UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIAM SAMMONS and JANIE SAMMONS, as legal guardians of A.S., an incapacitated adult,

Plaintiffs,

Case No.: 8:04-cv-2657-SCB-EAJ

vs.

POLK COUNTY SCHOOL BOARD

Defendant.
______________________________________/

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND SUPPORTING MEMORANDUM OF LAW

Plaintiffs, WILLIAM SAMMONS and JANIE SAMMONS, as legal guardians of A.S., an incapacitated adult ("Plaintiffs"), move this Court for entry of a preliminary injunction against Defendant, POLK COUNTY SCHOOL BOARD, directing it to provide A.S. with educational services *pendente lite*, and would show:

INTRODUCTION

This is an action pursuant to the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.,* seeking review of a final order of an Administrative Law Judge (ALJ) of the Division of Administrative Hearings, State of Florida (DOAH) rendered in an impartial due process proceeding conducted pursuant to 20 U.S.C. § 1415. Plaintiffs also seek preliminary and permanent injunctive relief under the IDEA and 42 U.S.C. § 1983 for Defendant's violation of Plaintiffs' rights under the "pendent placement" or "stay put" provision of the IDEA and its implementing regulations.

A.S. is a nineteen-year-old male who has been disabled since birth. His primary diagnosis is Asperger's Syndrome, a form of autism. A.S. also suffers from a number of other disabling conditions. As a result of his disabilities, A.S. has a low frustration tolerance level, flash anger, severe social and developmental delays, sensory integration problems, and significant communication deficits. With reference to the latter, A.S. is nonverbal, largely communicates through sign language and assistive technology, and has severe pragmatic language deficits. A.S. is unemployable and legally incapacitated.

In May of 2004, Defendant, without the consent of Plaintiffs, awarded A.S. a regular high school diploma and discontinued providing educational services. Plaintiffs challenged this action in administrative proceedings before DOAH, the result of which Plaintiffs now challenge in this Court. Despite the pendency of Plaintiffs' administrative and judicial challenges to the graduation, Defendant refuses to allow A.S. to remain in his pre-graduation educational placement as required by 20 U.S.C. § 1415(j), the so-called "stay-put" provision of the IDEA:

> Maintenance of current educational placement. Except as provided in subsection (k)(7), during 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.

See 34 C.F.R. § 300.514; and also § 1003.57, Fla. Stat. (2004). As a result of Defendant's clear violation of A.S.'s federal statutory rights, A.S. is not currently receiving educational services of any kind.

BACKGROUND AND PROCEDURAL HISTORY

A.S. received educational services from Defendant since kindergarten. Plaintiffs were informed of Defendant's intention to graduate A.S. and terminate educational services on or about February 23, 2004 when they attended an annual meeting to review his Individual Educational Plan (IEP). In order to pave the way for graduating A.S. without his meeting the goals and objectives on his IEP, Defendant proposed eliminating any goals that required completion of written work. This was particularly concerning to Plaintiffs since A.S. is nonverbal and already limited in his communication abilities. Plaintiffs objected to the IEP revisions and proposed graduation and refused to sign the proposed IEP. Based on their objections, Defendant issued to Plaintiffs an Informed Notice of Refusal dated February 23, 2004.

On April 20, 2004, Plaintiffs wrote a letter to Defendant's Director of Exceptional Student Education, with copies to the Superintendent, Assistant Superintendent, and all Board Members of the Polk County School Board. Plaintiffs raised several issues regarding the quality, quantity, depth, and completeness of A.S.'s education; explained why A.S. was not ready to graduate; requested that Defendant conduct additional evaluations of A.S., including a functional behavior assessment (FBA); requested that Defendant conduct an academic review to determine whether A.S. actually met the Sunshine State Standards or earned the credits he was awarded; and requested either mediation or a new IEP meeting. Plaintiffs stated that these were "formal" requests, and as such, Defendant should provide a written Informed Notice of Refusal in the event it declined to accede to them.

Defendant did not provide a written Informed Notice of Refusal with regards to Plaintiffs' formal requests. Instead, Defendant responded to the April 20 letter on May 7, 2004 by informing Plaintiffs that its ESE Director had instructed staff to set up a new IEP meeting. Defendant thereafter provided Plaintiffs *formal written notice that a new IEP meeting would be held on May 21, 2004*. The notice specifically informed Plaintiffs that the parties would address the following at the meeting: "transition services needs"; "diploma options"; "reevaluation information/needs"; "present level information and consider possible change in service(s)"; "change of free appropriate public education"; and "review the Individualized Education Plan (IEP)." Based on the letter from Defendant's ESE Director and the formal written notice of the IEP meeting, Plaintiffs reasonably believed that Defendant would not graduate A.S. before the scheduled meeting. So did their counsel. Notably, the notice did not indicate that Defendant would graduate A.S. on May 13, 2004. Neither did the February 23, 2004 notice.

On May 13, 2004, Plaintiffs received a notice from Bartow Senior High School indicating that senior graduation was on May 20, 2004. Defendant had previously disseminated a document entitled, "Important Dates for Seniors," which listed graduation as occurring on May 20, 2004. On or about May 13, 2004, Plaintiffs received an e-mail from an ESE Coordinator indicating that there was no school for seniors on May 14, 2004 as the seniors would be practicing graduation at the stadium. Plaintiffs were also told by A.S.'s teacher that A.S. should not come to school on May 14, 2004.

Plaintiffs, concerned that Defendant appeared to be proceeding with its plans to graduate A.S., immediately contacted their counsel who drafted a letter to the

Defendant requesting assurances that it was not Defendant's intention to graduate A.S. Defendant received this letter on May 14, 2004 by facsimile. Counsel for Plaintiffs indicated that if it were necessary for Plaintiffs to file a due process request to stay any effort to graduate A.S. that Defendant should so indicate. By the following Monday, May 17, 2004, Defendant had failed to respond to Plaintiffs' request for assurances.

On May 17, 2004, Plaintiffs' counsel formally requested an impartial due process hearing to challenge the proposed graduation. At the time, Plaintiffs' counsel advised Defendant that the request was being filed due to the rapid approach of graduation on May 20, 2004. Plaintiffs also requested an emergency injunction requiring Defendant to maintain A.S.'s current educational placement pending Plaintiffs' challenge to the proposed graduation.

On May 20, 2004, A.S. received a high school diploma from Defendant. The date on the diploma is May 20, 2004.

On August 6, 2004, Plaintiffs requested a hearing before DOAH on their request for an emergency injunction and filed a motion to determine the burden of proof and the order of proceeding. On August 8, 2004, Defendant filed a Motion to Clarify and/or Set Issue for Hearing. In this motion, Defendant asserted that A.S. had graduated from high school with a regular diploma on May 13, 2004 and that, since Plaintiffs' request was not filed until May 17, 2004, after the graduation, it was untimely. Defendant asserted that DOAH had no authority to conduct a post-graduation review of A.S.'s IEP or render a post-graduation determination of the educational program provided to A.S. Defendant supported its motion with an affidavit from an administrative employee indicating that graduation actually occurs when the last requirement is satisfied, which is typically when

the student's teacher turns in the final grades. In the case of A.S., this affidavit indicated that A.S. had met the requirements for and actually graduated on May 13, 2004 when A.S.'s teacher turned in his grades. A.S.'s own teacher was not aware that A.S. had graduated until May 14, 2004.

On or about August 11, 2004, the ALJ denied Plaintiffs' motion for emergency injunction to enforce A.S.'s "stay put" rights on the basis that A.S. did not have a current educational placement on May 17, 2004 since he had graduated on May 13, 2004. A.S. has not received educational services from Defendant since May 13, 2004.

At the final hearing before DOAH, Plaintiffs attempted to present evidence that they were not provided adequate notice of graduation and, in fact, were misled into not filing their request earlier through the misleading notice given by the school district. The ALJ excluded this evidence and held that notice was not an issue. In the final order denying Plaintiffs relief on the grounds that their filing was untimely (despite not affording an opportunity to present evidence on notice), the ALJ made the following findings of fact regarding the timing of Plaintiffs' request for a due process hearing:

> 4. On or about February 23, 2004, Respondent met with Petitioner's parents in an annual IEP review meeting, during which Respondent notified Petitioner's parents that, based on his academic progress, Petitioner would meet the requirements for high school graduation with a regular diploma at the end of the current school semester. An IEP was prepared which set forth the anticipated graduation. The parents immediately objected to the proposed graduation and questioned whether certain services addressed in prior IEP's had been provided.
>
> 5. By letter dated April 20, 2004, Petitioner's parents requested Respondent to convene another IEP meeting or proceed to mediation to address their dissatisfaction.
>
> 6. By letter dated May 7, 2004, Respondent advised that a new IEP meeting would be scheduled. An IEP Meeting Notice also dated May 7, 2004, advised that an IEP meeting was scheduled for May 21, 2004.

> 7. Petitioner's grades were due to be, and were, reported by his teacher to the school administration on May 13, 2004, at which point Petitioner obtained the remaining academic credits required to meet the requirements to receive a regular high school diploma.
>
> 8. Petitioner filed a request for a due process hearing on May 17, 2004.

Thus, the facts underlying this motion were actually found by the ALJ. Nonetheless, the ALJ denied stay-put relief and relief on the merits based on Plaintiffs' request being made after the unannounced deadline that Plaintiffs were led to believe by Defendant had been postponed pending a further meeting. As of the date of this motion, Defendant has never properly responded to Plaintiffs formal request for an independent educational evaluation to be completed before graduation.

MEMORANDUM OF LAW

The provisions of 20 U.S.C. § 1415(j) and 34 C.F.R. § 300.514 govern the status of the student during administrative and judicial proceedings under the IDEA. 20 U.S.C. § 1415(j) provides:

> Maintenance of current educational placement. Except as provided in subsection (k)(7), during 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.

See 34 C.F.R. § 300.514; and also § 1003.57, Fla. Stat. (2004).

There is little doubt that under the IDEA and 34 CFR § 300.121(a), a student with disabilities is entitled to a free and appropriate public education (FAPE) through his twenty-first birthday. However, under 34 C.F.R. § 300.122(a), the obligation to make FAPE available to all children with disabilities does not apply with respect to:

> (3)(i) Students with disabilities who have graduated from high school with a regular high school diploma.

34 C.F.R. § 300.122(a)(3)(ii). Under the regulatory framework, "Graduation from high school with a regular diploma constitutes a change in placement, requiring written prior notice in accordance with § 300.503." 34 C.F.R. § 300.122(a)(3)(iii).

The seminal case on graduation in the special education context is Stock v. Massachusetts, 467 N.E.2d 448 (Ma. 1984). In Stock, the Massachusetts school authorities issued a diploma and terminated special education services to an eighteen-year-old student who suffered from debilitating physical and cognitive deficits secondary to a brain tumor and chemotherapy treatments. Id. at 450-451. A psychologist evaluating Stock had placed Stock's abilities at below age norms, consistent with his brain damage. Id. at 451.

In the fall of 1980, Stock's teachers met and developed an IEP for the 1980-81 school year. Id. At the time, Stock's teachers intended to graduate Stock at the end of the school year. Id. Neither Stock nor his parents were invited to the meeting. Id. In the early part of winter 1981, Stock signed the IEP but his parents did not. Id. The IEP made no mention of graduation. Id. Stock's parents were not provided formal written notice of their right to challenge the IEP or of the procedural avenues available to make that challenge. Id. In June of 1981, the school district presented Stock with a high school diploma and terminated further educational services. Id.

Stock's parents obtained legal counsel in December of 1981 and challenged the diploma on substantive and procedural grounds in a Massachusetts Superior Court. Id. The court entered summary judgment against Stock on the grounds that he failed to exhaust administrative remedies and further found that he could not acquire the skills necessary for a high school diploma before the age of twenty (22), the age at which

special education entitlements terminated. Id. Stock's counsel also wrote to the Bureau of Special Education Appeals urging consideration of Stock's situation, which agency took the position that the award of a regular high school diploma to Stock ended its jurisdiction over the case. Id. Stock appealed the adverse summary judgment to the Supreme Judicial Court of Massachusetts. Id.

On appeal, Stock argued that failure to provide notice and procedural protections before terminating special education services violated his rights, that presentation of a high school diploma in the absence of actual attainment of sufficient skills to warrant such presentation violated his rights, and that the trial court erred in its conclusion that Stock had failed to exhaust administrative remedies. Id. The court first addressed Stock's notice argument. Id. In reversing the summary judgment, the court held that graduation is a "change in placement" under the EHA {now IDEA) requiring advance written notice under the Act. Id. The court reasoned that graduation, which involves a complete termination of all special education services, could be insidiously employed as a device to circumvent the federal mandate to provide handicapped children a free and appropriate public education by prematurely terminating special education services. Id. n. 8. The court concluded that failure to provide Stock's parents formal, written notice concerning the graduation decision violated State and federal law. Id. The court also rejected the requirement of exhaustion of administrative remedies finding exhaustion was futile in light of the absence of adequate notice to the parents. Id. at 454. In light of the Superior Court's finding that Stock was unable to attain sufficient skills to merit the awarding of a high school diploma by age 22, the court found that it inescapably followed that the awarding of an unearned diploma to Stock was substantively

inappropriate. Id. at 455. The court rescinded Stock's diploma and remanded for a hearing on further services to be provided. Id.

In Cronin v. Bd. of Educ. of the East Ramapo Centr. Sch. Dist., 689 F. Supp. 197 (S.D. N.Y. 1988), the federal district court confronted a graduation case in the stay-put context. In that case, the student and parents were notified in March of 1987 that the IEP team intended to graduate the student by the end of the school year. Id. On March 30, 1997, the parents received a letter from the school recommending that the student continue for another year. Id. Sometime in April of 1987, the parents requested an impartial due process hearing to resolve the conflict. Id. On April 30, 1987, the parents were informed that the student met all of the graduation requirements and would be graduated. Id. A hearing was held on June 11, 1987 at which the parents argued that the student had not attained the goals established for him. Id. Following the hearing but prior to a decision, the school issued a diploma to the student. Id. The hearing officer later upheld the school's decision to graduate the student. Id.

The parents appealed this decision to the Commissioner of Education and requested that services to the student continue during the pendency of the proceedings under the stay-put provision of the EHA (now IDEA). Id. The school refused to continue educational services. Id. The Commissioner of Education upheld the hearing officer's determination and denied the parent's request that educational services be continued pending the challenge to graduation, finding it moot in light of the affirmance. Id. The student and parents filed suit in federal district court challenging the administrative determinations and moved for a preliminary injunction under the stay-put provisions of the Act. Id.

In discussing the stay-put provision [then 20 U.S.C. § 1415(e)(3)], the district court, following Honig v. Doe, 484 U.S. 305 (1988), noted:

> Clearly, by enacting section 1415(e)(3), Congress made a policy choice. Congress decided that the danger of excluding a handicapped child entitled to an educational placement from that placement was much greater than the harm of allowing a child not entitled to an educational placement to remain in that placement during the pendency of judicial proceedings. Thus, the statute provides that all handicapped children, regardless of whether their case is meritorious or not, are to remain in their current placement until the dispute with regard to their placement is ultimately resolved.

Id. at 202. The court then went on to characterize the stay-put provision as an "automatic injunction" which did not require it to consider the traditional Fed.R.Civ.P. 65 standards. Id. Following Stock, the district court held that the student's graduation was a "change in placement" that violated the stay-put provision of the Act, automatically entitling the student and parents to a preliminary injunction. Id. The court also held that the traditional standards for injunctive relief set forth in Rule 65 were satisfied as well. Id.

More recently, in Bell v. Education in the Unorganized Territories, 2000 U.S. Dist. LEXIS 15262 (D. Maine 2000), the federal district court addressed a motion for preliminary injunction under the stay-put provision [now 20 U.S.C. § 1415(j)] in the graduation context. In that case, the Maine educational authorities responsible for educating Bell recommended that the student graduate with his class in the summer of 2000. Id. The parents requested an impartial due process hearing, which was subsequently held and resulted in a decision in favor of the school authorities. Id. The hearing officer ordered that a diploma be issued to the student and the school obliged. Id. The student and his parents appealed the decision by filing a complaint in federal

district court. Id. They then filed a motion for preliminary injunction arguing that the stay-put provisions of the Act mandated that educational services be continued to the student. Id.

After discussing the procedural protections of the Act, the district court noted that "[t]he congressional intent of the stay put provision was to ensure that public schools do not remove handicapped children over their parents' objection pending completion of legal proceedings." Id. (citing Sch. Comm. of Burlington v. Dept of Educ., 471 U.S. 359 (1985)). The district court found that the student's pre-graduation placement was his "then current educational placement" under the Act. Id. It then applied the traditional Rule 65 criteria for a preliminary injunction; interestingly, however, the district court held that since the school was attempting to modify the *status quo* by discontinuing services that it was its burden to satisfy the four-part test for injunctive relief. Id. Following Stock, Cronin, Carl v. Mundelein High Sch. Dist. 120, 1993 WL 787899 at *2 (N.D. Ill. 1993), 34 C.F.R. § 300.122(a)(3)(iii), and a similar Maine regulation, the court clearly recognized that graduation is a "change in placement" under the Act that violates the stay-put provision. Id.

The court addressed the school's argument that the student's current educational placement was that he was a high school graduate. Id. at *13. The court stated, "Quite simply, Defendant's argument 'would render the stay-put provision meaningless because the school district could unilaterally graduate handicapped children.'" Id. (quoting Cronin, 689 F. Supp at 202 n. 4). The court continued:

> The purpose of the IDEA is to prevent schools from excluding disabled children from receiving an adequate education. A school can exclude disabled children through a variety of methods, such as by ignoring them, expelling them, suspending them or graduating them. Because

> graduation entails the transmission of a diploma and some measure of pomp and circumstances does not inoculate graduation from the possibility that it is simply another form of illegal exclusion. In fact, graduation is probably the most dire form of exclusion because it potentially renders a person ineligible for future educational aid under the IDEA.

Id. at *14-15 (internal citations omitted). After finding that preliminary injunctive relief was appropriate, the court went on to excuse any requirement of bond. Id.

In the instant case, Defendant unilaterally graduated A.S. without his guardian's permission and terminated all educational services. No notice of when this graduation would occur was ever provided to A.S. or Plaintiffs, his parents and guardians, before Defendant claims it occurred.[1] To the contrary, Plaintiffs were notified that school authorities would convene another meeting of the IEP team on May 21, 2004 to discuss Plaintiffs' objections to graduation, requests for evaluation, diploma options, and a new IEP, among other things. Not even A.S.'s full time teacher was aware that A.S. was graduating until after it supposedly happened. Plaintiffs immediately responded to the attempted exclusion of A.S. from school by requesting an impartial due process hearing before the Division of Administrative Hearings. They have also appealed the hearing officer's decision essentially refusing to consider their challenges to this Court. Under well-settled law, A.S. was and is entitled, during the pendency of the administrative proceeding and this judicial proceeding, to his then current educational placement, which, under the authorities discussed, is the placement A.S. was in before the change of placement Plaintiffs have challenged.

[1] Plaintiffs first learned when their son had graduated from high school in Defendant's response to Plaintiff's request for stay-put relief.

Defendant argued below, and the ALJ apparently agreed, that A.S.'s "then current educational placement" was that A.S. was graduated on the date that Plaintiffs requested the impartial due process hearing. In other words, Plaintiffs' May 17, 2004 request for a hearing was too late since, according to it, Defendant was able to unilaterally graduate A.S. without advance notice on May 13, 2004. Not only was there no legal authority cited by either the Defendant or the ALJ for this proposition, this argument clearly ignores the congressional purpose against the unilateral exclusion of handicapped children from educational programs embodied in the IDEA. Moreover, it renders the procedural protections of the Act meaningless and is fundamentally unfair. Under the ALJ's decision, if school authorities are able, whether through cunning, guile, or even incompetence, to unilaterally graduate a student before the parents know about it, they can avoid their obligations under the Act. In any event, the publicized date for graduation was May 20, 2004 and there was no notice to Plaintiffs that A.S. would lose his stay-put rights and rights to challenge his graduation if request for a hearing was not made before May 13, 2004.

Not only is Defendant's position an evasion of the IDEA, it is barred by the doctrine of *equitable estoppel*:

> Equitable estoppel is based on principles of fair play and essential justice and arises when one party lulls another party into a disadvantageous legal position. 'Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights, which perhaps have otherwise existed, either of property or of contract, or of remedy, as against another person, who has in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, or of contract or of remedy.' The doctrine of estoppel is applicable in all cases where one, by word, act or conduct willfully caused another to believe in the existence of a certain state of

things, and thereby induces him to act on this belief injuriously to himself, or to alter his own previous condition to his injury.

Dep't. of Health and Rehab. Servs. v. S.A.P., 835 So. 2d 1091, 1096-1097 (Fla. 2002). The record is undisputed that Plaintiffs were never notified that graduation would occur on May 13, 2004.[2] Moreover, Plaintiffs and their counsel were affirmatively led to believe that graduation would not occur before a scheduled IEP meeting. This notice responded to a ten (10) page letter from Plaintiffs dated April 20, 2004 objecting to the proposed graduation and making a number of formal requests to invoke the procedural protections of the Act, including a request for an evaluation and for mediation.[3] Clearly, Plaintiffs cannot be said to have been sleeping on their rights, and Defendant, who lulled them into delaying, is equitably estopped from taking advantage of the reliance it induced.

Moreover, the proposition advanced by Defendant that Plaintiffs' request was untimely is itself not supported by the Act.[4] Nowhere does the Act require that a challenge to a "change in placement" occur before the change is implemented or that failure to do so would result in a loss of stay-put rights. To hold otherwise would merely encourage school districts to make changes rapidly in order to avoid their stay-put obligations and insulate their decisions from review. This result is not compelled by any provision of the Act itself or of any controlling interpretation. Tellingly, Defendant did not

[2] Individuals With Disabilities Education Improvement Act, H.R. 1350, 108th Cong. § 615(d)(2)(E)(i) (requiring notice of the time period within which to make complaint).
[3] Plaintiffs also maintain that Defendant could not graduate A.S. before responding to their formal request for an evaluation. See 34 C.F.R. § 300.533.
[4] In fact, the newly reauthorized IDEA now provides two (2) years to bring the challenge, Individuals With Disabilities Education Improvement Act of 2004, H.R. 1350, 108th Cong. § 615(f)(3)(C) (2004), and expressly contains a tolling provision where the parent is misled by specific representations of the local educational agency. Id. at § 615(f)(3)(D)(i).

argue that Plaintiffs were time-barred from challenging the decision to graduate A.S. altogether. Even if they had, 20 U.S.C. § 1415(j) does not allow for an exception to stay-put in circumstances where the school may have a meritorious affirmative defense. It applies to all cases where a challenge is made.

Defendant may disagree with Plaintiffs' decision to challenge its decision to graduate A.S. Defendant may also believe that Plaintiffs' challenge ultimately lacks merit and that A.S. is graduated. However, it is not Defendant's prerogative to disregard Plaintiffs' right to a stay-put placement during the pendency of that challenge. As noted in Cronin, this entitlement is available to all students, regardless of the merit of their challenge. Congress made that policy choice, and Defendant acceded to it in accepting federal funds. During the pendency of judicial proceedings to challenge his graduation, A.S. is entitled to the automatic preliminary injunction mandated by 20 U.S.C. § 1415(j) to enforce his right to the placement he enjoyed before his timely challenged graduation.

APPROPRIATENESS OF PRELIMINARY INJUNCTIVE AND COMPENSATORY RELIEF

The Court in Sch. Comm. of Burlington v. Dept of Educ., 471 U.S. 359 (1985), noted that the IDEA directs the court to "grant such relief as [it] determines is appropriate," and that "the ordinary meaning of these words confers broad discretion on the court." 471 U.S. at 369. "Absent other reference, the only possible interpretation is that the relief is to be appropriate in light of the purpose of the Act. As already noted, this is principally to provide handicapped children with 'a free appropriate public education which emphasizes special education and related services designed to meet

their unique needs.'" Id. In discussing the appropriateness of prospective injunctive relief, the Court noted:

> In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that "appropriate" relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.
>
> If the administrative and judicial review under the Act could be completed in a matter of weeks, rather than years, it would be difficult to imagine a case in which such prospective injunctive relief would not be sufficient. As this case so vividly demonstrates, however, the review process is ponderous. A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed. In the meantime, the parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. If they choose the latter course, which conscientious parents who have adequate means and who are reasonably confident of their assessment normally would, it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials. If that were the case, the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete. Because Congress undoubtedly did not intend this result, we are confident that by empowering the court to grant "appropriate" relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case.

471 U.S. at 370. Thus, the Burlington Court recognized that both prospective injunctive relief and tuition reimbursement were appropriate forms of relief to effectuate the stay put rights of parents and their child. Id.

The stay put provision has been widely interpreted by the federal courts as an automatic preliminary injunction eliminating the need for parents to make the usual showing required for obtaining preliminary injunctive relief. See Board of Educ. of Montgomery Cty. v. Brett Y., 959 F. Supp. 705, 709 (D. Md. 1997). Thus, where school

districts fail to comply with its mandate, federal courts have been quick to enter preliminary injunctions, in some cases without hearing. See Board of Educ. of Community High Sch. Dist. No. 218 v. Illinois State Bd. of Educ., 103 F.3d 545, 548 (7th Cir. 1996) ("Because the preliminary injunction was issued in conformity with the stay-put provision, no evidentiary hearing was warranted."); Schutz v. Bd. of Educ. of the Pawling Centr. Sch. Dist., 137 F. Supp. 2d 83, 92 (N.D. N.Y. 2001) (1415(j) mandates interim injunctive relief in light of state review officer's decision in favor of parents).

TRADITIONAL RULE 65 ANALYSIS

Even if this Court were to find stay-put inapplicable to this case, injunctive relief is clearly appropriate under the traditional test of Fed.R.Civ.P. 65. See Cronin, 689 F. Supp. at 204-205 (finding in the alternative that Rule 65 criteria were met to continue providing educational services beyond graduation as cessation of educational services was irreparable injury that could not be compensated by money damages). Plaintiffs have a high likelihood of success on the merits of their claim as the ALJ deprived them of their rights by improperly excluding evidence concerning whether A.S. received FAPE or was entitled to compensatory education, improperly excluding consideration of the IEP (the centerpiece of the IDEA) or whether A.S. met his IEP goals, deciding the notice issue adverse to Plaintiffs without affording Plaintiffs an opportunity to present evidence on notice, ignoring state law standards for graduation (including the requirement of 135 bona fide hours of instruction per credit), ignoring the failure of the district to respond to Plaintiffs' request for an independent educational evaluation, and purporting to procedurally bar Plaintiffs' case based on the misleading actions of the district. At minimum, Plaintiffs raise substantial issues concerning the ALJ's decision.

The balance of hardships tips decidedly in favor of A.S. As recognized in Cronin and in Cosgrove v. Bd. of Educ. of the Niskayuna Centr. Sch. Dist., 175 F. Supp. 2d 375 (N.D. N.Y. 2001), the interruption of service and danger of regression during the pendency of the suit, particularly where a claim for compensatory education is being asserted, is irreparable harm for which money damages cannot adequately compensate. In this case, Plaintiffs seek compensatory education for A.S. for the benefits he did not receive before graduation. Given the complete failure of the district to provide transition services, opportunities for socialization, and behavioral supports, as well as the failure of A.S. to meet the goals and objectives on his IEP, all as reflected in the transcript of the hearing below and Plaintiffs' Proposed Findings of Fact and Conclusions of Law, Plaintiffs are likely to prevail. As to the harm to Defendant, it is undisputed that A.S. would have been entitled to continued educational services had they requested the due process hearing four (4) days earlier. Defendant has never shown any prejudice from the delay in the request. Defendant is only being requested to do what it would have been doing had Plaintiffs' request came one minute before the secret graduation. The public interest in ensuring that A.S., a severely handicapped child, is able to become a contributing, productive member of society, one of the central goals of the IDEA, weighs heavily in favor of the injunction.

DISPENSATION WITH SECURITY

Under the stay put provision, the school district is not entitled to reimbursement of amounts paid for the pendent placement during the course of the litigation, even if it ultimately prevails in establishing that the placement was inappropriate. See Greenwich Bd. of Educ. v. Torok, 2003 U.S. Dist. LEXIS 18985, *12 n. 7 (citing Clovis Unified Sch.

Dist. v. Calif. Office of Admin. Hearings, 903 F.2d 635, 641 (9th Cir. 1990) (concluding that parents would not be required to reimburse school district if district prevailed on appeal); Henry v. School Admin. Unit 29, 70 F. Supp. 2d 52, 59 (D. N.H. 1999) (no right to reimbursement); Bd. of Educ. of the Pine Plains Centr. Sch. Dist. v. Engwiller, 170 F. Supp. 2d 410, 415 (S.D. N.Y. 2001) (citing cases). As a result, no harm will be suffered from enforcement of stay put, and it is highly appropriate for the Court to dispense with the security requirements of Rule 65(c). See Torok, 2003 U.S. Dist. LEXIS 18985 at *12 n.7 (requiring a bond under these circumstances might discourage parents and their children from exercising their rights under the IDEA).

WHEREFORE Plaintiffs respectfully request that this Court immediately enter a preliminary injunction against POLK COUNTY SCHOOL BOARD directing that it comply with the stay-put provisions of the IDEA, provide A.S. compensatory education for the period his stay-put rights were violated, and award such other and further relief as may be appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 19, 2005, I electronically filed the foregoing with the Clerk of the Court by using CM/ECF system.

s/ Timothy W. Weber

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