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COPY



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

J.H., a minor, by and
through his parents, [REDACTED]
[REDACTED] and [REDACTED],
and on their own behalf,

Plaintiff,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT; LOS ANGELES
UNIFIED SCHOOL DISTRICT
SPECIAL EDUCATION LOCAL
PLANNING AREA; and DOES 1 to
10,

Defendants.

) Case No. CV 10-00780 DDP (AGRx)

) **ORDER (1) GRANTING PLAINTIFF'S EX**
) **PARTE APPLICATION FOR TEMPORARY**
) **RESTRAINING ORDER AND (2)**
) **ORDERING DEFENDANT TO SHOW CAUSE**
) **WHY A PRELIMINARY INJUNCTION**
) **SHOULD NOT BE ISSUED**

) [Application filed on February
) 17, 2010]

On February 8, 2008, Plaintiffs, J.H., a minor and his
parents, filed suit against the Los Angeles Unified School District
(the "District"), seeking an order that would (1) reverse a
decision of the California Office of Administrative Hearings
("OAH"), dated November 30, 2009, and (2) award relief under the
Individuals with Disabilities Education Act, as amended by the
Individuals with Disabilities Education Improvement Act of 2004
(collectively the "IDEA"), 20 U.S.C. §§ 1400 et seq. (Compl. ¶ 1.)
Jurisdiction exists pursuant to 20 U.S.C. § 1415(i)(3)(A).

1 This matter comes before the Court on Plaintiffs' Ex Parte
2 Application for Temporary Restraining Order to Enforce Stay Put
3 During Pendency of Litigation. After reviewing Plaintiffs'
4 Application, the District's Opposition, and Plaintiffs' Reply, the
5 Court GRANTS the application and adopts the following Order.

6 **I. BACKGROUND**

7 **A. IDEA**

8 1. Statutory Framework

9 The IDEA seeks "to ensure that all children with disabilities
10 have available to them a free appropriate public education ["FAPE"]
11 that emphasizes special education and related services designed to
12 meet their unique needs and prepare them for employment and
13 independent living." 20 U.S.C. § 1400(d)(1)(A).

14 Under Part C of the IDEA, states must provide disabled
15 children under the age of three with an Individualized Family
16 Service Plan ("IFSP") setting forth early intervention services the
17 toddler or infant needs. 20 U.S.C. § 1435(a)(4). Under Part B of
18 the IDEA, states must provide disabled children between the ages of
19 three and twenty-one with special education and related services
20 under an Individualized Education Program ("IEP"). 20 U.S.C. §
21 1412(a)(1)(A), (a)(4).

22 An IEP is a written statement that is developed for each
23 disabled child by an IEP team typically consisting of the parents,
24 a special education teacher, a representative of the local
25 education agency, an expert, and, sometimes, the child. 20 U.S.C.
26 § 1414(d); Christopher S. v. Stanislaus County Office of Educ., 384
27 F.3d 1205, 1208 n.1 (9th Cir. 2004). Parents who are dissatisfied
28 with an IEP may file a complaint triggering a meeting with the IEP

1 team "where the parents of the child discuss their complaint" and
2 the educational agency "is provided the opportunity to resolve the
3 complaint" 20 U.S.C. § 1415(f)(1)(B)(i)(IV). If the
4 complaint is not resolved "to the satisfaction of the parents
5 within 30 days of the receipt of the complaint," the parents may
6 request a due process hearing. Id. § 1415(f)(1)(B)(ii). Following
7 such a hearing, "[a]ny party aggrieved by the findings and decision
8 . . . shall have the right to bring a civil action with respect to
9 the complaint presented pursuant to this section, which action may
10 be brought in any State court of competent jurisdiction or in a
11 district court of the United States," id. § 1415(i)(2)(A).

12 2. "Stay Put" Provision

13 While such administrative or subsequent judicial proceedings
14 are pending, the "stay put" provision of the IDEA entitles the
15 child to remain in his "current educational placement." 20 U.S.C.
16 § 1415(j); L.M. v. Capistrano Unified School Dist., 556 F.3d 900,
17 911 (9th Cir. 2009). Section 1415(j) provides, in relevant part,
18 that "[d]uring the pendency of any proceedings conducted pursuant
19 to this section, unless the State or local educational agency and
20 the parents or guardian otherwise agree, the child shall remain in
21 the then current educational placement of such child"

22 The IDEA does not expressly define "current educational
23 placement." However, courts have generally construed the phrase to
24 mean "the placement described in the child's most recently
25 implemented IEP." Johnson v. Special Educ. Hearing Office, 287
26 F.3d 1176, 1180 (9th Cir. 2002). However, § 1415(j) also provides
27 that the state and the parents may "otherwise agree" to an
28 alternative placement, which then becomes subject to the stay put

1 provision. Clovis Unified Sch. Dist. v. Cal. Office of Admin.
2 Hrgs., 903 F.2d 635, 641 (9th Cir. 1990). Such an agreement
3 concerning the child's pendent placement will be implied where the
4 parents receive a state administrative agency decision in favor of
5 their choice of placement. Id. (discussing Sch. Comm. of the Town
6 of Burlington v. Mass. Dept. Of Educ., 471 U.S. 359, 372-73
7 (1985)). The IDEA's implementing regulations confirm this rule,
8 providing that "[i]f the hearing officer in a due process hearing .
9 . . agrees with the child's parents that a change of placement is
10 appropriate, that placement must be treated as an agreement between
11 the State and the parents" for purposes of the stay put provision.
12 34 C.F.R. § 300.518(d).

13 The regulations further provide that when the complaint
14 concerns a child who has turned three years old and is thus
15 transitioning from Part C of the Act to Part B, "the public agency
16 is not required to provide the Part C services that the child had
17 been receiving" under his IFSP. Id. § 300.518(c). However, so long
18 as "the child has been found eligible for special education and
19 related services under Part B and the parent consents to the
20 initial provision of special education and related services . . .
21 the public agency must provide those special education and related
22 services that are not in dispute between the parent and the public
23 agency." Id.

24 **B. Factual History**

25 J.H., the son of [REDACTED] and [REDACTED] (collectively
26 "Plaintiffs"), is a four-year-old boy diagnosed with autism and
27 apraxia, and is eligible for special education services under the
28 IDEA.

1 In 2008, J.H. was referred to the District for a comprehensive
2 assessment as part of his transition to Part B of the IDEA at age
3 three. As part of this transition, a school psychologist, an OT
4 therapist, and a speech and language pathologist assessed J.H. in
5 July 2008.

6 1. First IEP

7 Following this assessment, J.H.'s IEP team convened for the
8 first time on September 10, 2008, to discuss his initial placement
9 in the District. The District offered to place J.H. in the
10 Preschool Collaborative Classroom ("PCC") at the Westminster Early
11 Education Center for an extended school year. The PCC is a class
12 of fourteen general education students and ten special education
13 students taught by a special education teacher. An occupational
14 therapist ("OT") is present weekly to work with the children's
15 gross motor skills, and several of the special education students
16 have behavioral intervention implementation (BII) aides. The class
17 also incorporates sensory tools needed for children with autism.
18 The goal of the class is to prepare special education children to
19 enter kindergarten.

20 J.H.'s parents rejected the District's offer to place J.H. in
21 the PCC at Westminster, indicating that J.H. would instead attend a
22 licensed preschool at Temple Isaiah at their expense. The District
23 then offered the services of a Preschool Kindergarten Itinerant
24 Teacher ("PKIT"), who would visit the private preschool one to five
25 times per month for a monthly total of 120 minutes in order to
26 consult with the school on strategies for meeting the child's
27 unique needs. The District also offered to provide (1) 120 minutes
28 per month of OT services, (2) 60 minutes per week of OT clinic, (3)

1 60 minutes per month of Language and Speech ("LAS") instruction,
2 (4) 720 minutes per month of BII with a nonpublic agency ("NPA"),
3 and (5) 180 minutes per month of behavioral intervention
4 development (BID). The meeting recessed so that assessments could
5 be completed in the areas of vision, health, and hearing.

6 On October 6, 2008, the IEP team reconvened. J.H.'s parents
7 disagreed with the District's offer of LAS services because they
8 were not specifically directed toward J.H.'s apraxia and requested
9 that the LAS services include one-to-one speech therapy four times
10 per week for 30 minutes per session. However, they consented to
11 the remaining portions of the IEP and to the commencement of the
12 LAS, BII, BID, and PKIT services pending the conclusion of the
13 District's informal dispute resolution.

14 After the October 6, 2008 meeting, the District failed to
15 provide BII and BID services due to unavailability. The District
16 also failed to provide the offered one hour per week of speech
17 therapy due to unavailability. During this time, J.H. enrolled in
18 the Temple Isaiah preschool program, but was asked to leave after
19 two days due to his behavioral problems. Shortly thereafter, he
20 enrolled in another preschool which also asked him to leave. At
21 the recommendation of his designated PKIT, J.H. enrolled in the
22 Garden School, a private Jewish school, on the condition that he
23 have a BII aide present. J.H. began attending the Garden School
24 four days per week, from 9:00 a.m. until 12:30 p.m.

25 On November 13, 2008, the District notified J.H.'s parents
26 that an NPA, Focus on All Child Therapies ("FACT"), was designated
27 to provide BII and BID services. However, FACT later refused to
28

1 provide those services because J.H. was not toilet trained and
2 their personnel do not change diapers.

3 J.H.'s parents began to provide J.H., at their own expense,
4 with (1) LAS services for three hours per week with an NPA,
5 Milestones Therapeutic Services, and (2) BII/BID services from
6 another NPA, Support and Treatment for Autism and Related Disorders
7 ("STAR"), consisting of 840 minutes per week of BII and 480 minutes
8 per month of BID.

9 On November 17, 2009, J.H.'s parents, through their attorney,
10 forwarded a letter to the District's Infant and Preschool Services
11 Division. The letter requested that the District reimburse them
12 for the cost of J.H.'s tuition at the Garden School; notified the
13 District that FACT was an inappropriate BII/BID provider due to
14 their refusal to change diapers; and requested three hours per week
15 of additional LAS in order to deal with J.H.'s severe verbal
16 apraxia. They also notified the District that they had not been
17 contacted by a speech and language therapist to commence the one
18 hour weekly individual speech therapy sessions. Finally, they
19 informed the District that they had obtained the BII/BID services
20 from STAR and speech and language therapy services from Milestone
21 Therapeutic Services.

22 On November 24, 2008, J.H.'s parents, through their attorney,
23 sent another letter to the District's Nonpublic School Department,
24 notifying it that FACT was unable to provide BII/BID services, that
25 they had obtained BII/BID services through STAR instead and would
26 seek reimbursement. In addition, they requested that the District
27 schedule another IEP team meeting to discuss J.H.'s program and to
28

1 review independent educational evaluations. The parties agreed
2 that the new IEP meeting would take place on January 28, 2009.

3 2. Second IEP

4 On January 28, 2009, the IEP team reconvened. The District
5 made an offer to place J.H. in the Preschool Mixed Class ("PSM") at
6 Westminster School in the morning and in a new program, Kid
7 Intensive Therapy ("KIT"), at Richland School, in the afternoon.
8 In addition, the District offered to provide (1) BII support during
9 the PSM class; (2) BID support totaling six hours per month, with
10 four of the six conducted at the preschool site; and (3)
11 transportation to the PSM and KIT classes. The offer eliminated
12 individual speech therapy services because speech therapy is
13 integrated into the KIT curriculum. The IEP Service Summary lists
14 BID services with a frequency of one to five sessions per month
15 totaling 300 minutes; BII services with a frequency of one to five
16 sessions per week for a total of 600 minutes; and LAS services with
17 a frequency of one to five sessions per week, omitting the total
18 weekly minutes.

19 J.H.'s parents did not consent to the IEP and instead
20 continued to place J.H. at the Garden School and provide LAS and
21 BII/BID services at their own expense. J.H.'s parents consented to
22 the school-based and clinic-based OT services, which continued to
23 be implemented by the District. The District also continued to
24 provide PKIT services within this placement. The District
25 continued to implement PKIT services with this placement.

26 **C. Procedural History**

27 On June 1, 2009, J.H. filed a request for a due process
28 hearing, and several days of hearings before an administrative law

1 judge ("ALJ") with the California Office of Administrative Hearings
2 ("OAH") commenced on September 14, 2009.

3 On November 30, 20089, the ALJ issued a detailed decision,
4 concluding, in part, that the Garden School is not an appropriate
5 placement, and that J.H. should be placed instead in the PCC at the
6 Westminster Early Education Center. In addition, the ALJ ordered
7 that while J.H. attends the PCC, the District should provide (1)
8 720 minutes per week of BII services; 180 minutes per month of BID
9 services; 120 minutes per month of OT; 60 minutes per week of OT
10 clinic; and 150 minutes per week of LAS services.

11 The ALJ also concluded that the District denied J.H. a FAPE
12 with respect to the First IEP's offer of one hour weekly LAS
13 therapy because the District never actually provided those services
14 and because the proper level of speech therapy to treat J.H.'s
15 disability is three to five sessions per week totaling 150 minutes.
16 In addition, the ALJ concluded that the District denied J.H. a FAPE
17 with respect to the First IEP's offer of behavioral services
18 because FACT was unable to meet J.H.'s needs. As a consequence,
19 the ALJ concluded that J.H.'s parents were entitled to
20 reimbursement for the behavioral services provided by STAR in an
21 amount equal to what the District would have paid FACT and for the
22 LAS services they had obtained for J.H.

23 Plaintiffs filed a Complaint in this Court on February 8,
24 2010, appealing the portion of the ALJ's decision finding that the
25 Garden School was not an appropriate placement for J.H.

26 On February 17, 2010, Plaintiffs filed an Ex Parte Application
27 for a Temporary Restraining Order, essentially asking the Court to
28 issue a stay put order. Plaintiffs argue that this stay put order

1 should include the services agreed upon prior to the due process
2 hearing, including (1) 120 minutes per month of school-based OT;
3 (2) 60 minutes per week of clinic-based OT; and (3) 120 minutes per
4 month of PKIT services, while J.H. continues to attend the Garden
5 School at their expense. In addition, Plaintiffs request that the
6 stay put order require the District to fund 16 hours per week of
7 behavioral services from STAR at \$51 per hour and three hours per
8 week of individual LAS services from Milestones at \$135 per hour.

9 On February 19, 2010, the District filed an opposition,
10 arguing that "Plaintiffs should be required to continue to fund the
11 LAS, BII, and BID services for the duration of this Appeal since
12 they disagreed with the initial placement and elected not to place
13 J.H. in the public setting as afforded under 20 U.S.C. § 1415(j),
14 which the ALJ found to be appropriate." (Opp'n 6:2-7.) The
15 District argues that because the ALJ ordered BII/BID and LAS
16 services only in combination with placement in the PCC at
17 Westminster, Plaintiff is not entitled to BII/BID and LAS services
18 while he attends the Garden School pending the outcome of this
19 case.

20 **II. LEGAL STANDARD**

21 The Ninth Circuit has held that a motion for a stay put order
22 "functions as an 'automatic' preliminary injunction, meaning that
23 the moving party need not show the traditionally required factors
24 (e.g., irreparable harm) in order to obtain preliminary relief."
25 Joshua A. v. Rocklin Unified Sch. Dist., 559 F.3d 1036, 1037 (9th
26 Cir. 2009) (citing Drinker ex rel. Drinker v. Colonial Sch. Dist.,
27 78 F.3d 859, 864 (3d Cir. 1996)). The relevant inquiry is
28 therefore two-fold: First, what is the child's "then current

1 educational placement"? And, second, who should pay for it? Zvi D.
2 V. Ambach, 694 F.2d 904, 906 (2d Cir. 1982). For "implicit in the
3 maintenance of the status quo is the requirement that a school
4 district continue to finance an educational placement made by the
5 agency and consented to by the parent before the parent requested a
6 due process hearing." Id.

7 **III. DISCUSSION**

8 Plaintiffs argue that they "consented to J.H.'s eligibility
9 and consented to a number of services that the District never
10 implemented, with the exception of OT. Further, the District
11 continued to offer to provide services to J.H. while he attended a
12 private placement at Plaintiff's expense based on the initial
13 September/October IEP." (Pls.' Mem. 13:10-15.) As a result,
14 Plaintiffs argue that J.H.'s stay put placement "should include
15 placement at the private school, at Parents' expense with the OT
16 services implemented by the District and continuation of
17 reimbursement of the LAS and behavior services to Plaintiffs as
18 outlined in the administrative decision." (Id. 13:16-20.)

19 The Court agrees. Pursuant to 34 C.F.R. § 300.518(c), "the
20 public agency must provide those special education and related
21 services that are not in dispute between the parent and the public
22 agency" in order to comply with the stay put provision. Prior to
23 the disputed January 2009 IEP, the District and J.H.'s parents
24 reached an agreement as part of the September/October 2008 IEP that
25 J.H. would attend private school at his parents' expense and that
26 the District would provide him with (1) a PKIT, (2) OT services for
27 120 minutes per month and OT clinic for 60 minutes per month; (3)
28 LAS instruction, one to five times per month for 60 minutes per

1 month; (4) BII services with a non-public agency for 720 minutes
2 per week; and (5) BID services for 180 minutes per month.

3 Furthermore, where the due process hearing officer "agrees
4 with the child's parents that a change of placement is appropriate,
5 that placement must be treated as an agreement between the State
6 and the parents" for purposes of the stay put provision. 34 C.F.R.
7 § 300.518(d). In this case, the ALJ "agree[d] with the child's
8 parents" that two changes of placement they implemented- the
9 provision of BII/BID services through STAR and the provision of
10 additional weekly LAS services- were "appropriate." Specifically,
11 the ALJ concluded that the District denied student a FAPE by (1)
12 making a substantively inappropriate offer of one hour per week of
13 LAS, when 150 minutes per week is necessary and (2) by failing to
14 provide J.H. with the agreed upon BII/BID services, as FACT refused
15 to work with children who are not toilet trained. As a result, the
16 ALJ ordered the District to reimburse J.H.'s parents for their
17 expenses spent on BII/BID and LAS services.

18 The District argues, however, that the ALJ "found that the
19 private placement of J.H. in [a non-public school] was
20 inappropriate, and that the District's offer of placement at the
21 initial IEP was appropriate." (Opp'n 4:9-12 (emphasis in
22 original).) Therefore, the District argues that "Plaintiffs should
23 be required to continue to fund the LAS, BII, and BID services for
24 the duration of this Appeal since they disagreed with the initial
25 placement and elected not to place J.H. in the public setting . . .
26 which the ALJ found to be appropriate." (Id. 6:1-7.) This
27 argument is beside the point. Parents are not asking to be
28 reimbursed for their placement of J.H. in private school; rather,

1 they argue that the District must provide J.H. with the services
2 they expressly agreed to provide in October 2008 and an the
3 additional hour and a half of LAS services over the District's
4 initial offer of one hour, which the ALJ agreed was appropriate.

5 The District completely ignores Plaintiff's argument that the
6 District is required to "provide those special education and
7 related services that are not in dispute," 34 C.F.R. § 300.518(c),
8 and suggests that because the ALJ disagreed with parents as to one
9 part of the IEP, he did not agree with them as to any part of it.

10 That is simply not the case. First, the IDEA's implementing
11 regulations require only that the ALJ agree with the parents that
12 "a change of placement is appropriate," not that all changes are
13 appropriate, in order to establish an agreement between the State
14 and the parents for purposes of the stay put provision. Id. §
15 300.518(d) (emphasis added). Second, courts have repeatedly found
16 that an order for reimbursement predicated on a finding that a
17 previous IEP was substantively inappropriate "constitutes a change
18 in the child's current educational placement for purposes of
19 interpreting the pendent placement provision, at § 1415(j) of the
20 IDEA." Bd. of Educ. of Pawling Central Sch. Dist. v. Schutz, 290
21 F.3d 476, 484 (2d Cir. 2002); see also J.M. v. Capistrano Unified
22 Sch. Dist., 556 F.3d 900, 903 (9th Cir. 2009), cert. denied 130 S.
23 Ct. 90 (2009) (implicitly recognizing that a reimbursement order
24 based on a finding on the merits that the IEP was inappropriate
25 provides the basis for a "viable argument for entitlement to 'stay
26 put'"); Winkelman v. Parma City Sch. Dist. Bd. of Educ., 51 IDELR
27 126 (N.D. Ohio Oct. 24, 2008) (concluding that an ALJ's
28 reimbursement order for a year of private placement, even absent a

1 finding that private placement was appropriate for the future,
2 nonetheless obliged the district to pay for the private school
3 pending resolution of the dispute as to the child's future
4 placement).

5 Therefore, the Court concludes that Plaintiff has made a
6 sufficient showing that J.H.'s "then current educational placement"
7 includes private placement at the Garden School for three and one
8 half hours per day, four days per week at his parents' expense,
9 along with BII, BID, OT, PKIT, and LAS services provided by the
10 District.

11 **IV. CONCLUSION**

12 For the foregoing reasons, Plaintiff's Ex Parte Application
13 for Temporary Restraining Order for Stay Put is GRANTED.
14 Accordingly, it is hereby ordered that the District shall provide
15 J.H. with the following services:

- 16 1. One-to-one LAS services from Milestones for three hours
17 per week;
- 18 2. Daily BII services from STAR while J.H. attends the
19 Garden School;
- 20 3. BID services from STAR one to five times per month, for a
21 monthly total of 180 minutes;
- 22 4. A PKIT one to five times per month, for a monthly total
23 of 120 minutes;
- 24 5. OT services one to five times per month, for a monthly
25 total of 120 minutes; and
- 26 6. OT clinic once per week for 60 minutes.

27 It is further ordered that this Temporary Restraining Order
28 shall expire at _____ o'clock ____ .m. on _____,

1 2010, unless, for good cause shown, it is extended or unless the
2 parties against whom it is directed consent that it may be extended
3 for a longer period.

4 It is further ordered that at 11:00 a.m. on March 8, 2010, or
5 as soon thereafter as the parties can be heard, the defendants
6 shall appear before this Court to show cause why a preliminary
7 injunction should not be granted. Any declarations, affidavits,
8 points and authorities, or other submissions in support of, or in
9 opposition to, the issuance of such an Order shall be filed with
10 the Court and served on the opposing party no later than 2:00 p.m.,
11 on March 5, 2010.

12
13 IT IS SO ORDERED.

14 Dated: February 26, 2010


15 DEAN D. PREGERSON
16 United States District Judge
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