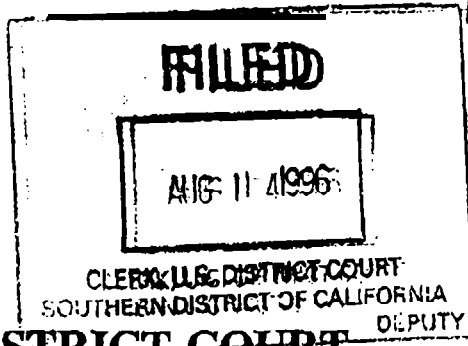


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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF, CALIFORNIA

NOV 28 1996

BRENT ~~_____~~ by his Guardian)
ad Litem ~~_____~~; MICHAEL)
~~_____~~ by his Guardian ad Litem)
~~_____~~; BARBARA ~~_____~~ by)
her Guardian ad Litem ~~_____~~)
~~_____~~, JOE ~~_____~~ by his)
Guardian ad Litem ~~_____~~;)
CHRISTOPHER ~~_____~~ by his)
Guardian ad Litem ~~_____~~)
Corcovelos; ROBERT ~~_____~~ by his)
guardian ad Litem ~~_____~~;)
DUSTIN ~~_____~~ by his guardian ad)
Litem ~~_____~~; STEVEN ~~_____~~)
by his Guardian ad Litem)
~~_____~~; ~~_____~~)
~~_____~~ by his Guardian ad)
Litem ~~_____~~ I ~~_____~~; MATTHEW)
~~_____~~ by his Guardian ad Litem)
~~_____~~; BRANDON ~~_____~~ by)
his guardian ad Litem ~~_____~~)
~~_____~~; BRANDON ~~_____~~ by his)
Guardian ad Litem ~~_____~~;)
BRITTANY ~~_____~~ by her Guardian)
ad Litem Lisa Lewis,)

Plaintiffs,)

V.)

SAN DIEGO UNIFIED DISTRICT, a)
California public entity; BERTHA)
O. PENDLETON, in her capacity as)
Superintendent of Saa Diego)
Unified School District)

Defendante.)

Case Number 96-1377-IEG
ORDER GRANTING PLAINTIFFS' EX
PARTE APPLICATION FOR A
TEMPORARY RESTRAINING ORDER AND
ORDER TO SHOW CAUSE RE
PRELIMINARY INJUNCTION

1 By ex **parte** application received on August 13, 1996,
2 plaintiffs request the Court for an temporary restraining order
3 prohibiting defendants from failing and refusing to transport
4 plaintiffs to their respective day treatment facilities.

5 **BACKGROUND**

6 Plaintiffs are fourteen special education students,
7 ranging from **seven** to sixteen years old, enrolled in defendant San
8 Diego Unified School District ("**SDUSD**"). SDUSD has classified
9 each plaintiff as having the handicapping condition of Social and
10 Emotional **Disability** ("**SED**"). Pursuant to the terms of their
11 Individual Education Programs ("**IEP**"),¹ plaintiffs each receive
12 mental health services from San Diego County **Medical Health**
13 Services at various day treatment facilities in San Diego. (See
14 Plaintiffs' Exhibit 1, A-N).

15 Until July 26, 1996, SDUSD provided plaintiffs with
16 round **trip** transportation to these day treatment facilities.
17 However; SDUSD recently announced that it would not provide
18 plaintiffs with transportation until special education school
19 resumes on or about September 3, 1996, Plaintiffs have all filed
20 requests for due process hearings with the Special Education
21 Hearing Office ("**SEHO**"). SEHO has scheduled plaintiffs' cases for
22 hearing on August 20, 1996. SDUSD refuses to provide
23 transportation for plaintiffs during the **pendency** of the due
24

25 ¹ The Individual Educational Program ("**IEP**") is a written document
26 that describes what the child's special education needs are and
27 what services will best meet those needs, Cal. Ed. code. §56345.
28 The IEP has been described as the key operative feature of the
IDEA. David D.v. Dartmouth Sch. Committee, 775 **F.2d** 411, 415
(1st **Cir.** 1985).

process hearing. On July 30, 1996, SEHO denied plaintiffs' request for a "stay-put" order which would require SDUSD to provide transportation for plaintiffs during the pendency of the due process hearing. (Plaintiffs' Exhibit 4).

Defendants' refusal to provide transportation has significantly interrupted plaintiffs' ability to participate in their day treatment programs. As a result, several plaintiffs have suffered severe regression in their progress. (See Davis Decl. ¶ 5; Tenio Decl. ¶ 5). For example, Brent ██████'s grandmother states:

After Brent missed the first day of treatment because I had no transportation, he became out of control at home and broke out the windows in the bedroom of my house, took a knife to the furniture and threatened me. I was forced to call the police and they removed Brent from the house and he was then placed in a locked psychiatric hospital.

(██████ Decl. ¶ 3). Thus, the importance of continuous day treatment is apparent. In addition, San Diego County arc entitled to discharge plaintiffs from the day treatment program due to their prolonged absences this summer. (See Ervin Decl. ¶ 4).

DISCUSSION

Plaintiffs now request the Court to temporarily restrain defendants from refusing to transport them to the day treatment program. Plaintiffs argue that they are entitled to injunctive relief against SDUSD under the "stay put" provision of the IDEA.

A. *Individuals with Disabilities Education Act*

The purpose of the Individuals with Disabilities Education Act ("IDEA") is to assure that children with

² Only two of the plaintiffs (Davis and Crockett) requested SEHO to issue an emergency stay-put order.

disabilities have available to them a free and appropriate public education that addresses their unique needs. Petties v. District of Columbia, 881 F.Supp. 63, 65 (D.D.C. 1995); see 20 U.S.C. § 1400 et seq. To assure that this goal is met, the IDEA directs the child's parents, teachers and other professionals to develop an Individualized Education Program ("**IEP**") for each special education student that sets forth the required instructions and services designed to meet the particular child's unique needs. 20 U.S.C. § 1401(a)(20). Once the IEP is developed, the school system must provide an appropriate placement that meets those needs and, if an appropriate public placement is unavailable, the school system must provide an appropriate private placement or make available educational-related services provided by private organizations to supplement a public placement. 20 U.S.C. § 1413(a)(4)(B); 34 C.F.R. § 300.348, 300.400-300.403, 104.33(c); see Burlington Sch. Comm. v. Mass. Dept. of Educ., 471 U.S. 359, 369 (1985).

The statute further provides that once a placement has been made, agreed to or determined to be appropriate after an administrative hearing, a school system proposing to change the placement must provide written notice to the student's parents and an explanation of why the school system proposes to take the action. A school system may not change a student's placement without the parents' agreement or a determination in an administrative due process hearing that the change in placement is appropriate and permissible under the IDEA. See 20 U.S.C. § 1415; 34 C.F.R. § 300.504, 300.505, 104.36.

1 Exhaustion of administrative remedies is usually
2 required for students and parents who wish to challenge a change
3 in placement. 20 U.S.C. § 1415(b),(e). However, the courts have
4 recognized an exception to the general rule that administrative
5 remedies must be exhausted before an action may be brought in the
6 district court. Specifically, exhaustion is not required where it
7 would be futile or where the administrative remedies available
8 would be inadequate. See Honig v. Doe, 484 U.S. 305, 326-27
9 (1988). Here, the Court accepts plaintiffs' assertion that
10 exhaustion *would* be futile because the Special Education Hearing
11 Office has already denied plaintiff Davis and plaintiff Crockett's
12 request for a stay-put order.

13 **B. Temporary Restraining Order -- Standard of Review**

14 Under Federal Rule of Civil Procedure 65, a temporary
15 restraining order may be granted "only if (1) it clearly appears
16 from the specific facts shown . . . that immediate and irreparable
17 injury, loss, or damage will result to the applicant before the
18 adverse party or that party's attorney can be heard in
19 opposition." Fed. R. Civ. P. 65(b) (emphasis supplied). A
20 showing of *immediate*, irreparable loss or injury is an essential
23 prerequisite to a temporary restraining order. As the Supreme
22 Court explained in Granny Goose Foods, Inc. v. Brotherhood of
23 Teamsters & Auto Truck Drivers, 415 U.S. 423 (1974):

24 The stringent restrictions imposed by § 17, and now by
25 Rule 65, on the availability of ex parte temporary
26 restraining orders reflect the fact that our entire
27 jurisprudence runs counter to the notion of court **action**
28 taken before reasonable notice and an opportunity to be
heard has been granted both sides of a dispute. Ex
parte restraining orders are no doubt necessary in
certain circumstances . . . but under federal law they
should be restricted to serving their underlying purpose

1 of preserving the status quo and preventing irreparable
2 harm just **so long as** is necessary **to hold a hearing and**
no longer. (emphasis added.)

3 Id. at 438-39.

4 1. **Immediate, Irreparable Injury**

5 Some courts have held that "stay-put" injunctive relief
6 is available without the traditional showing of irreparable harm.
7 Andersen v. Andersen, 877 F.2d 1018, 1023 (D.C. Cir. 1989); **see**
8 **also** Doe v. Maher, 793 F.2d 1470, 1486 (9th Cir. 1986). Although
9 a showing of irreparable injury is not required, the Court finds
10 that defendants' disruption of plaintiffs' ability to participate
11 in the IEP-recommended day treatment programs has already resulted
12 in irreparable harm **by** causing severe regression in plaintiffs'
13 progress. Moreover, defendant's conduct has exposed plaintiffs to
14 future irreparable injury because plaintiffs may be discharged
15 from the day treatment program due to their prolonged absences
16 this summer. Thus, having reviewed plaintiffs' application and
17 supporting documents, the Court finds that plaintiffs have
18 adequately demonstrated **immediate**, irreparable injury as required
19 under Rule 65(b).

20 2. **Likelihood of Success on the Merits or Fair Chance**
21 **of Success on the Merits**

22 To obtain injunctive relief, the moving party must show
23 "either (1) a combination of probable success on the merits and
24 **the** possibility of irreparable harm, or (2) the existence of
25 **serious** questions going to the merits, the balance of hardships
26 **tipping** sharply in its favor, and at least a fair chance of
27 **success** on the **merits.**" Miller v. California Pac. Medical Ctr.,
28 **19 F.3d** 449, 456 (9th Cir. 1994); Diamontinev v. Borg, 918 F.2d

1 793, 795 (9th Cir. 1990). The **two** formulations represent "two"
2 points on a sliding scale in which the required degree of
3 irreparable harm increases as the probability of success
4 decreases." Miller, 19 F.3d at 456. Thus, even a modest chance
5 of success on the merits may be enough if the potential
6 irreparable harm to the movant is severe and that to the opponent
7 is slight. Steldt v. School Board of the Riverdale Dist., 885 F.
8 Supp. 1192, 1198 (W.D. Wis. 1995).

9 As discussed above, the irreparable harm to plaintiffs
10 is quite severe. On the other hand, defendants have not
11 identified any irreparable injury. Therefore, plaintiff6 need
12 only establish a fair chance of success on the merits. The Court
13 has taken judicial notice? of the decision of the Special
14 Education Hearing Office in Walnut Valley Unified School District,
15 No. 465-95 and finds the hearing officer's analysis persuasive.
16 In Walnut Valley, the Special Education Hearing Office held that a
17 school district is responsible for transportation of students to
18 day treatment programs to receive mental health services during
19 the summer. Because plaintiffs' case will be heard by the same
20 office which issued the opinion in Walnut Valley, the Court finds
21 that plaintiffs have at least a fair chance of succeeding on the
22 merits at the upcoming due process hearing.

23 **C. Conclusion**

24 _____
25 "A judicially noticed fact must be one not subject to reasonable
26 dispute in that it is either (1) generally known within the
27 territorial jurisdiction of the trial court or (2) capable of
28 accurate and ready determination by resort to sources whose
accuracy cannot reasonably be questioned." Fed. Rule. Evid.
201(b). The Court finds that SEHO's published opinion in the
Walnut Valley Unified School District case falls within the second
category and is therefore appropriate for judicial notice.

1 For the foregoing reasons, the Court hereby GRANTS
2 plaintiffs' ex parte application for a temporary restraining
3 order.

4 Therefore, the Court hereby ORDERS defendants, their
5 officers, agents, servants and employees- to FORTHWITH provide
6 plaintiffs with round-trip transportation to their respective day
7 treatment programs.

8 **D. Order to Show Cause Re. Preliminary Injunction**

9 Defendants are hereby ORDERED TO SHOW CAUSE Why a
10 preliminary injunction should not be issued against them. The
11 hearing on the order to show cause shall be on Friday, August 23,
12 1996, at 11:30 a.m. in Courtroom 13. Defendants' response must
13 be filed, personally served on plaintiffs and a courtesy copy
14 delivered directly to chambers by 4:00 p.m. Monday, August 19,
15 1996. Plaintiffs' reply shall be filed, personally served on
16 defendants, and a courtesy copy delivered directly to chambers by
17 4:00 p.m. Wednesday, August 21, 1996.

18 IT IS SO ORDERED.

19
20 Dated:

Aug. 13, 1996


IRMA E. GONZALEZ
United States District Judge