



7 of 12 DOCUMENTS

L.J., a minor, individually and by his Parents, V.J. & Z.J., Plaintiffs, v. AUDUBON BOARD OF EDUCATION, Defendant.

Civil No. 06-5350 (JBS)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2007 U.S. Dist. LEXIS 81527

November 5, 2007, Decided

SUBSEQUENT HISTORY: Later proceeding at L.J. v. Audubon Bd. of Educ., 2008 U.S. Dist. LEXIS 12337 (D.N.J., Feb. 19, 2008)

PRIOR HISTORY: L.J. v. Audubon Bd. of Educ., 2007 U.S. Dist. LEXIS 62080 (D.N.J., Aug. 22, 2007)

COUNSEL: [*1] Jamie Epstein, Esq., Cherry Hill, NJ, Attorney for Plaintiffs.

James Schwerin, Esq., Paul C. Kalac, Esq., PARKER MCCAY, P.A., Lawrenceville, NJ, Attorneys for Defendant Audubon Board of Education.

JUDGES: JEROME B. SIMANDLE, United States District Judge.

OPINION BY: JEROME B. SIMANDLE

OPINION

SIMANDLE, District Judge:

In this action, Plaintiff L.J., individually and by his parents, V.J. and Z.J., filed a Complaint [Docket Item 1] and First Amended Complaint [Docket Item 4] against Defendant Audubon Board of Education ("Audubon") alleging a denial of his rights under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400, et seq. In an earlier action on this dispute brought by Plaintiff on July 10, 2006 with the New Jersey Office of Special Education, Docket No. O.A.L. EDS 06203-2006S [Agency Ref. No. 2007-11386], Plaintiff received a favorable final decision from Administrative Law Judge Joseph F. Martone issued on October 23, 2006 (the "ALJ Order").

Presently before the Court is Plaintiff's order to show cause requesting that the Court (1) issue a preliminary injunction ordering Defendant to comply with the ALJ Order, and (2) hold Defendant in contempt for its alleged failure to comply with the [*2] ALJ Order [Docket Item 5]. For the reasons discussed herein, which constitute this Court's findings of fact and conclusions of law pursuant to Rule 52(a), Fed. R. Civ. P., the Court will grant in part Plaintiff's motion for a preliminary injunction but will deny the remainder of the relief Plaintiff seeks.

I. BACKGROUND

L.J. is an eight-year-old student in the Audubon Public School system. (Epstein Aff., P 2; Pl.'s Suppl. Br. App. 1.) As a result of having been diagnosed with autism, L.J. receives special education and related services from Defendant's school district as required by the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400, et seq. L.J.'s Individualized Education Program ("IEP")¹ lists numerous services that Defendant is required to provide L.J. in order to meet his educational needs, including speech and occupational therapy, school counseling, and Applied Behavioral Analysis ("ABA").² (Pl.'s Suppl. Br. App. 39.)

1 An IEP is "a detailed written statement arrived at by a multi-disciplinary team summarizing the child's abilities, outlining the goals for the child's education and specifying the services the child will receive." *Jeremy H. v. Mount Lebanon School Dist.*, 95 F.3d 272, 275 n.4 (3d. Cir. 1996) [*3] (citation omitted).

2 As Judge Martone noted in his decision in this matter,

Applied Behavior Analysis is an educational method designed to increase through learning principles and methods behaviors that help children to learn and decrease behaviors that impede the ability to learn. While these techniques of learning are generally applicable to all children, they have been proven effective in the education of children on the autism/PDD spectrum who suffer from behavioral excesses or deficits that left uncorrected prevent learning.

Z.J. and V.J. v. Audubon Board of Education, No. EDS 6203-06, 2006 N.J. AGEN LEXIS 833, at *34 (N.J. Agen. 2006) (citation omitted).

On July 10, 2006, L.J.'s parents, V.J. and Z.J., filed a due process petition pursuant to 20 U.S.C. § 1415(f) with the New Jersey Office of Special Education on behalf of their son, alleging that L.J.'s IEP for the 2005-2006 school year failed to address L.J.'s educational needs. (Am. Compl. P 8.) The petition identified various shortcomings in L.J.'s IEP, including the IEP's failure to provide an effective behavior intervention plan to address the behaviors that were interfering with L.J.'s ability to learn; the absence of clear [*4] benchmarks, communication methodologies, and parental training strategies in the IEP; and Defendant's failure to employ qualified staff to provide L.J. with ABA-related services. (*Id.*) Hearings on the petition were held before Judge Martone on August 18 and 29, 2006. (*Id.* at P 11.)

At the hearings before Judge Martone (the "ALJ hearings"), Plaintiff presented the testimony of Carolyn L. Breslyn and Brett DiNovi. *Z.J. and V.J. v. Audubon Board of Education*, No. EDS 6203-06, 2006 N.J. AGEN LEXIS 833, at *5, *15 (N.J. Agen. 2006). Ms. Breslyn testified at the hearings that between June 2004 and March 2006, she worked for Audubon as a private autism consultant, and that during this time she was assigned to L.J. 2006 N.J. AGEN LEXIS 833 at *7. Ms. Breslyn testified to numerous failings in L.J.'s IEP for the 2005-06 academic year. 2006 N.J. AGEN LEXIS 833 at *11-13. Specifically, Ms. Breslyn noted that while L.J.'s IEP identified educational goals, the plan failed to identify the personnel who were responsible for meeting those goals; the goals themselves were "neither measurable nor objective"; and the plan failed to provide a "methodology to be used to teach L.J. the goals and objectives." 2006 N.J. AGEN LEXIS 833 at *11. Additionally, according to [*5] Ms. Breslyn, the IEP did not contain a behavior intervention plan ("BIP"), which is a means of identifying and responding to inappropriate behaviors that interfere with a child's ability to learn. 2006 N.J. AGEN LEXIS 833 at *12.

Ms. Breslyn also testified at length about a dispute she had with Patricia Porreca, Audubon's Director of Special Services, about whether L.J. was receiving the hours of ABA-related services to which he was entitled. According to Ms. Breslyn's testimony, L.J.'s IEP entitled him to receive fifteen hours of ABA-related services each week, with five of those hours provided at home by an aide and ten hours provided during school. 2006 N.J. AGEN LEXIS 833 at *8. In spite of these requirements in the IEP, Ms. Breslyn testified that L.J. did not receive the five hours of home-based ABA-related services to which he was entitled, and that "the ABA services in the school were only provided sporadically." *Id.* In discussing Audubon's failure to provide L.J. with the ABA-related services to which he was

entitled, Ms. Breslyn noted in particular that the district relied upon L.J.'s teacher, Beth Crosby, to provide L.J. with ABA-related services, but according to Ms. Breslyn, Ms. Crosby was unqualified to provide [*6] such services and failed to attend sessions at which she would have received ABA training. 2006 N.J. AGEN LEXIS 833 at *7-8. The result, according to Ms. Breslyn, was that L.J. did not receive the hours of ABA-related services his IEP called for.

At the ALJ hearings, the plaintiff also presented the testimony of Brett DiNovi, a board-certified behavior analyst. 2006 N.J. AGEN LEXIS 833 at *15-16. Mr. DiNovi testified that the absence of a BIP in L.J.'s IEP undermined the IEP because L.J.'s inappropriate behaviors could not be addressed effectively. 2006 N.J. AGEN LEXIS 833 at *16-17. Mr. DiNovi testified to the importance of methodological consistency in crafting an IEP and criticized L.J.'s IEP for its methodological inconsistency and its failure to provide objective, measurable goals. 2006 N.J. AGEN LEXIS 833 at *18-19.

In his decision issued on October 23, 2006, Judge Martone found the testimony of Ms. Breslyn and Mr. DiNovi credible and determined, in effect, that Audubon had failed to provide sufficient ABA-related services to L.J. and that the 2005-06 IEP lacked "clear benchmarks" and methodologies. In light of these findings, Judge Martone issued a four-part order that responded to the identified failings in L.J.'s 2005-06 IEP:

1. The petitioners' request that [*7] the previously identified interfering behaviors be adequately addressed by a positive behavioral plan shall be required. Based on the testimony of Mr. DiNovi, a qualified behavior specialist shall monitor and adjust the plan.

2. L.J. shall be provided with the sessions of behavior programming he lost during the 2005-06 school year to be provided by qualified personnel at respondent's expense and this compensatory education be completed within one year.

3. At a minimum, the level of ABA-related services of 15 hours per week as established in the 2005-06 IEP shall be strictly complied by the school district. If any sessions are missed by therapists because of absences or any other reason, they shall be made up on an immediate basis by the school district at its own expense.

4. The IEP shall be revised to set forth goals providing clear benchmarks with related instructional materials and methodologies, and the revised IEP shall include provisions for ongoing parental training to generalize interventions and programs.

2006 N.J. AGEN LEXIS 833 at *42-43. Judge Martone designated his decision as final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.510. 2006 N.J. AGEN LEXIS 833 at *43.

According to the plaintiff, Audubon has [*8] failed to comply with the terms of the ALJ Order. (Epstein Aff. P 10.) Plaintiff filed a complaint with this Court on November 8, 2006, and an amended complaint on November 17, 2006, requesting that the Court award attorney fees to Plaintiff's counsel pursuant to 20 U.S.C. § 1415(i)(3)(B). (Compl. PP 16-18; Am. Compl. PP 16-18.) On November 24, 2006, Plaintiff moved for an order to show cause asking the Court (1) to issue a preliminary injunction ordering Defendant to comply with the terms of the ALJ Order, and (2) to hold Defendant in contempt of the ALJ Order. (Pl.'s Mot. 1-2.) On December 8, 2006, after Defendant failed to file a response to Plaintiff's complaint, the Clerk of the Court entered default against Defendant at Plaintiff's request. Defendant subsequently moved to dismiss the matter, arguing that this Court lacked subject matter jurisdiction to entertain Plaintiff's complaint [Docket Item 10]. In its Opinion and Order of December 22, 2006 (the "December 22 Opinion and Order") [Docket Items 15 and 16], the Court denied Defendant's motion to dismiss, holding, under the reasoning of *Jeremy H. v. Mount Lebanon School Dist.*, 95 F.3d 272, 278-279 (3d Cir. 1996), that its jurisdiction [*9] to enforce the ALJ Order lies under 42 U.S.C. § 1983. The Court also declined to remand the matter back to Judge Martone for clarification of his order, instead calling upon Plaintiff "to develop the record in this Court so that a clear command of the ALJ Order emerges" [Docket Item 15]. Plaintiff subsequently responded by filing a supplemental brief

discussing the requirements of the ALJ Order [Docket Item 17].

II. DISCUSSION

A. Plaintiff's Motion for a Preliminary Injunction

In order to obtain a preliminary injunction, the moving party must establish that "(1) it has a likelihood of success on the merits, (2) it will suffer irreparable harm if the injunction is denied, (3) granting preliminary relief will not result in even greater harm to the nonmoving party, and (4) the public interest favors such relief." *Rogers v. Corbett*, 468 F.3d 188, 192 (3d Cir. 2006) (internal quotations and citations omitted). As the Court of Appeals for the Third Circuit has noted, "[p]reliminary injunctive relief is an extraordinary remedy and should be granted only in limited circumstances." *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) [*10] (internal quotations and citations omitted).

1. Likelihood of Success

The Court first addresses the likelihood that Plaintiff will succeed on the merits of his claim. Under the IDEA, states that accept federal funding for the education of disabled children must provide children with disabilities "a free appropriate public education." 20 U.S.C. § 1415(a). The IDEA "provides a procedure that allows disabled children and their parents to enforce this guarantee," *Jeremy H.*, 95 F.3d at 278, by filing a request for an impartial due process hearing before the state education agency. 20 U.S.C. § 1415(f). Although the IDEA provides for the right of a party "aggrieved" by the outcome of the administrative hearing to bring an action in "any State court of competent jurisdiction or in a district court of the United States," the statute does not expressly provide a means for children and parents who prevail at the administrative hearing to enforce the favorable administrative decision in state or federal court. 20 U.S.C. § 1415(i)(2)(A). However, as this Court noted in its December 22 Opinion, the Court of Appeals for the Third Circuit held in *Jeremy H.* that "whether or not an IDEA decision of a [*11] state hearing officer or appellate body is enforceable under IDEA directly, such a decision would seem to be enforceable under section 1983." *Jeremy H.*, 95 F.3d at 279; *see also Robinson v. Pinderhughes*, 810 F.2d 1270 (4th Cir. 1987).

This Court thus has jurisdiction to enforce the ALJ Order, and the critical issue regarding Plaintiff's likelihood of success in its enforcement action is whether Audubon has complied with the terms of that Order. According to the plaintiff's allegations, Audubon has failed to comply with all four elements of the ALJ Order. (Pl.'s Supp. Br. 7-14.) The defendant disputes each of these allegations of noncompliance. (Porreca Aff. PP 14-17.) The Court accordingly turns to each of the four paragraphs of the ALJ Order to determine whether Plaintiff is likely to succeed in proving Defendant's noncompliance.³

³ On September 11, 2007, Defendant moved for summary judgment on its counterclaim, arguing that the Court should reverse Judge Martone's ruling because he precluded Defendant from submitting evidence at the hearings before him [Docket Item 32]. On October 16, 2007, the Court dismissed Defendant's motion without prejudice to renewal on account of Defendant's [*12] failure to file with the Court the administrative record from the ALJ Hearings, as is required by 20 U.S.C. § 1415(i)(2)(C)(i) [Docket Item 39]. Without the administrative record, of course, the Court is unable to account meaningfully for the possibility of reversing the ALJ Order in weighing Plaintiff's likelihood of success on the merits.

a. The Behavior Plan Order

With regard to the first paragraph of the ALJ Order, Plaintiff argues that Judge Martone's requirement that "previously identified interfering behaviors be adequately addressed by a positive behavioral plan" (the "Behavior Plan Order"), *Z.J. and V.J.*, 2006 NJ AGEN LEXIS 833, at *42, required Defendant to conduct a "functional behavioral assessment" ("FBA") in order to create the behavioral plan. (Pl.'s Supp. Br. 8.) While the Behavior Plan Order itself does not use the term "functional behavioral assessment," Plaintiff argues that the ALJ's findings, on which the Order was based, make clear that an effective behavioral plan must be based on an FBA. (*Id.*) According to Plaintiff, Defendant has failed to conduct an FBA, which would require Defendant to collect data on L.J.'s interfering behavior,

establish techniques to discourage [*13] such behavior and to reinforce positive behavior, and train school staff and L.J.'s parents on the implementation of the behavioral plan. (*Id.*) In failing to conduct an FBA, Plaintiff argues, Audubon has failed to comply with Judge Martone's Behavior Plan Order.

Defendant argues that it has complied with the express requirements of the Order because it has had a behavior intervention plan in place since July 5, 2006. (Porreca Aff. P 14.) According to Defendant, the text of the Behavior Plan Order requires only a "positive behavioral plan," not an FBA, and, as a matter of practice, behavior intervention plans are not typically based on FBAs, because FBAs are conducted only after a student has exhibited a persistent lack of progress. (*Id.*) While it has not conducted an FBA, Defendant argues that it has complied with the Order by implementing a behavior plan that has been monitored by board-certified behavior analysts and by collecting data on L.J.'s behavior. (*Id.*)

The Court finds that, although the text of the Behavior Plan Order does not expressly require Audubon to conduct an FBA, the ALJ's findings indicate that the behavioral plan contemplated in the Order must incorporate an FBA. [*14] In his discussion of whether L.J.'s IEP provided an appropriate behavior intervention plan, ALJ Martone found credible Mr. DiNovi's testimony that "a behavior plan based on a functional behavioral assessment must be developed in order to design a motivational system of behavior to extinguish inappropriate behaviors, and to establish appropriate methods of dealing with those behaviors in order to allow L.J. the ability to progress academically." *Z.J. and V.J.*, 2006 NJ AGEN LEXIS 833, at *32-33. It would be inappropriate to read Judge Martone's Order in a manner that contradicts the findings underlying that Order, and, as such, the Order necessarily includes a requirement that Audubon conduct an FBA. To comply with this section of the ALJ's decision, the Court finds that Audubon was required to conduct an FBA in a manner consistent with Mr. DiNovi's testimony on this issue. *See* 2006 NJ AGEN LEXIS 833, at *19-20.

There is some evidence in the record suggesting that Audubon has complied in part with these requirements. For example, Ms. Porreca states in her affidavit that Audubon has implemented a behavior implementation plan overseen by qualified personnel and has compiled data on L.J.'s behavior. (Porreca [*15] Aff. P 14.) Critically, however, the defendant concedes that it has not conducted an FBA because it disputes the appropriateness of performing such an assessment. (*Id.*) The question before this Court is not the wisdom of the ALJ's order, but whether Audubon has complied with its requirements. In light of Defendant's concession that it has not conducted an FBA, the Court finds that Plaintiff is likely to succeed in proving Audubon's noncompliance with the Behavior Plan Order.

b. The Compensatory Education Order

Plaintiff alleges that Defendant has likewise failed to comply with the second element of the ALJ Order, which required Audubon to provide L.J. with "the sessions of behavior programming he lost during the 2005-2006 school year to be provided by qualified personnel at [Audubon's] expense and this compensatory education be completed within one year" (the "Compensatory Education Order"). *Z.J. and V.J.*, 2006 NJ AGEN LEXIS 833, at *42-43. Defendant does not argue that it has complied with the Compensatory Education Order, but instead explains that it does not understand what ALJ Martone meant when referring to "lost" sessions. (Porreca Aff. P 15.) In Defendant's words, it "cannot implement [*16] what it cannot understand." (*Id.*)

Although the Court agrees with Defendant that the ALJ Order is not clear on the issue of compensatory education, its requirements are not inscrutable. The ALJ found credible the testimony of Ms. Breslyn, who testified that Audubon failed to provide L.J. with the fifteen hours of ABA-related services to which he was entitled each week. *Z.J. and V.J.*, 2006 NJ AGEN LEXIS 833, at *8. Specifically, Ms. Breslyn testified that she recommended to Ms. Porreca that L.J.'s aide provide the five hours of home-based ABA-related services to which L.J. was entitled each week, but, according to Ms. Breslyn, "[t]his was not followed by the school." *Id.* In addition, Ms. Breslyn testified that the remaining ten weekly hours of ABA-related services called for in L.J.'s IEP "were only provided sporadically." *Id.* According to Ms. Breslyn, Audubon's failure to provide ABA-related services in school was in part tied to the fact that the personnel Audubon relied upon to provide such services, including the classroom teacher and the one-on-one aide, were not properly trained. 2006 NJ AGEN LEXIS 833, at *36-37. Judge Martone thus found that the fifteen weekly hours of ABA-related

services called [*17] for in L.J.'s IEP had been "lost" and ordered Audubon to provide fifteen weekly hours of compensatory ABA-related services to make up for the identified failings. 2006 NJ AGEN LEXIS 833, at * 42-43.

Audubon does not claim that it has attempted to provide these "lost" hours, arguing only that the Compensatory Education Order is too vague to be implemented. (Porreca Aff. P 15.) The Court disagrees. Having assessed the requirements of the Order, and the ALJ's underlying findings, and in view of Audubon's acknowledged noncompliance, the Court finds that Plaintiff is likely to succeed in proving that Audubon has not complied with the second requirement of the ALJ Order.

c. The Service Provision Order

Plaintiff alleges that Audubon has also failed to comply with the third paragraph of the ALJ Order, which requires that "[a]t minimum, the level of ABA related services of 15 hours per week as established in the 2005-2006 IEP shall be strictly complied [with] by the school district" and that "[i]f any sessions are missed by therapists because of absences or an other reason, they shall be made up on an immediate basis by the school district at its own expense" (the "Service Provision Order"). *Z.J. and V.J.*, 2006 NJ AGEN LEXIS 833, at *43. [*18] According to Plaintiff, Defendant has failed to document the hours of ABA-related services it has been providing L.J. and, as such, "there is no way of ascertaining whether this provision is being carried out." (Pl.'s Supp. Br. 12.)

Audubon disputes these allegations and argues that it has complied with the Service Provision Order. Ms. Porreca states in her affidavit that Audubon has provided ABA-related services, including "small group instruction, individualized instruction and drills, behavioral programming, [and] teacher, parent and student consultation" during the 2006-2007 school year. (Porreca Aff. P 16.) Ms. Porreca further notes that "to comply with the ALJ's order, minutes of individualized instruction have been logged daily," and that, since the issuance of the Order, L.J.'s "individual minutes, along with small group instruction, behavioral programming, and consultation services currently exceed the 15 hours as set forth in the ALJ's written decision." (*Id.*)

The Court finds that Plaintiff has not shown that he is likely to succeed in proving Defendant's noncompliance with the Service Provision Order. Indeed, Plaintiff's argument does not even appear to allege that Audubon [*19] has failed to provide the services in question, but instead suggests that it is Audubon's burden to prove that the services are in fact being provided. In view of the detailed explanation of Audubon's compliance with the Service Provision Order in Ms. Porreca's affidavit, the Court finds that Plaintiff has failed to establish a reasonable probability of eventual success in proving Audubon's noncompliance on this issue.

d. The IEP Order

Plaintiff finally alleges that Defendant has failed to comply with the fourth paragraph of the ALJ Order, which states that "[t]he IEP shall be revised to set forth goals providing clear benchmarks with related instructional materials and methodologies, and the revised IEP shall include provisions for ongoing parental training to generalize interventions and programs" (the "IEP Order"). *Z.J. and V.J.*, 2006 NJ AGEN LEXIS 833, at *43. According to Plaintiff, ALJ Martone found that L.J.'s 2005-2006 IEP failed to comply with IDEA requirements, in that it failed to set measurable goals or designate parties responsible for their implementation. (Pl.'s Supp. Br. 12.) Plaintiff alleges that the 2006-2007 IEP suffers from similar deficiencies, and thus evidences [*20] Audubon's noncompliance with the IEP Order. (*Id.* at 14.) Specifically, Plaintiff alleges that the 2006-2007 IEP does not specify a training methodology, fails to tailor success criteria to L.J.'s particular needs, fails to designate the parties responsible for implementation, and sets non-observable goals that inhibit the capacity to measure L.J.'s progress. (*Id.*) Plaintiff also contends that the 2006-2007 IEP fails to provide for parental training to "generalize"⁴ the ABA-related work done during school hours, further demonstrating Defendant's noncompliance with the IEP Order. (*Id.* at 15.)

⁴ "Generalization" in this context refers to the process of reinforcing what the child learns in the tightly structured therapeutic environment in less structured settings, such as the home. *See Z.J. and V.J.*, 2006 NJ

AGEN LEXIS 833, at *34-35.

Defendant contests these allegations of noncompliance. Audubon first notes that since Judge Martone issued his order, it has invited L.J.'s parents to two meetings to review and revise L.J.'s IEP. (Porreca Aff. P 17.) Ms. Porreca states in her affidavit that L.J.'s parents attended the first of these meetings on November 21, 2006, "but refused to review or [*21] revise the IEP goals at this time," and that the parents failed to attend the second meeting on December 7, 2006. (*Id.*) Faced with the parents' unwillingness to cooperate, Ms. Porreca states that Audubon "could not afford to wait any longer to develop" L.J.'s IEP, and, accordingly, drafted a new IEP with "[c]larified goals . . . [that] are being implemented." (*Id.*) Additionally, Ms. Porreca states that L.J.'s 2006-2007 IEP provides for a parent clinic in order to "provide and review successful interventions that can be generalized in other settings." (*Id.*)

Having examined L.J.'s 2006-2007 IEP, the Court generally disagrees with Plaintiff that Audubon has failed to comply with the IEP Order. The Court is unpersuaded by Plaintiff's argument that the new IEP fails to "state the methodology to be used to train L.J.," in that the IEP itself belies this claim. (Pl.'s Supp. Br. 14.) For instance, in the section of the IEP that lists L.J.'s academic goals, numerous evaluation criteria are provided, with each objective listing a corresponding evaluation procedure.⁵ (Pl.'s Supp. Br. App. 3.) The IEP also explains a methodology for training interfering behavior out of L.J. in its section on behavior [*22] interventions. (*Id.*) In addressing the target behavior of hand-bending and biting, for example, the IEP lists a clear method that school personnel should use to respond:

1. When hand bending/biting is self-stimulatory it will be ignored and [L.J.] will be re-directed to the activity he was originally completing.

2. When the hand-bending/biting is in response to a demand, [L.J.] will be instructed verbally to "Do this" (with a demonstration of hands on lap) repeatedly, until he complies. He will then be redirected back to the original demand.

(*Id.*) This evidence of training methodologies in the 2006-2007 IEP do not exhibit the noncompliance with the ALJ Order that Plaintiff alleges.

5 For example, under L.J.'s "Reading/Language Arts" goals, the objective that L.J. "will independently type 15 letters of the alphabet with a visual cue" is evaluated by a "percent of trials data" methodology, with 80% success as the goal. (Pl.'s Supp. Br. App. 3.) As another example, under L.J.'s "Health, Safety, and Self-Help" goals, L.J.'s ability to "place a shoehorn and slide his foot into his shoe" is evaluated by a "# of prompts" methodology, with the goal being that L.J. performs the task "with 1 prompt." [*23] (*Id.*)

Moreover, the occupational and speech therapy goals and objectives in the 2006-2007 IEP do not appear to "preclud[e] measurability of any progress," as Plaintiff alleges. (Pl.'s Supp. Br. 14.) The goals in L.J.'s speech therapy program, such as "accept No for an answer and go on to other activities" and "volunteer social greetings without prompting" are not so self-evidently vague as to make measurability impossible. (Pl.'s Supp. Br. App. 3.) Furthermore, the fact that the speech therapy program uses L.J.'s success rate for each goal in order to evaluate his mastery of the objectives indicates that Audubon intends to measure L.J.'s progress. (*Id.*)

Moreover, the record does not indicate that Plaintiff is likely to succeed in showing Defendant's noncompliance with the IEP Order's requirement that Audubon provide "ongoing parental training to generalize interventions and programs." *Z.J. and V.J.*, 2006 NJ AGEN LEXIS 833, at *43. Ms. Porreca describes the parental training and consultation that is provided in L.J.'s 2006-2007 IEP as follows:

[T]he 2006-2007 IEP provides for a parent clinic with L.J.'s team of educators, paraprofessionals, and related service personnel 1x/month to review [*24] current programming, address parental concerns, and provide and review successful interventions that can be generalized in other settings. Moreover, parent consultation is offered 1x/week to address parent concerns and present data review on how L.J. is

performing in his educational program on a weekly basis.

(Porreca Aff. P 17.) There is nothing in the record at this stage to suggest that the clinic and parental consultation provide inadequate training. The Court is particularly disinclined to enjoin Audubon to provide a more robust parental training program in light of the refusal of L.J.'s parents to participate in drafting L.J.'s 2006-2007 IEP in the first place.

The Court does agree with Plaintiff that the 2006-2007 IEP fails to designate parties responsible for implementing the program's various components. To that limited extent, therefore, the Court finds the new IEP to be noncompliant with the IEP Order. Apart from the IEP's failure to identify responsible school personnel, which is an easily-remedied oversight by Defendant, the Court finds that the 2006-2007 IEP complies with the substance of Judge Martone's IEP Order.

2. Irreparable Harm

In order for a court to issue a preliminary [*25] injunction, "a plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial." *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994) (internal quotations and citations omitted). To justify the issuance of such an "extraordinary remedy," *Kos Pharms.*, 369 F.3d at 708 (citation omitted), the moving party must establish that more than "money, time and energy" is at stake in order for the harm to be considered irreparable. *Sampson v. Murray*, 415 U.S. 61, 90, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974).

There can be no doubt that the potential injury Plaintiff has alleged constitutes irreparable harm. Judge Martone found that Audubon had fallen short of its obligations to provide L.J. with a "free appropriate public education," 20 U.S.C. § 1415(a), because L.J.'s 2005-2006 IEP failed to meet his educational and developmental needs. The continuing denial of the educational services to which L.J. is entitled cannot be adequately redressed post-trial because "at the rate at which a child develops and changes . . . a few months can make a world of difference in harm to a child's educational development." *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 121-22 (1st Cir. 2003) [*26] (internal quotations and citations omitted). Taking into account the ALJ's findings regarding the inadequacy of the education Audubon was providing L.J., the Court finds sufficient evidence to show that L.J. will suffer irreparable harm in the absence of an injunction.

3. Harm to the Nonmoving Party

The Court finds that any harm Audubon would experience as a result of complying with the ALJ Order is outweighed by the injury that L.J. would suffer in the absence of an IEP that comports with Judge Martone's requirements. Audubon has not indicated to the Court that it would suffer any injury by complying with the ALJ Order; it has alleged instead that it is generally in compliance and any noncompliance is attributable to its inability to interpret the Order. (Porreca Aff. P 15.) Moreover, Ms. Porreca recognizes in her affidavit that Audubon has an interest in furthering "the best educational interests of L.J." (*Id.*) In other words, the interests of L.J. and Audubon are not antagonistic. Judge Martone determined that L.J.'s educational interests would be best served by following the requirements of his four-part Order. Accordingly, in light of all parties' recognition of the primacy of L.J.'s [*27] educational needs and in the absence of any suggestion that compliance with the ALJ Order would harm Audubon, the Court finds that the balance of hardships weighs in favor of issuing an injunction.

4. Public Interest

As the Court of Appeals for the Third Circuit has noted, "[a]s a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff." *AT&T v. Winback & Conserve Program*, 42 F.3d 1421, 1427 n.8 (3d Cir. 1994). It is undeniably in the public interest for providers of public education to comply with the requirements set out in the IDEA, and if administrative decisions in IDEA cases were unenforceable except after protracted litigation, then a child's right to "a

free appropriate public education" would amount to very little indeed. 20 U.S.C. § 1415(a). The Court therefore finds that it is in the public interest to enforce the ALJ Order in this case to the extent that Audubon's probable non-compliance has been found, above.

5. Summary of Preliminary Injunction Findings

Having assessed the record regarding Audubon's compliance with [*28] the ALJ Order, the Court finds that Plaintiff is likely to prove that Audubon has not complied with the Behavior Plan Order, to the extent that it failed to conduct an FBA, and will enjoin Audubon to conduct an FBA and incorporate it into L.J.'s IEP. The Court further finds that Plaintiff has shown that Audubon has not complied with the Compensatory Education Order, since it has failed to provide the fifteen weekly hours of compensatory ABA-related services that Judge Martone called for, and the Court accordingly will order Audubon to provide such services. Additionally, the Court finds that L.J.'s IEP does not identify the school personnel responsible for implementing the program's various components, and directs Audubon to make appropriate designations within the IEP so as to conform with Judge Martone's Order. The Court finds that Plaintiff has failed to establish his likelihood of proving the remainder of his allegations of noncompliance, and as to those, Plaintiff's motion for preliminary injunctive relief will be denied.

B. Contempt

Plaintiff has moved that the Court hold Audubon in contempt for its alleged noncompliance with the ALJ Order. (Pl.'s Br. 7.) Plaintiff argues that [*29] Audubon's conduct following the issuance of the ALJ Order amounts to contempt because Judge Martone's decision constituted a valid court order of which Audubon had knowledge and Audubon nonetheless failed to comply with that order's terms. (*Id.* at 8.) Plaintiff further argues that because willfulness is not necessary to a finding of contempt, any good faith effort on Audubon's part to comply with the ALJ Order is irrelevant if it ultimately failed to comply. (*Id.*)

1. Lack of Authority to Entertain Contempt of Another Forum's Order

The Court will deny Plaintiff's motion to hold Defendant in contempt. First and most critically, the Court notes that it does not have the authority to hold a party in contempt of another tribunal's orders, because "[c]ontempt proceedings, whether civil or criminal, must be brought in the court that was allegedly defied by a contumacious act." Fed. R. Civ. P. 4.1, Notes of Advisory Committee; *see also International Union, UMW v. Bagwell*, 512 U.S. 821, 829, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994) ("civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct"); *Gray v. Petoseed Co.*, 985 F. Supp. 625, 631-32 n.6 (D.S.C. 1996) [*30] (citing additional cases). Accordingly, the inherent authority of this Court to redress violations of its own orders through civil contempt does not extend to violations of orders of an Administrative Law Judge entered in a different forum.

2. Lack of Merit of Contempt Motion

Even assuming the Court had the authority to hold Audubon in contempt of Judge Martone's order, however, it would not do so in this case. "To prove civil contempt the court must find that (1) a valid court order existed, (2) the defendant had knowledge of the order, and (3) the defendant disobeyed the order." *John T. ex rel. Paul T. v. Delaware County Intermediate Unit*, 318 F.3d 545, 552 (3d Cir. 2003) (citation omitted). These three elements must be proven by clear and convincing evidence, a "high evidentiary standard," and any "ambiguities must be resolved in favor of the party charged with contempt." *Id.* (internal quotations omitted); *see also Robin Woods Inc. v. Woods*, 28 F.3d 396, 399 (3d Cir. 1994) ("where there is ground to doubt the wrongfulness of the conduct, [the alleged contemnor] should not be adjudged in contempt"). Although "[w]illfulness is not a necessary element of civil contempt," *John T.*, 318 F.3d at 552 [*31] (citation omitted), "[c]ontemnors . . . are sometimes excused when they violate vague court orders." *Robin Woods*, 28 F.3d at 399. This is because of the "longstanding salutary rule in contempt cases that ambiguities and omissions in orders redound to the benefit of the person charged with the contempt." *Id.* (citation omitted).

In this case, it is evident, and indeed Audubon admits, that a valid order existed, that Audubon knew of the order, and that it has not entirely complied with the order. (Porreca Aff. P 15.) Nonetheless, Audubon has argued, and the Court agrees, that the provisions of the order with which Audubon has failed to comply are not unambiguously clear from Judge Martone's decision. Audubon sought clarification from Judge Martone, which was denied. Audubon argues that it complied with the Behavior Plan Order because it instituted a behavior intervention plan, but that it was not required to conduct an FBA because Judge Martone's final Order made no express reference to an FBA. *See Z.J. and V.J.*, 2006 NJ AGEN LEXIS 833, at *42 ("The petitioners' request that the previously identified interfering behaviors be adequately addressed by a positive behavioral plan shall be required. [*32] Based on the testimony of Mr. DiNovi, a qualified behavior specialist shall monitor and adjust the plan."). Although, as detailed *supra*, the Court disagrees with Audubon's interpretation of the Behavior Plan Order, it is clear that the Order does not expressly direct Audubon to conduct an FBA. Likewise, while the Court is confident that it has correctly interpreted the Compensatory Education Order, Audubon's admission that it was "confused as to [the Order's] meaning" and its allegation that, when asked, L.J.'s parents "had no explanation" as to the requirements of the Order suggest that those requirements were not unambiguously clear. (Porreca Aff. P 15.)

Moreover, the Court's examination of L.J.'s 2006-2007 IEP reveals that Audubon has largely complied with those provisions of the ALJ Order that are not ambiguous. Audubon's compliance with the Order's straightforward requirements provides further support for the likelihood that its noncompliance with the more ambiguous requirements is more attributable to the Order's vagueness than to wrongfulness on Audubon's part. In view of the fact that "ambiguities and omissions in orders redound to the benefit of the person charged with the [*33] contempt," *Robin Woods*, 28 F.3d at 399 (citation omitted), Plaintiffs have failed to prove, by clear and convincing evidence, that Defendant has acted in contempt of Judge Martone's decision.

Moreover, since civil contempt is an equitable remedy, the efforts of the movant to secure the alleged contemnor's compliance with the order must also be weighed; indeed, a movant's unclean hands can be a basis for denying the remedy of civil contempt. *See Trs. of the Buffalo Laborers' Pension Fund v. Accent Stripe, Inc.*, No. 01-CV-76C, 2007 U.S. Dist. LEXIS 38035, at *16, 2007 WL 1540267 (W.D.N.Y. May 24, 2007). Here, the parents have failed to use reasonable efforts to formulate a mutually satisfactory, compliant IEP. By failing to meaningfully participate in the first IEP meeting and refusing to even attend the follow-up IEP meeting for 2006-2007, as noted above, the parents left to the school officials the matter of converting the ALJ's unclear directives into a concrete IEP. The parents should not skip participation in the IEP formulation meetings and then urge the Court to impose the extraordinary remedy of contempt when the resulting IEP does not conform to their expectations, especially in a rather close case [*34] such as this one.

3. Conclusions Regarding Contempt Motion

In conclusion, the Court holds that it lacks authority to impose a civil contempt remedy for violation of the order of an Administrative Law Judge. Even if such authority existed, Plaintiffs have not established Defendant's contempt of the ALJ's Order in light of Plaintiffs' own failure to meaningfully participate in the formulation of the resulting IEP for 2006-2007, and the unclarity of the decidual terms of the ALJ's Order, and Defendant's compliance with terms that were not unclear.

III. CONCLUSION

For the reasons discussed above, the Court grants in part Plaintiff's motion for a preliminary injunction, and directs Defendant (1) to conduct an FBA and incorporate it into L.J.'s IEP, (2) to provide L.J. with the fifteen weekly hours of compensatory ABA-related services that the ALJ Order called for, and (3) to designate the school personnel responsible for implementing the IEP's components. The Court denies the remainder of relief Plaintiff seeks, and denies Plaintiff's motion for contempt.

The accompanying Order will be entered.

November 5, 2007

Date

s/ Jerome B. Simandle

JEROME B. SIMANDLE

United States District Judge

ORDER

This matter [*35] having come before the Court on the motion [**Docket Item 5**] of Plaintiff for a preliminary injunction ordering Defendant to comply with the **October 23, 2006** decision of ALJ Martone and for an order holding Defendant in contempt of ALJ Martone's decision; the Court having considered the submissions of the parties in support thereof and opposition thereto; for the reasons explained in the Opinion of today's date which constitutes this Court's findings of fact and conclusions of law pursuant to Rule 52(a), Fed. R. Civ. P.; and for good cause shown;

IT IS this **5th** day of **November, 2007** hereby

ORDERED that Plaintiff's motion for preliminary injunctive relief shall be and hereby is **GRANTED in part and DENIED in part** as follows:

1. Defendant shall conduct a functional behavioral assessment of L.J. and incorporate this assessment into L.J.'s individualized education program (IEP) as called for in ALJ Martone's order;
2. Defendant shall provide L.J. with compensatory education in the form of fifteen hours of ABA-related services each week in accordance with ALJ Martone's order;
3. Defendant shall designate in L.J.'s individualized education program the school personnel who are responsible for implementing [*36] the program's provisions; and
4. The remainder of the relief requested in Plaintiff's preliminary injunction motion will be **DENIED**; and

IT IS FURTHER ORDERED that Plaintiff's motion for an order holding Defendant in contempt of ALJ Martone's October 23, 2006 decision shall be, and hereby is, **DENIED**.

s/ Jerome B. Simandle

JEROME B. SIMANDLE

United States District Judge