

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

JEANETTE ALLEYNE, ET AL.

Plaintiffs,

v.

**Civil No. 1:06cv00994
(GLS)**

**NEW YORK DEPARTMENT of
EDUCATION, ET AL.**

Defendants.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFFS:

O'Connell, Aronowitz Law Firm

JEFFREY J. SHERRIN, ESQ.

MEMORANDUM-DECISION AND ORDER

On August 16, 2006, The Judge Rotenberg Educational Center, Inc. ("JRC") and the parent(s) and/or guardians of identified individual students filed suit against the New York State Education Department, its Commissioner, Richard P. Mills, and the New York State Board of Regents ("State Education Defendants") alleging, *inter alia*, violations of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400

et seq. The gravamen of the complaint is that the State Education Defendants unilaterally altered the students' individualized educational programs ("IEP's") when they passed June 20, 2006, Emergency Regulations that eliminated or restricted aversive treatment that had been authorized for the individually named students by their parents or guardians, their IEP's, and orders of a Massachusetts probate court. The complaint was accompanied by an application entitled, "TRO/Preliminary Injunction," which, *inter alia*, sought to preclude the State Education Defendants from enforcing the Emergency Regulations.

Because the plaintiffs failed to submit an affidavit demonstrating the need for the court to consider their application *ex parte*, the court declined to do so. Instead, the court ordered expedited service of plaintiffs' papers, and scheduled a hearing for August 22. The State Defendants subsequently filed an expedited response, and the court conducted the hearing. As prompted by the court, plaintiffs subsequently filed an amended complaint on September 1 which added new, individual plaintiffs.

As the court indicated during the hearing, it is fully conversant with the legal standard applicable to equitable relief sought by a temporary restraining order or preliminary injunction. To warrant a temporary

restraining order, a plaintiff must satisfy the same prerequisites as a party seeking a preliminary injunction. *Local 1814, Intern. Longshoremen's Ass'n, AFL-CIO v. New York Shipping Ass'n, Inc.* 965 F.2d 1224, 1228 (2d Cir. 1992). In general, a district court may grant a preliminary injunction where the moving party establishes: (1) that it is likely to suffer irreparable injury if the injunction is not granted, and (2) either (a) a likelihood of success on the merits of its claim, or (b) the existence of serious questions going to the merits of its claim and a balance of the hardships tipping decidedly in its favor. *Moore v. Consolidated Edison Co. of New York, Inc.*, 409 F.3d 506, 510 -511 (2d Cir. 2005). "Such relief...is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Id.* However, when the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard. *Connecticut Dept. of Environmental Protection v. O.S.H.A.*, 356 F.3d 226, 230 -231 (2d Cir. 2004)(quoting *Beal v. Stern*, 184 F.3d 117, 122 (2d Cir.1999) (citations and internal quotation marks omitted)). Moreover, in some cases, a significantly higher standard

applies. The moving party must make a “clear” or “substantial” showing of a likelihood of success in two instances; namely, (1) the injunction sought is mandatory, *i.e.*, “will alter, rather than maintain, the status quo”; or (2) the injunction sought “will provide the movant with substantially all the relief sought, and that relief cannot be undone even if the defendant prevails at a trial on the merits.” *Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir.1996).

During the hearing, the court attempted to share its equitable concerns given the arguments raised by the parties. Without reciting each of those argument and without reaching any legal conclusions, the court repeats several of its concerns. The court is not convinced that it has a jurisdictional basis to grant preliminary relief to those who are not parties to this litigation. If the court does grant preliminary relief, the language employed should be narrowly tailored to encompass only those named plaintiffs attending the JRC whose *status quo* was altered by the Emergency Regulations and who now express the definitive wish to return to the *status quo ante*. The court is mindful that the State Educational Defendants are authorized by the IDEA to set standards governing special education and related services. While the plaintiffs must make a “clear” or “substantial” showing of a likelihood of success if a preliminary injunction

“will alter, rather than maintain, the *status quo*”, it is the State Education Defendants that altered the *status quo* when it passed the Emergency Regulations. Furthermore, the court believes that narrowly tailored relief can be undone if the State Education Defendants prevail on the merits, and the court has the means to expedite disposition.

Ultimately, the court is confronted with a dispute concerning the efficacy of aversives in terms of what, when and how they should be utilized, and whether the State authority to regulate them has been exceeded. Broadly speaking, the State and JRC are on opposite sides of the debate. However, it is obvious that at least some parents have shouldered the unenviable task of caring for severely challenged children for years, believe in the efficacy of aversives as applied to their children, and are now caught in the middle. Accordingly, the court clearly intended to convey to the parties that it would look favorably on the *status quo ante*, expedite the action, and grant a narrowly tailored preliminary injunction.¹

Based upon these equitable observations, the court requested that the parties confer and provide a proposed order by September 1, narrowly

¹See *by analogy*, 20 U.S.C. § 1415(j) (IDEA stay-put provision).

tailored to address the court's concerns. While plaintiffs provided a proposed order, it far exceeded the narrow scope intended by the court. While the State Education Defendants continue to object to any preliminary relief, they have provided suggested limits that would effectuate the court's concerns.

Therefore, and for the reasons stated, it is hereby

ORDERED that the State Education Defendants are preliminarily enjoined from the enforcement of 8 NYCRR §200.22(f)(2)(vi) (limiting the use of aversives to aggressive and self injurious behavior) and 8 NYCRR § 200.22(f)(2)(ix) (prohibiting the combined use of aversive interventions with mechanical restraints), **only as** those named Student Plaintiffs identified in the September 1, 2006, amended complaint who: (1) have a current individualized education program (IEP) that expressly permits Level III aversives, and that permitted Level III aversives on June 23, 2006; (2) have a current behavioral intervention plan that specifies the aversive intervention appropriate for each targeted behavior; and (3) have a current Massachusetts Probate Court order that authorizes the use of Level III aversives, and had such an order in effect on June 23, 2006; and it is further

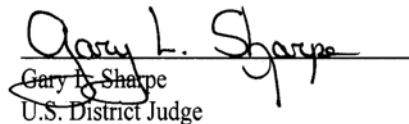
ORDERED that to the extent plaintiffs' proposed order seeks broader relief, it is **DENIED**; and it is further

ORDERED that in the interest of expedience, this court's order of referral to Magistrate Judge Treece is rescinded, this court will preside over the pretrial management phases of this litigation, and a Rule 16 conference is set for October 19, 2006 at 1:30 P.M.; and it is further

ORDERED that the parties **shall** file a joint Rule 16 Management Plan on or before October 12, 2006.

SO ORDERED.

Date: September 8, 2006
Albany, New York


Gary L. Sharpe
U.S. District Judge