triplets to enter public school, without any accommodation whatsoever and without any remedy. That conclusion is based upon neither the facts of this case nor our legal analysis. The "public school placement" that the triplets were offered by the school board is, in fact, enrollment at the Mailman Segal Institute's Baudhuin Preschool, located on the main campus of Nova Southeastern University. The Baudhuin Preschool is a private school for pre-kindergarten-aged children with autism.

The triplets' parents rejected this placement, as is their right under the IDEA. Having done so, they could have continued private services and challenged the school board's plan in a due process hearing and, if necessary, a subsequent lawsuit in which they attempted to prove that the school board had denied the triplets FAPE. Had they been successful, the parents would have been able to receive reimbursement from the school board for the costs of the private services that replaced the FAPE their children were wrongly denied. See *M.M. ex rel. C.M. v. Sch. Bd. of Miami-Dade County, Fla.*, 437 F.3d 1085, 1098-99 (11th Cir.2006).

However, while the triplets' parents alleged in their due process requests that their children had been denied FAPE, they chose not to present evidence supporting their FAPE allegations. Therefore, no determination has ever been made as to whether the Board denied the triplets FAPE.

regulation in effect at the time Appellants filed their due process requests stated:

> If the [due process] complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.

34 C.F.R. § 300.514(b).[2]

Our interpretation is also consistent with other agency guidance on the proper pendency placement for children transitioning from Part C to Part B of the IDEA. That guidance, issued by the Office of Special Education Programs within the Office of Special Education and Rehabilitative Services of the United States Department of Education, is published in the Federal Register with the implementing regulations for the statute. It states:

> Comment: A few commenters requested that the regulation be revised to make clear that the pendency provisions of § 300.514 apply to children transitioning from early intervention services under Part C to preschool special education and related services under Part B.

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[2] The regulation has since been revised. The same language now appears in 34 C.F.R. § 300.518(b) (effective Oct. 13, 2006). Subsection (c) of the revised regulation reads, in part:

> If the complaint involves an application for initial services under this part from a child who is transitioning from Part C of the Act to Part B and is no longer eligible for Part C services because the child has turned three, the public agency is not required to provide the Part C services that the child had been receiving.

34 C.F.R. § 300.518(c).

> Discussion: The pendency provision at § 300.514(a) does not apply when a child is transitioning from a program developed under Part C to provide appropriate early intervention services into a program developed under Part B to provide FAPE. Under § 300.514(b), if the complaint requesting due process involves the child's initial admission to public school, the public agency responsible for providing FAPE to the child must place that child, with the consent of the parent, into a public preschool program if the public agency offers preschool services directly or through contract or other arrangement to nondisabled preschool-aged children until the completion of authorized review proceedings.
>
> Changes: None.

64 Fed. Reg. 12,406, 12,558 (Mar. 12, 1999).

Because we rely on the plain language of the "stay put" provision, we do not engage in analysis to determine whether the agency's interpretation of the statute is reasonable and therefore entitled to deference. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984) (stating that, where the statute is clear, that is the " end of the matter"). We simply note its consistency with our reading.

Appellants argue that they should have been granted an injunction pursuant to the "stay put" provision or Fed.R.Civ.P. 65. But, we do not find any error in the district court's denial of the injunction. As stated above, the IDEA does not provide for continued provision of services to the triplets pursuant to their IFSPs. And, for that reason, Appellants did not (and cannot) carry their burden of demonstrating a

substantial likelihood of success on the merits of their claim. *See Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir.2000) (en banc).[3]

The dissent claims that our holding is inconsistent with *M.M. ex rel. C.M. v. Sch. Bd. of Miami-Dade County, Fla.*, 437 F.3d 1085 (11th Cir.2006). It is not. *M.M.* does not hold (as the dissent states) that the plaintiffs in that case were eligible for reimbursement because their child had received early intervention services. To the contrary, our opinion in that case affirmed dismissal of the plaintiffs' claim for reimbursement because the complaint failed to state a claim that the child was denied FAPE. *See id.* at 1103. And, though *M.M.* recognizes that reimbursement may be available for services rendered after a child's third birthday, that case does not hold that a school board can be enjoined to continue providing services previously rendered pursuant to an IFSP after a child's third birthday or even that, in the case where FAPE has been denied, all services previously rendered pursuant to an IFSP are reimbursable. As stated above, whether the triplets were denied FAPE is not at issue in this case.

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[3] The Board also moved to dismiss Appellants' claims for reimbursement of expenses incurred by continuing to provide the services previously provided under the IFSPs because the Board had failed to provide the triplets with FAPE on the ground that Appellants had failed to exhaust their administrative remedies as to those claims. The district court found that the reimbursement requests were premature because the ALJ had not determined whether the triplets had been denied FAPE. It is unclear whether Appellants seek review of the district court's dismissal without prejudice of these claims. We find no reversible error in the dismissals without prejudice.

The dissent characterizes the result that our holding produces as "absurd," using that word at least four times. We do not agree and take comfort in the fact that the Department of Education interprets the "stay put" provision as we do.

V. CONCLUSION

For the foregoing reasons, we affirm the judgments for the Board.

AFFIRMED.

BARKETT, Circuit Judge, dissenting:

I would agree with the majority's application of the "stay put" provision's plain language-that the pendency placement for a child applying for initial admission to public school is only the public school-if this case involved a situation for which that part of the provision was intended; that is, for a school-aged, disabled child who had never received services under the IDEA and was applying for initial admission to public school. The triplets in this case, however, *were* receiving services under later amendments to the IDEA, which were designed to promote the development of children *before* they reach school age and assure their smooth transition into school when they reach school age. Thus I believe the majority errs by finding as a matter of law that the receipt of these services did not entitle the triplets to the continuation of services pending resolution of their placement dispute.

Although we are generally to apply a statutory provision's plain language, we must read that language in context,[1] and consider the statute's over-

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[1] *See In re International Admin. Serv., Inc.*, 408 F.3d 689, 708 n. 7 (11th Cir.2005) ("It is a fundamental canon of statutory

arching purpose in order to avoid absurd results.[2] Congress enacted "stay put" provisions under both Part C and Part B of the IDEA-each of which, when read independently, prohibit the disruption of services during a placement dispute. Moreover, Congress made clear its intent that there be a smooth transition from one part of the statute to the other. Thus, it would be absurd to apply the "stay put" provision in a manner that reaches the completely opposite result: the *withdrawal* of existing services to a disabled child when she reaches school age.[3] With-

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construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme . . . . We must therefore interpret the statute as a symmetrical and coherent regulatory scheme . . . and fit, if possible, all parts into an harmonious whole.") (citations and internal quotation marks omitted); *United States v. Ballinger*, 395 F.3d 1218, 1237 (11th Cir.2005) ("[S]tatutory language must be read in the context of the purpose it was intended to serve.").

[2] *See Broward Gardens Tenants Ass'n v. U.S. E.P.A.*, 311 F.3d 1066, 1075-76 (11th Cir.2002) (plain meaning of statutory language does not control if it would lead to truly absurd results). Although the majority takes issue with the use of the word "absurd" in this opinion, any reference to "absurd result" herein is merely a statement and application of the relevant legal standard for purposes of statutory interpretation. 3

[3] In this case, the School Board refused to continue, or pay for the continuation of, the "early intervention services" the triplets had been receiving when they turned 3 on January 4, 2004; that is, right in the middle of the school year.

Although the majority is correct that in this case the School Board ultimately offered the triplets placement at a private school for children with autism (in the form of a proposed "temporary" IEP about a month after refusing to continue early intervention services), no such placement is mandated by the majority's reading of "stay put." The only placement required under the majority's opinion is enrollment in the public schools. Moreover, there is no indication that the private school place-

drawing necessary services at the moment of transition eviscerates the procedural protections Congress afforded parents who challenge a proposed change in services, disrupts the smooth transition Congress expressly intended for children transitioning from one program to the other, and punishes children whose disabilities have been detected and addressed early under the statute, leaving them with no accommodation pending resolution of a placement dispute. The IDEA cannot reasonably be read to permit this result. Therefore, I respectfully dissent.

The "stay put" provision at issue was enacted in 1975, at a time when the IDEA's predecessor statute provided funding for special education and related services only to school-age children and did not provide for early intervention services to infants and toddlers. See Education for All Handicapped Children Act of 1975, S. 6, 94th Cong., 89 Stat. 773 (1975) ("EAHCA" or "the Act").[4] Because the statute did not yet provide for early intervention services to disabled infants and toddlers, its provisions were drafted with only school-age children in mind.[5] The

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ment the School Board belatedly offered the triplets in this case would have included the particular one-on-one services which they had been receiving. Thus, this accommodation would not have been the same as continuing those services already deemed to be necessary and appropriate for these children. It is precisely the continuation of services pending a placement dispute that Congress sought to protect by enacting "stay put."

[4] In 1990, Congress changed the name of the law to the "Individuals with Disabilities Education Act." *See* Education of the Handicapped Act Amendments of 1990, S. 1824, 101st Cong. § 901(a), 104 Stat. 1103, 1141 (1990).

[5] Specifically, the Act was designed to assure that a free and appropriate public education ("FAPE") was made available to handicapped children ages 6 and above, and provided incentives

"stay put" provision assured that, pending the resolution of a placement dispute, a school-age child applying for initial admission to public school would be guaranteed placement in the public school program (rather than be excluded on the basis of disability),[6] and that a child already in school with an educational placement under the IDEA would be entitled to maintain that placement until the dispute was resolved.[7] The dual purposes of this procedural safeguard were clear: to guarantee access to public school, on the one hand, and to maintain special educational services where those were already being provided, on the other. The drafters of this provision could not have intended, or even anticipated, that once Congress amended the statute to also provide grants for early intervention services to disabled infants and toddlers, this "stay put" provision would be

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for States also to offer a FAPE to preschoolers between the ages of 3 and 5. EAHCA § 612(2)(B).

[6] Indeed, Congress passed the legislation after finding that a million handicapped children in the United States were "*excluded entirely* from the public school system . . ." *See* EAHCA § 3(b)(4) (emphasis added); see also *Honig v. Doe*, 484 U.S. 305, 323, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988) (finding that by enacting the "stay put" provision, "Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school.").

[7] The "stay put" provision under Part B provides that, unless the school and parents otherwise agree,

> the child shall remain in [his or her] then-current educational placement . . . 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).

construed against the interests of a disabled child to result in the *withdrawal* of services pending the resolution of a placement dispute.

More than a decade later, in 1986, Congress enacted what we now know as Part C of the IDEA to address the developmental disabilities of handicapped infants and toddlers before those children reached school age (ages birth to 2, inclusive).[8] *See* Education of the Handicapped Act Amendments of 1986, S. 2294, 99th Cong., 100 Stat. 1145 § 101(a) (1986) ("1986 Amendments"). In passing this legislation, Congress recognized that certain special education needs could be mitigated if children's developmental disabilities were addressed before they reached the age of 3. Congress thus developed a program to help states identify handicapped infants and toddlers and provide "early intervention services" to those children and their families. *Id.* at §§ 676, 677. Entities receiving federal funding for this purpose were to develop "individualized family service plans" ("IFSPs") that would identify each child's developmental needs and the particular services required to meet those needs. *Id.* at § 677(d).

Notably, as it had done more than ten years before with Part B, Congress enacted a "stay put" provision for parents who disputed a proposed change in services now provided to handicapped infants and toddlers, to assure that those services too would be maintained during any dispute.[9] *Id.* at § 680(7). Con-

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[8] What is now Part C of the IDEA was originally designated as "Part H." For clarity, however, I refer to that section of the statute as "Part C" throughout.

[9] The "stay put" provision relevant to the infants and toddlers program provides:

gress additionally required that IFSPs state "the steps to be taken supporting *the transition of the handicapped toddler to [special education] services provided [to school age children]* under part B" where those services would be needed, *id.* at § 677(d)(7) (emphasis in original), thereby emphasizing the importance of a smooth transition from this new program into Part B.

As of 1986, then, it was clear that Congress intended to develop a framework for the continuous provision of services to handicapped children from birth through school age in order to promote their educational development. The 1986 amendments dovetailed with the existing law (providing for services for children ages 3 and up) by providing for early intervention services for children from birth to age 2, inclusive, and increasing the incentives to provide services for children ages 3 to 5.[10] The "stay put" provision pertaining to handicapped infants and tod-

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> During the pendency of any proceeding or action involving a complaint by the parents of an infant or toddler with a disability, unless the State agency and the parents otherwise agree, the infant or toddler shall continue to receive the appropriate early intervention services currently being provided or, if applying for initial services, shall receive the services not in dispute.

20 U.S.C. § 1439(b)(2005).

[10] The requirement that attention be paid to the transition of handicapped infants and toddlers who would continue to require services when they reached school age protected against any interruption in services necessary for the child's development and education. Early intervention services were to include case management services designed to facilitate "the development of a transition plan to preschool services" where those would be needed. H.R. No. 99-860, at 8, *as reprinted in* 1986 U.S.C.C.A.N. 2401, 2408.

dlers guaranteed that parents could maintain the current level of early intervention services pending resolution of any dispute. Congress therefore intended that where services were provided under the IDEA (whether under Part B or Part C of the IDEA), those services would continue to be provided if a dispute arose as to a child's proper placement, until the dispute was resolved.

Indeed, Congress recognized that where early intervention and special education services would be provided by different entities, it would be "essential that the agencies coordinate their efforts to transition the child to the special education system operated by the local educational agency." H.R. No. 99-860, at 6, *as reprinted in* 1986 U.S.C.C.A.N. at 2407. The House Report also noted that speedy resolution of placement disputes in the infant and toddler program would be essential "because an infant's development is rapid and therefore undue delay could be potentially harmful." *Id.* at 14, *as reprinted in* 1986 U.S.C.C.A.N. at 2415.

Congress' intention to ensure a smooth transition from Part C to Part B became most prominent in the IDEA's 1991 amendments. *See* Individuals with Disabilities Education Act Amendments of 1991, S. 1106, 102nd Cong., 105 Stat. 587 (1991) ("1991 Amendments"). Congress expressly crafted those amendments "to facilitate the development of a comprehensive *'seamless' system of services for children, aged birth to 5, inclusive*, and their families which will ensure . . . *a smooth transition for children moving from early intervention programs under [Part C] to preschool programs under part B* . . . ." H.R. No. 102-198, at 4 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 310, 313 (emphasis added). The House

Report found that "it is critical that there will be no gap in services when a child turns three . . ." *Id.* at 7, *as reprinted in* 1991 U.S.C.C.A.N. at 316.

To this end, the 1991 amendments (1) require that state educational agencies establish policies and procedures for the smooth transition from early intervention services to special education services in preschool programs, including an assurance that either an IEP or an IFSP is being implemented by the disabled child's third birthday; (2) allow educational agencies, with the parents' consent, to continue using IFSPs as IEPs for children ages 3 to 5; (3) authorize states and local educational agencies to use preschool grants to provide a FAPE to 2-year old children with disabilities who will turn 3 during the school year; (4) require that personnel be trained to coordinate transition services for children moving from early intervention services to special education services in preschool programs; (5) make transition arrangements available that involve the family; and (6) guarantee the right of parents or guardians to determine whether a disabled infant or toddler will accept or decline an early intervention service without jeopardizing other early intervention services. *See* 1991 Amendments §§ 5; 7; 13; 15; 16; and 17.

In short, these amendments were unambiguously designed to assure continuous services to disabled children from birth through school age notwithstanding any disputes and disagreements as to a child's placement. The majority errs by reading the "stay put" provision entirely outside this context and, having done so, reaches a result that is contrary to the history, design, and purpose of the IDEA. In order avoid an absurd result and give effect to the IDEA's

procedural safeguards, we cannot read the "stay put" provision in isolation.

Nowhere could the absurd consequences of our failure to consider statutory language in context be clearer than under the facts presented in this case. The majority's interpretation of "stay put" allows for the actual *withdrawal* of services to the triplets in the middle of a school year (when they turned 3 years old), even though the School Board *failed to meet its statutory obligation* to have an IEP in place for the triplets when they reached the age of 3.[11] This ruling thus has the surely unintended effect of allowing a school board to abdicate its obligation to develop IEPs for disabled infants and toddlers about to transition, and leaving those children and their parents with no effective recourse during the pendency of a placement dispute.[12] A procedural safeguard in-

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[11] While the School Board may dispute the parents' allegations in this case, the posture of this appeal (as an appeal from the district court's grant of the School Board's motions to dismiss) requires us to accept those allegations as true.

[12] The majority contends that the reimbursement remedy is sufficient, because 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. While the Supreme Court has noted that "conscientious parents who have adequate means and who are reasonably confident of their assessment" will often choose that course, *School Committee of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 370, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), this is no remedy for parents who do not have the financial means to pay for private educational services in the first place. The IDEA's procedural safeguards promote access to a free and appropriate public education by protecting disabled children's current educational placements during a dispute as well as by providing for

tended to protect the rights of disabled children during a placement dispute simply cannot reasonably be read to result in the withdrawal of services already identified as necessary to a child's educational development. This result is contrary to the purpose of the IDEA.

Relying solely on part of the "plain language" of the stay-put provision to conclude that the only placement for a disabled child who has reached school age and is therefore applying for initial admission to public school is a "public school program" with no accommodation, the majority rejects the argument that the existing IFSP may constitute the triplets' then-current educational placement, so as to entitle them to continuation of those services pending the resolution of their dispute with the School Board. For the foregoing reasons, concluding as a matter of law that existing IFSPs cannot constitute a current educational placement is inconsistent with the statute, when read as a whole, as well as with its intent and purpose. This conclusion is also inconsistent with our reasoning in *M.M. ex rel. C.M. v. Sch. Bd. of Miami-Dade County, Fla.*, 437 F.3d 1085 (11th Cir.2006). In *M.M.*, we recognized that "early intervention services" previously provided under Part C-the same type of services the triplets had been receiving here-may also constitute "special education and related services" for purposes of establishing eligibility for reimbursement for private school expenses when a child is denied a FAPE.[13] If "early in-

reimbursement when children are denied a FAPE under Part B and then seek private services on their own.

[13] Section 1412(a)(10)(C)(ii) provides:

> If the parents of a child with a disability, *who previously received special education and related services under the*

tervention services" may constitute "special education services" for purposes of establishing eligibility for reimbursement under the IDEA, then they may also constitute a child's existing "educational placement" for purposes of "stay put."[14] Like the triplets here, C.M. (the child of M.M.) had never been enrolled in public school (by virtue of not having yet reached school age), but *had* been provided early intervention services under the IDEA. Even though C.M. had never been enrolled in public school, we held that her parents were eligible for reimbursement for private school expenses *because the early intervention services C.M. had previously received constituted "special education and related services under the authority of a public agency"* for purposes of the reimbursement provision. *M.M.*, 437 F.3d at 1098. The majority errs by finding as a matter of law that the triplets did not have a current educational placement without considering, consistent with our case law, whether the "early intervention services"

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authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

20 U.S.C. § 1412(a)(10)(C)(ii) (emphasis added).

[14] To the extent that a particular IFSP does not contain an educational component, as defined under the IDEA, a school board would not be required to continue those services under this construction of "stay put." All the IDEA requires is that schools make a FAPE accessible to children with disabilities through the provision of "special education and related services."

they received also constituted "special education and related services."

In *Pardini v. Allegheny Intermediate Unit*, 420 F.3d 181 (3d Cir.2005), the Third Circuit found that Part B's "stay put" provision required the continuation of early intervention services to a child transitioning from Part C to Part B pending resolution of a placement dispute, because those services constituted the child's "educational placement," even though the child had not previously been admitted to public school. In reaching that conclusion, the Third Circuit took particular note of Congress' intention that children transitioning from Part C to Part B enjoy a smooth transition.[15] *See id.* at 191 ("Congress stressed that the amendments it added [to the IDEA] were 'designed to promote a *seamless* system of services for children with disabilities, aged birth to five, inclusive.'") (citation omitted). Although the majority rejects our sister Circuit's decision in *Pardini* as "incorrectly decided," it fails to address how its ruling squares with our own reasoning in *M.M.*

For these reasons, I dissent.

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[15] The Third Circuit also rejected the interpretation of "stay put" by the Department of Education, finding it to be unpersuasive in light of the purpose and design of the statute. *Pardini*, 420 F.3d at 191. Indeed, an agency interpretation is not entitled to deference when it is not based on a permissible construction of the statute. *See Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

D.P. and L.P., on behalf of E.P., D.P., and K.P.,
Plaintiffs
v.
SCHOOL BOARD OF BROWARD COUNTY, FLORIDA,
Defendant.

Nos. 04–60297–CIV–MARRA;
04–60297–CIV–SELTZER.

March 8, 2005

ORDER

MARRA, District Judge.

This cause is before the Court upon Defendant's Motion to Dismiss the Amended Complaint, filed April 20, 2004 (DE 10). On April 30, 2004, Plaintiffs filed a response to the motion. (DE 13.) On May 28, 2004. Defendant filed a reply in support of its motion. (DE 20.) The Court has considered the motion and is otherwise advised in the premises.

I. Background

On April 6, 2004, Plaintiffs D.P. and L.P. filed, on behalf of E.P., D.P., and K.P., an Amended Complaint asserting claims for declaratory judgment (Count I), injunctive relief (Count II), and attorneys' fees (Count III). (DE 7.)

The facts alleged in the Amended Complaint are as follows: Plaintiff-triplets have each been diag-

nosed with a serious autism spectrum disorder. (Amended Complaint ¶ 1.) On January 4, 2004, Plaintiff-triplets turned three years old. (Amended Complaint ¶ 11.) Prior to their third birthday, they had been receiving educational services under their respective Individual Family Service Plans ("IFSP") from the State of Florida's early intervention program. (Amended Complaint ¶ 9.) When Plaintiff-triplets turned three, they "aged out" of the Florida early intervention program, and their education became the responsibility of Defendant. (Amended Complaint ¶ 11.) However, Defendant allowed the triplets to turn three without having an Individualized Educational Plan ("IEP") in place for any of the children. (Amended Complaint ¶¶ 4, 13.) Defendants failed to timely evaluate the triplets, and then insisted on delaying the IEP meeting process until after the triplets turned three. (Amended Complaint ¶ 12.) Plaintiffs requested Defendant to continue the services set forth in their early intervention IFSPs. (Amended Complaint ¶ 13.) However, Defendant refused to provide the children with the services they were receiving under their then-existing IFSPs. (Amended Complaint ¶ 14.) Plaintiff-parents have been forced to bear the cost of their children's IFSP services during the pendency of these proceedings. (Amended Complaint ¶ 16.)

On January 6, 2004, Plaintiff-parents requested an impartial due process hearing, arguing that the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.*, requires that the services authorized by their children's last IFSPs be provided to the children until such time as IEPs are in place for each child and/or all judicial remedies are exhausted. (Amended Complaint ¶ 15.) On January 7,

2004, the requests were referred to the State of Florida Division of Administrative Hearings for assignment to an Administrative Law Judge to conduct a due process hearing. (Exhibit A to Amended Complaint, Final Order of Administrative Law Judge at 3.) On January 9, 2004, during a telephonic conference call, the parties agreed that evidentiary hearings were not necessary because the dispute concerning the continuation of the IFSP services raised a pure legal question. (Final Order at 3.)

On February 10, 2004, the Administrative Law Judge issued a Final Order concluding that the IDEA does not require Defendant to provide Plaintiff-triplets the services of their last IFSPs during the pendency of these proceedings. (Amended Complaint ¶ 18.) The Administrative Law Judge also concluded that he was not empowered to award to Plaintiffs reimbursement for the cost of any private education received by the Plaintiff-triplets or attorneys' fees. (Final Order at 13, 24.)

In the Amended Complaint, Plaintiffs contend that the Administrative Law Judge's interpretation of the IDEA was erroneous because it "failed to take into account or address the fact that the district failed to develop and have in place any IEPs prior to the children's third birthday, as required by federal and state law." (Amended Complaint ¶¶ 18, 23, 24, 25.) Plaintiffs also assert that the Administrative Law Judge failed to specify to what interim services, if any, Plaintiff-triplets should be entitled. (Amended Complaint ¶ 23.) Plaintiffs also contend that the Administrative Law Judge ignored existing law recognizing that the services rendered pursuant to an IFSP can be deemed an appropriate placement under Part B of the IDEA. (Amended Complaint ¶¶ 28, 29.)

In Count I, Plaintiffs ask the Court to declare the pendency placement to be the children's IFSP services, enjoin Defendant from refusing to continue to supplement the children's IFSP services, and order Defendant to reimburse to the Plaintiff-parents the cost of the interim IFSP services. (Amended Complaint at 7-8.) In Count II, Plaintiffs request that the Court reverse the Administrative Law Judge's Final Order and require Defendant hereafter to fund the services provided in the children's IFSPs during the pendency of the administrative and judicial proceedings. (Amended Complaint at 8-9.)

Defendant asks this Court to dismiss the Amended Complaint, arguing that the Final Order issued by the Administrative Law Judge was correctly decided and that Plaintiffs have not exhausted their administrative remedies with respect to the other allegations in the Amended Complaint. (Motion to Dismiss at 1.) The parties' contentions are more fully discussed in the "Discussion" section below.

II. Legal Standard

Rule 8(a) of the Federal Rules of Civil Procedure requires "a short and plain statement of the claims" that "will give the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests." Fed. R. Civ. P. 8(a). It is well settled that a complaint should not be dismissed unless "it appears beyond a doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). When considering a motion to dismiss, the Court must accept all of the plaintiff's allegations as true. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984).

III. Discussion

A. Legal Background

The IDEA creates a federal grant program to assist state and local agencies in providing early intervention services for disabled infants and toddlers, and in providing education to disabled children. 20 U.S.C. § 1400. Under Part C of the IDEA, states must provide disabled children under three years of age with an individualized family service plan, or IFSP, setting forth specific early intervention services necessary for the toddler or infant and their family. 20 U.S.C. § 1435(a)(4). Under Part B of the IDEA, states must provide disabled children between the ages of three and twenty-one with the opportunity to receive a "free appropriate public education" ("FAPE") by offering each student special education and related services under an individualized education program, or IEP. 20 U.S.C. § 1412(a)(1)(A), (a)(4). A state is obligated to have policies and procedures in place to ensure a smooth and effective transition from early intervention programs provided under Part C of the Act to preschool programs provided under Part B of the IDEA. 34 C.F.R. § 300.132(a). To that end, a state's policies and procedures must ensure that "by the third birthday of a child . . . . an IEP, or if consistent with § 300.342(c) and section 636(d) of the Act, an IFSP, has been developed and is being implemented for the child . . .". 34 C.F.R. § 300.132(b).

To ensure disabled children with disabilities are guaranteed procedural safeguards with respect to the provision of FAPE under Part B, the IDEA requires states to provide, among other things, "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or

educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6). When a complaint under section 1415(b)(6) is received by the state, the parents of the disabled child have an opportunity for an impartial due process hearing conducted by the state agency. 20 U.S.C. § 1415(f). Following a decision by the state agency, the parents have the right to bring a civil action with respect to the complaint in either state or federal court. 20 U.S.C. § 1415(i)(2).

During the pendency of any such proceedings, unless the parties agree otherwise, "the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to 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). This provision is also commonly referred to as the "stay-put" provision. The purpose of the stay-put provision is "to prevent school districts from effecting unilateral change in a child's educational program." *Georgia State Department of Education v. Derrick C.*, 314 F.3d 545, 551 (11th Cir. 2002) (citations and internal quotation marks omitted).

The implementing regulation similarly states as follows:

§ 300.514 Child's status during proceedings.

> (a) Except as provided in § 300.526, during the pendency of any administrative or judicial proceeding regarding a complaint under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

> (b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.
>
> (c) If the decision of a hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of paragraph (a) of this section.

34 C.F.R. § 300.514. The issue in this case centers upon whether, under the stay-put provision, a child transitioning from Part C to Part B of the IDEA is entitled to a continuation of the early intervention services provided to the child in conformity with the child's IFSP when an IEP has not been completed by the child's third birthday.

The Office of Special Education and Rehabilitative Services of the United States Department of Education, through its Office of Special Education Programs ("OSEP"), in connection with its issuance of regulations following the 1997 amendments to Part B of the IDEA, stated its position with regard to this issue:

> Comment: A few commenters requested that the regulation be revised to make clear that the pendency provisions of §300.514 apply to children transitioning from early intervention services under Part C to preschool special education and related services under Part B.
>
> Discussion: The pendency provision at §300.514(a) does not apply when a child is transi-

> tioning from a program developed under Part C to provide appropriate early intervention services into a program developed under Part B to provide FAPE. Under §300.514(b), if the complaint requesting due process involves the child's initial admission to public school, the public agency responsible for providing FAPE to the child must place that child, with the consent of the parent, into a public preschool program if the public agency offers preschool services directly or through contract or other arrangement to nondisabled preschool-aged children until the completion of authorized review proceedings.

64 Fed. Reg. 12,406, 12,558, 1999 WL 128278 (Mar. 12, 1999).[1] OSEP's interpretation of the stay-put provision is entitled to substantial deference. *Pardini v. Allegheny Intermediate Unit*, 280 F. Supp. 2d 447, 455 (W.D. Pa. 2003) (concluding that an IFSP was not a "current educational placement" for purposes of the stay-put provision of the IDEA). Adopting OSEP's interpretation of the stay-put provision of Part B of the IDEA, the Administrative Law Judge in this case concluded that the School Board's refusal to provide Plaintiff-triplets with the early intervention services they had been receiving pursuant to Part C of the IDEA did not constitute a violation of the stay put provision set forth in Part B of the IDEA. (Final Order at 23.)

B. Parties' Contentions

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[1] This interpretation is consistent with OSEP's earlier interpretation in a policy letter interpreting a former version of 34 C.F.R. § 300.514. Letter to Klebanoff, 28 IDELR 478 (1997) (which is quoted in relevant part in the Administrative Law Judge's Final Order).

In the motion to dismiss, Defendant contends that the Amended Complaint should be dismissed because the Final Order was correctly decided and Plaintiffs have not exhausted their administrative remedies with respect to the other allegations in the Amended Complaint. (Motion to Dismiss at 1.)

Plaintiff-parents disagree, arguing that the Final Order was incorrect because it essentially permits Defendant to disregard the time requirements of the IDEA without any consequence. (Response to Motion to Dismiss at 2.) Plaintiff-parents argue that this Court must consider Defendant's failure to provide an IEP to the children in conjunction with an adjudication of Plaintiff-triplets' pendency entitlements. (Response to Motion to Dismiss at 10.) Plaintiff-parents also submit that the developmental and educational needs of a child with autism are "one in the same," as recognized by 34 C.F.R. § 300.132(b) and Broward County's procedures, such that the early development services received by the children under their respective IFSPs were appropriate pendency placements. (Response to Motion to Dismiss at 11-12.) Plaintiff-parents further contend that the Administrative Law Judge's reliance upon the OSEP's comments was improper because the comments presumed that a public school placement was offered in a timely manner and under a timely IEP. (Response to Motion to Dismiss at 14.) Relying upon *Johnson v. Special Education Hearing Office*, 287 F.3d 1176 (9th Cir. 2002), Plaintiff-parents argue that courts have held that an IFSP can constitute a proper pendency placement under Part B of the IDEA. (Response to Motion to Dismiss at 15.) Plaintiffs argue that even if some issues remain unexhausted, exhaustion of administrative remedies would be futile in this case.

Plaintiffs argue that "to hold otherwise would effectively make stay put determinations incapable of judicial review as there is always the potential some dispute could arise sometime in the future." (Response to Motion to Dismiss at 8.)

In response, Defendant argues that Plaintiffs failed to raise at the administrative level the factual issue of Defendant's alleged failure to provide an IEP at the appropriate time. (Reply at 3.) Defendant suggests that Plaintiff is attempting to argue the denial of a FAPE in the guise of the IDEA's stay-put provision. (Reply at 3.) Defendant further argues that exhaustion would not be futile, and that the two cases, *Covington v. Knox County School System*, 205 F.3d 912 (6th Cir. 2000) and *Engwiller v. Pine Plains Central School District*, 110 F. Supp. 2d 236 (S.D.N.Y. 2000), cited by Plaintiffs and which are discussed below, are factually distinguishable. (Reply at 4.) Furthermore, Defendant asserts that the "then-current educational placement" clause of the stay-put provision does not apply to children transitioning from Part C to Part B without regard to whether an IEP has been timely developed, and that, in any event, the failure to provide a timely IEP is outside the scope of this appeal. (Reply at 10-11.) Finally, Defendant posits that even if it had the discretion to utilize the IFSP in creating an IEP, there is no express requirement to do so. (Reply at 12-13.) Defendant summarizes that the only alleged violation in this case is Defendant's failure to provide a timely IEP, and such a denial of FAPE claim must first be raised at the administrative level. (Reply at 13.)

In reply, Plaintiffs reassert some of their previous arguments and, citing to *Wagner v. Board of Education*, 335 F.3d 297 (4th Cir. 2003), contend that the

mere existence of factual issues relating to a FAPE does not divest this Court of jurisdiction to grant relief under the stay-put provision of the IDEA. (Plaintiffs' reply in support of Cross-Motion at 2-3.)

C. Legal Analysis

After conducting a *de novo* review of the Administrative Law Judge's Final Order and the parties' contentions, the Court concludes that the decision of the Administrative Law Judge was not erroneous. As set forth above, the stay-put provision of the IDEA provides that during the pendency of review proceedings, unless the parties agree otherwise, "the child shall remain in the then-current educational placement of such child, or, *if applying for initial admission to 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) (emphasis added). A careful reading of this provision reveals that the appropriate pendency placement for a child under the stay-put provision of the IDEA depends upon whether the child has or has not been admitted to public school. The pendency placement of a child is determined by the then-current educational placement, unless the child is "applying for initial admission to public school," in which case the second part of the stay-put provision applies. If the child is applying for initial admission to public school, thereby triggering the second part of the stay-put provision, it follows that the child's pendency placement is not determined by the first part of the stay-put provision. This interpretation of the statute is supported by the grammatical structure of the provision, i.e. the presence of only one main subject-noun, i.e. "the child," and the subse-

quent disjunctive word "or" which divides the two parts of the stay-put provision.

Thus, the first part of the stay-put provision addresses the pendency placement for the child who has already been admitted to public school. The statutes mandates that "the child shall remain in the then-current educational placement of such child." 20 U.S.C. § 1415(j). The second part of the stay-put provision, on the other hand, addresses the pendency placement for the child who is applying for initial admission to public school, "If applying for initial admission to public school, [the child] 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). Pursuant to the second clause of the stay-put provision, with the consent of the parents, the public school program is the statutorily-mandated pendency placement for all children initially entering public school.

In this case, because Plaintiff-triplets had not been admitted to public school at all relevant times, the second clause of the stay-put provision applies. Therefore, Plaintiff-triplets' pendency placement, with the consent of the parents, is the public school program until all proceedings have been completed. *Id.* Because the first clause of the stay-put provision does not apply, the "then-current educational placement" of the triplets is not relevant to a determination of the statutorily-established pendency placement in this case. Thus, Plaintiffs' position that the triplets' pendency placement should be determined by an interpretation of the "then-current educational placement" is untenable.

Moreover, contrary to Plaintiffs' suggestion otherwise, application of the stay-put provision does not

depend upon whether the "identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child," was adequate or timely. 20 U.S.C. § 1415(b)(6). Rather, the clear language of the statute establishes that the pendency placement is the public school program for a child applying for initial admission in public school, without regard to the untimeliness or inappropriateness of the IEP for the child. This allows for the implementation of an interim placement without the necessity of delving into the merits a particular plaintiff's complaint. The only prerequisite to implementation of the interim placement in the public school program is the parents' consent. If parental consent is withheld, a pendency placement is simply not provided by the school district during the pendency of the proceedings. There is no indication in the statute that, by withholding their consent, parents are entitled to a pendency placement of their choice.

Moreover, the statute does not make any special exceptions for children who, upon initial admission to public school, were receiving appropriate IFSP services under Part C of the IDEA. All children seeking initial admission to public school are essentially treated the same under the stay-put provision. Although Plaintiffs appear to quarrel with the appropriateness of that result, the Court is not in a position to rewrite the statute. Furthermore, the mere fact that federal law and local procedure recognizes that an IFSP may serve as the IEP of a child aged three through five under certain circum-stances, *see* 34 C.F.R. § 300.342; Broward County's Special Programs and Procedures for Exceptional Students at 7, does not in any way change the clear language of the

stay-put provision which establishes the public school program is the proper pendency placement for a child initially entering public school.[2]

The Court's interpretation of the stay-put provision is consistent with the OSEP's interpretation, as well as the interpretation of at least one district court that has considered the issue. *See* 64 Fed. Reg. 12, 06, 12,558, 1999 WL 128278 (Mar. 12, 1999); *Pardini*, 280 F. Supp. 2d at 455 (concluding that an IFSP was not a "current educational placement" for purposes of the stay-put provision of the IDEA). The *Johnson* case, cited by Plaintiffs, is not contrary to this Court's holding since the parties in that case "agreed that Nicholas's IFSP constitutes his current educational placement for 'stay put' purposes. . ." 287 F.3d at 1180-81.

In summary, the Court concludes that the Administrative Law Judge's interpretation of the stay-put provision, i.e. that the children were not entitled to the continuation of their early intervention services as a pendency placement, was not erroneous. In reaching this statutory interpretation, there was no need for the Administrative Law Judge to consider the timeliness or adequacy of Defendant's conduct with respect to the children's IEPs. Similarly, the

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[2] The recognition in federal and local law that an IFSP may be a suitable substitute to an IEP might, however, bear upon the issue of the appropriateness of the private placement and thus whether Plaintiffs are entitled to reimbursement, as discussed below. *School Committee of Town of Burlington v. Department of Education*, 471 U.S. 359, 370, 85 L. Ed. 2d 385, 105 S. Ct. 1996 (1985) (recognizing that a district court is authorized to order school authorities to reimburse parents for private education if the court ultimately determines that the private placement was appropriate and that a FAPE was not offered).

Administrative Law Judge did not need to determine the children's specific pendency placement to conclude that they were not entitled to the continuation of the IFSP services.[3] Indeed, the parties conceded as much in the administrative proceedings below by stipulating that the interpretation of the stay-put provision was purely a legal question, making evidentiary hearings unnecessary. "The parties agreed that evidentiary hearings were not necessary in these cases inasmuch as the dispute between them concerning the continuation of the 'services provided on [Petitioners'] last IFSP[s]' was purely a legal one that could be resolved based on briefs submitted by the parties." (Final Order at 3.)

Moreover, a review of the Amended Complaint indicates that all the relief sought by Plaintiff-parents in this case flows from their position that the Administrative Law Judge's decision was erroneous. Even their request for reimbursement for the costs of the IFSP services is based upon their argument they were statutorily entitled to the continuation of the IFSP services. In effect, Plaintiff-parents do not seek any relief independent of the issue of whether the Administrative Law Judge's decision was erroneous. Because the Court concludes that the Administrate

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[3] In any case, pursuant to the stay-put provision and OSEP's interpretation thereof, Plaintiff-triplets' pendency placement, with the consent of the parents, is the "public school pro-gram" until all proceedings have been completed, *see* 20 U.S.C. § 1415(j), and, more specifically, the "public pre-school program if the public agency offers preschool services directly or through contract or other arrangement to nondisabled pre-school-aged children until the completion of authorized review proceedings," *see* 64 Fed. Reg. 12,406, 12,558, 1999 WL 128278 (Mar. 12, 1999).

Law Judge's decision was not erroneous, Plaintiff-parents are not entitled to the relief they requested.[4]

To the extent that Plaintiff-parents may wish to seek reimbursement for the costs of the IFSP services based upon Defendant's failure to provide adequate and/or timely IEPs, they have not requested such relief in the Amended Complaint, and the issue is premature since it has not been determined whether the Plaintiff-triplets have been denied a FAPE. If either the Administrative Law Judge determines that the Plaintiff-triplets have been denied a FAPE, or if the Court, upon appeal of a decision by the Administrative Law Judge in favor of Defendant on the FAPE issue, finds that a FAPE has been denied, the Court will then consider the appropriateness of requiring Defendant to reimburse Plaintiff-parents for the cost of the IFSP services. *See* 20 U.S.C. § 1415(i)(2)(B) ("the court . . . shall grant such relief as the court determines is appropriate."); *School Committee of Town of Burlington v. Department of Education*, 471 U.S. 359, 370, 85 L. Ed. 2d 385, 105 S. Ct. 1996 (1985) (recognizing that a district court is authorized to order school authorities to reimburse parents for private education if the court

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[4] Because interpretation of the stay-put provision was raised before, and properly decided by, the Administrative Law Judge in the first instance, and since there are no relevant issues presently before the Court that remain unresolved, remand of this case for administrative exhaustion is unnecessary. In so concluding, the Court need not decide whether the requirement of administrative exhaustion should even apply to this case. *See Murphy v. Arlington Central School District Board of Education*, 297 F.3d 195 (2d Cir. 2002), as cited by Plaintiffs in their reply memorandum in support of their Motion for Preliminary Injunction.

ultimately determines that the private placement was appropriate and that a FAPE was not *offered); Board of Education v. Jeff S.*, 184 F. Supp. 2d 790, 803 (C.D. Ill. 2002) (failure of the district to present educational proposals to parents in a timely manner triggered the school district's obligation to reimburse the parents for the costs of private school education); *see also* 20 U.S.C. § 1412(a)(10)(C)(ii).[5]

D. Conclusion

Based upon the foregoing, it is **ORDERED and ADJUDGED** as follows:

1. Defendant's Motion to Dismiss the Amended Complaint, filed April 20, 2004 (DE 10) is **GRANTED**. The Amended Complaint is **DISMISSED** with prejudice as to the request for a pendency placement, and **DISMISSED** without prejudice as to the request for reimbursement and attorney's fees. Plaintiffs may resubmit a request for reimbursement and supporting memorandum of law after the Administrative Law Judge has rendered a decision, if any, on the issue of a FAPE.

2. The decision of the Administrative Law Judge is hereby **AFFIRMED**.

3. Any pending motions are **DENIED** as moot.

4. The Clerk shall **CLOSE** this case.

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[5] The Court does not, at this time, pass on the issue of whether Plaintiffs would be entitled to reimbursement.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 04-61461-CIV-MARRA/SELTZER
L.M.P. on behalf of E.P., D.P., AND K.P.
Petitioner[s]
vs.
SCHOOL BOARD OF BROWARD COUNTY, FLORIDA
Respondent
ORDER

This cause is before the Court upon Defendant's Motion to Dismiss the Complaint with Prejudice, filed January 24, 2005 (DE 6). On February 8, 2005, Plaintiffs filed a response to the motion. (DE 7.) On February 14, 2005, Defendant filed a reply in support of its motion. (DE 9.) The Cowl has considered the motion and is otherwise advised in the premises.

I. BACKGROUND

On November 4, 2004, Plaintiff L.M.P. on behalf of E.P., D.P., and K.P. filed a one-count Complaint asserting that Defendant had breached its statutory duty to provide a free and appropriate public education. (DE l.) The facts alleged in the Complaint are as follows: Plaintiff-triplets have each been diagnosed with a serious autism spectrum disorder. (Complaint ¶ 8.) Plaintiff L.M.P. is the parent of E.P., D.P., and K.P. (Complaint ¶ 3.) On January 4, 2004, Plaintiff-triplets turned three years old. (Complaint ¶ 10.) Prior to their third birthday, they had been receiving educational services under their respective Individual Family Service Plans ("IFSP") from the State of Florida's early intervention program. (Complaint ¶ 11.) When Plaintiff-triplets turned three, they "aged

out" of the Florida early intervention program. (Complaint ¶ 13.) However, Defendant allowed the triplets to turn three without having an Individualized Educational Plan ("IEP") in place for any of the children. (Complaint ¶ 15.) On February 3, 2004, Defendant issued "temporary IEPs" for the children at the Baudhuin Preschool. (Complaint ¶ 16.) The children's parents did not consent to the temporary placement. (Complaint ¶ 17.) Defendant has not offered any additional temporary IEPs or final IEPs for the children. (Complaint ¶ 18.)

On August 17, 2004, Plaintiffs requested a due process hearing in connection with the effect, if any, of their refusal to consent to the temporary placement. (Complaint ¶ 19.) Plaintiffs asserted that "where a parent of a child transitioning from the E[early] I[intervention] program does not consent to a temporary IEP, a school district must replicate the last EI FSP unless that district can demonstrate it was impossible to do so." (Complaint ¶ 21.) On October 5, 2004. the Administrative Law Judge determined that the IEPs were not valid because they had never been consented to by the parents, and thus Defendant was prohibited from providing the children with the proposed services. (Final Order of the Administrative Law Judge at 24, attached to the Complaint.) Nevertheless, the Administrative Law Judge found that Defendant "is not now, nor has it ever been, as a result of the parents' failure to consent to the Triplets' 'temporary' IEPs, responsible for providing the Triplets with the early intervention services they had been receiving under Part C of the IDEA before turning three years of age." (Final Order of the Administrative Law Judge at 24.)

In the Complaint, Plaintiffs state that the children have been denied a free and appropriate public education in violation of Defendant's statutory duty under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400, et seq. Plaintiffs ask the Court to "(1) declare the February 3, 2002 temporary IEPs invalid; (2) order the [school] district to reimburse the parents for continuation of the triplet's [I]FSPs, and, (3) order the district to continue such services unless the [sic] it can show cause why it was impossible to do so, and (4) award Plaintiffs attorneys fees and costs, and, (5) for all other relief the Court deems proper." (Complaint at 4.)

Related Case

The instant case is related to a case which was pending before the undersigned, but is now closed: D.P. v. The School Board of Broward County, Florida, Case No. 04-60297-Civ-MARRA/SELTZER. In that case, on April 6, 2004, Plaintiff D.P. and L.P. filed, on behalf of their children E.P., D.P., and K.P., an Amended Complaint asserting claims for declaratory judgment (Count I), injunctive relief (Count II), and attorneys' fees (Count III). (DE 7.) The case arose out of Defendant's refusal to provide the same children with the services they were receiving under their then-existing IFSPs. (Amended Complaint ¶ 14.) An Administrative Law Judge issued a Final Order concluding that the "stay-put" provision, 20 U.S.C. § 1415(j), of the IDEA does not require Defendant to provide Plaintiff-triplets the services of their last IFSPs on a temporary basis. (Amended Complaint ¶ 18.) The Administrative Law Judge also concluded that he was not empowered to award to Plaintiffs reimbursement for the cost of any private education received by the Plaintiff-triplets or attor-

neys' fees. (Final Order at 13, 24, attached to Amended Complaint.)

In the Amended Complaint, Plaintiffs contended that the Administrative Law Judge's interpretation of the IDEA was erroneous because it "failed to take into account or address the fact that the district failed to develop and have in place any IEPs prior to the children's third birthday, as required by federal and state law." (Amended Complaint ¶¶ 18, 23, 24, 25.) Plaintiffs asked the Court to declare the pendency placement to be the children's IFSP services, enjoin Defendant from refusing to continue to supplement the children's IFSP services, and order Defendant to reimburse to the Plaintiff-parents the cost of the interim IFSP services. (Amended Complaint at 7-8.) Plaintiffs also requested that the Court reverse the Administrative Law Judge's Final Order and require Defendant hereafter to fund the services provided in the children's IFSPs during the pendency of the administrative and judicial proceedings. (Amended Complaint at 8-9.)

After conducting a statutory analysis of the "stay-put" provision, 20 U.S.C. §1415(j), the Court concluded that a child transitioning from Part C to Part B of the IDEA is <u>not</u> entitled to a continuation of the early intervention services provided to the child in conformity with the child's IFSP when an IEP has not been completed by the child's third birthday. (DE 34, Order at 9-12.) The Court also noted that to the extent that Plaintiff-parents sought reimbursement for the costs of the IFSP services, the issue was premature since it had not been determined whether the Plaintiff-triplets had been denied a free and appropriate education ("FAPE"). Accord-

ingly, the Court dismissed the Amended Complaint and entered Judgment for Defendant.

II. LEGAL STANDARD

Rule 8(a) of the Federal Rules of Civil Procedure requires "a short and plain statement of the claims" that "will give the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests." Fed. R. Civ. P. 8(a). It is well settled that a complaint should not be dismissed unless "it appears beyond a doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson. 355 U.S. 41, 45-46 (1957). When considering a motion to dismiss, the Court must accept all of the plaintiff's allegations as true. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

III. DISCUSSION

After careful review of the allegations of the Complaint and the related proceedings, the Court concludes that Plaintiffs are not entitled to the relief requested at this time.

As to their request for a declaration that the temporary IEPs are invalid, the request is denied us unnecessary. As alleged in the Complaint, the Administrative Law Judge himself declared the temporary IEPs to be invalid in the Final Order dated October 5, 2004.

(Complaint ¶ 22; Final Order of the Administrative Law Judge at 24, attached to the Complaint.)

As to the request that the Court order Defendant to continue the IFSP services, the request is denied on the merits. After due consideration of the parties' arguments, the Court concludes that pursuant to the "stay-put" provision of the IDEA, 20 U.S.C. §1415(j),

a child transitioning from Part C to Part B of the IDEA is not entitled to a continuation of the early intervention services, even if parental consent to the temporary placement is withheld. The Court incorporates the reasoning for this conclusion set forth in the Court's Order Granting Defendant's Motion to Dismiss entered in related Case No. 04-60297-Civ-Marra (DE 34). Additionally, the Court concludes that any amendment of the Complaint with respect to the temporary placement issue would be futile. Foman v. Davis, 371 U.S. 178, 182 (1962).

As to the request for an order requiring Defendant to reimburse Plaintiff-parents for the cost of the IFSPs, the request is denied at this time because the allegations of the Complaint do not indicate that Plaintiffs have exhausted their administrative remedies relating to the denial of a FAPE and/or whether the private placement was appropriate. See 20 U.S.C. §1415(i)(2)(C) ("the court ... shall grant such relief as the court determines is appropriate.") See School Committee of Town of Burlington v. Department of Education, 471 U.S. 359, 370 (1985) (recognizing that a district court is authorized to order school authorities to reimburse parents for private education if the court ultimately determines that the private placement was appropriate and that a FAPE was not offered). In addition, the Court concludes that any amendment of the Complaint with respect to the reimbursement issue would be futile since the same issues are pending before the district court in another case. Foman v. Davis, 371 U.S. 178, 182 (1962). [1]

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[1] The Court's independent research reveals that a later-filed case brought by the same Plaintiffs appeals the Administra-

Finally, because Plaintiffs are not the prevailing parties in this case, the request for attorney's fees is denied at this time. See 20 U.S.C. § 1415 (1)(3)(B).

Based upon the foregoing, it is **ORDERED and ADJUDGED** as follows:

1. Defendant's Motion to Dismiss the Complaint with Prejudice, filed January 24, 2005 (DE 6) is **GRANTED**. The Complaint is **DISMISSED** with prejudice as to the request for a pendency placement, and **DISMISSED** without prejudice as to the request for reimbursement and attorney's fees, which issues are raised in L.M.P. v. School Board of Broward County, Case No.05-60845-COHN.

2. The decision of the Administrative Law Judge is hereby **AFFIRMED**.

3. Any pending motions are **DENIED** as moot.

4. The Clerk shall **CLOSE** this case.

DONE and ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this _____ day of August, 2005:

/s/
KENNETH A. MARRA
United States District Judge

Copies provided to:

All Counsel of Record

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tive Law Judge's Final Order relating to the issue of reimbursement due to the alleged denial of a FAPE and the alleged appropriateness of the private placement. L.M.P. v. School Board of Broward County, Case No.05-60845-COHN.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-15188-HH

D.P., o.b.o. E.P., D.P. and K.P.

L.P., o.b.o. E.P., D.P., and K.P.,

Plaintiffs-Appellants,

vs.

SCHOOL BOARD OF BROWARD COUNTY,

Defendant-Appellee.

No. 05-15193-HH

L.M.P., on behalf of E.P., D.P. and K.P.,

Plaintiff-Appellant,

vs.

THE SCHOOL BOARD OF BROWARD COUNTRY, FLORIDA,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

BEFORE: EDMONDSON, Chief Judge, BARKETT and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Emmett R. Cox
United States Circuit Judge

APPENDIX E

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
Case No. 04-0076E
D. P,
Petitioner,
vs.
Broward County School Board,
Respondent.
Case No. 04-0077E
E. P,
Petitioner,
vs.
Broward County School Board,
Respondent.
Case No. 04-0078E
K. P.
Petitioner,
vs.
Broward County School Board,
Respondent.

FINAL ORDER

D. P., E. P., and K. P. are three-year-old triplets who reside with their parents in Broward County, Florida. Each of them has been diagnosed as having an autistic spectrum disorder. Until turning three years of age, they had been receiving early intervention services under Part C (formerly Part H[1]) of the Individuals with Disabilities Education Act[2] (IDEA) pursuant to Individualized Family Service Plans (IFSPs). In accordance with Section 391.306, Florida Statutes, the services were "provided under a contract between the Department of Health and the provider." The Broward County School Board (School

Board) played no role in the delivery of these services.

On January 6, 2004, the triplets' attorney father filed with the School Board, on the triplets' behalf, Requests for Due Process Hearings/Emergency Motion for Mandatory Injunctive Relief (Requests), which read as follows:

> I represent [L. P.] as parent of [D., E., and K. P.]. A due process hearing is requested. The reason the hearing is requested is because the school district has refused, despite numerous requests, to comply with the "stay put" provisions of IDEA.
>
> In particular, [D., E., and K.] aged out of the Part C program on January 4, 2004. Each has been diagnosed as autistic. Upon information and belief the school district is contemplating modifying the services provided on their last IFSP. Until such time as IEPs are in place for each child and/or all judicial remedies are exhausted, IDEA requires the services authorized on their last IFSPs continue to be provided. See, e.g., Johnson v. Special Edu. Hearing Office, 287 F.3d [1176] (9th Cir. 2002).
>
> The violation of the stay put provision by the district creates an imminent risk of harm to each child because it ma[y] lead to a cess[at]ion of critically needed instruction. Because of the immediacy of the harm, it is requested that a hearing be scheduled on an emergency basis, an expedited briefing schedule be set, a mandatory injunction issued requiring the school district to continue providing the services authorized on the children's most recent I[FS]P, and that attorneys['] fees and costs be awarded.

On January 7, 2004, the Requests were referred to the Division of Administrative Hearings (DOAH) for the assignment of an Administrative Law Judge to conduct the requested due process hearings. The Requests were docketed as DOAH Case No. 04-0076E (D. P.'s Request), DOAH Case No. 04-0077E (E. P.'s Request), and DOAH Case No. 04-0078E (K. P.'s Request).

During a telephone conference call held on January 9, 2004, in which the triplets' father, counsel for the School Board, and the undersigned participated, the parties agreed that evidentiary hearings were not necessary in these cases inasmuch as the dispute between them concerning the continuation of the "services provided on [Petitioners'] last IFSP[s]" was purely a legal one that could be resolved based on briefs submitted by the parties. They further agreed that the cases should be consolidated. The undersigned concurred with the parties. He consolidated the cases and established the following briefing schedule:

1. Petitioners [D. P., E. P., and K. P.] shall file their Initial Brief with the Division of Administrative Hearings (DOAH) no later than January 23, 2004.

2. Respondent shall file its Answer Brief with DOAH no later than February 2, 2004.

3. Any Reply Brief Petitioners desire to file with DOAH shall be filed no later than February 5, 2004.

Petitioners filed their Initial Brief on January 23, 2004. The School Board filed its Answer Brief on February 3, 2004. Petitioners filed their Reply Brief on February 5, 2004.

Having carefully considered the arguments advanced by the parties, the undersigned has concluded that the School Board is not required by the "stay put" provision of Part B of the IDEA to provide Petitioners "the services on their last IFSPs" "[u]ntil such time as IEPs are in place for each child and/or all judicial remedies are exhausted." District school boards in Florida are required by Florida statute to provide for an "appropriate program of special instruction, facilities, and services" for "exceptional students"[3] who have "attained the age of 3 years." §§ 1001.42(4)(l), 1003.21(1)(e), and 1003.57, Fla. Stat.

The imposition of this requirement is necessary in order for the State of Florida to be eligible to receive federal funding under Part B of the IDEA, which mandates, among other things, that participating states ensure, with limited exceptions, that "[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school." 20 U.S.C. § 1412(a)(1); Cf. Agency for Health Care Administration v. Estabrook, 711 So. 2d 161, 163 (Fla. 4th DCA 1998) ("[A] state that has elected to participate [in the Medicaid program], like Florida, must comply with the federal Medicaid statutes and regulations."); Public Health Trust of Dade County, Florida v. Dade County School Board, 693 So. 2d 562, 564 (Fla. 3d DCA 1996) ("The State of Florida elected to participate in the Medicaid program, Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. (1994), which provides federal funds to states for the purpose of providing medical assistance to needy persons. However, once the State of Florida elected to participate in the Medicaid program, its medical assistance plan must comply with

the federal Medicaid statutes and regulations"; held that where a Florida administrative rule is in direct conflict with federal Medicaid statutes and regulations, the federal Medicaid law governs); and State of Florida v. Mathews, 526 F.2d 319, 326 (5th Cir. 1976) ("Once a state chooses to participate in a federally funded program, it must comply with federal standards.").

A "free appropriate public education," as that term is used in the IDEA, "means special education and related services that -- (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under [20 U.S.C. § 1414(d)]." 20 U.S.C. § 1401(8). "Special education," for purposes of the IDEA, is "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability." 20 U.S.C. § 1401(25). "Related services," for purposes of the IDEA, are those services that "may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(22).

It has been said that, in order to provide an "appropriate" public education, a district school board must provide "personalized instruction with 'sufficient supportive services to permit the child to benefit from the instruction.'" Hendry County School Board v. Kujawski, 498 So. 2d 566, 568 (Fla. 2d DCA 1986), quoting from, Board of Education of the Hendrick Hudson Central School District v. Rowley, 102 S. Ct. 3034 (1982). The instruction and services

provided must be "'reasonably calculated to enable the child to receive educational benefits.'" School Board of Martin County v. A. S., 727 So. 2d 1071, 1073 (Fla. 4th DCA 1999), quoting from, Board of Education of the Hendrick Hudson Central School District v. Rowley, 102 S. Ct. at 3051. As the Fourth District Court of Appeal further stated in its opinion in School Board of Martin County v. A. S., 727 So. 2d at 1074:

> Federal cases have clarified what "reasonably calculated to enable the child to receive educational benefits" means. Educational benefits provided under IDEA must be more than trivial or de minimis. J. S. K. v. Hendry County Sch. Dist., 941 F.2d 1563 (11th Cir. 1991); Doe v. Alabama State Dep't of Educ., 915 F.2d 651 (11th Cir. 1990). Although they must be "meaningful," there is no requirement to maximize each child's potential. Rowley, 458 U.S. at 192, 198, 102 S. Ct. 3034. The issue is whether the "placement [is] appropriate, not whether another placement would also be appropriate, or even better for that matter. The school district is required by the statute and regulations to provide an appropriate education, not the best possible education, or the placement the parents prefer." Heather S. by Kathy S. v. State of Wisconsin, 125 F.3d 1045, 1045 (7th Cir. 1997) (citing Board of Educ. of Community Consol. Sch. Dist. 21 v. Illinois State Bd. Of Educ., 938 F.2d at 715, and Lachman v. Illinois State Bd. Of Educ., 852 F.2d 290, 297 (7th Cir. 1988)). Thus, if a student progresses in a school district's program, the courts should not examine whether another method might produce additional or maximum benefits. See Rowley, 458 U.S. at 207-208, 102 S. Ct. 3034; O'Toole v.

Olathe Dist. Schs. Unified Sch. Dist. No. 233,No. 97-3125, 144 F.3d 692, 709 (10th Cir. 1998); Evans v. District No. 17, 841 F.2d 824, 831 (8th Cir. 1988).

"Before the initial provision of special education and related services to a child with a disability" under Part B of the IDEA, a district school board must conduct a "full and individual initial evaluation" in order "to determine whether [the] child is [indeed] a child with a disability" and "to determine the educational needs of [the] child." 20 U.S.C. § 1414(a)(1)(B).

Parents who have "complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" under Part B of the IDEA must "have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(f). "After the due process hearing is completed and any applicable administrative appeals are exhausted, an aggrieved party may bring a civil action in the district court which is empowered to 'grant such relief as the court determines is appropriate.' 20 U.S.C. § 1415(i)(2)(A)-(B)." T. B. v. Warwick School Department, 2003 WL 22069432 (D. R.I. 2003).

In Florida, by statute, the 20 U.S.C. § 1415(f) "impartial due process hearing" to which a complaining parent is entitled under Part B of the IDEA must be conducted by a DOAH Administrative Law Judge. § 1003.57(5), Fla. Stat.

DOAH was created by the Florida Legislature through the exercise of its lawmaking power. § 120.65, Fla. Stat. As a "mere creature" of Florida statute, DOAH's "powers, duties and authority [and those of its Administrative Law Judges] are those and only those that are conferred expressly or impliedly by statute of the State. Any reasonable doubt as to the lawful existence of a particular power that is being exercised by [DOAH or its Administrative Law Judges] must be resolved against the exercise thereof and the further exercise of the power should be arrested." City of Cape Coral v. GAC Utilities of Florida, 281 So. 2d 493, 495-96 (Fla. 1973); see also S.T. v. School Board of Seminole County, 783 So. 2d 1231, 1233 (Fla. 5th DCA 2001) ("The authority of an administrative law judge to conduct a due process hearing in ESE cases is conferred solely by Section 231.23(4)(m)5 [the predecessor of current Sections 1001.42(4)(l) and 1003.57, Florida Statutes] and Rule 6A-6.03311(5) of the Florida Administrative Code. Neither of these authorities, however, discuss, contemplate, or otherwise support the allowance of discovery in this particular circumstance Unless created by the constitution, an administrative agency has no common law powers, and has only such powers as the legislature chooses to confer upon it by statute. ... Here, the legislature chose not to confer upon the administrative law judge the power to allow discovery in this particular variety of hearing. The administrative law judge, therefore, erred in authorizing this practice, and the lower court erred in its sanctioning of it."); and Department of Environmental Regulation v. Puckett Oil Company, Inc., 577 So. 2d 988, 991 (Fla. 1st DCA 1991) ("It is well recognized that the powers of administrative agencies are measured and limited by the statutes or acts in

which such powers are expressly granted or implicitly conferred"; held that DOAH exceeded its authority in establishing a jurisdictional time limit for the filing of a response to a petition for attorney's fees and costs filed pursuant to Section 57.111, Florida Statutes.).

The authority of a DOAH Administrative Law Judge to grant relief to parents who have requested a 20 U.S.C. § 1415(f) "impartial due process hearing" is therefore statutorily limited. While a DOAH Administrative Law Judge is authorized to determine the appropriateness of a challenged educational placement, the judge is not empowered to order, by mandatory injunction or otherwise, an alternative placement. See School Board of Martin County v. A. S., 727 So. 2d at 1074; and Hendry County School Board v. Kujawski, 498 So. 2d at 568. With respect to reimbursement requests made by parents, pursuant to 20 U.S.C. § 1412(a)(10)(C) and 34 C.F.R. § 300.403 (with which the State of Florida, as a recipient of federal IDEA funds, must comply), a DOAH Administrative Law Judge does have the authority, in a "impartial due process hearing," to require a district school board to reimburse parents who have withdrawn their "exceptional" child from public school and provided the child with private instruction, without the consent of the district school board, for the cost of such private instruction if the judge finds that: (1) the district school board had not timely made a "free appropriate public education" available to the child prior to the parents' provision of private instruction; (2) the child's private instruction is appropriate; and (3) facts of the case do not establish that there should be any "limitation on reimbursement." There are no other provisions of federal or Florida law, however, that operate to specifically au-

thorize a DOAH Administrative Law Judge to order district school boards to reimburse parents of "exceptional students" for any out-of-pocket instructional-related expenses incurred under circumstances other than those described in 20 U.S.C. § 1412(a)(10)(C) and 34 C.F.R. § 300.403. While Congress has specified, in 20 U.S.C. § 1412(a)(10)(C), that either "a court or a hearing officer may require the agency to reimburse the parents" under the circumstances described therein, it has not vested those conducting "impartial due process hearings" with the same broad authority it has given to courts in civil actions brought pursuant to 20 U.S.C. § 1415(i)(2) (of the IDEA) to "grant such relief as [they] determine[] is appropriate."[4] See Beach v. Great Western Bank, 692 So. 2d 146, 152 (Fla. 1997), quoting from, Russello v. U.S., 104 S. Ct. 296, 300 (1983) ("As a general rule, '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"); Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976) ("It is of course, a general principle of statutory construction that the mention of one thing implies the exclusion of another."); and Sierra Club v. St. Johns River Water Management District, 816 So. 2d 687, 693 (Fla. 5th DCA 2002) ("When the legislature uses a term in one section of the statute but omits it in another section of the same statute, courts should not imply it where it has been excluded."); see also Lester H. by Octavia P. v. Gilhool, 916 F.2d 865, 870 (3d Cir. 1990) ("The administrative process could not have given that to him; it had no power to grant compensatory education."); but see Cocores By and Through Hughes v. Portsmouth, N.H., 779 F. Supp. 203, 205-06 (D. N.H.

1991), quoting from, S-1 By and Through P-1 v. Spangler, 650 F. Supp. 1427, 1431 (W.D. N.C. 1986) ("Finally, the court finds erroneous the hearing officer's conclusion that the authority of the administrative process -- as opposed to that of the court -- does not extend to an award of compensatory education to the over-twenty-one plaintiff. 'It seems incongruous that Congress intended the reviewing court to maintain greater authority to order relief than the hearing officer, especially in light of the hearing officer's expertise in the area.'"[5]). Accordingly, the only type of reimbursement a DOAH Administrative Law Judge in Florida is empowered to award in an "impartial due process hearing" is reimbursement for the "cost of [the private school] enrollment" of an "exceptional student" who has been unilaterally moved by his parents from public school to private school under circumstances described in 20 U.S.C. § 1412(a)(10)(C) and 34 C.F.R. § 300.403. Other types of reimbursement, including reimbursement for the cost of special education and related services needed by a child never enrolled in public school, are not available in an "impartial due process hearing" (although such relief may be awarded, in appropriate circumstances, by a court pursuant to 20 U.S.C. § 1415(i)(2)). Neither does a DOAH Administrative Law Judge possess the statutory authority to award attorney's fees in an "impartial due process hearing." Only a "court" (state or federal) is empowered to make an attorney's fees award under Part B of the IDEA. 20 U.S.C. § 1415(i)(3); W.R. ex rel.Doe v. School Board of Osceola County, 726 So. 2d 801, 804 (Fla. 2d 1999).

Part B of the IDEA contains a "stay put" provision, the purpose of which is "to prevent school districts from effecting unilateral change in a child's

educational program" during the pendency of the "impartial due process hearing" and any subsequent judicial proceeding on the parent's complaint. Georgia State Department of Education v. Derrick C., 314 F.3d 545, 551 (11th Cir. 2002); see also Verhoeven v. Brunswick School Committee, 207 F.3d 1,6 (1st Cir. 1999) ("Nothing in the 'stay put' provision limits the availability of 'stay put' injunctions to the duration of the administrative hearings. ... [Rather, it] provides for 'stay put' placement throughout both the administrative and judicial proceedings challenging a placement decision."). This statutory provision "does not impose any affirmative obligations on a [district] school board; rather, it is totally prohibitory in nature." Wagner v. Board of Education of Montgomery County, 335 F.3d 297, 301 (4th Cir. 2003). It "functions, in essence, as an automatic preliminary injunction" and "represents Congress' policy choice that all handicapped children, regardless of whether their case is meritorious or not, are to remain in their current educational placement until the dispute with regard to their placement is ultimately resolved." Drinker by Drinker v. Colonial School District, 78 F.3d 859, 864 (3d Cir. 1996). "The right under the stay-put provision does not depend in any way upon the merits or lack thereof of the issues presented in the proceedings; it depends only upon the pendency of those proceedings." Carl, Maura B. v. Mundelein High School District 120 Board of Education, 1993 WL 787899 (N.D. Ill. 1993); see also Termine ex rel. Termine v. William S. Hart Union High School District, 219 F. Supp. 2d 1049, 1059-60 (C.D. Cal. 2002) ("As Plaintiffs argue: '... . It is simply nonsensical to argue that the location of the stay put that should have been implemented at the outset of the dispute should be different based on who ulti-

mately prevails in due process.' ... Plaintiffs' argument is compelling, and the Court agrees that the case law generally seems to hold that a subsequent determination of proper placement would not effect the location of the 'stay put.'").

Part B's "stay put" provision is set forth in 20 U.S.C. § 1415(j), which reads as follows:

> (j) Maintenance of current educational placement
>
> Except as provided in subsection (k)(7) of this section,[6] 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 such 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.

The Office of Special Education and Rehabilitative Services of the United States Department of Education, through its Office of Special Education Programs (OSEP), the "principal agency in such Department for administering and carrying out [Part B of the IDEA] and other programs and activities concerning the education of children with disabilities,"[7] has promulgated a regulation, 34 C.F.R. § 300.514 (formerly 34 C.F.R. § 300.513), implementing 20 U.S.C. § 1415(j). The regulation, which has the force and effect of law,[8] reads as follows:

> § 300.514 Child's status during proceedings.
>
> (a) Except as provided in § 300.526, during the pendency of any administrative or judicial proceeding regarding a complaint under § 300.507, unless the State or local agency and the parents

> of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.
>
> (b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.
>
> (c) If the decision of a hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of paragraph (a) of this section.

The dispute in the instant cases is over the correct interpretation of the language in 20 U.S.C. § 1415(j) and its implementing regulation, 34 C.F.R. § 300.514.[9] At the heart of this dispute is the meaning of the phrase "current educational placement" and, more particularly, whether it includes, in a case involving a disabled three-year-old child seeking to enter the public school system for the first time, the expired IFSP (developed under Part C of the IDEA) that was in effect at the time child turned three.

While there is no Florida, Eleventh Circuit Court of Appeals,[10] or United States Supreme Court case directly on point,[11] in a policy letter interpreting former 34 C.F.R. § 300.513 (which was essentially identical in all material respects to its successor, 34 C.F.R. § 300.514[12]), OSEP gave the following answer to the question of "whether a placement that was intended to provide a disabled infant or toddler and his

or her family with appropriate early intervention services under Part H [now Part C of the IDEA] would constitute the child's 'present educational placement' under 34 CFR § 330.513":

> OSEP does not interpret 34 CFR § 300.513 as requiring a public agency responsible for providing FAPE to a disabled child to maintain that child in a program developed for a two-year-old child as a means of providing that child and his or her family appropriate early intervention services under Part H.[13] Rather, in the situation prompting your inquiry, the complaint involves a child's initial admission to public school. Therefore, it is OSEP's view that, in this instance, to meet its obligation under 34 CFR § 300.513(b), the public agency responsible for providing FAPE to the child would place that child, with the consent of the parents, in the public preschool program until the completion of authorized review proceedings. 34 CFR § 300.513(b).

Letter to Klebanoff, 28 IDELR 478 (1997). As was stated in Pardini v. Allegheny Intermediate Unit, 280 F. Supp. 2d 447, 454 (W.D. Pa. 2003), this "interpretation of the stay-put provision, by the agency charged with its implementation, is entitled to substantial deference." See also Honig v. Doe, 484 U.S. 305, 325 n.8, 108 S. Ct. 592, 605 (1988) ("The Department of Education has adopted the position first espoused in 1980 by its Office of Civil Rights that a suspension of up to 10 school-days does not amount to a 'change in placement' prohibited by § 1415(e)(3) U.S. Dept. of Education, Office of Special Education Programs, Policy Letter (Feb. 26, 1987), Ed. for Handicapped L. Rep. 211:437 (1987). The EHA nowhere defines the phrase 'change in placement,' nor

does the statute's structure or legislative history provide any guidance as to how the term applies to fixed suspensions. Given this ambiguity, we defer to the construction adopted by the agency charged with monitoring and enforcing the statute."); Hooks v. Clark County School District, 228 F.3d 1036, 1040 (9th Cir. 2000) ("[W]e look to the interpretation embraced by the policy letter issued by OSEP, which is charged with implementing and enforcing the IDEA. See 20 U.S.C. § 1402(a) (2000). According to OSEP, the 'determination of whether a home education constitutes private school placement must be made on the basis of state law.' OSEP Policy Letter to Williams, 18 IDELR 742, 744. The Supreme Court has taken guidance from an OSEP policy letter, as we do today, to define an ambiguous provision of the IDEA."); Magyar v. Tucson Unified School District, 958 F. Supp. 1423, 1440 (D. Ariz. 1997) ("An agency's interpretative statements such as that espoused by OSEP, commands heightened respect."); Mary P. v. Illinois State Board of Education, 919 F. Supp. 1173, 1180 (N.D. Ill. 1996) ("Because the interpretive letter does not offend any binding legal authority, the court defers to OSEP's interpretation and adopts its position with regard to the eligibility criteria for speech impairment."); and Yankton School District v. Schramm, 900 F. Supp. 1182, 1190 n.3 (D. S.D. 1995) ("Although the agency's interpretation of statutes and regulations set forth in Office of Special Education (OSEP) policy letters are not binding on recipients of IDEA funds, courts give substantial deference to an agency's interpretation of the statutes and regulations it must administer."). More recently, on March 12, 1999, in connection with its issuance of regulations following the 1997 amendments to Part B of the IDEA, OSEP reaffirmed, by its publication of

the following in the Federal Register, its position that early intervention services that a newly Part B-eligible, three-year-old child had received before turning three years of age do not constitute an "educational placement" that a district school board, under Part B's "stay put" provision, must maintain on an interim basis during the pendency of Part B complaint proceedings "relating to the [district school board's] identification, evaluation, or educational placement of the child, or the provision [by the district school board] of a free appropriate public education to such child":

> Transition of Children From Part C to Preschool Programs (§ 300.132)[14]
>
> * * *
>
> Comment: A few commenters requested that the regulation be revised to make clear that the pendency provisions of § 300.514 apply to children transitioning from early intervention services under Part C to preschool special education and related services under Part B.
>
> Discussion: The pendency provision at § 300.514(a) does not apply when a child is transitioning from a program developed under Part C to provide appropriate early intervention services into a program developed under Part B to provide FAPE. Under § 300.514(b), if the complaint requesting due process involves the child's initial admission to public school, the public agency responsible for providing FAPE to the child must place that child, with the consent of the parent, into a public preschool program if the public agency offers preschool services directly or through contract or other arrangement to nondis-

> abled preschool-aged children until the completion of authorized review proceedings.
>
> Changes: None.

64 Fed. Reg. 12,406, 12,558 (March 12, 1999), 1999 WL 128278 (F.R.). This "discussion" in the Federal Register concerning the correct interpretation of 34 C.F.R. § 300.514 by the federal agency responsible for its promulgation and for otherwise administering Part B of the IDEA provides compelling support for the position taken by the School Board herein that "IFSP services pursuant to Part C of the IDEA are not the [required] 'stay put' placement [under Part B of the IDEA] for a three-year-old child without an IEP." See Butler v. Social Security Administration, 331 F.3d 1368, 1373 (Fed. Cir. 2003) ("The regulation, properly read, covers only a 'reassignment' or 'demotion' 'to a position other than that of an administrative law judge.' This interpretation is confirmed by OPM's commentary on the regulation upon its publication in the Federal Register.") (citation omitted); Kelly v. Keystone Shipping Co., 281 F. Supp. 2d 313, 324 (D. Mass. 2003) ("[For purposes of interpreting an agency regulation,] [l]egislative history, while not conclusive, gives insight into the intent of the drafters. Such history includes the agency's responses to public comments published in the Federal Register.") (citation omitted); and Weil v. Long Island Savings Bank, 195 F. Supp. 2d 383, 388-89 (E.D. N.Y. 2001) ("This conclusion is also supported by the legislative history of the regulation, which, while not conclusive, gives insight to the intent of the drafters.").

The interpretation of Part B's "stay put" provision adopted by OSEP and urged by the School Board in these cases is persuasive. It is not in any

way inconsistent with the "prohibitory" purpose of the provision. Wagner v. Board of Education of Montgomery County, 335 F.3d at 301. Furthermore, it recognizes that "Parts B and C of [of the IDEA] are different in that Part B services focus on promoting 'educational benefit,' while Part C [services] focus on meeting the developmental needs of disabled infants and toddlers and their families." Wagner v. Short, 63 F. Supp. 2d 672, 677 (D. Md. 1999); see also Pardini v. Allegheny Intermediate Unit, 280 F. Supp. 2d at 454 ("Under the birth to three years program, an Individualized Family Service Plan (IFSP) is family centered, focusing on the needs of the family to help the child. An IEP is centered and responsive to the needs of the individual child, particularly his or her educational needs and related services. ... An IFSP is a medical model, which requires a 25% delay in one or more developmental areas to be eligible. An IEP is an educational model which requires a 25% delay in a developmental area and a need for specially designed instruction."). In addition, it is not an interpretation that adds words or meaning, obviously not intended by Congress, to the provision's language, but rather is one that represents the most reasonable reading of the provision and gives effect to all of the language used, including the language found at the end of the provision dealing with the situation where a child is "applying for initial admission to a public school" and therefore does not have a "current educational placement." See Janos v. State, 763 So. 2d 1094, 1096 (Fla. 4th DCA 1999) ("We may not go beyond [the statute's] clear wording and plain meaning to expand or limit its reach. To do so would be to modify the express terms of the statute and, thereby, usurp legislative power."); and Harris Corp. v. Department of Revenue, 409 So. 2d 91, 92 (Fla. 1st DCA

1982) ("[C]ourts should give effect to all legislative language "). The undersigned therefore accepts this interpretation.

In view of the foregoing, it is hereby ORDERED:

1. The School Board's refusal to provide D. P., E. P., and K. P with the early intervention services they had been receiving under Part C of the IDEA does not constitute a violation of the "stay put" provision set forth in Part B of the IDEA (in 20 U.S.C. § 1415(j)).

2. The request that a "mandatory injunction [be] issued requiring the [School Board] to continue providing the[se] services" is denied.15

3. The request (made by Petitioners in their Initial Brief) that the School Board be ordered to "reimburse and make [their] family whole," to the extent that the family has paid for these services following their third birthday, is denied.

4. The request that the School Board be required to pay attorneys' fees and costs is denied.

DONE AND ORDERED this 10th day of February, 2004, in Tallahassee, Leon County, Florida.

/s/ Stuart M. Lerner
STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

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Filed with the Clerk of the Division of Administrative Hearings
this 10th day of February, 2004.

ENDNOTES

1/ Part C supplanted Part H effective July 1, 1998. See Marie O. v. Edgar, 131 F.3d 610, 612 n.1. (7th Cir. 1997).

2/ The Individuals with Disabilities Education Act "is the successor to the Education of the Handicapped Act of 1970, which was amended in 1975 and renamed the Education for All Handicapped Children Act." A. B. ex rel. D. B. v. Lawson, 354 F.3d 315, 319 (4th Cir. 2004).

3/ The term "exceptional student," as used in Chapter 1003, Florida Statutes, includes "students who are ... autistic." § 1003.01(3)(a), Fla. Stat.

4/ Courts have been granted such authority in 20 U.S.C. § 1415(i)(2)(B)(iii), which provides as follows:

In any action brought under this paragraph, the court --

basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(It has been held that this grant of authority, while broad, is not so expansive as to authorize an

award of non-reimbursement type monetary damages. See Witte v. Clark County School District, 197 F.3d 1271, 1275 (9th Cir 1999) ("Although the IDEA allows courts to grant 'such relief as the court determines is appropriate,' 20 U.S.C. § 1415(i)(2)(B)(iii), ordinarily monetary damages are not available under that statute.")).

5/ It is noteworthy that the language specifically authorizing due process hearing officers to order "[r]eimbursement for private school placement" was added to the IDEA after Cocores and Spangler were decided.

620 U.S.C. § 1415(k)(7) provides as follows:

(7) Placement during appeals

(A) In general

When a parent requests a hearing regarding a disciplinary action described in paragraph (1)(A)(ii) or paragraph (2) to challenge the interim alternative educational setting or the manifestation determination, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(A)(ii) or paragraph (2), whichever occurs first, unless the parent and the State or local educational agency agree otherwise.

(B) Current placement

If a child is placed in an interim alternative educational setting pursuant to paragraph (1)(A)(ii) or paragraph (2) and school personnel propose to change the child's placement after expiration of the interim alternative placement, during the pendency of any proceeding to challenge the proposed change

in placement, the child shall remain in the current placement (the child's placement prior to the interim alternative educational setting), except as provided in subparagraph (C).

(C) Expedited hearing

(i) If school personnel maintain that it is dangerous for the child to be in the current placement (placement prior to removal to the interim alternative education setting) during the pendency of the due process proceedings, the local educational agency may request an expedited hearing.

(ii) In determining whether the child may be placed in the alternative educational setting or in another appropriate placement ordered by the hearing officer, the hearing officer shall apply the standards set out in paragraph (2).

It is inapplicable to the instant cases.

720 U.S.C. § 1402(a).

8/ "It is well settled that [a] government agency's regulations that have been published in the Code of Federal Regulations have the force and effect of law. . . ." First Tennessee Bank National Association v. Barreto, 268 F.3d 319, 329 (6th Cir. 2001) (internal quotation marks omitted).

9/ Section 1003.57(5), Florida Statutes (formerly Section 230.23(4)(m)5, Florida Statutes) provides the same "stay put" protection as 20 U.S.C. § 1415(j) and 34 C.F.R. § 300.514. See Hill By and Through Hill v. School Board for Pinellas County, 954 F. Supp. 251, 253-54 (M.D. Fla. 1997).

10/ In Georgia State Department of Education v. Derrick C., 314 F.3d at 546-47, the Eleventh Circuit Court of Appeals expressly declined to reach the is-

sue, which it noted was one "of first impression in [its] court," of "whether the 'stay put provision' of Part B of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1491 ('IDEA'), applies to a child who, at the time he turned three years of age and came within the purview of Part B, disputed his Part B placement," finding that it was unnecessary to address this issue "[b]ecause the lawsuit that led to this appeal was barred by the statute of limitations."

11/ In the Ninth Circuit Court of Appeals case relied on by Petitioners, Johnson ex rel. Johnson v. Special Education Hearing Office, *State of California*, 287 F.3d 1176 (9th Cir. 2002), unlike in the instant cases, there was no dispute concerning whether the child was entitled to automatic "stay put" protection upon turning three years of age; rather, the controversy centered on the extent of that protection, as the following excerpt from the court's opinion reveals:

> For the purpose of 1415(j)'s stay put" provision, the current educational placement is typically the placement described in the child's most recently implemented IEP. Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625 (6th Cir. 1990). The parties agree that Nicholas's IFSP constitutes his current educational placement for "stay put" purposes, however, they dispute whether IDEA requires a previously non-responsible agency, such as Clovis [Unified School District], to provide the exact same vendors and supervisors to a disabled child who transitions between educational agencies. See Cal. Educ. Code § 56032.

Id. at 1180-81. (California Education Code § 56032 provides that an "'[i]ndividualized education program' means 'individualized family service plan' as described in Section 1436 of Title 20 of the United States Code when individualized education program pertains to individuals with exceptional needs younger than three years of age." The existence of this California statutory provision, which has no Florida analogue, may explain why the school district in Johnson conceded that the child's "IFSP constitute[d] his current educational placement for 'stay put' purposes.") The court resolved the controversy before it regarding the use of different "vendors and supervisors" in favor of the school district, finding persuasive, particularly in light of California law, the school district's argument that it could "meet the requirements of the 'stay put' provision by [merely] providing comparable educational placement." Id. at 1181. Johnson therefore stands for the proposition that a change in the "vendors and supervisors" responsible for the delivery of services under an "individualized education program," as defined by California law, that indisputably represents a child's "stay put" placement under Part B of the IDEA does not amount to a change in that placement and therefore is not impermissible even if accomplished through unilateral school district action. In any event, even if Johnson was squarely on point and in no way indistinguishable from the instant cases, it would not be controlling because Florida is not within the Ninth Circuit's jurisdictional boundaries. Cf. Singh v. Ilchert, 63 F.3d 1501, 1508 (9th Cir. 1995) ("A federal agency is obligated to follow circuit precedent in cases originating within that circuit."); Newton v. Thomason, 22 F.3d 1455, 1460 (9th Cir. 1994), quoting from, In re Korean Air Lines Disaster

of Sept. 1, 1983, 829 F.2d 1171 (D.C. Cir. 1987) ("'[B]inding precedent for [all] courts is set only by the Supreme Court and, for the district courts within a circuit only by the court of appeals for that circuit [in the absence of Supreme Court authority].'"); and Hialeah, Inc. v. Florida Horsemen's Benevolent & Protective Association, Inc., 899 F. Supp. 616, 623 (S.D. Fla. 1995)("A decision of a sister circuit court of appeals is not binding precedent on a district court in another circuit, but is merely persuasive authority.").

12/ Former 34 C.F.R. § 300.513 provided as follows:

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings

13/ This interpretation was consistent with the view that had been expressed by the Assistant Secretary for Special Education and Rehabilitative Services in a 1987 policy letter, Letter to Baugh, EHLR 211:481 (1987), that the term "present educational placement," as used in former 34 C.F.R. § 300.513, meant "the current education and related services provided in accordance with a child's most recent individualized education program (IEP)" developed under Part B of the IDEA.

14/ 34 C.F.R. § 300.132 provides as follows:

Transition of children from Part C to preschool programs.

The State must have on file with the Secretary policies and procedures to ensure that --

(a) Children participating in early intervention programs assisted under Part C of the Act, and who will participate in preschool programs assisted under Part B of the Act, experience a smooth and effective transition to those preschool programs in a manner consistent with section 637(a)(8) of the Act;

(b) By the third birthday of a child described in paragraph (a) of this section, an IEP or, if consistent with § 300.342(c) and section 636(d) of the Act, an IFSP, has been developed and is being implemented for the child consistent with § 300.121(c); and

(c) Each LEA will participate in transition planning conferences arranged by the designated lead agency under section 637(a)(8) of the Act.

15/ The undersigned's denial of this request does not foreclose Petitioners from asking a court to exercise its equitable power (power the undersigned does not have) to grant them injunctive relief against the School Board. See Wagner v. Board of Education of Montgomery County, 335 F.3d at 302-03.

APPENDIX F

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
Case No. 04-2942E
D. P,
Petitioner,
vs.
Broward County School Board,
Respondent.
Case No. 04-2943E
E. P,
Petitioner,
vs.
Broward County School Board,
Respondent.
Case No. 04-2944E
K. P.
Petitioner,
vs.
Broward County School Board,
Respondent.

FINAL ORDER CONCERNING CONSEQUENCES OF PARENTS' REFUSAL TO CONSENT TO "TEMPORARY" IEPS

D. P., E. P., and K. P. (Triplets) are three-year-old triplets who reside with their parents in Broward County, Florida. Each of them has been diagnosed as having an autistic spectrum disorder. Until turning three years of age, they had been receiving early intervention services under Part C (formerly Part H1] of the Individuals with Disabilities Education Act2 (IDEA) pursuant to Individualized Family Service Plans (IFSPs). In accordance with Section 391.306, Florida Statutes, the services were "provided under a contract between the Department of Health and the

provider." The Broward County School Board (School Board) played no role in the delivery of these services.

On January 6, 2004, the Triplets' attorney father filed with the School Board, on the Triplets' behalf, Requests for Due Process Hearings/Emergency Motion for Mandatory Injunctive Relief (First Requests), which read as follows:

> I represent [L. P.] as parent of [D., E., and K. P.] A due process hearing is requested. The reason the hearing is requested is because the school district has refused, despite numerous requests, to comply with the "stay put" provisions of IDEA.
>
> In particular, [D., E., and K.] aged out of the Part C program on January 4, 2004. Each has been diagnosed as autistic. Upon information and belief the school district is contemplating modifying the services provided on their last IFSP. Until such time as IEPs are in place for each child and/or all judicial remedies are exhausted, IDEA requires the services authorized on their last IFSPs continue to be provided. See, e.g., Johnson v. Special Edu. Hearing Office, 287 P.3d [1176] (9th Cir. 2002).
>
> The violation of the stay put provision by the district creates an imminent risk of harm to each child because it ma[y] lead to a cess[at]ion of critically needed instruction. Because of the immediacy of the harm, it is requested that a hearing be scheduled on an emergency basis, an expedited briefing schedule be set, a mandatory injunction is-

> sued requiring the school district to continue providing the services authorized on the children's most recent I[FS]P, and that attorneys['] fees and costs be awarded.

On January 7, 2004, the First Requests were referred to the Division of Administrative Hearings (DOAH) for the assignment of an Administrative Law Judge to conduct the requested due process hearings. The First Requests were docketed as DOAH Case No. 04-0076E (D. P.'s First Request), DOAH Case No. 04-0077E (E. P.'s First Request), and DOAH Case No. 04-0078E (K. P.'s First Request) and assigned to the undersigned.

During a telephone conference call held on January 9, 2004, in which the Triplets' father, counsel for the School Board, and the undersigned participated, the parties agreed that evidentiary hearings were not necessary in those cases inasmuch as the dispute between them concerning the continuation of the, "services provided on (Petitioners') last IFSP[s]" was purely a legal one that could be resolved based on briefs submitted by the parties. They further agreed that the cases should be consolidated. Pursuant to the parties' agreement, the cases were consolidated and a briefing schedule was established.

After having received and carefully considered the parties' briefs, the undersigned, on February 10, 2004, issued a Final Order in DOAH Case Nos. 04-0076E, 04-0077E, 01-0078E (2/10/04 Final Order), in which he held the following:

1. The School Board's refusal to provide D. P., E. P., and K. P with the early intervention services they had been receiving under Part C of the IDEA does not constitute a violation of the

"stay put" provision set forth in Part B of the IDEA (in 20 U.S.C. § 1415(j)).

2. The request that a "mandatory injunction [be] issued requiring the [School Board] to continue providing the[se] services" is denied [3]

3. The request (made by Petitioners in their Initial Brief) that the School Board be ordered to "reimburse and make (their) family whole," to the extent that the family has paid for these services following [the Triplets'] third birthday[s] is denied. [4]

4. The request that the School Board be required to pay attorneys' fees and costs is denied.

The undersigned's 2/10/04 Final Order is attached hereto and incorporated herein by reference.

On August 17, 2004, the Triplets' father again filed with the School Board, on the Triplets' behalf, Requests for Due Process Hearings (Second Requests). These Second Requests read as follows:

> I represent [L. P.] as parent of [D., E., and K. P.] A due process hearing is requested pursuant to the Individuals with Disabilities Education Act ("IDEA"). The reason a hearing is requested is because the school district:
>
> failed to have individual education plans ("IEPs") in place for each child at the beginning of the current school year;
>
> failed to take any required action to even attempt to have timely in place [IEPs] for each of the children by the beginning of the current school year;

failed to have valid timely IEPs in place for the children for the 2003-2004 school year;

failed to properly grant, deny or institute a due process hearing in response to the parent's request for independent educational evaluations ("IEEs");

unilaterally and improperly convened IEP meetings without the children's parents in attendance, against the request of the parents and without first properly acting on the parents' request for IEEs;

failed to provide appropriate prior notice of the February 3, 2004 meeting to the parents, including, but not limited to the fact the February 3, 2004 meeting was to be held for the purpose of instituting temporary IEFs;

failed to allow inspection and review of complete records upon request by the children's parents;

failed to keep a record of parties obtaining access to the children's education records collected, maintained, or used under Part B of the IDEA including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records;

unilaterally crafted untimely "temporary IEPs," on February 3, 2004 which were not consented to by the parents, and which are not authorized to be used under the IDEA. Further, even if they were permitted to be used, which they were not, the temporary IEPs violated the children's rights under the

IDEA because, in addition to the preceding, the district:

failed to conduct full and individual initial evaluations;

failed to consider the individual strengths and needs of each child and the concerns of the parents for enhancing the education of their children;

performed inadequate evaluations some of which were conducted by unqualified person[nel];

made unilateral decisions without reference to antecedent records and interagency cooperation;

failed to include sufficient and/or accurate statements of the children's present levels of educational performance, and how the disability affects the child's participation in appropriate activities;

failed to make behavioral observations, including behaviors which impede the children's learning, and failed to adopt strategies and supports to address those behaviors;

failed to address and implement services for all the children's identified needs, including, without limitation, speech, physical, occupational and behavioral therapy, and extended school year service;

included incomplete, inadequate and inappropriate goals for the children;

did _____ include requisite details concerning the special educational services/specifically

> designed instruction/ and or interventions to meet the unique needs of each of the children;
>
> unilaterally adopted the temporary IEPs to create a legal defense to the parent[s'] previous demand for a due process hearing regarding the district's failure to have IEPs in place by the children's third birthdays and were not reasonably calculated to confer educational benefits; and
>
> took no meaningful action to put permanent IEPs in place, failed to timely convene a staffing committee to make permanent eligibility determinations and placement decisions and by simply allowing temporary IEPs, if valid, to lapse.

On August 18, 2004, the Second Requests were referred to DOAH for the assignment of an Administrative Law Judge to conduct the requested due process hearings. The Second Requests were docketed as DOAH Case No. 04-2942E (D. P.'s Second Request), DOAH Case No. 04-2943E (E. P.'s Second Request), and DOAH Case No. 04-2944E (K. P.'s Second Request) and assigned to the undersigned.

A telephone conference call, in which the Triplets' father, counsel for the School Board, and the undersigned participated, was held on August 24, 2004. Following this telephone conference call, pursuant to the unopposed request made by the father during the conference call, the undersigned issued an Order of Consolidation consolidating DOAH Case Nos. 04-2942E, 04-2943E, and 04-2944E. The undersigned also issued an Order Establishing Briefing Schedule, which read as follows:

ORDER ESTABLISHING BRIEFING SCHEDULE

During a telephone conference call held on August 24, 2004, the father suggested that the following threshold issue in these consolidated cases be resolved before any other issues are litigated and that the issue be resolved based on briefs submitted by the parties (without an evidentiary hearing being held):

"Does the parents' failure to consent to their children's temporary IEPs render these temporary IEPs invalid and, if so, what if anything, must be done to remedy the situation?"

There appearing to be no disputed issues of material fact relating to this threshold issue, the undersigned agreed to follow the father's suggestion and, pursuant to the agreement of the parties (who waived the requirement that a final order be issued in these cases no later than 45 days from the date of Respondent's receipt of Petitioners' due process hearing requests), established the following briefing schedule to which the parties shall be required to adhere:

1. Petitioners shall file their initial brief with the Division of Administrative Hearings (DOAH) no later than September 8, 2004.
2. Respondent shall file its answer brief with DOAH no later than September 23, 2004.[3]
3. Any reply brief that Petitioners desire to file with DOAH shall be filed no later than October 4, 2004.

> All briefs filed with DOAH shall be simultaneously served on the opposing party by facsimile transmission.
>
> Oral argument will be held by telephone conference call at a mutually convenient time after the parties submit their briefs only if the undersigned believes, following his review of the parties' briefs, that having oral argument will help him better understand the parties' respective positions and will not unnecessarily delay his resolution of the above-stated threshold issue.

The Triplets' father filed an Initial Brief, on the Triplets' behalf, on September 8, 2004. The School Board filed its Answer Brief on September 27, 2004. The Triplets, through their father, filed their Reply Brief on October 4, 2004. The arguments made by the parties in these pleadings have been carefully considered. Because the parties have clearly stated their positions, oral argument has been deemed to be unnecessary.

"Before the initial provision of special education and related services to a child with a disability" under Part B of the IDEA, a district school board must conduct a "full and individual initial evaluation" in order "to determine whether [the] child is [indeed] a child with a disability" and "to determine the educational needs of [the] child." 20 U.S.C. §1414(a)(1)(B). After doing so, it must develop, taking into consideration any input provided by the child's parents,[5] an IEP (Individualized Education Program) designed to meet these needs. 20 U.S.C. § 1414(a) (4) and (d).

The IEP is the centerpiece of (Part B's) education delivery system for disabled children." Honig v. Doe, 484 U.S. 305, 311, 108 S. Ct. 592, 598 (1988). It must

include, among other things, "[a] statement of the child's present levels of educational performance"; "[a] statement of measurable annual goals, including benchmarks or short-term objectives"; "[a]statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child"; "[a] statement of the program modifications or supports for school personnel that will be provided for the child"; "[a]n explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class"; and "[a] statement of any individual modifications in the administration of State or district-wide assessments of student achievement that are needed in order for the child to participate in the assessment." 34 C.F.R. § 300.347. Unless and until an IEP is in effect, special education and related services may not be provided. 34 C.F.R. § 300.342(b)(1)(i). Once an IEP is in effect, special education and related services must be provided in accordance with the IEP. 34 C.F.R. § 300.350(a)(1).

Pending the finalization of a "permanent" IEP, with the parents' approval, an "interim" or "temporary" IEP may be developed and used to allow for the delivery of special education and related services under Part B. See Weiss By and Through Weiss v. School Board of Hillsborough County, 141 F.3d 990, 996 (11th Cir. 1990); and 34 C.F.R. Pt. 300, App. A, Question 14. Florida law specifically authorizes the use of "temporary" IEP for "transferring exceptional students," but only "for a period not to exceed six months." Fla. Admin. Code R. 6A-6.0334(4) and (5).[6]

There are "differences between an IFSP and an IEP." 34 C.F.R. § 300.342(c)(2)(i). Nonetheless, under Part B, an IFSP may be utilized in lieu of an IEP for

the delivery of special education and related services to eligible children three to five year of age. See 34 C.F.R. § 300.121(c)(1)(ii); 34 C.F.R. § 300.132(b); and 34 C.F.R. § 300.342(c); see also Fla. Admin. Code R. 6A-6.03029(2). The parents and the district school board must agree to such an arrangement, however. Absent such agreement, the IFSP delivery model is unavailable. 34 C.F.R. § 300.342(c)(1)(ii); see also Fla. Admin. Code R. 6A-6.03029(2).

Pursuant to 34 C.F.R. § 300.505(a)(1)(ii), "informed parent consent must be obtained before .. [i]nitial provision of special education and related services to a child with a disability" under Part B, regardless of what the vehicle for delivery of those services may be. See also Fla. Admin. Code R. 6A-6.03311(3)(b) ("Parental consent shall be obtained prior to initial placement of the student into a special program for exceptional students."). Unless and until such consent is obtained, a "permanent" IEP, interim" or "temporary" IEP, or IFSP drafted by the district school board describing those special education and related services it proposes to provide to the child cannot be considered to be "in effect," within the meaning 34 C.F.R. § 300.342(b)(1)(i), and the services may not be provided. While the district school board is barred from providing these services under these circumstances, it is not required, by mere virtue of the parents' refusal to consent, to provide any alternative special education and related services, much less those the parents desire.

As the undersigned noted in his 2/10/04 Final Order, the Office of Special Education Programs (OSEP) within the United States Department of Education's Office of Special Education and Rehabilitative Services is the "principal agency in such De-

partment for administering and carrying out [Part B of the IDEA] and other programs and activities concerning the education of children with disabilities." In policy letters, OSEP has expressed the view that the provisions of Part B become inapplicable to otherwise eligible children upon their parents' refusal to consent to the initial provision of special education and related services and that, under Part B, a district school board is not only not required to seek, through the due process hearing procedure or any other means, to "override" the lack of parental consent, but is powerless to do so. See Letter to Bowe (OSEP Letter of Clarification September 5, 2003), available at http//www.ed.gov/ policy/ speced/ guid/ idea/ letters/ 2003-3/ bowe090503eval3q2003.doc; Letter to Gloeckler (OSEP Letter of Clarification April 10, 2003), available at http://www.ed.gov/ policy/ speced/ buid/ idea/ letters/2003-2gloceckler041003eva12q2003.doc; Letter to Yudien (OSEP Letter of Clarification March 20, 2003), available at http://www.ed.gov/ policy/ speced/ guid/ idea/ letters/ 2003-1/ yuidien032003evalq2003.doc; Letter to Grantwerk (OSEP letter of Clarification February 11, 2003), available at http://www.ed.gov/ policy/ speced/ guid/ idea/ letters/2003-1/grantwerk021103eval1q2003.doc; Letter to Gagliardi (OSEP Letter of Clarification November 15, 2001), available at http://www.ed.gov/ policy/ speced/ guid/ idea/ letteres/2001-4/ gagliardi110501eval.doc; and Letter to Cox (OSEP Letter of Clarification September 24, 2001), available at http://www.ed.gov/ policy/ speced/ guid/ idea/ letters/ 2001-3/ cox092401eval.doc. Notwithstanding that OSEP has opined that a state law allowing for such an "override" is not "consistent with the IDEA's express statutory and regulatory provisions"(Letter

to Gloeckler, at page 2), the Florida Department of Education amended Florida Administrative Code Rule 6A-6.03311(3), effective September 20, 2004, to provide, in pertinent part, as follows:

> (3) Informed parental consent.
>
> * * *
>
> (c) Written parental consent shall be obtained . . . prior to initial provision of specially designed instruction and related services to a student with a disability . . . .
>
> (d) . . . . If consent is not obtained, and the school district maintains that such services are required in order for the student to be provided a free appropriate public education, school district personnel . . . . may request a hearing as provided in subsection (11) of this rule. The district may . . . initially provide specially designed instruction and related services to the student without the parent's consent only if an administrative law judge provides for such in the final decision in a due process hearing held in accordance with subsection (11) of this rule.

While this provision permits a district school board to initiate a due process hearing to attempt to "override" a lack of parental consent, it does not mandate that the district school board take such action. Neither Florida law, nor Part B, imposes upon a district school board the obligation to take any affirmative action in response to parents' refusal to consent to the initial provision of special education and related services.

The instant cases involve the proposed "[i]nitial provision of special education and related services" under Part B to children (the Triplets) who, until their third birthdays, had been receiving early inter-

vention services under Part C. These special education and related services are described in so-called "temporary" IEPs developed by the School Board that have been challenged, on the Triplets' behalf,7 on the grounds, among others, that they have not been "consented to by the parents." Without the consent of the-Triplets' parents, these "temporary" IEPS actually constitute mere draft proposals, not valid and effective IEPs that pursuant to 34 C.F.R. § 300.142(b)(1)(i), must be "in effect" before the School Board may begin providing the children special education and related services. These draft proposals for the initial provision of special education and related services never having been agreed to by the parents, the School Board is prohibited from providing the Triplets with the services it has proposed in these documents. Nothing in Part B, or Florida law, however, obligates the School Board, based solely on the parents' lack of consent, to provide the Triplets with the early intervention services they had been receiving in accordance with their IFSPs before they turned three.

The Triplets' father, on their behalf, contends otherwise, claiming that, unless it can demonstrate that it is impossible for it to continue these early intervention services, the School Board must do so, "until final IEPs for the [T]riplets are in place" in order to comply with Florida Administrative Code Rule 6A-6.0334, which provides as follows:

> 6A-6.0334 Temporary Assignment of Transferring Exceptional Students.
>
> (1) Transferring exceptional student. A transferring exceptional student is one who was previously enrolled as an exceptional student in another Florida public school or

private school or agency program or an out-of-state public or private school or agency program and who is enrolling in a Florida school district or in an educational program operated by the Department through grants or contractual agreements pursuant to Section 230.23(4)(n), Florida Statutes.

(2) An exceptional student who is transferring from one (1) Florida public school district to another and who has a current individual educational plan (IEP) shall be placed in the appropriate educational program(s) consistent with the plan. The IEP may be reviewed and revised if determined necessary by the receiving district in accordance with Rule 6A-6.0331, FAC.

(3) An exceptional student who is transferring from an out-of-state public school who has a current IEP and evaluation data necessary to determine that the student meets Florida's eligibility criteria for special programs or does not meet the district's dismissal criteria, may be placed immediately in the appropriate educational program(s), without temporary assignment. The receiving district may review and revise the current IEP, as necessary. Procedures for placement shall be in accordance with Rule 6A-6.0331, FAC.

(4) Temporary assignment. A transferring exceptional student may be temporarily assigned to a special program for exceptional students for a period not to exceed six months.

(5) The school board shall establish policies and procedures for temporary assignment of transferring exceptional students, including but not limited to the following:

(a) Verifying and documenting the student's previous program eligibility or assignment in the sending school or agency;

(b) Conducting an eligibility staffing which provides for the administrator of special programs to receive recommendations of the eligibility staffing committee without a formal meeting;

(c) Recommending, determining and documenting the student's eligibility or ineligibility for temporary assignment to a special program for exceptional students based on verified information regarding the student's previous program eligibility or assignment;

(d) Informing the parent in writing of ineligibility in accordance with Rule 6A-6.03311, FAC, if the student is determined ineligible for a special program based on the verified information regarding the student's previous program assignment;

(e) Developing a temporary individual educational plan for eligible exceptional students in accordance with Rule 6A-6.0331, FAC; and

(f) Providing notice and obtaining parental consent for temporary assignment, in accordance with Rule 6A-6.03311, FAC. If there is evidence of the parent's consent to the student's initial placement in a special program, or for those exceptional students who are ad-

judicated and placed in commitment programs, awaiting assignment to commitment programs for delinquent dependents, or detained awaiting adjudication, only informed parental notice of temporary assignment is required.

(g) Within six (6) months of temporary assignment, a staffing committee shall meet and a decision on eligibility for permanent assignment shall be made and an IEP committee shall determine placement in accordance with Rules 6A-6.0331 and 6A-6.03311, FAC, except that the district shall not be required to document anecdotal records, observations, conferences, interventions and adjustments required by Rules 6A-6.03011 through 6A-6.03025, FAC, and notice and consent for previous evaluations or previous placements, if such data are not transferred from the sending school or agency.

(6) A student's eligibility for permanent assignment may be based on the following, as appropriate:

(a) Evidence of previous program eligibility or assignment in the sending school district or agency which meets the receiving district's eligibility criteria, or

(b) The student does not meet the dismissal criteria set forth in the special programs and procedures document of the district to which the student has transferred. The special programs and procedures document is a completed Form ESE-017 as incorporated by reference in Rule 6A-6.0341, FAC.

In support of his argument, the Triplets' father cites the following excerpt from a Florida Department of Education Technical Assistance Paper, Technical Assistance Paper FY 2003-5, published in July 2003:

> 17. How can the temporary assignment rule assist with transition of children with disabilities at age three?
>
> Rule 6A-6.0334,FAC, Temporary Assignment of Transferring Exceptional Students, was created to ensure that students with exceptionalities moving into and within Florida public schools receive appropriate services in a timely manner. This rule defines a transferring exceptional student as "one who was previously enrolled as an exceptional student in another Florida public school or private school or agency program or an out-of-state public or private school or agency program and who is enrolling in a Florida school district." The Part C EIP (Early Intervention Program) is considered an agency program. If there is not enough information to determine placement permanently, children who were previously enrolled in the EIP upon verification of previous program eligibility or assignment may be temporarily assigned to the appropriate Prekindergarten Program for Children with Disabilities with parental consent. If the child is being temporarily assigned, the IEP or FSP team must develop a temporary IEP or FSP and determine temporary placement. Parental consent for temporary placement must be obtained. The school district then has up to six months to conduct the necessary evalua-

> tions to determine if the student is eligible for permanent assignment.

The father also points out that in a September 26, 1997, OSEP report concerning OSEP monitoring to determine Florida's compliance with the IDEA, the following was stated:

> FLDE [Florida Department of Education] officials informed OSEP that FLDE's procedures for program operation allow for a "temporary placement rule," which allows LEAs to use an existing family service plan for up to six months in order to develop an appropriate IEP. This procedure facilities a smooth transition by allowing services to continue while LEAs conduct additional evaluations as appropriate and determine program eligibility, to ensure that children receive a free appropriate public education by their third birthday. OSEP was informed by this official, however, that this procedure is not consistently utilized in public agencies in the State.

The father's reliance on Florida Administrative Code Rule 6A-6.0334 is misplaced. As children transitioning from Part C to Part B of the IDEA, the Triplets may be "transferring exceptional students" subject to discretionary "temporary assignment" pursuant to subsection (4) of the rule (provided their parents consent to such assignment, which the parents have not yet done), but they clearly are not exceptional student[s] who [are] transferring from one (1) Florida public school district to another and who ha[ve] [] current individual educational plan[s] (IEP[s])" describing the special education and related services they are to receive. The provisions of subsec-

tion (2) of the rule (which require the district school board, immediately upon transfer, to provide special education and related services "consistent" with those described in the IEP the transferring exceptional student" had in his old public school distric therefore do not apply to the, Triplets' situation. Cf. Schuylkill Haven Area School District v. Rhett P., 2004 WL 1977622 *3 (Pa. Commw. Ct. September 8, 2004)("Because the regulations only require that an (existing) IEP must be utilized when a student transfers from a public school district in this Commonwealth to another, and that is not what happened here, the Appeals Panel erred by awarding compensatory education to C.P. and M.P."). No other provisions of the rule make mandatory the continuation of services the "transferring exceptional student" had been receiving prior to transferring. Under the rule, the only consequence of the parents' refusal to consent to the Triplets' "temporary" IEPs is that the Triplets' "temporary assignment" cannot be accomplished.

The father further argues that the IDEA, not just Florida Administrative Code Rule 6A-6.0334, requires the School Board to provide for the continuation of the early intervention services he is seeking on behalf of the Triplets. In advancing this argument, he relies on the response to Question 17 in Appendix A to 34 C.F.R. Part 300-Notice of Interpretation. The question and response read as follows (with the language the father finds particularly significant underlined, as it was in his Initial Brief):

> 17. If a disabled child has been receiving special education from one public agency and transfers to another public agency in the same State, must the new public agency de-

velop an IEP before the child can be placed in a special education program?

If a child with a disability moves from one public agency to another in the same State, the State and its public agencies have an ongoing responsibility to ensure that FAPE is made available to that child. This means that if a child moves to another public agency the new agency is responsible for ensuring that the child has available special education and related services in conformity with an IEP.

The new public agency must ensure that the child has an IEP in effect before the agency can provide special education and related services. The new public agency may meet this responsibility by either adopting the IEP the former public agency developed for the child or by developing a new IEP for the child. (The new public agency is strongly encouraged to continue implementing the IEP developed by the former public agency, if appropriate, especially if the parents believe their child was progressing appropriately under that IEP.)

Before the child's IEP is finalized, the new public agency may provide interim services agreed to by both the parents and the new public agency. <u>If the parents and the new public agency are unable to agree on an interim IEP and placement, the new public agency must implement the old IEP to the extent possible until a new IEP is developed and implemented</u>.

> In general, while the new public agency must conduct an IEP meeting, it would not be necessary if: (1) A copy of the child's current IEP is available; (2) the parents indicate that they are satisfied with the current IEP; and (3) the new public agency determines that the current IEP is appropriate and can be implemented as written.
>
> If the child's current IEP is not available, or if either the new public agency or the parent believes that it is not appropriate, the new public agency must develop a new IEP through appropriate procedures within a short time after the child enrolls in the new public agency (normally, within one week).

The question asks about, and the response discusses, the situation of a child who "has been receiving special education from one public agency and transfers to another public agency in the same State." Neither Triplet is such a child. While the Triplets had been receiving services from a public agency before their "transfer," these services were not special education services. Rather, they were early intervention services. The response to Question 17 in Appendix A to 34 C.F.R. Part 300-Notice of Interpretation, therefore, is not authority for the proposition that, in the instant cases, in light of the inability of the parents and the School Board to agree on "interim" or "temporary" IEPs for the Triplets, the School Board is obligated to provide for the continuation of the early intervention services the Triplets' had been receiving before their third birthdays.

In view of the foregoing, it is hereby ORDERED:

1. The "temporary" IEPs developed for the Triplets by the School Board are not now, nor have they ever been, valid and "in effect' inasmuch as they have never been "consented to by the parents."

2. The School Board is therefore prohibited from providing the Triplets with the services it has proposed in these documents.

3. The School Board is not now, nor has it ever been, as a result of the parents' failure to consent to the Triplets' "temporary" IEPs, responsible for providing the Triplets with the early intervention services they had been receiving under Part C of the IDEA before turning three years of age.

4. The request (made in the Initial Brief filed on behalf of the Triplets) that the School Board be ordered to "reimburse the parents for continuation of the [T]riplets' [I]FSPS" is denied.

5. The father, on behalf of the Triplets, shall file with DOAH, and serve on the School Board, no later than 14 days from the date of this Final Order, a written statement: advising as to whether there are any issues set forth in the Second Requests that, in light of the determinations made in this Final Order, still need to be resolved; and if so, identifying those issues and specifying the relief that is being requested. Failure to timely file such a written statement will result in the issuance of an order closing the files in the instant cases.

6. If a written statement is timely filed indicating that there remain issues to be resolved in these cases, there will be a telephone conference call (on a date and time to be subsequently determined) to discuss scheduling matters.

DONE AND ORDERED this 5th day of October, 2004, in Tallahassee, Leon County, Florida.

/s/ Stuart M. Lerner
STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of October, 2004.

ENDNOTES

1/ Part C supplanted Part H effective July 1, 1998. See Marie O. v. Edgar, 131 F.3d 610, 612 n.l. (7th Cir. 1997).

2/ The Individuals With Disabilities Education Act "is the successor to the Education of the Handicapped Act of 1970, which was amended in 1975 and renamed the Education for All Handicapped Children Act." A. B. ex rel. D. B. v. Lawson, 354 F.3d 315, 319 (4th Cir. 2004).

3/ In an enduote, the undersigned observed:

The undersigned's denial of this request does not foreclose Petitioners from asking a court to exercise its equitable power (power the undersigned does not have) to grant them injunctive relief against the

School Board. See Wagner v. Board of Education of Montgomery County, 335 F.3d at 302-03.

4/ Earlier in his 2/10/04 Final Order, the undersigned had stated the following concerning the limited circumstances when DOAH Administrative Law Judges are authorized to order district school boards to reimburse parents of "exceptional students" for out-of-pocket instructional-related expenses:

> [T] only type of reimbursement a DOAH Administrative Law Judge in Florida is empowered to award in an "impartial due process hearing" is reimbursement for the "cost of (the private school) enrollment" of an "exceptional student" who has been unilaterally moved by his parents from public school to private school under circumstances described in 20 U.S.C. § 1412(a)(10)(C) and 34 C.F.R. § 300.403. Other types of reimbursement, including reimbursement for the cost of special education and related services needed by a child never enrolled in public school, are not available in an "impartial due process hearing" (although such relief may be awarded, in appropriate circumstances, by a court pursuant to 20 U.S.C. § 1415(i)(2)).

5/ "The [parents']right to provide meaningful input [in the development of the IEP is simply not the right to dictate an outcome and obviously cannot be measured by such." White ex rel. White v. Ascension Parish School Board, 343 F.3d 373, 380 (5th Cir. 2003); see also AW ex rel. Wilson v. Fairfax County School Board, 372 F.3d 674, 683 n.10 (4th Cir. 2004) ("Although AW's parents indicated their dissatisfaction with AW's April IEP by declining to sign it, the right conferred by the IDEA on parents to participate

in the formulation of their child's IEP does not constitute a veto power over the IEP team's decisions.").

6/ "[A] valid rule or regulation of an administrative agency has the force and effect of law." Graham v. Swift, 480 So. 2d 124 (Fla. 3d DCA 1985). (A challenge to the validity of Florida Administrative Code Rule 6A-6.0334 on the ground that it was inconsistent with the IDEA was rejected by the 11th Circuit Court of Appeals in Weiss By and Through Weiss, 141 F.3d at 996.)

7/ The validity of these "temporary" IEPs (which apparently were developed after the Triplets' First Requests were submitted) was not an issue that was litigated or decided in DOAH Case Nos. 04-0076E, 04-0077E, and 04-0078E.

8/ In its Answer Brief, the School Board argues that the Triplets are barred by the doctrine of res judicata from challenging the School Board's refusal to provide these early intervention services because they had already unsuccessfully challenged such School Board inaction in DOAH Case Nos. 04-0076E, 04-00775E. This argument need not be addressed, given the undersigned's determination herein that, notwithstanding the invalidity of the "temporary" IEPs due to lack of parental consent, the School Board has at no time bore responsibility to provide these services. See State v. Mears, 256 So. 2d 217, 218 (Fla. 3d DCA 1972); Bradley Development Corporation v. First National Bank in Palm Beach, 121 So. 2d 670, 672 (Fla. 2d DCA 1960); and Department of Professional Regulation v. Lieberman, Case Nos. 88-3333 and 88-3334, 1989 WL 645334 *10 (Fla. DOAH April 13, 1989)(Recommended Order). To the extent, however, the School Board is further contending that the Triplets are also barred by the doctrine

of res judicata from seeking a determination that the "temporary" IEPs are invalid and that the School Board has failed to comply with Part B of the IDEA and Florida special education law in ways other than by refusing to provide for the continuation of the Triplets' early intervention services, this additional argument is rejected. See Tremblay v. Santa Rosa County, 688 So. 2d 985, 986 (Fla. lst DCA 1997); and Markel v. Dizney, 534 So. 2d 1205 (Fla. 5th DCA 1988).