UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NIKITA PETTIES, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 95-0148 (PLF)
THE DISTRICT OF COLUMBIA, et al.,	)	
Defendants.	)	

OPINION AND ORDER

This matter is before the Court on plaintiffs' motion for a preliminary injunction. Defendants opposed the motion, and the Court heard oral argument on February 17, 2009. Plaintiffs, minor students eligible for special education and their parents, seek to enjoin defendants from terminating payment for special education and related services, including transportation, for any class member whose residency in the District of Columbia has not been verified, until the class member has the opportunity to complete an administrative appeal. Plaintiffs also seek to require defendants to recognize class counsel's appeal of the class members' residency. The Court has carefully considered the parties' arguments and the entire record in the case, and has determined that plaintiffs are not entitled to a preliminary injunction.[1]

[1] The papers submitted in connection with this motion include: Plaintiffs' Motion for a Preliminary Injunction ("Mot."); Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction ("Opp."); Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction ("Rep."); the exhibits, affidavits, and declarations submitted therewith; the Second Declaration of Milo A. Howard ("Second Howard Decl."), filed February 18, 2009; and the Declaration of Anne Gay ("Gay Decl."), filed February 19, 2009. In addition, the Court has considered Plaintiffs' Motion to Compel Defendants to Provide Residency Information, and Defendants' Opposition to Plaintiffs' Motion to Compel the District to Provide

I. BACKGROUND

A. A Brief History of the Case

Plaintiffs filed this class action lawsuit fourteen years ago because the District of Columbia Public Schools ("DCPS") had consistently failed to pay the costs of special education placements or related services to private providers, either fully or on a current or timely basis as required under the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 et seq. As a result of this failure, many of the private providers threatened to terminate the students' placements. On March 17, 1995, the Court granted plaintiffs' motion for a preliminary injunction, finding that "unless defendants fully and immediately fund all DCPS students currently in private special education placements and/or receiving related services from private providers and, in addition, give adequate written assurances that such payments will be made on a current basis in the future, many, if not all of those students will have those placements and/or services terminated, and there is no indication that appropriate alternative placements will be available to meet the students' individual needs." Petties v. District of Columbia, 881 F. Supp. 63, 64 (D.D.C. 1995).[2]

Residency Information.

[2] That same day the Court certified a plaintiff class, defined as follows:

> all [DCPS] students currently placed in private special education schools or receiving special education and/or related services from a private third party provider, all [DCPS] students who currently are receiving related services from private providers, and all [DCPS] students who have been determined by an administrative decision or by agreement with the DCPS to be eligible to receive services from private providers (including private placements).

Petties v. District of Columbia, 881 F. Supp. at 64. On July 21, 1995, the Court modified the

As the Court explained then, the purpose of the IDEA is to ensure that children with disabilities have available to them a free and appropriate public education that addresses their unique needs. Petties v. District of Columbia, 881 F.Supp. at 65; see 20 U.S.C. §§ 1400 et seq. To ensure 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. See 20 U.S.C. § 1414(d). 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 education-related services provided by private organizations to supplement a public placement. See 20 U.S.C. § 1412(a)(10); 34 C.F.R. §§ 300.104, 300.325.

The Court concluded that DCPS's failure to pay providers, and the resulting risk to the children's placements, violated the IDEA and its implementing regulations. See Petties v. District of Columbia, 881 F. Supp. at 65. The Court expressly held that "the IDEA prohibits the DCPS from making unilateral changes in placements or provision of related services by failing to pay timely or fully. Failing to make payments in whole or in part or cutting off funds for special education programs amounts to a unilateral change in students' placement, which is prohibited by the IDEA." Id. at 66 (citing Zvi D. by Shirley D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982)).

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preliminary injunction and class certification specifically to include all DCPS students with disabilities whose private special education placements and/or related services are funded by the District of Columbia Department of Human Services. See Petties v. District of Columbia, 894 F. Supp. 465, 469 (D.D.C. 1995).

In the circumstances presented at that time, the Court determined that, "continued late and partial payments of tuition and for related services by the DCPS will lead to unilateral changes in students' placements. In these circumstances, there is no question that the plaintiffs have a strong likelihood — indeed, a virtual certainty — of success on the merits. Simply put, 'the right . . . to receive a free appropriate education . . . cannot be constricted by monetary limitations.'" Petties v. District of Columbia, 881 F. Supp. at 66-67 (quoting Cox v. Brown, 498 F. Supp. 823, 830 (D.D.C. 1980) and citing Fisher v. District of Columbia, 828 F. Supp. 87, 88-89 (D.D.C. 1993)). Seven years later, the Court had to remind DCPS that such unilateral changes in placement without notice and hearing (when requested) is a clear violation of the IDEA. See Petties v. District of Columbia, 238 F. Supp. 2d 88, 94, 97 (D.D.C. 2002). Plaintiffs see the current dispute as more of the same on the part of DCPS; the District views it very differently.

B. Current Circumstances

The District of Columbia Code requires that in order for a student to enroll in a District of Columbia public school, a District of Columbia public charter school, or to otherwise receive educational services paid for by the District, the student must provide proof of residency in the District every year. See D.C. CODE § 38-306; see also D.C. CODE § 38-308(a) ("Residency status shall be re-established annually."). Typically, the student's parent or guardian (unless the student is an adult) would submit appropriate paperwork establishing residency at the student's local school. See D.C. CODE § 38-309(a). For students who attend nonpublic schools, however, the District requires the student's parent or guardian to bring residency documentation to the Office of Student Residency Verification, located at 825 North Capitol Street, N.E. See

Mot., Ex. 1 ("Nov. 13, 2008 Letter") at 1. If a parent or guardian does not fulfill this obligation on his or her own, the District typically sends a letter reminding him or her to do so and advising that the District will cancel tuition payments and transportation for the child if residency is not established. For the current school year, DCPS sent such a letter to parents and guardians of students attending nonpublic schools at District expense on October 14, 2008. See Second Howard Decl. ¶ 2. It sent a second such reminder letter on November 13, 2008. See Nov. 13, 2008 Letter. As counsel for DCPS represented at oral argument, it is the District's practice to send such letters to the parent's or guardian's last known address. Students who are wards of the District are not required to prove residency. See D.C. CODE § 38-307; D.C. MUN. REG. § 5-2000.2(c).

If the documentation submitted by a parent or guardian is insufficient to establish residency, District of Columbia regulations provide that the parent or guardian must be given written notice of the denial of resident status and be provided with information about the procedure for obtaining a review of the residency determination. See D.C. MUN. REG. § 5-2009.2. After a process of fact-finding, interviews and discussion with the parties, DCPS issues a final determination on the student's residency. See id. at §§ 5-2009.5-2009.6 ; see also D.C. CODE § 38-311.

Plaintiffs' class counsel bring this motion for a preliminary injunction on behalf of a group of special needs students (in their view a subset of the Petties class) with IEP's and placements in nonpublic schools who DCPS believes have not established residency. After DCPS sent their second reminder letter to parents and guardians regarding the residency requirements on November 13, 2008, plaintiffs' class counsel notified defendants that they

wished to resolve the disputed residency concerns informally and that they were appealing the prospective funding termination. See Mot., Ex. 2 ("Nov. 26, 2008 Letter") at 1.[3] Defendants responded that plaintiffs' class counsel had not brought a valid appeal on behalf of unidentified students or their parents or guardians, in part because "the issue of residency verification [is not] implicated in the Petties Litigation." See Mot., Ex. 4 ("Dec. 2, 2008 Email") at 1.

On January 2, 2009, DCPS sent a letter to certain nonpublic providers with a listing of their students who had not verified residency, notifying the providers that if the parents or guardians did not submit proof of residency or file a valid appeal by January 12, 2009, the District would begin the procedures necessary to discontinue funding and transportation for those students. See Mot., Ex. 7 ("Jan. 2, 2009 Letter") at 1. In response to subsequent communications by plaintiffs' class counsel, DCPS extended this deadline and represented that it would not terminate payments for any class members until January 28, 2009. See Mot., Ex. 9 ("Jan. 16, 2009 Letter").

When plaintiffs' class counsel filed the current motion on January 27, 2009, plaintiffs believed that approximately 467 class members were at risk of losing their placements because of their failure to verify residency. See Mot. at 4. DCPS subsequently represented that the number of students whose residency had not been proven had been reduced to 220. See Opp. at 1 n.1. Following the District's agreement that it would delay terminating funding for any student's special education, related services or transportation until February 18, 2009, the parties agreed to a briefing schedule. See Petties v. District of Columbia, Civil Action No. 95-0148,

[3] The parties agree that historically plaintiffs' class counsel, the District and the Special Master have at times worked to resolve cases of disputed residency informally.

Minute Order (D.D.C. Feb. 5, 2009). At oral argument on February 17, 2009, the District represented that it would not begin terminating any payments until February 20, 2009. See also Letter of February 2, 2009 from Milo A. Howard to Non-Public School Administrator ("Feb. 2, 2009 Letter") (provided to the Court and opposing counsel at February 17, 2009 hearing); Second Howard Decl., Ex. A ("Feb. 18, 2009 Letter").

II. DISCUSSION

A. Standard for a Preliminary Injunction

In deciding whether to grant emergency injunctive relief, the Court must consider (1) whether there is a substantial likelihood that plaintiffs will succeed on the merits of the case, (2) whether plaintiffs will suffer irreparable injury absent an injunction, (3) the harm to defendants or other interested parties (balance of harms), and (4) whether an injunction would be in the public interest or at least not be adverse to the public interest. See Al-Fayed v. CIA, 254 F.3d 300, 303 (D.C. Cir. 2001); Sea Containers Ltd. v. Stena AB, 890 F.2d 1205, 1208 (D.C. Cir. 1989); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Milk Industry Foundation v. Glickman, 949 F. Supp. 882, 888 (D.D.C. 1996).

Plaintiffs are not required to prevail on each of these factors. Rather, under Holiday Tours, the factors must be viewed as a continuum, with more of one factor compensating for less of another. See Serono Labs, Inc. v. Shalala, 158 F.3d 1313, 1318 (D.C. Cir. 1998). "If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak." CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir.1995). An injunction may be justified "where there is a particularly

strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury." Id. Conversely, when the other three factors strongly favor interim relief, a court may grant injunctive relief when the moving party has merely made out a "substantial" case on the merits. The necessary level or degree of likelihood of success that must be shown will vary according to the Court's assessment of the other factors. Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d at 843-45. In sum, an injunction may be issued "with either a high probability of success and some injury, or vice versa." Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985).

B. Substantial Likelihood of Success on the Merits

Plaintiffs argue that if DCPS determines that a student has failed to prove residency and on that basis terminates funding for the student's nonpublic school placement and related services, if that decision is in error, the District will have unilaterally altered the student's placement in violation of the IDEA and numerous earlier orders in this case. This argument presents something of a chicken-and-egg question — the parties agree, and it seems plain to the Court, that if a child is truly not a resident of the District of Columbia, the District is not required to provide the child with free educational services under District of Columbia law. See D.C. CODE § 38-302(a). If a child is not entitled to the provision of free educational services by the District, the child is not entitled to a free and appropriate public education in the District of Columbia under the IDEA, and therefore presumably is not a member of the Petties class. If the child has a valid IEP, however, the District may not unilaterally alter the placement. See supra at 2-4. The issues related to plaintiffs' motion for a preliminary injunction occur in a kind of

middle ground — the children at issue were at one time (and may still be) District of Columbia residents with valid IEP's and they therefore have existing placements in nonpublic schools, but their parents or guardians have not fulfilled the legal requirement of providing annual proof of residence in order to maintain the child's right to educational services from the District.

If DCPS had a functional record keeping system for student contact information in which all interested parties had confidence, the vast majority of the concerns underlying plaintiffs' motion would be dispelled. Plaintiffs do not contest DCPS's right to terminate funding for children who are no longer residents of the District of Columbia; instead they argue that DCPS is likely to terminate funding mistakenly for a large number of children who in fact are residents — in some cases because these children are wards of the District of Columbia (in which case they do not have a legal obligation to establish residency, see D.C. CODE § 38-307; D.C. MUN. REG. § 5-2000.2(c)); in some cases because their parents or guardians never received the letters sent by DCPS reminding them to verify residency (probably because DCPS sent the notice to an outdated address); and in some cases because the parents or guardians simply chose not to make the effort to establish the child's residency. Plaintiffs' concerns are not unfounded — DCPS's initial list of 467 students whose residency was unproven mistakenly contained students who were wards of the District of Columbia, see Mot. at 9 (citing Mot., Exs. 10-15); the District has not provided an explanation for the decrease in the number of names on the list from 467 to 220, other than that the first list was not a "final 'cut' list." Opp. at 4 (citing Opp., Ex. 1 ("First Howard Decl.") ¶ 4); and at oral argument counsel for the District was unable to estimate how many letters sent to last known addresses were returned because the parent or guardian no

longer resided at that address.[4] See also Gay Decl. ¶ 12.

While the Court shares plaintiffs' concerns about the adequacy of DCPS's record keeping and the probability that many mistakes have been made during the notification process, the Court believes that the procedures described by counsel for DCPS in the papers submitted to the Court, at oral argument, and in the Second Declaration of Milo Howard provide adequate safeguards against widespread termination of funding for students who are D.C. residents. DCPS has contacted the nonpublic provider schools to determine whether any of the students remaining on its list are wards based on the schools' records. See February 2, 2009 Letter. On February 18, 2009, DCPS sent another letter to nonpublic providers asking them to contact parents or guardians of any students who had not yet proven residency and urging them promptly to provide DCPS with proof of District of Columbia residency. See Second Howard Decl. ¶ 4; Feb. 18, 2009 Letter. The Court fully expects that this method of contacting parents through the providers will be more successful than DCPS's attempt to contact certain parents and guardians directly at their last known addresses. The schools presumably have frequent contact with their students, and they are more likely to have current contact information for the students' parents or guardians. In addition, the nonpublic providers have a financial incentive to ensure that the students' residency is verified, namely, continued tuition payments.

On the secondary issue presented by the parties, plaintiffs also have not persuaded the Court at this point that they are substantially likely to succeed in showing that plaintiffs' class

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[4] Mr. Howard, in his second declaration, states that "[s]everal letters were returned because of wrong addresses" after the October 14, 2008 mailing, and that he contacted schools in an attempt to get more current address information before sending the November letter. Second Howard Decl. ¶ 3.

counsel have a procedurally proper "appeal" pending on behalf of all students whose residency has not been proven. District regulations require a student's parent or guardian to submit information proving residency. See D.C. CODE § 38-306. If the District determines that the documentation is inadequate and contests the student's residency, the regulations then provide for an appeal by the parent or guardian. See D.C. CODE 38-311(a); D.C. MUN. REG. § 5-2009. Plaintiffs have not established that it is substantially likely that they will be able to demonstrate that parents or guardians may avoid this requirement, through the activities of class counsel, by filing a blanket appeal without first participating in the required residency verification process.

For these reasons, the Court finds that plaintiffs have not shown a likelihood of success on the merits with respect to the issues raised in their motion.

C. Irreparable Harm

As the Court has held in the past, if the District unilaterally changes a student's valid placement without either the parent's agreement or a determination in an administrative due process hearing that a change in placement is appropriate under the IDEA, the student will be irreparably harmed. See, e.g., Petties v. District of Columbia, 238 F. Supp. 2d at 97-99. The Court is not persuaded, however, that plaintiffs have shown that such harm will occur or is likely to occur in the circumstances presented in the current motion. For the reasons discussed above, the Court is persuaded that DCPS is engaging in reasonable efforts to ensure that students who are actually residents of the District of Columbia will not have their educational funding mistakenly terminated.

Once DCPS begins the process of terminating funding for students who it concludes have not verified their residency in the District of Columbia, additional measures exist to protect students who are, in fact, residents. As Mr. Howard explains in his second declaration, if a parent or guardian proves a student's residency in the District of Columbia after February 20, 2009, DCPS will restore funding for special education and related services required by the student's IEP on that date. See Second Howard Decl. ¶ 5. If the parent or guardian attempts to prove that the student is a resident of the District of Columbia on or before February 20, 2009, but DCPS determines that the documents presented are insufficient or that the child is not in fact a resident of the District of Columbia, the parent or guardian will have a right to appeal and termination of funding will be stayed pending appeal. See id. ¶ 6. DCPS does not intend to stay the termination of funding if the parent's or guardian's attempt to prove residency after February 20, 2009 is unsuccessful, and the parent or guardian pursues an appeal. See id. ¶ 7.[5] If the parent or guardian is successful on appeal, however, DCPS will restore funding retroactive to February 20, 2009. See id.

In addition, during oral argument, counsel for the District explained that because of existing payment schedules, providers will receive notice of imminent funding termination on February 20, 2009, nearly one month before DCPS is required to send its next payment checks to providers. This lag should give schools adequate time to contact parents and guardians who, to date, have either not been notified or have been tardy in complying with the legal requirements to

[5] The Court notes, however, that District regulations require that if the District contests a currently enrolled student's residency and is engaged with the parent or guardian in the appeals process, the student will be "allowed to continue to attend school without the prepayment of tuition pending the final administrative decision by D.C. Public Schools." D.C. MUN. REG. § 5-2009.7.

prove residency, and encourage them to submit the required documentation promptly.

Without a showing of either substantial likelihood of success or irreparable injury, plaintiffs' motion cannot succeed. The Court therefore need not engage in a lengthy discussion of the balance of harms and the public interest, other than to note that the District and the public have an interest in not having District of Columbia funds used to pay for the education of students who are not in fact residents of the District.

Plaintiffs' motion for a preliminary injunction is hereby DENIED.

SO ORDERED.

__/s/_____
PAUL L. FRIEDMAN
United States District Judge

DATE: February 19, 2009