IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DAVID AND JENNIFER PARDINI, on behalf of themselves and on behalf of their minor child, GEORGIA PARDINI,

Plaintiffs-Appellants

v.

ALLEGHENY INTERMEDIATE UNIT,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will address the following question:

Whether the "stay-put" provision of Part B of the Individuals With Disabilities Education Act requires continuation of the early intervention services that were provided to a child pursuant to Part C of the statute during the pendency of administrative or judicial proceedings regarding the services to be provided under Part B.

INTEREST OF THE UNITED STATES

This case raises a significant issue regarding the procedural safeguards required by the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.* The IDEA is enforced by the Office of Special Education Programs (OSEP) within the Office of Special Education and Rehabilitative Services of the U.S. Department of Education, which is authorized to promulgate regulations and to withhold IDEA funds from States that fail to comply with the IDEA's requirements. See 20 U.S.C. 1406, 1416. The district court in this case relied upon OSEP's interpretation of the "stay-put" or "pendency" provision applicable to Part B of the statute, 20 U.S.C. 1415(j), and appellants and their amici have challenged that position in their briefs in this appeal. This brief is filed pursuant to Federal Rule of Appellate Procedure 29(a), to set forth the agency's rationale for its interpretation of the statute.

STATEMENT

1. The IDEA is an important statute providing educational opportunities for children with disabilities. Part C of the IDEA requires States that receive funds under the statute to provide "appropriate early intervention services," as set forth in an "individualized family service plan" (IFSP), to eligible children with disabilities from birth to age three and their families. 20 U.S.C. 1431-1445. Part

B of the IDEA requires States that receive funds under the statute to provide a "free appropriate public education," as set forth in an "individualized education program" (IEP), to eligible children with disabilities from age 3 through 21. 20 U.S.C. 1411-1427. Parts B and C have different eligibility definitions and requirements, require States to make available different services, and, in approximately two-thirds of the States, are administered by different agencies.

a. Part C - Services For Children Ages Birth To Three

Part C requires "early intervention services" for "infants and toddlers with disabilities." 20 U.S.C. 1432(4), 20 U.S.C. 1434(1). The statute defines the term "infant or toddler with a disability" as:

> * * * an individual under 3 years of age who needs early intervention services because the individual --
>
> > (i) is experiencing developmental delays, as measured by appropriate diagnostic instruments and procedures in one or more of the areas of cognitive development, physical development, communication development, social or emotional development, and adaptive development; or
> >
> > (ii) has a diagnosed physical or mental condition which has a high probability of resulting in developmental delay[.]

20 U.S.C. 1432(5). The definition of the term "developmental delay" under Part C is left to the States, and thus may vary from State to State. 20 U.S.C. 1432(3).

"Early intervention services" are defined as "developmental services" that:

> (C) are designed to meet the developmental needs of an infant or toddler with a disability in any one or more of the following areas--
>
> (i) physical development;
> (ii) cognitive development;
> (iii) communication development;
> (iv) social or emotional development; or
> (v) adaptive development[.]

20 U.S.C. 1432(4). Early intervention services under Part C may include training and other services to the family as well as the child, and "to the maximum extent appropriate, are provided in natural environments, including the home, and community settings in which children without disabilities participate[.]" 20 U.S.C. 1432(4)(G).

Part C requires development of an individualized family service plan (IFSP), based upon "a multidisciplinary assessment of the unique strengths and needs of the infant or toddler and the identification of services appropriate to meet such needs" and "a family-directed assessment of the resources, priorities, and concerns of the family and the identification of the supports and services necessary to enhance the family's capacity to meet the developmental needs of the infant or toddler[.]" 20 U.S.C. 1436(a)(1) & (a)(2).

b. Part B - Services For Children Ages 3 Through 21

Part B requires a "free appropriate public education" for "children with disabilities" between the ages of 3 and 21. 20 U.S.C. 1412(a)(1)(A). The IDEA defines a "a child with a disability" as a child

> (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, * * * orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
>
> (ii) who, by reason thereof, needs special education and related services.

20 U.S.C. 1401(3)(A).[1]

The term "free appropriate public education" is defined as "special education and related services" that, *inter alia*, "meet the standards of the State educational agency" and "include an appropriate preschool, elementary, or secondary school education in the State involved[.]" 20 U.S.C. 1401(8). Identification of the services to be provided under Part B begins with an initial evaluation to determine whether the child has a disability, and "to determine the educational needs of such child." 20 U.S.C. 1414(a)(1)(B)(ii). Based on this

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[1] A State may, but is not required, to provide services to children age 3 through 9 who are "experiencing developmental delays." 20 U.S.C. 401(3)(B). A State's definition of "developmental delay" under Part B is not required to be the same as under Part C. Compare 20 U.S.C. 1432(3), 20 U.S.C. 1435(a)(1).

evaluation, an individualized education program (IEP) is developed. 20 U.S.C. 1414(d). The IEP includes statements of: (i) "the child's present levels of educational performance;" (ii) "measurable annual goals" defined in terms of the "general curriculum" and the child's "educational needs;" and (iii) "the special education and related services and supplementary aids and services to be provided to the child[.]" 20 U.S.C. 1414(d)(1)(A). Public agencies must ensure that IEPs are individualized and identify the special education and related services based on the individual needs of the child. 34 C.F.R. 300.346–300.347.

c. Administration

Parts B and C may be administered by different entities within the same State. Part B expressly provides that the "State educational agency" will administer the State's program of education for children with disabilities. 20 U.S.C. 1412(a)(11); see 20 U.S.C. 1412(b). And Part B includes provisions detailing the requirements for local education agency eligibility for funding. 20 U.S.C. 1413. In contrast, Part C only requires designation of a "lead agency" at the state level to administer the State's programs for infants and toddlers. 20 U.S.C. 1435(a)(10); 20 U.S.C. 1437(a)(1).

d. Stay-Put Provisions

To qualify for funding under the IDEA, States must establish procedures to ensure that children with disabilities and their parents have procedural safeguards, including the right to an impartial due process hearing to resolve disputes regarding the child's placement or the services provided. 20 U.S.C. 1415(f) (Part B); 20 U.S.C. 1439(a) (Part C). A party aggrieved by the results of the administrative process established by the State has the right to initiate a civil action. 20 U.S.C. 1415(i)(2) (Part B); 20 U.S.C. 1439(a)(1) (Part C). Both Part B and Part C contain "stay-put" or "pendency" provisions that prescribe the services to be provided during the pendency of administrative or judicial proceedings regarding the child's placement or the appropriate services to be provided to the child. See 20 U.S.C. 1415(j), 20 U.S.C. 1439(b). The stay-put provision for Part B 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 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.

20 U.S.C. 1415(j).[2] The stay-put provision for Part C is similarly worded, except that it requires continuation of "the appropriate early intervention services currently being provided," rather than "the then-current educational placement." 20 U.S.C. 1439(b).

2. This case arises from a dispute between the plaintiffs-appellants, Georgia Pardini and her parents, and the defendant-appellee, Allegheny Intermediate Unit (AIU), over the educational services to be provided to Georgia under Part B of the IDEA, following her third birthday. Until her third birthday, Georgia received occupational therapy, physical therapy and "conductive education" from the Alliance for Infants and Toddlers (AIT), pursuant to an individualized family service program (IFSP) under Part C of the IDEA.[3] *Pardini* v. *Allegheny Inter. Unit*, 280 F. Supp. 2d 447, 450 (W.D. Pa. 2003). Once Georgia turned three, her eligibility for services under Part C ended, and she was determined eligible for educational services under Part B of the IDEA.

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[2] There is an exception for children involved in disciplinary proceedings.

[3] According to the Inter-American Conductive Education Association, conductive education is an educational approach for children with central nervous system disabilities. In a child with cerebral palsy, conductive education appears to work mainly on strengthening and retraining the physically impaired side of the body. See http://www.iacea.org/CE.htm (visited February 27, 2004).

In January, 2003, the Allegheny Intermediate Unit (AIU), which is responsible for administering services for preschoolers under Part B, began preparation for Georgia's transition to Part B. *Id.* at 450-452. At the start of this process, the Pardinis told AIU that they considered Georgia's conductive education the most effective of her therapies. *Id.* at 452. AIU evaluated Georgia, prepared an evaluation report, which confirmed her eligibility for services under Part B, and proposed an IEP. *Id.* at 450. AIU proposed to provide essentially the same services that Georgia had received under her IFSP, *except* for conductive education. *Id.* at 452.

The Pardinis refused to approve the evaluation report and requested an independent evaluation at public expense. 280 F. Supp. 2d at 450, 452. They also asked AIU to provide all the IFSP services, including conductive education, during the pendency of the parties' dispute over the evaluation report and the content of Georgia's IEP. AIU stated that it would provide, as part of Georgia's proposed IEP, all of the IFSP services except conductive education. *Id.* at 452. However, because the Pardinis refused to consent to provision of these services, AIU discontinued all services following Georgia's third birthday. *Id.* at 452-453.[4]

[4] Part B requires parental consent before the initial provision of special education and related services. 34 C.F.R. 300.505(a)(1)(ii).

Both parties instituted due process proceedings. The AIU sought to defend the validity of its evaluation report. *Id.* at 450. The Pardinis sought a ruling that the AIU was required to continue all of Georgia's IFSP services, including conductive education, during the pendency of their dispute over the evaluation report and proposed IEP. *Id.* at 451.[5]

3. While the due process proceedings were pending, the Pardinis instituted this action in federal court, seeking an injunction requiring AIU to provide all the IFSP services during the pendency of the dispute over the evaluation report. On May 30, 2003, the district court denied their motion for a preliminary injunction, ruling (1) that they had not shown a likelihood of success on the merits because Georgia's IFSP did not constitute her "current educational placement" so as to trigger the stay-put rule; (2) that they had failed to exhaust their administrative remedies under the IDEA; and (3) that the public interest would be served by permitting completion of the due process hearings. 280 F. Supp. 2d at 451-452.

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[5] Part B provides parents with the right to request a due process hearing if the parents disagree with the appropriateness of the special education and related services proposed by the local educational agency in its IEP. 34 C.F.R. 300.507. Here, the parents had the right to request a due process hearing if they believed AIU's policy of refusing to provide conductive education denied their child a free appropriate public education. If the parents prevailed at such a hearing, they would receive appropriate relief, which might include reimbursement for the services provided at the parent's expense.

On August 29, 2003, after a hearing, the district court entered judgment for the defendant. *Id*. at 449-450. The district court concluded that "the stay-put provision of the IDEA does not require the AIU to provide the exact same educational program that had been provided by the AIT, a different agency with different funding streams, providing services for children of ages 0 to three." *Id.* at 454.

The court recognized that Parts B and C of the statute require different kinds of services. It stated that Part B requires States to provide a free appropriate preschool, elementary, or secondary public education, and the IEP is "an educational model" focused on the child's "educational needs." *Ibid.* In contrast, the court stated, Part C is a "medical model" and focuses "on the needs of the family to help the child." *Ibid.*

The court also found support for its ruling in the Department of Education's regulations regarding the transition from Part C to Part B. *Id.* at 455. In particular, the district court pointed to regulations providing that the transition process must prepare the child "for changes in service delivery;" that a State is not required to continue the IFSP when the child reaches three; and that an IEP often will not contain the same components as an IFSP. *Id*. at 455 (citing 34 C.F.R. 300.342(c)(1), 300.344(h)). The court also deferred to OSEP's position that the

stay-put provision of Part B does not require continuation of Part C services when a dispute arises about the child's initial school placement under Part B. *Id.* at 455.

Finally, the court recognized that the IDEA places the primary responsibility for formulating an educational plan with the education agency. *Ibid.* Accordingly, the court held, when a child transitions from Part C to Part B, there is no current "educational" plan that could be implemented under the stay-put provision of Part B. *Id.* at 456.

ARGUMENT

This appeal concerns the narrow question whether the "stay-put" provision of Part B of the Individuals With Disabilities Education Act requires continuation of services that were provided to a child pursuant to Part C of the statute during the pendency of administrative or judicial proceedings regarding the services to be provided under Part B. As set forth below, it is the considered view of the Office of Special Education Programs of the Department of Education that the stay-put provision of Part B of the IDEA does not require continuation of such services.

THE STAY-PUT PROVISION OF PART B OF THE IDEA DOES NOT REQUIRE CONTINUATION OF THE SERVICES PROVIDED TO A CHILD PURSUANT TO PART C OF THE IDEA DURING THE PENDENCY OF PROCEEDINGS REGARDING THE SERVICES TO BE PROVIDED UNDER PART B

The district court correctly held that the stay-put provision of Part B does not require continuation of the services provided to a child pursuant to Part C once the child turns three and during the pendency of administrative or judicial proceedings regarding the services to be provided to the child under Part B. This decision is well-supported by the language and structure of the statute, the United States Department of Education's regulations implementing the statute, and interpretations of the statute by the Department's Office of Special Education Programs.

1. The plain language of the stay-put provision of Part B, 20 U.S.C. 1415(j), does not require continuation of the same services provided under Part C pending resolution of a dispute regarding the services to be provided under Part B.

Section 1415(j) requires that a "child shall remain in the then-current *educational* placement" during the pendency of proceedings conducted pursuant to Section 1415 of the statute. 20 U.S.C. 1415(j) (emphasis added). A child applying for Part B services for the first time does not yet have a "current *educational* placement." If she has been receiving services under Part C, she has

received "early intervention services," or "developmental services," as set forth in an "individualized family service program" (IFSP). 20 U.S.C. 1431-1445.

This language of Part C contrasts with that of Part B, which is education-focused. Part B requires a "free appropriate education" for eligible children with disabilities, defined as "special education and related services" that, *inter alia*, "meet the standards of the State educational agency" and "include an appropriate preschool, elementary, or secondary school education in the State involved[.]" 20 U.S.C. 1401(8); see 20 U.S.C. 1411(b)(2)(C)(iii). The educational services to be provided under Part B are set forth in an "individualized education program." 20 U.S.C. 1414(d). Thus, although the early intervention services provided under Part C may have an educational component, the IFSP services provided under Part C do not constitute an "educational placement" under Part B. Rather, Part C early intervention services are designed to serve the *developmental* needs of an infant or toddler and her family, and the rights to those services terminate when the child turns three.

When, as here, the child turns three and is determined eligible for services under Part B, he or she is "applying for initial admission to a public school" under Part B. In this circumstance, the stay-put provision of Part B provides that 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). Thus, under the terms of Section 1415(j), the stay-put placement for a child who has turned three, and is applying for educational services under Part B, is the public school program, rather than the IFSP services the child had been receiving under Part C.

This construction of the stay-put provision of Part B is supported by the language and structure of the statute as a whole. As set forth in detail on pages 3-6, *supra*, Parts B and C have different eligibility requirements, require different services, and may even be administered by different entities within the same State.

As set forth on page 5, *supra*, a "child with a disability" is defined under Part B of the statute as a child having one or more of 13 specific conditions, in contrast to the definition of infant or toddler with a disability under Part C, which is defined in more general terms. As the statute itself acknowledges, children eligible for services under Part C may not even be eligible for services under Part B. See 20 U.S.C. 1437(a)(8)(A)(ii)(III) (requiring lead agency to take steps to identify alternate services for preschoolers ineligible for services under Part B).

Part C services are directed to the child *and* her family, and are tailored to meet the developmental needs of an infant or toddler. They are often provided in the home or other natural environment. For example, early intervention services

under Part C may include family training, counseling, and home visits. See 20 U.S.C. 1432(4)(E). In contrast, Part B services are designed to serve the special education needs of children of age three and above, and are provided in a school setting, except in the rare cases when the health of the child requires services at home or in a residential placement. The statute acknowledges the differences between the two parts by requiring "transition plans" for infants and toddlers receiving services under Part C. 20 U.S.C. 1437(a)(8).

Parts B and C also may be administered by different entities within the same State. Indeed in this case, in Pennsylvania, the Department of Education and local education agencies are responsible for providing special education and related services under Part B, while the Department of Public Welfare is the lead agency responsible for providing early intervention services under Part C. Pa. Stat. Ann. tit. 11, §§ 875-103, 875-303, 875-304.

Thus, the language and structure of the statute clearly support the district court's holding that the stay-put provision of Part B does not require continuation of the services provided to a child pursuant to Part C once the child turns three and during the pendency of administrative or judicial proceedings regarding the services to be provided to the child under Part B.

2. This construction of the statute is also supported by OSEP's IDEA regulations.

Various provisions of the IDEA regulations recognize that the services contemplated under Part B and Part C of the statute are different and that a child eligible to receive services under Part C may not even be eligible to receive services under Part B. The Part C regulations require a State to maintain policies and procedures to ensure "a smooth and effective transition" from early intervention services under Part C to preschool services under Part B. 34 C.F.R. 300.132(a). The regulation setting forth the contents of an IFSP require that provisions be included for transition to preschool services under Part B "to the extent that those [preschool] services are appropriate." 34 C.F.R. 303.344(h)(1)(i). This regulation clearly acknowledges both that a child receiving services under Part C may not be eligible for preschool services under Part B, *ibid.*, and that the transition to Part B may involve "changes in service delivery" and "a new setting." 34 C.F.R. 303.344(h)(2)(ii).

The regulations also provide that, "at the discretion of the [state education agency]," the IFSP provided under Part C *may* serve as the child's IEP, if "[c]onsistent with State policy," and if the parents and the local education agency consent, 34 C.F.R. 300.342(c)(1) (emphasis added), again recognizing that Part B

and Part C services are not necessarily the same. This provision also requires that parents be provided "a detailed explanation of the differences between an IFSP and an IEP." 34 C.F.R. 300.342(c)(2)(i).

These regulations reinforce the conclusion that a State is not required to continue the early intervention services provided to a child and family under Part C when the child is no longer eligible for services under Part C and becomes eligible for special education and related services under Part B, and a dispute arises over what educational services are appropriate.

3. OSEP's consistent interpretation of the statute has been that the stay-put provision in Part B does not require continuation of Part C services when a child becomes ineligible for Part C services, and a dispute arises about the child's initial school placement under Part B. In promulgating its final regulations, OSEP stated that the stay-put provision in Part B:

> 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 [educational services]. 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 [educational services] 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 (Mar. 12, 1999).

In 1997, OSEP set forth a similar interpretation of its regulation implementing the stay-put provision of Part B in an opinion letter. The agency was asked to identify the stay-put placement for a child who had been receiving early intervention services under what was then known as the Birth to Three program, and was applying for services under Part B for the first time. OSEP stated that its regulation did not "requir[e] a public agency responsible for providing [a free appropriate education] 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" during the pendency of proceedings over the appropriate educational services for the child under Part B. *Letter to Klebanoff*, 28 IDELR 478 (July 1, 1997) (copy attached at Tab A).

This considered interpretation of the statute, by the agency charged with its enforcement, "reflects a 'body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Yates* v. *Hendon*, 124 S. Ct. 1330, 1334 (2004) (quoting *Skidmore* v. *Swift & Co.,* 323 U. S. 134, 140 (1944)). As this Court has recognized, OSEP's interpretation of the IDEA is entitled to deference when that interpretation is persuasive. *Michael C.* v. *Radnor*

Township Sch. Dist., 202 F.3d 642, 649-650 (3d Cir.), cert. denied, 531 U.S. 813 (2000). Deference to OSEP's interpretation of the statute is particularly appropriate here where, as discussed above, the interpretation is clearly supported by the language and structure of the statute itself.

CONCLUSION

The district court judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Date: April 6, 2004

CERTIFICATE OF SERVICE

I certify that on April 6, 2004, two copies of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE were served by overnight delivery on the following counsel of record:

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