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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EUGENE DIVISION

S.C., by her mother and next friend, K.G.

Plaintiff

v.

Lincoln County School District

Defendant

_____/

Case No: 6:20-cv-02277-MK

Plaintiff's Motion for a Stay-Put Injunction Or in the Alternative A Preliminary Injunction

Oral Argument Requested

LR 7-1 CERTIFICATION

Pursuant to LR 7-1(1), counsel for Plaintiff certifies that the parties made a good faith effort to resolve the dispute and have been unable to do so.

The Plaintiff, by and through her undersigned attorneys, moves this Honorable Court for an order requiring Defendant Lincoln County School District (District) to obey the Administrative Law Judge's (ALJ) as the stay-put placement or in the alternative entering preliminary injunction requiring District to obey the ALJ's final order. This Court is requested to enter an order requiring District pay for S.C.'s educational placement. This motion is filed pursuant to Fed.R.Civ.Proc. 65. It is premised on the IDEA and 42 U.S.C. § 1983. As grounds for this Motion, Plaintiff states:

1. S.C. is a 14 year old student entitled to a free appropriate public education under the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*

2. She is person with Prader-Willi Syndrome (PWS). This condition is a genetic defect which, *inter alia,* affects the function of the hypothalamus disrupting the body's appetite-control center. A person with PWS does not have the sensation of fullness after eating and is relentlessly driven to eat more food.

3. S.C. is a student of District in the 8th grade at one of its middle schools.

4. A dispute arose between the parties as to whether District was providing S.C. a free appropriate public education (FAPE) as required by the IDEA. S.C. sought an order requiring District to pay for a residential school, Latham Centers, located in Brewster, MA.

5. S.C.'s mother K.G. brought a due process proceeding as authorized by the

IDEA, 20 U.S.C. § 1415(b)(6). The Administrative Law Judge (ALJ) held a hearing which lasted in excess of 50 hours. She heard from 20 witnesses and admitted 211 exhibits.

6. On December 22, 2020, she entered a Final Order (Comp., 9-70, ECF 1). This order held:

> Parents have shown by a preponderance of the evidence that the District did not provide Student with a FAPE as required under IDEA. Accordingly, it is ordered that:
>
> The District is to pay the cost of enrolling the Student at the Latham Center, including non-medical care, room and board, for the period commencing on the first day of the winter 2021 semester until the District provides TFS[1] in school-wide setting along with an IEP which addresses all of the inadequacies identified in this order or the next annual IEP which appears to be September 2021.

Compl., 76, ECF 1

7. On December 24, 2020, District's counsel wrote S.C.'s counsel stating, *inter alia*, "District declines to pay for Latham and will have no involvement in enrolling S.C. at Latham." Compl., 79, ECF 1.

8. Without District's payment for Latham S.C. will not be able to attend. Ex.1, ¶ 4.

9. Without timely placement at Latham S.C. will suffer irreparable harm.

10. She is likely to prevail on the merits.

11. The balance of the equities tip in her favor.

12. An injunction would be in the public interest.

WHEREFORE, Plaintiff requests the entry of an order declaring Latham the "current

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[1] TFS means total food security. In the context of addressing issues of people with PWS this means that "food is present only during meal times and that food is locked up and out of sight in all other areas/times. In a school setting, there is no food during instruction, special events, or anywhere in the school building except during meal times in the cafeteria. Compl., 13 (¶ 14), ECF 1.

education placement" and that requires District:

1. To obey the ALJ's order;

2. Enter into a contract with Latham to provide for S.C.'s placement at the school.

3. Pay the cost of enrolling S.C. at Latham.

MEMORANDUM IN SUPPORT OF MOTION

I. Introduction

This is action to enforce an order of an ALJ requiring District to pay for the cost of S.C. attendance at the Latham Centers. Without such an order S.C. will suffer irreparable harm. There are three alternative basis upon which relief is sought: (1) an automatic stay-put injunction under the IDEA; (2) enforcement of the final order under the authority of 42 U.S.C § 1983; (3) the IDEA.

II. Facts

As pled in the Complaint, S.C. is a 14 year old whose legal residence is Lincoln County. As such she is entitled to receive public educational services from the District. As a child with PWS she has complex needs which include an insatiable appetite requiring total food security (TFS) including at school. She has other complex psychological needs.

She is a child with a disability within the mean of the IDEA. As such she is entitled to a free appropriate public education (FAPE).20 U.S.C. § § 1400(d), 1412(a)(1).

On December 22, 2020, the ALJ entered her final order. *See* Motion, ¶ 6, *supra*. District takes the position that it is in compliance with her order because and 2) its September 20, 2020 IEP and 2) it has been providing TFS since March13, 2020. Compl., 79, ECF 1. These positions do not comport with the facts as established by the ALJ's S.C. Motion for Stay-Put, etc. Page 4 of 16

order.

IEP

The District's position that it has been providing TFS since March 13, 2020 is absurd on its face. District would have it appear that it itself was providing TFS on a voluntary basis. But that is not true. Rather, the reason that total food security is being provided is because since that date that has not been any in-person teaching as school was closed "due to the COVID-19 pandemic." Compl., 72, ECF 1.

III. Relevant Statutory Provisions

1. The IDEA's purpose

In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). Further, the Act purpose is "to ensure that the rights of children with disabilities and parents of such children are protected. 20 U.S.C. § 1400(d)(1)(B). The statute was intended to address the inadequate educational services offered to children with disabilities and to combat the exclusion of such children from the public school system. 20 U.S.C. § 1400(c)(2)(A) and (B). To accomplish these objectives, the federal government provides funding to participating state and local educational agencies, which is contingent on each agency's compliance with the IDEA's procedural and substantive requirements. 20 U.S.C. §1416.

A school district must provide a residential placement to a student with a disability

if such a placement is necessary to provide a student with special education and related services. 34 C.F.R. § 300.104. Every effort must be made to place a student the home school district. However, the placement must be in least restrictive environment which meets the student's individual education program's (IEP) goals. 34 C.F.R. §300.116; *Sacramento City School District v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994). It must be a placement which supports the child's education; when medical, social or emotion problems that require residential placement are intertwined with educational problems; and when the placement primarily aids the student to benefit from special education. *Clovis Unified School District v. California Office of Administrative Hearings,* 903 F.2d 635, 643 (9th Cir. 1990).

Here, the ALJ held that the placement at Latham will provide FAPE in the least restrictive environment. Compl., 74-75, ECF 1.

2. IDEA Due Process and Enforcement of ALJ's Decisions

A. IDEA "Stay-Put"

If there is a disagreement between parents and a school district regarding "any matter relating to" the child's, *inter alia*, educational placement, one is entitled to an administrative due process proceeding. 20 U.S.C. §§ 1415(b)(6), (f), (g)(2). During the pendency of any proceedings conducted under the IDEA, unless otherwise agreed, "the child shall remain in the then-current educational placement of the child until all such proceedings have been completed." 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (regulation implementing same). This is called "stay-put." By operation of law, an administrative law judge's final order decision constitutes the agreement by District to the placement ordered. 34 C.F.R. § 300.514(d)(hearing officer decision agreeing with parent

that change of placement is appropriate, that placement must be treated as stay-put)[2]; *Clovis Unified School District,* 903 F.2d at 641.

The stay-put provision acts as an automatic injunction and does not require the application of the four-standards required for a preliminary injunction. *Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 1037 (9th Cir. 2009), citing *Drinker ex rel. Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864 (3d Cir. 1996).[3] The automatic nature of this provision "acts as a powerful protective measure to prevent disruption of the child's education throughout the dispute process." *Id.* at 1040. "[T]he stay put provision requires no specific showing on the part of the moving party, and no balancing of equities by the court...", *Id*. This provision shows Congress's sense that there is a heightened risk of irreparable harm inherent in the premature removal of a disabled child to a potentially inappropriate educational setting. In light of this risk, the stay put provision acts as a powerful protective measure to prevent disruption of the child's education throughout the dispute process. It is unlikely that Congress intended this protective measure to end suddenly and arbitrarily before the dispute is fully resolved. *Id.*

On this basis alone Plaintiff is entitled to an order requiring District to obey the stay-

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[2] An ALJ's order is final unless and until it is modified on appeal. 20 U.S.C. 1415(i)(1)(B). *See Tamalpais Union High Sch. Dist. v. D.W.*, Case No: 16-04350, 2016 WL 5791259 (Oct. 4, 2016, N.D. Calif.)(explaining this principle)

[3] There is Ninth Circuit law which holds that the traditional preliminary injunction standards do apply. *See, e.g. Johnson ex rel. Johnson v. Special Ed. Hearing Officer*, 287 F.3d 1176 (9th Cir. 2002). However, the procedural posture of that case is different than this one. There, the relief sought was to enjoin a preexisting stay-put order. *Id*., at 1180. *See also E.M.C. v. Ventura Unified Sch. Dist*., Case No. 2:20-09024, 2020 WL 7094071 *4 (C.D. Calif., Oct. 14, 2020)(explaining different contexts for automatic stay-put orders and preliminary injunctions)

put placement ordered by the ALJ. *Cf. Douglas v. Calif. Office of Admin. Hearings*, 650 Fed.Appx. 312, 315 (9th Cir. 2016)(stay-put order available to parents who had received a favorable administrative decision). *See also A.D. ex rel. L.D. v. Hawaii Dep't of Educ.*, 727 F.3d 911 (9th Cir. 2013)(stay-put is automatic) and. *Ravenswood City Sch. Dist. v. J.S.*, Case No. 10–03950, 2010 WL 4807061, *3 (N.D. Calif., Nov. 18, 2010).

B. The IDEA

Section 1415(i)(2)(a) provides that "[a]ny person aggrieved by the findings and decison of a hearing officer "the right to bring a civil action...in a district court of the United States, without regard to the amount in controversy." There has been a split in the circuits courts as to whether this grant of jurisdiction provides authority to enforce final orders. For example, in *Robinson v. Pinderhuges*, 810 F.2d 1270, 1275 (4th Cir. 1987, a relatively early enforcement case, it was held that the IDEA does not provide an enforcement cause of action. This holding is based on the statutory provision that "a party aggrieved" may bring an action but as the plaintiffs prevailed by obtaining a favorable final order they are not "aggrieved."

By contrast in *Nieves-Márquez v. Puerto Rico*, 353 F.3d 108, 115-16 (1st Cir. 2003), permitted an enforcement action under this provision. The reasoning here was that Congress could not have intended to leave plaintiffs who had prevailed without a statutory remedy once they were successful before hearing officers. Rather, plaintiffs are "aggrieved" by the failure of a school district to comply with a hearing officer's decision.

The Ninth Circuit has yet to address whether a party seeking enforcement of an administrative due process decision is "aggrieved" in the context of Section 1415(i)(2)(a).

See Fresno Unified Sch. Dist. v. K.U., Case Nos. 1:12-01699, 1:14-00555, 2014 WL 3839796 (E.D. Cal., July 30, 2014). However, the Ninth Circuit recognizes the need to balance a student's interest in promptly accessing a judicial forum against the institutional interests that favor administrative processes. *Porter v. Bd. Of Trustees of Manhattan Beach*, 307 F.3d 1064, 1071(9th Cir. 2002).

The better reasoned cases permit enforcement of an administrative due process order by deeming a student an "aggrieved party." The District's refusal to comply with an ALJ's placement decision is contrary to law, as discussed above. Surely, a party entitled to enforcement is “aggrieved” when the relief they sought becomes illusive because of willful non-compliance, such as in this case.

C. 42 U.S.C. § 1983

It is a well established axiom that there should not be a wrong without a remedy. Assuming, *arguendo*, that an action for enforcement cannot be brought under the IDEA another cause of action is necessary. That action is 42 U.S.C. § 1983. *Jeremy H. By Hunter v. Mount Lebanon Sch. Dist*., 95 F.3d 272 (3rd Cir. 1996).

As the court explained in *Robinson*, the Supreme Court decided in *Maine v. Thiboutot*, 448 U.S. 1 (1980), the § 1983 encompasses claims based on purely statutory violations of federal law. The Education for All Handicapped Act (the predecessor statute to the IDEA) contains no enforcement authority. But when there is a refusal to comply with a final order, the enforcement mechanism in the IDEA is inadequate; thereby permitting the use of § 1983.[4] *Robinson*, 810 F.2d at 1274. *See also Porter*, 307 F.3d 1064, 1070

[4] This entitlement is distinguishable from those cases which prohibit the use of § 1983 to seek damages for violation of the IDEA. Those cases hold that the IDEA

(citing *Robinson* with approval in a case brought for enforcement pursuant to, *inter alia*, § 1983); *accord, Hoeft v. Tucson Unified Sch. Dist*, 967 F.2d 1298, 1307.

IV. Preliminary Injunction

1. Standards

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Defense Council, Inc*., 555 U.S. 7, 22 (2008). A plaintiff seeking a preliminary injunction generally must show that: (1) he or she is likely to succeed on the merits; (2) he or she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his or her favor; and (4) that an injunction is in the public interest. *Id*. at 20. *Cf Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118 (9th Cir. 2014)(applying *Winter* factors). As discussed below, S.C. meets all these requirements.

V. S.C. Meets the Preliminary Injunction Standards

1. Irreparable Harm

There are two bases for a finding of irreparable harm. First, the ALJ's order found that District was not providing FAPE. The failure to provide FAPE is itself irreparable harm. *Olsen v. Robbinsdale Area Sens*., Case No. 04-2707, 2004 WL 1212081, *4(D. Minn., May 28, 2004) and cases cited there. As the court in *Young v. Ohio* observed,

"Courts have courts have repeatedly found that "the denial of a [free appropriate public education] over an extended period does constitute harm, and the longer that denial

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provides a "comprehensive enforcement scheme" and that damages are not contemplated. *See ,e.g. C.O. v. Portland Public Schools*, 679 F.3d 1162 (9th Cir. 2012), relying on *Blanchard v. Morton Sch. Dist*., 509 F.3d 934, 938 (9th Cir. 2007).

continues, the more irreparable it becomes." Case No. 1:12-967, 2013 WL 146365, *9 (S.D. Ohio, Jan. 14, 2013) (case cite omitted). *See also cases cited there.* The longer the delay in providing FAPE, the more irreparable the harm becomes. *Sanchez v. Grandview School Dist. No. 200,* Case No.0–3118, 2011 WL 797769, *4 (E.D. Wash., Feb. 28, 2011)("...delay is to the detriment of a child who has done nothing but ask for educational opportunities. Each day that passes without an appropriate education plan... is another day in which he falls farther behind in school, and farther from being able to read, communicate, and meaningfully participate in society."); *see also Murphy v. Arlington Central Sch. Dist. Bd. of Educ.*, No. 99 CIV. 9294, 1999 WL 980164 *4 (S.D.N.Y., Oct.28, 1999) (Congress was concerned to avoid lengthy administrative appeals during which "the appropriateness of a child's educational placement remains in limbo").

These cases clearly apply here. The ALJ's Order found District procedurally and substantively failed to provide FAPE to S.C. from December 13, 2018 through at least the date S.C. filed her request for due process hearing, May 21, 2020. According to the Final Order, the deprivation of FAPE resulted from District's failure to properly evaluate, develop appropriate IEPs, implement IEPs, provide appropriate supports, place S.C. in the least restrictive environment that offered the level of food security she required, and issue prior written notices, and collect necessary data. This failure to provide FAPE for an extended period of time since December 13, 2018, has already caused S.C. harm by depriving of her of meaningful educational benefit. Any further delay will cause irreparable harm.

S.C.'s ability to attend Latham is dependent on securing funding for the placement. Neither S.C., nor her mother, have the financial resources to pay for Latham. Ex. 1, Decl. of K.G.,¶ 4.

Second, in addition to the irreparable harm that S.C. has suffered and will continue to suffer as the result of the denial of FAPE. S.C.s psychological state increases the degree of irreparable harm. *See generally* Ex. 2, Decl. of Maygen Blessman.

2. Likelihood of Success on the Merits

A prevailing student's right to have a hearing officer's decision carried out is a right "secured by the laws of the United States." *Robinson v. Pinderhuges*, 810 F.2d 1270, 1275 (4th Cir. 1987).[5] As indicated above, a hearing officer's decision is final. This motion seeks enforcement of a final order. District maintains that "the order is seriously flawed." Ex. B to Compl., 79. ECF 1 While S.C. maintains that the order will be affirmed should the District, as it indicates in its e-mail (*id*.), appeal to the federal district court, a review of the order is not currently pending. District does not have an option to simply ignore the order. At this time, the only issue is whether the order is enforceable. As argued above, it is. S.C. meets the "likelihood of success factor." *Sanchez*, 2011 WL 797769, *4. *Cf. Johnson ex rel. Johnson v. Special Educ. Hearing Officer*, 287 F.3d 1176,1180-81 (9th Cir. 2002)(denying motion for preliminary injunction on the basis, *inter alia*, that there was little likelihood of success in reversing stay-put established by a hearing officer's order)

3. Balancing of Equities

A student's receipt of an appropriate education trumps a school district's financial interest. *Dominique L. v. Bd. of Educ. of Chicago*, No.10-C-7819 (N.D. Ill. 2011); *L.G. v.*

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[5] As indicated, S.C. prevailed. This is not, therefore, a case that challenges the Final Order. District may well decide to counter-claim to attack the order as it suggests in its e-mail of December 24, 2020. *See* Compl., 79, ECF 1. While S.C. is confident that she will prevail against such an attack a losing school district may not avoid complying with the order during the course of the litigation, as argued in this memorandum.

Port Townsend Sch. Dist. No. 50, Case No. 09-5652, 2009 WL 4730840 (W.D. Wash., Dec. 4, 2009). Here, the ALJ found S.C. has been deprived of meaningful educational opportunities since December 2018 (Compl., 52, ECF 1) in an inappropriate placement since January 2020. *Id*. at 58. The harms to S.C. will be further compounded if she is forced to remain in her current placement during the pendency of the District's appeal. When balancing the equities, the permanent loss of educational opportunities that risk a student falling educationally behind tips the equities in S.C.'s favor. *See L.G.,* at 2; *Sanchez*, 2011 WL 797769, at *4. Therefore, S.C. meets the balance of equities factor.

4. Public Interest

Public interest favors disabled students receiving a free and appropriate education. *Bd. of Educ. of Jacksonville Sch. Dist. v. C.P.*, No. 3:15-cv-3228 (C.D. Ill., December 2, 2015) (citing *Olson v. Robbinsdale Sch. Dist.*, No. 04-2707, 2004 WL 1212081(D. Minn., May 28, 2004); *Young v. Ohio*, Case No. 1:12-967, 2013 WL 146365 (S.D. Ohio, Jan 14, 2013). Ensuring a school district's compliance with the mandates of the IDEA is an important public policy interest. *Cosgrove v. Bd. of Educ. of the Niskayuna Cent. Sch. Dist*. 175 F.Supp.2nd 375 (N.D.N.Y. 2001). Public interest favors District prospectively funding private placement during the pendency of appeals where a public school placement was found inappropriate. *See Burlington Sch. Comm. v. Mass. Dept. of Educ*., 471 U.S. 359, 370 (1985). To hold otherwise runs contrary to the purpose of the IDEA and has the potential to render administrative decisions meaningless. *Id*. Therefore, granting this injunction is in the public's interest.

V. District's Non-Compliance

On December 22, 2020, the ALJ entered her final order. *See* Motion, 6, *supra.*

District takes the position that it is in compliance with her order because 2) it is September 20, 2020 IEP provides FAPE and 2) it has been providing TFS since March13, 2020. Compl., 79, ECF 1. These positions do not comport with the facts as established by the ALJ's order.

1. September 20, 2020 IEP

This IEP includes a food safety protocol. Id., 44. However, the proposed placement in this IEP is for the totally segregated setting of the SLC. *Id*., 45. And it believes that in order to provide the necessary setting S.C. would need to remain in that setting throughout the entire day. *Id*. See also Id., 66 ("...the District has chosen not to provide TFS as had been recommended when its own efforts to address the behaviors through a full-time program in the SLC and a trained adult support proved ineffective.")

The ALJ rejected the September 2020 IEP when she found that:

> When the record is examined as a whole, it is clear that Student requires a TFS environment to obtain meaningful educational benefit at school. In its most recent IEP, the District refused to provide a TFS outside the SLC and planned to restrict Student's access during instructional time to approximately 16 to 17 disabled peers in the SLC none of whom were similarly disabled. The District also planned to limit Student's food consumption to eating alone with an adult who was not eating.

Id., 74.

2. TFS

The District's position that it has been providing TFS since March 13, 2020 is absurd on its face. District would have it appear that it itself was providing TFS on a voluntary basis. But that is not true. Rather, the reason that total food security is being provided is because since that date there has not been any in-person teaching as school was closed

"due to the COVID-19 pandemic." Compl., 72, ECF 1.

District further asserts in this regard that it "will continue to so in any educational setting." *Id.,* 79. This belies the entire thrust of the ALJ's order on TFS which makes clear that to date had not even tried to so. *Id*., 43.

Thus, despite its assertions to the contrary, District is not in compliance with the ALJ's order.

VI. Conclusion

For all the above-stated reasons, S.C. respectfully requests an order requiring District to comply with the ALJ's order.

Dated: This 6th day of January 2021

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served the persons identified below via e-mail as they are not registered for this case with CM/ECF, although known to the undersigned to represent Lincoln County School District in this action:

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