

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
SEP 27 2001
JAMES W. McCORMACK, CLERK
By: _____ PLAINTIFFS
DEP CLERK

DAVID BRADLEY, et. al.

VS.

NO:4:96CV1004
4:00CV00747

ARKANSAS DEPARTMENT OF EDUCATION, et. al.

DEFENDANTS

ORDER

Pending are Plaintiffs' motion for determination of class action under Federal Rule of Civil Procedure 23(c)(1) (docket #91) and Plaintiffs' motion for reconsideration (docket # 117). The Defendants have responded. Following a hearing held in this matter September 19, 2001, the Court finds that Plaintiffs' motion for reconsideration should be, and hereby is granted in part and denied in part. Plaintiffs' motion for class certification, as set forth herein, is granted in part and denied in part.

Facts

Plaintiffs' motion for class certification requests that the Court certify the two following classes of persons:

- (1) All school-age children with disabilities and their parents, guardians and next friends who have been, are being or will be denied
 - (a) their right to a decision of their due process complaint within 45 days;
 - (b) the opportunity to confront, cross examine and compel the attendance of witnesses at the due process hearing; or
 - (c) their right to an impartial hearing.

- (2) All high school, junior high school, middle school, or late primary school-age children, as well their parents, guardians and next friends who have been identified as having autism, Asperger's Syndrome, or Pervasive Developmental Disorder (PDD), or a

disability with characteristics similar to autism, and who have strong cognitive abilities, but who have been, are being or will be denied an education which

(a) is both appropriate and integrated, as to both academic and extracurricular activities;

(b) provides for participation and progress in the general curriculum; and

(c) utilizes promising and proven educational practices.

On June 8, 2001 this Court entered an order denying Plaintiffs' motion for class certification with respect to the substantive class (that class identified in #2 above). The Court requested the parties present evidence with regard to the procedural class (that class identified in #1 above). Plaintiffs subsequently filed a motion to reconsider the Court's denial of the substantive class.

As proposed representative of both classes, Plaintiffs state that they have met the prerequisites of Rule 23(a): "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

Plaintiffs goes on to say that they have met the requirements of 23(b)(2) because the Defendants have policies of denying procedural safeguards to children with disabilities and meaningful, integrated education to children with autism and related disabilities, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Fed. R. Civ. P. 23(b)(2).

Substantive Class

With regard to the proposed substantive class, the Court previously held that the Plaintiffs failed to satisfy the commonality and typicality requirements of Rule 23(a). In response to the

Court's ruling Plaintiffs state that the common thread applicable to this class is that the State Defendants have failed to have in effect a comprehensive system of personnel development that is designed to ensure an adequate supply of qualified special education and regular education personnel, failed to acquire and disseminate significant knowledge derived from educational research and other sources and failed to adopt promising practices, materials and technology.

The Plaintiffs presented evidence that the current state system is inadequate to meet the needs of the proposed class and that the proposed class totals approximately 766. Plaintiffs seek declaratory and injunctive relief on behalf of the proposed class members. Although Defendants responded with evidence concerning the appropriateness and effectiveness of the state system, Defendants did not present evidence contradicting the elements necessary for class certification.

Based upon the evidence presented and the relief sought, the Court concludes that a review of each class member's individual education plan will not be necessary. The issue at trial will be whether the State met the requirements of the IDEA with regard to the adoption and dissemination of promising educational practices designed to ensure a free appropriate public education by the class members defined herein.

The Court finds that Plaintiffs have met all four requirements of Rule 23(a). The class, as defined by Plaintiffs, includes:

All high school, junior high school, middle school, or late primary school-age children, as well their parents, guardians and next friends who have been identified as having autism, Asperger's Syndrome, or Pervasive Developmental Disorder (PDD), or a disability with characteristics similar to autism, and who have strong cognitive abilities, but who have been, are being or will be denied an education which

(a) is both appropriate and integrated, as to both academic and extracurricular activities;

(b) provides for participation and progress in the general curriculum; and

(c) utilizes promising and proven educational practices.

The numerosity requirement of Rule 23(a)(1) requires an inquiry into whether the class is “so numerous that joinder of all members is impracticable.” The evidence presented to the Court indicates that the proposed class totals approximately 766. This number is certainly sufficient to meet the requirement of numerosity.

Rule 23(a)(2) requires that there be common questions of law or fact among the members of the class. This element may be satisfied “where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated.” *Paxton v. Union National Bank*, 688 F. 2d 552,561 (8th Cir. 1982). The commonality requirement is satisfied because the following issue pervades all the class members’ claims: whether the State met the requirements of the IDEA with regard to the adoption and dissemination of promising educational practices designed to ensure a free appropriate public education by the class members defined herein.

Rule 23(a)(3) requires that “the claims or defenses of the representative parties (be) typical of the claims or defenses of the class.” The Eighth Circuit has interpreted typicality to mean that there are “other members of the class who have the same or similar grievances as the plaintiff”. *Christina A. v. Bloomberg*, 197 F.R.D. 664,668 (S.D.S.D. 2000). The Plaintiffs have met this requirement. Plaintiffs presented evidence to the Court that the current state system is failing to meet the educational requirements of the proposed class. Plaintiffs offered testimony that the State Defendants have failed to have in effect a comprehensive system of personnel development that is designed to ensure an adequate supply of qualified special education and regular education personnel, failed to acquire and disseminate significant knowledge derived from educational research and other sources and failed to adopt promising practices, materials

and technology.

The Court is satisfied that the class representatives have common interests with the members of the class and that the class representatives will vigorously prosecute the interests of the class through qualified counsel. Therefore, the requirements of Rule 23(a)(4) have been met. Further, the Court finds that Rule 23(b)(2) certification is appropriate. Plaintiffs seek injunctive and declaratory relief to cure the alleged violations.

The Court also finds that the Plaintiffs are entitled to an exemption from the exhaustion of administrative remedies requirement. Although failure to exhaust may deprive a district court of subject matter jurisdiction, the exhaustion requirement is not absolute. Exhaustion is not required "where it would be futile or the state administrative system would be inadequate". *See Garro v. State of Connecticut*, 23 F.3d 734, 737 (2d Cir. 1994) and *Doe v. Maher*, 793 F. 2d 1470 (9th Cir., 1986), cert. granted on other grounds, 107 S. Ct. 1284 (1987)(exhaustion not required where the administrative relief would be futile or inadequate). Plaintiffs seek to remedy alleged system wide violations of the IDEA. The Court finds that it is improbable if not impossible for adequate relief to be obtained by pursuing administrative remedies. If the administrative procedure is incapable of offering a remedy for a party's complaint and is incapable of addressing the issues presented by a party's claim, exhaustion is not required. *Mrs. W. v. Tirozzi*, 832 F. 2d 748 (2d Cir. 1987).

For the reasons set forth above, the Court finds that Plaintiffs motion to certify the proposed substantive class should be and hereby is granted.

Procedural Class

Plaintiffs define the proposed procedural class as follows:

- (1) All school-age children with disabilities and their parents, guardians and next friends who have been, are being or will be denied
 - (a) their right to a decision of their due process complaint within 45 days;
 - (b) the opportunity to confront, cross examine and compel the attendance of witnesses at the due process hearing; or
 - (c) their right to an impartial hearing.

In support of this class, Plaintiffs submitted numerous documents identifying those individuals who had allegedly been denied their right to a decision of their due process complaint within 45 days. Plaintiffs presented no evidence to support the maintenance of a class on behalf of individuals denied the opportunity to confront, cross examine and compel the attendance of witnesses at the due process hearing or their right to an impartial hearing. As such, the Court will deny Plaintiffs request to certify a class based upon these alleged violations of the proposed class members rights. The Court will limit its inquiry into the proposed class allegedly denied their right to a decision of their due process complaint within 45 days.

Plaintiffs have presented evidence that approximately 26 violations have occurred. The State contends these 26 alleged violations represent only 20 individual students, 7 of whom have pursued litigation individually. However, Plaintiffs also include in this class those individuals who will in the future be denied their right to a decision of their due process complaint within 45 days. No arbitrary rules regarding the necessary size of classes have been established. *Boyd v. Ozark Air Lines, Inc.*, 568 F. 2d 50, 54 (8th Cir. 1977). In addition, Plaintiffs' complaint seeks to remedy alleged systematic violations. The Court finds that joinder of the members of this class is impracticable. None of the individual members could obtain the broad based injunctive or declaratory relief that the class representatives seek. Therefore, the Court concludes that Plaintiffs have met the numerosity requirement.

The Court finds that the Plaintiffs have presented sufficient evidence to satisfy the remaining requirements for class certification. Plaintiffs have demonstrated common questions of law and fact exist among the members of the class and that other members of the class have the same or similar grievances as the Plaintiffs. For the reasons stated above, the Court finds that the Plaintiffs have satisfied the requirements of Rule 23 (a)(4) and Rule 23(b)(2). Further, Plaintiffs are entitled to an exemption from the exhaustion requirement for the reasons set forth herein. As such, Plaintiffs' motion to certify the procedural class, as defined below, should be and hereby is granted. Plaintiffs motion to certify the procedural class of all school-age children with disabilities and their parents, guardians and next friends who have been, are being or will be denied the opportunity to confront, cross examine and compel the attendance of witnesses at the due process hearing or their right to an impartial hearing is denied.

Conclusion

For the reasons set forth herein, Plaintiffs' motion for determination of class action under Federal Rule of Civil Procedure 23(c)(1) (docket #91) and Plaintiffs' motion for reconsideration (docket # 117) are granted in part and denied in part. The Court hereby certifies the following classes of individuals:

(1) All school-age children with disabilities and their parents, guardians and next friends who have been, are being or will be denied
(a) their right to a decision of their due process complaint within 45 days.

(2) All high school, junior high school, middle school, or late primary school-age children, as well their parents, guardians and next friends who have been identified as having autism, Asperger's Syndrome, or Pervasive Developmental Disorder (PDD), or a disability with characteristics similar to autism, and who have strong cognitive abilities, but who have been, are being or will be denied an education which

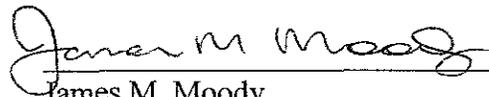
(a) is both appropriate and integrated, as to both academic and

extracurricular activities;

- (b) provides for participation and progress in the general curriculum; and
- (c) utilizes promising and proven educational practices.

Plaintiffs motion to certify the procedural class of all school-age children with disabilities and their parents, guardians and next friends who have been, are being or will be denied the opportunity to confront, cross examine and compel the attendance of witnesses at the due process hearing or their right to an impartial hearing is denied.

IT IS SO ORDERED this 27 day of September, 2001.



James M. Moody

United States District Judge

THIS DOCUMENT ENTERED ON
DOCKET SHEET IN COMPLIANCE
WITH RULE 58 AND/OR 79(a) FRCP
ON 9/28/01 BY ah

ah

UNITED STATES DISTRICT COURT
Eastern District of Arkansas
U.S. Court House
600 West Capitol, Suite 402
Little Rock, Arkansas 72201-3325

September 28, 2001

* * MAILING CERTIFICATE OF CLERK * *

Re: 4:96-cv-01004.

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Date: 9/28/01 _____

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