Nos. 06-3274, 06-3738

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOHN M., by his parents and next friends,
CHRISTINE M. and MICHAEL M.,

Plaintiffs-Appellees

v.

BOARD OF EDUCATION OF EVANSTON
TOWNSHIP HIGH SCHOOL DISTRICT 202, *et al.*

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

BRIEF FOR THE UNITED STATES DEPARTMENT OF EDUCATION AS *AMICUS CURIAE* SUPPORTING REVERSAL

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QUESTION PRESENTED

The Secretary of the United States Department of Education will address the following question:

Whether the district court erred in holding that the "stay-put" provision of the Individuals With Disabilities Education Act, 20 U.S.C. 1415(j), requires the provision of services using a methodology not specified in a student's

individualized educational program.

INTEREST OF THE UNITED STATES

This Court has invited the Secretary to address an issue concerning the procedural safeguards required by the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.* Sec'y App'x at 1.[1] The IDEA is enforced by the Office of Special Education Programs (OSEP) within the Office of Special Education and Rehabilitation Services of the Department of Education. The Department of Education promulgates IDEA regulations and can withhold funds from States that fail to comply with the statute. See 20 U.S.C. 1406, 1416. The Department of Education has filed briefs in numerous cases involving the construction of the IDEA. See *Lillbask ex rel. Mauclaire* v. *Connecticut Dep't of Educ.*, 397 F.3d 77 (2d Cir. 2005); *Pardini* v. *Allegheny Intermediate Unit*, 420 F.3d 181 (3d Cir. 2005), cert. denied, 126 S. Ct. 1646 (2006); *Girty* v. *School Dist. of Valley Grove*, 60 F. App'x 889 (3d Cir. 2002); *Board of Educ. of LaGrange Sch. Dist. No. 105* v. *Illinois State Bd. of Educ.*, 184 F.3d 912 (7th Cir. 1999).

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[1] "Sec'y App'x at __" refers to pages in the Appendix filed on May 21, 2007, by the Secretary of Education As *Amicus Curiae*, along with the brief. "Pl. Br. __" refers to pages in the brief filed by plaintiffs-appellees, John M., *et al*.

STATEMENT

1. Individuals With Disabilities Education Act

Congress enacted the IDEA, as amended by the Individuals With Disabilities Education Improvement Act (IDEIA), 20 U.S.C. 1400 *et seq*., to ensure that children with disabilities are provided a "free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. 1400(d)(1)(A); see also *School Comm. of Burlington* v. *Department of Educ.*, 471 U.S. 359, 367 (1985); *Board of Educ. of LaGrange Sch. Dist. No. 105* v. *Illinois State Bd. of Educ.*, 184 F.3d 912, 915 (7th Cir. 1999). The Act seeks to "assist States, localities, [and] educational service agencies * * * to provide for the education of all children with disabilities." 20 U.S.C. 1400(d)(1)(C). Under the Act, a "free appropriate public education" includes educational services, as well as those related services and supports that are "reasonably calculated to enable the child to receive educational benefits." *Board of Educ.* v. *Rowley*, 458 U.S. 176, 207 (1982); see also *Todd* v. *Duneland Sch. Corp.*, 299 F.3d 899, 901 (7th Cir. 2002).

A key element of the IDEA is the development of an "individualized education program" (IEP) for each child with a disability. 20 U.S.C. 1414(d)(1)(A); see also 20 U.S.C. 1412(a)(4) (eligibility for federal funding

requires that States develop IEPs for children with disabilities). The IEP is "a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." *Burlington*, 471 U.S. at 368; see also 20 U.S.C. 1414(d)(1)(A); see also 20 U.S.C. 1401(14) (defining IEP as a "written statement for each child with a disability").

> The IEP, which is reviewed and revised annually, includes
>
> (1) the child's "present levels of academic achievement and functional performance";
>
> (2) "measurable annual goals, including academic and functional goals, designed to * * * enable the child to be involved in and make progress in the general education curriculum";
>
> (3) "how the child's progress toward meeting the annual goals will be measured"; and
>
> (4) "a statement of the special education and related services and supplementary aids and services * * * to be provided to the child * * * and a statement of the program modifications or supports for school personnel that will be provided for the child * * * to be involved in and make progress in the general education curriculum" and "to be educated and participate * * * in activities" with disabled and nondisabled children.

20 U.S.C. 1414(d)(1)(A)(i) and 20 U.S.C. 1414(d)(4)(A); see also 34 C.F.R. 300.320(a)(4)(ii).

The IDEA contains "[p]rocedural [s]afeguards" to protect the rights of the

parents and child, including notice to the parents whenever there is a change in a child's "educational placement." 20 U.S.C. 1415. If a parent objects to a new IEP, further proceedings – *i.e.*, an administrative hearing and, if necessary, federal court suit – are permitted. See 20 U.S.C. 1415. The procedural safeguards also include a "stay-put" provision that enjoins any change to a child's educational placement pending administrative or judicial proceedings. That provision reads:

> [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.

20 U.S.C. 1415(j).[2]

2. Facts

This case involves a dispute between plaintiffs John M. and his parents, and defendant Board of Education of Evanston Township High School District 202

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[2] The stay-put provision is also found in Department of Education regulations and similarly reads:

> [D]uring the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing 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.

34 C.F.R. 300.518(a) (amendment to provision became effective Oct. 13, 2006); see also 71 Fed. Reg. 46,755 (2006).

(ETHS). The dispute concerns, *inter alia*, the educational services to be provided to John pending resolution of this judicial proceeding. John is a 15 year-old boy with Down Syndrome. Sec'y App'x at 4. He was a ninth grade student at ETHS during the 2005-2006 school year. *Ibid.* ETHS receives federal IDEA funds and therefore is bound by the requirements of the IDEA. *Ibid.*

Before attending high school at ETHS, John attended sixth through eighth grades at a public middle school operated by Evanston Community Consolidated School District 65. Sec'y App'x at 4. Public school students progress from District 65 to ETHS for high school. *Ibid.*

John's seventh grade IEP specifically called for his inclusion – *i.e.*, instruction in a regular general education classroom with non-disabled students – in reading, language arts, and math classes, facilitated by a "co-teach[ing] model." Pl. Br. at 2, citing R. Vol. I, p. 000157. John's eighth grade IEP also required his inclusion in reading, language arts, and math classes, but did not specify that inclusion be facilitated by co-teaching. See Pl. Br. at 2; see also Sec'y App'x at 26. Middle school officials, however, employed a co-teaching arrangement during his eighth grade year.[3]

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[3] Specifically, John's eighth grade IEP required that he receive 200 minutes per week of regular education classroom instruction in each of his reading,

(continued...)

During the spring of John's eighth grade year, his parents met with ETHS officials to draft a new IEP for his ninth grade year in high school. Sec'y App'x at 6. John's parents objected to the proposed IEP and requested an administrative due process hearing. *Id*. at 7.

Pending the administrative proceedings, ETHS implemented the terms of John's eighth grade IEP as his stay-put placement. ETHS did not provide John with co-teaching. Rather, the school provided him with a one-on-one teaching aide in his social studies, English, Algebra, and Biology classes. Sec'y App'x at 41-42, 46, 49. The teaching aide sits with John in these regular classes and assists him by getting him started with his work, keeping him on task, and helping him complete assignments in the classroom. *Ibid.*

The hearing officer held that ETHS's proposed ninth grade IEP provided John the free appropriate public education the IDEA requires. *Id.* at 52-59. The hearing officer further found that ETHS's program for John "fully complied" with the stay-put placement, 20 U.S.C. 1415(j). *Id.* at 51. John's parents objected to the adequacy of the stay-put placement because it did not include the co-teaching that John had received in eighth grade.

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[3](...continued)
language arts, and math classes, for a total of 600 minutes per week. Sec'y App'x at 4-5.

3. District Court Proceedings

On March 17, 2006, John's parents filed a complaint in federal district court seeking relief under the IDEA, and moved for a preliminary injunction to enforce the stay-put placement. The parents argued that, in implementing the stay-put requirement, John was entitled to all the services he had received in eighth grade, including co-teaching. Sec'y App'x at 7.

On August 18, 2006, the district court granted preliminary relief, and ordered that ETHS place John in regular classes with the assistance of special education teachers "until the issue of John's placement into regular classes can be determined by the parties and this court." Sec'y App'x at 14. The district court also ordered the formulation of a new IEP for John. *Id.* at 15-16.

Defendants moved to stay judgment pending appeal, arguing that the merits of John's permanent high school educational placement were not yet before the court. On September 26, 2006, the district court entered an order granting in part and denying in part defendants' motion. Sec'y App'x at 17. With respect to John's stay-put placement, the district court held that since the "stay-put provision uses the term 'then-current educational placement' instead of 'then-current IEP,' the stay put provision covers more than just the four corners of the last-agreed upon IEP." *Id.* at 26. The district court ordered ETHS to "adhere to John's May

2004 [eighth grade] IEP [as] his then current educational placement from [middle school]" by providing him "*600 minutes per week of co-teaching*" he had "receiv[ed] [in middle school] along with the 200 minutes per week of special education outside the regular education classroom." *Ibid.* (emphasis added).

The district court rejected ETHS's claim that it provided John comparable educational services and that it would be "impossible for ETHS to give John 600 minutes per week of 'co-teaching' services." Sec'y App'x at 26. The district court held that "[215] minutes a week of consultative special education services for John's regular classroom teachers and 86 minutes a week of observing John's regular classroom along with a daily period of resource are not comparable to 600 minutes of co-teaching services in a regular classroom." *Id.* at 26-27. The district court held that ETHS waived any argument about the impossibility of providing co-teaching services due to its "stipulation in the pre-hearing conference that it will 'implement the student's 2004-2005 [eighth grade] IEP * * * at the start of the 2005-2006 [ninth grade] school year.'" *Id.* at 27.

This appeal followed.

STANDARD OF REVIEW

Whether a school district has satisfied the requirements of the IDEA is a mixed question of law and fact that this Court reviews *de novo*. *Board of Educ. of*

Murphysboro v. *Illinois State Bd. of Educ.*, 41 F.3d 1162, 1166 (7th Cir. 1994). Absent a mistake of law, this Court reviews the district court's factual conclusions for clear error. *Id*. at 1166-1167. "[B]ecause courts do not have special expertise in the area of educational policy, they must give 'due weight' to the results of the administrative decisions and should not substitute 'their own notions of sound educational policy for those of the school authorities which they review.'" *Id.* at 1166, quoting *Board of Educ.* v. *Rowley*, 458 U.S. 176, 206 (1982).

SUMMARY OF ARGUMENT

This brief addresses the narrow question whether the district court erred in holding that the IDEA's stay-put provision requires ETHS to provide John co-teaching services, even though this requirement is not explicitly listed in his eighth grade IEP. For purposes of the IDEA's stay-put provision, the services to which a student like John is entitled, including the methodology for delivering those services, are those expressly stated in his or her last agreed-upon IEP.

This interpretation comports with the IDEA's statutory provisions, a key element of which is the development of an individualized educational program. The IEP is a comprehensive statement formulated by a team of individuals, which includes the child's parents, and sets out, *inter alia*, the full range of services and aids that a state or local educational agency has agreed to provide the child.

This interpretation also comports with the position of the Department of Education. The Department of Education has consistently stated that, in the context of stay-put, an educational agency is only required to implement the express terms of the child's IEP. This is a reasonable interpretation of the IDEA to which this Court should defer.

Finally, this interpretation is consistent with the case law interpreting the IDEA. In determining stay-put cases, this Court uses a fact driven approach and looks to the IEP for establishing the foundation of the stay-put placement. Other courts have similarly recognized that a child's educational placement under stay-put is determined by the terms of the child's last agreed-upon IEP. Accordingly, courts have held that stay-put does not require services or supports that a child may have been receiving but were *not* included in the IEP.

Because John's eighth grade IEP did not specify the specific methodology of co-teaching, ETHS's failure to provide co-teaching pending the resolution of John's judicial proceedings does not violate the stay-put provision.

ARGUMENT

THE SUPPORTS AND SERVICES SET OUT IN JOHN'S LAST AGREED-UPON IEP CONSTITUTES HIS STAY-PUT PLACEMENT

A. For Purposes Of The Stay-Put Provision of the IDEA, An Educational Placement Is Determined By The Terms Of The IEP

The stay-put requirement of the IDEA provides that when a due process or judicial hearing is requested, the child "shall remain in the then-current educational placement of the child" unless the parents and school officials agree to another educational program or placement. 20 U.S.C. 1415(j). For purposes of this provision of the IDEA, the "educational placement" of a student like John is defined by the provisions of his or her last agreed-upon IEP.

1. This Interpretation Comports With The Statutory Provisions Of The IDEA

A key element of the IDEA is the development of an "individualized education program" for each child with a disability. 20 U.S.C. 1414(d)(1)(A). Indeed, the Supreme Court in *Honig* v. *Doe* characterized the IEP as the "centerpiece" of the IDEA. 484 U.S. 305, 311 (1988); see also *S.H.* v. *State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003) (The "Individualized Education Program (IEP) is the primary vehicle for providing students with the required free and appropriate education.").

The IEP is a comprehensive statement that contains the specific terms and

conditions pursuant to which a state or local educational agency provides educational and related services to a child with a disability. See pp. 3-5, *supra*; see also 20 U.S.C. 1414(d)(1)(A); 20 U.S.C. 1401(14). The IDEA provides specific guidelines for what is to be included in a child's IEP. 20 U.S.C. 1414(d)(1)(A)(i). The IEP summarizes the child's abilities and goals for the child's education; provides an explanation of the extent to which, if any, services will not be provided in classrooms with nondisabled children; and specifies the type of educational services and related services and teaching supports and program modifications that will be provided for the child. 20 U.S.C. 1414(d)(1)(A)(i)(IV); see also 34 C.F.R. 300.320 (definition of individualized education program).

The IEP is developed by a team of individuals that includes the child's parents, regular and special education teachers, and a representative of the local educational agency. 20 U.S.C. 1414(d)(1)(B). "Writing IEPs is a dynamic, collaborative process, one that involves" IEP team members "working together to prepare an education program suitable for a disabled child." *Settlegoode* v. *Portland Public Sch.*, 371 F.3d 503, 511 (9th Cir.), cert. denied, 543 U.S. 979 (2004); see also *Alex R.* v. *Forrestville Valley Cmty. Unit Sch. Dist. No. 221*, 375 F.3d 603, 618 (7th Cir.) (court concludes that child's IEPs were valid and that "the [school] [d]istrict took a thoughtful, measured approach to [the child's]

education"), cert. denied, 543 U.S. 1009 (2004).

In developing the child's IEP, the IEP team considers the "(i) strengths of the child; (ii) the concerns of the parents for enhancing the education of their child; (iii) the results of the initial evaluation or most recent evaluation of the child; and (iv) the academic, developmental, and functional needs of the child." 20 U.S.C. 1414(d)(3)(A). The IEP team "reviews the child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved" and "revises the IEP as appropriate" to address the child's needs. 20 U.S.C. 1414(d)(4)(A); see also 34 C.F.R. 300.324(b)(1)(i).

Given the central purpose of the IEP within the IDEA, and the detailed manner in which the IEP is developed and is required to set out the educational services a child is to receive, defining the term "educational placement" in the context of the stay-put requirement as encompassing the provisions of the child's IEP is clearly consistent with the statutory scheme.

2. This Interpretation Is Consistent With The Position Of The Department Of Education

The Department of Education has consistently stated that in the context of stay-put, a child's educational placement is the educational program described in the IEP, and that, under stay-put, school districts are only required to implement the express terms of the child's IEP. See, *e.g.*, *Assistance To States For The*

Education Of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, Final Regulations, Attachment 1 – Analysis of Comments and Changes, 64 Fed. Reg. 12,406, 12,616 (Mar. 12, 1999) ("The term 'current placement' * * * includes the IEP and the setting in which the IEP is implemented, such as the regular classroom or a self-contained classroom, [but] * * * is generally not considered to be location-specific."). The Department of Education's Office of Special Education Programs has consistently informed school districts that stay-put does not require schools to provide services, including the methodology for delivering such services, not specified in an IEP. See Sec'y App'x at 64, 66, Letter to Reiser, 211 IDELR 403 (July 17, 1986) ("[T]he LEA must maintain, during the pendency of a dispute, the child's 'then current educational placement' by providing the complete program of special education and related services *described in the existing IEP*.") (emphasis added); see also Sec'y App'x at 68, 70, Letter to Campbell, 213 IDELR 265 (Sept. 16, 1989) ("[I]f the parents disagree with the new IEP and pursue due process, the child's old IEP must be maintained through the administrative proceedings, unless the parents and school district otherwise agree."); Sec'y App'x at 62-63, Letter to Watson, unpublished, (April 12, 2007) ("[W]hen pendency attached to the child's current educational placement, the public agency must ensure that the child receives the

complete program of special education and related services contained in the IEP developed for the child when pendency attached, unless the parents and the public agency agree otherwise.").

This is a reasonable interpretation of the IDEA, to which this Court should defer. *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) (an agency's views as *amicus curiae* are entitled to deference); see also *Irving Indep. Sch. Dist.* v. *Tatro*, 468 U.S. 883, 892 & n.9 (1984) (United States Department of Education's IDEA regulations are entitled to deference by the courts). The Department of Education's interpretation facilitates the ease of implementation of stay-put. Stay-put was not intended to require a fact finding about how a child's IEP actually was implemented. Instead, it was supposed to ensure that the child continues to receive the educational services and supports that were last agreed to by the child's parents and school as set out in the child's IEP.

Additionally, stay-put was intended to allow parents and school officials involved in a dispute over an IEP to understand quickly and easily what services are going to be required in the next school year, pending resolution of administrative and judicial proceedings in the child's case. These purposes are served most appropriately by examining the written IEP and following its dictates. The factual situation presented here – where a school district provided a service by

a methodology that was not specified by the IEP and there arose a dispute over whether that unspecified methodology is required – itself suggests the reasonableness and advantages of using the written IEP as the limit a federal court may require.

3. This Interpretation Is Consistent With The Case Law Interpreting The IDEA

This Court has recognized the definitive role of the IEP in determining a child's educational placement, stating that the "IEP, which sets forth the child's educational level, performance, and goals is the *governing document* for all educational decisions concerning the child." *Board of Educ. of Cmty. High Sch. Dist. No. 218* v. *Illinois State Bd. of Educ.*, 103 F.3d 545, 546 (7th Cir. 1996) (emphasis added), citing *Rodiriecus L. and Betty H.* v. *Waukegan Sch. Dist. No. 60*, 90 F.3d 249, 252 (7th Cir. 1996); see also *Butler* v. *Evans*, 225 F.3d 887, 893 (7th Cir. 2000) (The "IEP determines the IDEA services that the state will provide subject to state approval and oversight."). Moreover, in determining stay-put cases, this Court uses a "fact-driven approach," defining educational placement as "something more than the actual school attended by the child and something less than the child's ultimate educational goals," and looks to the IEP for establishing the foundation of the stay-put placement. *Dist. No. 218*, 103 F.3d at 549.

For example, in *District No. 218,* this Court considered the appropriate stay-

put placement for a child, who transferred between three programs at two private residential facilities. 103 F.3d at 547. In determining the approriate stay-put placement, this Court looked to the IEP and stated as follows:

> Still obligated to effect the stay-put provisions and preserve an "educational placement," *we move one level of abstraction to [the child's] IEP, which establishes [the child's] educational needs and goals.* All three programs are able to implement a substantively identical IEP. Due to this consistency, we conclude that the district court injunction effected the stay-put provisions.

Ibid. (emphasis added).

As with the approach taken by this Court, other courts of appeals have agreed that under stay-put, the "dispositive factor is the IEP [that is] in place when the stay-put provision is invoked." *Erikson* v. *Albuquerque Pub. Schs.*, 199 F.3d 1116, 1121 (10th Cir. 1999) (citing *Susquenita Sch. Dist.*, v. *Raelee S.*, 96 F.3d 78, 83 (3rd Cir. 1996)); see also *Johnson ex rel. Johnson* v. *Special Educ. Hr'g Office*, 287 F.3d 1176, 1180 (9th Cir. 2002) (a child's "then current educational placement" means 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) (court holds that when a "dispute arises over a new IEP before it is implemented, but while a previous one is already in place * * * the child's 'then current educational placement' will clearly be the previously implemented IEP."); *Drinker by Drinker* v. *Colonial Sch. Dist.*, 78 F.3d 859, 867 (3d Cir. 1996) (court

holds that the IEP that is "functioning when the 'stay put' is invoked" is "dispositive" in determining a child's "current educational placement"); *CP* v. *Leon County Sch. Bd. of Florida*, 2007 WL 1052607 *6 (11th Cir. 2007) (court holds that school board "maintain[ed] the status quo" by "implementing the [last agreed-upon] IEP in the 2003-2004 school year during the pendency of proceeding initiated by [the child's parents]."); *Spilsbury* v. *District of Columbia*, 307 F. Supp. 2d 22, 26-28 (D.D.C. 2004) ("current educational placement" for purposes of stay-put encompassed range of services that were provided for in student's last agreed upon IEP); *Gabel ex rel. L.G.* v. *Board of Educ. of Hyde Park Cent. Sch. Dist.*, 368 F. Supp. 2d 313, 324 (S.D.N.Y. 2005) (The then-current educational placement for purposes of "stay-put" provision means the "last unchallenged IEP.").

Consistent with this understanding of the IDEA, several courts of appeals have held that the IDEA's stay-put provision does *not* require services that a child may have been receiving, but were not specifically included in the child's IEP. For example, in *Cordrey* v. *Eukert*, the Sixth Circuit Court of Appeals held that the stay-put provision was not violated when a school district did not provide services which were not specified in a child's IEP, even though the student had received the services in the past. 917 F.2d 1460 (6th Cir. 1990), cert. denied, 499 U.S. 938 (1991). In that case, a child with a disability and his parents challenged a school

district's failure to provide the child an extended school year (ESY) program. Noting that "it is undisputed that [the child's] IEP has never formally included an ESY placement," the court of appeals found that the child was not entitled to ESY services under stay-put since those services had not been not specified in the child's last agreed-upon IEP. *Id.* at 1468.

Similarly, the Ninth Circuit Court of Appeals, in *Gregory K.* v. *Longview School District*, held that the stay-put provision did not require the school district to provide tutoring services that had been provided in the past, but were not specified in the child's IEP. 811 F.2d 1307, 1314-1315 (9th Cir. 1987). The court of appeals noted that the child's "eligibility for special education * * * does not mean that whatever services he received from the [school] [d]istrict were automatically 'special education' entitled to protection under the Act." *Id.* at 1313. The court of appeals held that, since tutoring services were not provided pursuant to the child's IEP, the school district was not required to provide those services. *Id.* at 1314-1315.

Likewise, the Tenth Circuit Court of Appeals, in *Erickson* v. *Albuquerque Public Schools*, held that a school district did not violate the stay-put provision by refusing to provide hippotherapy, a type of occupational therapy, where the last prior IEP required occupational therapy but did not specify the type of such

therapy. 199 F.3d at 1119. Finding that the child's "IEP provided for occupational therapy, but did not specify the providers or modalities," the court held that the "elimination of hippotherapy, when occupational therapy was still provided, would not contravene the IEP." *Id.* at 1121.

These holdings fully support the Department of Education's view that, under the IDEA's stay-put provision, school districts are not required to provide supports and services, including the methodology for facilitating such supports and services, that are not specified in a child's IEP.

B. Co-Teaching Is Not Required For John's Stay-Put Placement Because This Methodology Is Not Specified In His Eighth Grade IEP

There is no dispute in this case that John's eighth grade IEP, the last agreed-upon educational program for John, sets out the educational placement to which he is statutorily entitled under the stay-put provision. The eighth grade IEP expressly states that John receive 600 minutes per week of general education classroom instruction. This requirement had been facilitated during his middle school years through the use of a co-teacher, who assisted John and was physically present with him during three of his academic classes. The use of co-teaching, however, is not expressly required by John's eighth grade IEP. The dispute stems from whether the stay-put provision requires that John continue to receive the co-teaching that he received in eighth grade, even though his eighth grade IEP did not require it. Since

the eighth grade IEP does not expressly require co-teaching, it is not required under the stay-put provision.

Plaintiffs nevertheless argue (Pl. Br. 30) that co-teaching was the "centerpiece" of John's eighth grade IEP. However, if co-teaching was the centerpiece, it should have been expressly specified in the IEP document itself, as it had been in John's seventh grade IEP. Since it was not, ETHS's primary obligation to John is not the provision of co-teaching, but rather to ensure John's involvement in general education classes for 600 minutes per week.

The IDEA generally leaves issues of educational methodology primarily to the educators, and not the federal courts. "A major part of the task of local and state officials in fashioning what they believe to be an effective program for the education of a handicapped child is the selection of the methodology or methodologies that will be employed." *Lachman* v. *Illinois State Bd. of Educ.*, 852 F.2d 290, 296 (7th Cir. 1988), cert. denied, 488 U.S. 925 (1988); *Rowley*, 458 U.S. at 207 ("In assuring that the requirements of the [IDEA] have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States."). Thus, absent an express reference to "co-teaching" in an IEP, a decision on whether to provide it is a choice of educational methodology properly left to educators. See, *e.g.*, *Erickson*, *supra* at 21, 199 F.3d 1116 (choice of the

type of occupational therapy is up to school officials, absent express designation of specific type in the IEP).

Indeed, in this case, ETHS ensured John's participation in regular education classes, as his eighth grade IEP required, but utilized a different methodology for facilitating that requirement. Rather than providing John a co-teacher, as his middle school had done, ETHS provided John a one-on-one teaching aide, who keeps him focused on his work and helps him complete assignments during his social studies, English, Algebra, and Biology classes. See *supra* at p. 7. In this case, ETHS was well within its discretion to choose a one-on-one teaching aide, rather than a co-teacher, to facilitate John's participation in regular education classes.

Since John's eighth grade IEP did not specify the requirement of co-teaching, ETHS's failure to provide it does not violate the stay-put provision.[4] The district court's order requiring co-teaching, based on the IDEA's stay-put provision is therefore incorrect.

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[4] John's parents suggest that co-teaching is necessary for John to benefit from the educational services that he receives from ETHS. That issue, however, is not presented in this appeal. Although under the IDEA the services and supports provided to John must be "reasonably calculated" to provide him with an "educational benefit," see *Rowley*, 458 U.S. at 207, whether a placement with an aide is of "educational benefit" goes to the appropriateness of John's ninth grade IEP, not to the services or supports required by the stay-put provision.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation required by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains no more than 5,196 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I also certify that the electronic version of this brief, which has been sent to the Court by overnight delivery on a compact disc, has been scanned with the most recent version of Trend Micro Office Scan (version 7.0) and is virus-free.

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Date: May 21, 2007

CERTIFICATE OF SERVICE

I certify that on May 21, 2007, two copies of the foregoing Brief For The United States Department Of Education As *Amicus Curiae* Supporting Reversal were sent by overnight Federal Express delivery to the following counsel of record:

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