T.I. v. Delia
JI-WA-001-023

CIVIL TRACK I

THE HONORABLE ROBERT E. DIXON

SEATTLE, WA.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

T.I., et al., Plaintiffs, v. HAROLD DELIA, et al., Defendants.	No. 90-2-16125-1 PLAINTIFFS' MEMORANDUM IN OPPOSITION TO SCHOOL DISTRICT'S MOTION TO DISMISS Noted for Hearing: July 12, 1993 - 9:00 a.m.
SEATTLE SCHOOL DISTRICT NO. 1, Defendants and Third-Party Plaintiff, v. STATE OF WASHINGTON, Third-Party Defendant.	

I. INTRODUCTION

State law requires that:

> A program of education shall be provided for by the several counties and school districts of the state for common school age persons confined in . . . (county) detention facilities.

RCW 13.04.145. See also Tommy P. v. Board of County Commissioners of Spokane County, 97 Wn.2d 385, 645 P.2d 697 (1982) (holding that education must be provided to youth in county detention facilities

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both before and after adjudication. Special education services and vocational education, "as necessary to address the unique needs and limitations" are mandated by state law as required components of a detention educational program. See RCW 28A.190.030(H)(b), as modified by RCW 13.04.145. Central to special education services is a student's Individual Educational Program ("IEP"), which is developed through the combined resources of a number of trained specialists and the student's parents. IEPs are the "centerpiece of the special education statute's education delivery system for disabled children." Honig v. Doe, 484 U.S. 305, 98 L.Ed.2d 868, 699, 108 S. Ct. 592 (1988). The right to appropriate special education is both statutory and constitutional in Washington. See Article IX, Section 1, Washington State Constitution.

The defendant Seattle Public School District's ("School") policy for "Special Education Procedures for King County detention" acknowledges the School's legal obligation to provide special education services to detained youth. It unequivocally states:

> Passage of 94-142 required that all eligible handicapped students be provided a Free and Appropriate Public Education. The Act established a priority for services to youth who were unserved or underserved. Certainly, handicapped youth in correctional settings fit these priorities. State and local educational agencies must meet the responsibility to assure that the needs of all eligible handicapped individuals are met. This responsibility includes the identification, evaluation and service to all youth until such time as they reach age 21 or graduate from high school.

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Declaration of John W. Phillips ("Phillips") (July 2, 1993), Ex. A "Special Education Procedures for King County Detention at Overview. The third-party defendant State Office of the Superintendent for Public Instruction's ("OSPI") procedures for "Juvenile Correctional Education" mirror this benchmark standard and require that "state and local educational agencies must assure that the needs of all eligible students in the correctional settings are met." Id. Ex. B. "Special Education Procedures: Juvenile Correction Education (Nov. 1992), at Preface. The School further acknowledges that the detention special education program "must conform to the requirements of the Individualized Education Program." Phillips Ex. C "Due Process and Procedural Safeguards" (Nov. 1992) at 1-2.

The sole issue at trial will be whether the School and OSPI, separately and in combination, meet these unequivocal regulatory and statutory standards at the King County Detention Center ("KCDC") School.[1] Plaintiffs believe the evidence will establish that the School and OSPI do not meet the requirements of the law in delivering special education services to youth confined in detention.

Specifically, plaintiffs will show that the detention school program is not adequately staffed with a sufficient member of certified special education teachers, psychologist, and clerical personnel to even minimally provide appropriate special education services to "special education eligible" students in detention.

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[1] Plaintiffs stipulate to the dismissal of our special education claims against the county defendants.

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Plaintiffs will further establish that due to inadequate special education resources in detention, IEP's developed in the public schools are abandoned and replaced in detention with "interim IEPs" that modify a student's IEP based on limited resources and without regard to regulations governing such changes. As a result, eligible special education students in detention do not receive the special education services to which they are legally entitled.

The School attempts to avoid a ruling on the merits of these important issues by placing three belated and spurious procedural hurdles in front of the plaintiffs. First, the School claims that this Court lacks subject matter jurisdiction because the plaintiffs' parents failed to exercise their procedural right to object to changes in programming that the students receive while in detention. The argument is not persuasive. The School's own representative testified that she has been able to obtain a parent's signature on an Interim IEP (the document that changes a student's programming) only once in the past three years and that the Special Education program in detention is "nonparent participation." Phillips, Ex. D, Nash Dep. 60:5-61:3. The plaintiffs need not exhaust administrative remedies because neither they nor their parents were informed of the substantive changes to their programming before it occurred in detention. Even if they had been notified, the administrative remedies would have been impracticable and futile, and would not have cured the school's systemic failures.

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Second, the School claims that to the extent that plaintiffs' claims regarding the inadequacy of the Special Education program in detention focus on funding, funding is a responsibility of OSPI. This point also misses the mark. Plaintiffs assert that the School fails to provide Special Educational services, as the School states it is required to do. To the extent those Special Education services fall short of the statutory standard because of inadequate funding, the School has impleaded OSPI as a third-party defendant. Therefore, the parties that are responsible for the inadequacy of Special Education at KCDC are before the Court and the Court will be able to examine both the adequacy of the Special Education program (as administered by the School with its current level of funding) and whether the funding is inadequate to ensure that appropriate Special Education services are provided.

Third, the School claims that the class representatives lack standing because they failed to allege an inadequacy in the school's Special Education program. The School is not only wrong, but it also conceded this issue long ago.

As demonstrated in more detail below, this Court should deny the School's Motion to Dismiss for these reasons.

II. ARGUMENT

A. This Court Has Subject Matter Jurisdiction Over the Complaint: Plaintiffs Need Not Have Exhausted Their Administrative Remedies.

The School argues that this case should be dismissed because neither plaintiff B.I. nor plaintiff S.K. ever attempted to pursue their administrative remedies prior to instituting this lawsuit: "They never complained to the School District or sought a hearing

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challenging the alleged inadequate special education program at KCDF." School District's Motion to Dismiss ("School Motion") at 9.

In particular, the School relies on the procedures set forth in WAC 392-171, which require (1) notice to the student's parents a "reasonable time" *before* the School proposes to change an educational placement or provision of special education and *related services to the student*, WAC 392-17-521; (2) *written* notice to the parents 10 days in advance of any *reassessment* of the IEP, WAC 392-171-513; (3) the right to request a due process hearing that the School must transmit to OSPI within 5 days, WAC 392-171-533; and (4) a decision no later than 45 days after the receipt of a request for such hearing. WAC 302-171-556. See School Motion at 5.

This Court should quickly conclude that exhaustion of these remedies is not required. Indeed, the legislative history of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1485, upon which Washington's law is modelled, not only acknowledged but also expanded the exceptions to exhaustion with respect to IEPs.

> There are certain situations in which it is not appropriate to require the use of due process and review procedures set out in [20 U.S.C. § 1415(b)(c) of the [IDEA] before filing a lawsuit.
>
> These include complaints that: (1) it would be futile to use the due process procedures. . .; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to law; (3) it is improbable that adequate relief can be obtained just by

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> pursuing administrative remedies (e.g., the hearing officer lacks the authority to grant the relief sought). . . .

H.R. Rep. No. 296, 99 Cong. 1st Sess. 7 (1985). A number of courts have refused to require exhaustion in the circumstances presented by this case. (See cases discussed below.) This Court should reach the same conclusion.

1. Exhaustion is not required because plaintiffs were not given notice.

The principle of exhaustion of administrative remedies does not apply where the parties who might exhaust those remedies are not even given notice of the events that would trigger the exercise of procedural rights. This is such a case. The School abandons the existing IEP for each special education student who enters detention and writes an Interim IEP that alters the student's program based on the School's limited resources. Phillips, Ex. D, Nash Dep. 47:6-48:4. Even though the School writes an Interim IEP for every special education student who is in detention for more than three days, parents of those students are rarely if ever involved in that decision making. As Ms. Nash, the special education teacher in detention, testified, the special education program in detention, is "non-parent participation." In short, there is no evidence that parents (including the parents of the representative plaintiffs) were or are given notice of the School's modification of the IEP before it occurs.[2]

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[2] Ms. Nash testified that she has sent a notification form, on a discontinuous basis, to parents, but it has not been useful, and, in any event it is not sent before the Interim IEP is implemented. See Phillips, Ex. D., Nash Dep. 46:7-47:5.

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In Doe By Gonzalez v. Maher, 793 F.2d 1470, 1490-91 (9th Cir. 1987), the court held that a school district failed to perform its statutory duty to fully notify parents or guardians of a change in program and of all available safeguards and avenues of review. The court concluded that under those circumstances, exhaustion of administrative remedies would not be required.

> The evaluation procedures under [the IDEA] and the safeguards available in connection with those procedures were intended to protect parents and children whom the responsible local agency has treated unfairly; they were not intended to . . . insulate the agency from federal court review of its conduct.

Id. at 1491, citing Christopher T. v. San Francisco Unified School District, 553 F. Supp. 1107, 1117 (N.D. Cal. 1982).

Doe By Gonzalez is a case very much like this one. The school district defendant failed to notify guardians of a change to a student's schedule from a full day to a part day, without first convening an IEP team meeting. The court concluded that a reduction in program is only valid if it is "contemplated by the child's IEP and tied to valid educational goals." Id. at 1491. While the student's rights were affected, the school district failed to notify the grandparents of their right to protest and secure review of that change in program. Exhaustion was thus held inapplicable.

Similarly, in J.G. v. Rochester City School District Board of Education, 830 F.2d 444 (2d Cir. 1987), the court refused to dismiss for failure to exhaust administrative remedies a class action to compel compliance with federal and state laws governing identification, evaluation and placement of students with

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disabilities. The court concluded that exhaustion was not required: "As plaintiffs assert the deprivation of their due process rights to proper notice and hearing, they cannot be faulted for the lack of an administrative hearing and appeal." Id. at 447.

Washington decisions are consistent with the holdings in Doe By Gonzalez and J.G. v. Rochester City School District. In Gardner v. Pierce County Board of Commissioners, 27 Wn. App. 241, 243-44, 617 P.2d 743, 745 (1980), the court concluded exhaustion was not required where a land owner received no notice of a county's decision to plat adjacent land. South Hollywood Hills Citizens Ass'n v. King County, 101 Wn.2d 68, 74, 677 P.2d 114 (1984), relied on by the School District, acknowledges the exception to exhaustion when no notice occurs:

> [I]f the aggrieved party has no notice of the initial administrative decision or no opportunity to exercise the administrative review procedures, the failure to exhaust those procedures will be excused.

Id. at 74, citing Gardner, 27 Wn. App. at 243-44.

The primary case relied upon by the School, Hoeft v. Tucson Unified School District, 967 F.2d 1298 (9th Cir. 1992) is obviously distinguishable. In Hoeft, the court deemed it significant that the plaintiffs did not allege they were unaware of their procedural rights or prejudiced by a lack of adequate notice. 967 F.2d at 1302. Where a plaintiff has not enjoyed a fair opportunity to exhaust administrative procedures, relaxation of the exhaustion requirement is both "just and proper." Craycroft v. Ferrall, 408 F.2d 587, 595 (9th Cir. 1969).

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In short, when the School abandons the student's IEPs in detention, it does so without notice or involvement of parents and cannot be heard now to complain that administrative procedures have not been followed to correct their violation of the law.[3]

2. Exhaustion is not required because administrative remedies would be either inadequate or futile.

Even if the plaintiffs or their parents or guardians had been given notice of the School's unilateral modification of existing IEPs, the administrative procedures to which the School refers would be completely inadequate in this case. As the School will doubtless emphasize to this Court at trial, students in detention are a transient population whose stay in detention, on average, is less than 10 days. The School's representatives testify that the Interim IEP is created solely for the stay in detention and is not intended to follow the student once she returns to her home school district. Phillips Ex. D, Nash Dep. at 42:12 - 46:3. Yet the procedures that the School would have the plaintiffs invoke span two months and do not require an administrative response before the student leaves detention. By the time parents would have notice of the change, invoke their procedural rights, and obtain a response, their children already would have left detention and no longer be subject to the Interim IEP. Thus, the procedural options available to plaintiffs would be completely inadequate.

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[3] Exhaustion is not required when "the question of the adequacy of the . . . remedy is for all practical purposes coextensive with the merits of the plaintiff's . . . claim." Fuentes v. Roher, 519 F.2d 379, 398 (2d Cir. 1975), quoted in Andre H. by Lula H. v. Ambach, 104 F.R.D. 606, 610 (S.D.N.Y 1986).

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In other words, the administrative remedies that the School would interpose would be insufficient to prevent the harm to plaintiffs. See Terrell v. Brewer, 935 F.2d 1015, 1019 (9th Cir. 1991). Accord Andre H. By Lula H. v. Ambach, 104 F.R.D. at 610. Exhaustion is excused when consideration of "fairness and practicability" outweigh the policies favoring exhaustion in a particular case. See Citizens for Clean Air v. Spokane, 114 Wn.2d 20, 30, 785 P.2d 447, 454 (1990); Zylstra v. Piva, 85 Wn.2d 743, 539 P.2d 823 (1975), cited with approval in Hollywood Hills, 101 Wn.2d at 74. Because exhaustion of administrative remedies would be impracticable and futile, the doctrine should not be applied in this case.

3. Exhaustion Is Not Required Because the School's Unlawful Treatment of Students Is Systemic.

Administrative remedies are not required where the harm done and relief sought is systemic. See Hoeft, 967 F.2d at 1309. Hoeft, a case cited by the School in support of its motion, explicitly recognizes that when the challenge involves "statutory violations so serious and pervasive that basic statutory goals are threatened" and the relief sought is structural in nature, rather than content-oriented, exhaustion requirements should be waived. Hoeft, 967 F.2d at 1304, 1309.[4] See Ackerly Communications, Inc. v. Seattle, 92 Wn.2d 905, 602 P.2d 1177 (1977), cert. denied, 449

[4] Whereas, in Hoeft, plaintiffs' class action challenged the content and length of extended school year services, we do not focus on content but on the School's complete failure to follow existing IEPs, the implementation of which are at the heart of our special education laws.

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U.S. 804 (1980) (exhaustion is not required when constitutionality of agency action is at issue).

Here, each of the infirmities of the School's educational program that will be raised at trial applies to all special education students in detention. It is impracticable for every student to challenge the uniform manipulation of the IEP in detention; all are subject to IEP modifications based on limited resources in the facility; and all students are deprived of an appropriate education to which they are entitled under Washington law. Addressing the specific inadequacies of the School's treatment of an individual student would not address the School's systemic failure to provide appropriate education to all. That is not only why this case is being tried as a class action, but also why exhaustion of administrative remedies in individual cases, even if practicable, would serve little if no purpose in addressing the systemic harm to students.

B. Plaintiffs State a Claim Against the School.

The School also argues that the plaintiffs have failed to state a claim against the School by reading a sentence fragment in an earlier brief filed by the plaintiffs and ignoring the entire sentence. The sentence states:

> [T]here remains a genuine controversy over the statutory and constitutional adequacy of the special education program and detention, especially about the adequacy of funding for it by the office of the superintendent for public instruction.

Plaintiffs' Reply to Defendant Seattle School District's Response to Plaintiffs' Motion for Protective Order (Dec. 3, 1990) at 2. The School District apparently reads the word "especially" as

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"exclusively." Neither Webster's nor this Court should abide such a reading.

Stated succinctly, the plaintiffs assert that the School District has failed to provide adequate Special Educational services with its existing funding, and to the extent that Special Education services are inadequate because of shortfalls in funding, OSPI should be held accountable. Both parties are before the Court and the respective responsibilities of the defendants will be sorted out at trial.[5]

C. The School Cannot Now Claim That B.I. and S.K. Lack Standing.

Any claim by the School that the plaintiffs lack standing was conceded when this Court entered its class certification ruling. Defendants now seek to relitigate class action certification without presenting any changed circumstance or new facts that did not exist when this Court certified this case as a class action. This Court should not reconsider the issue.

On December 6, 1990, this Court entered the following order:

> That plaintiffs may conduct this action as a class action of declaratory and injunctive relief for a class against the School District defendants with respect to all claims identified as resolved and reserved in the partial settlement on behalf of the following class: All youth of compulsory school age now

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[5] To the extent that School's argument is that the plaintiffs have not made direct claims against the third-party defendant, OSPI, this court has discretion to "change the status of a third party defendant brought in by the original defendant pursuant to CR 14(a), to that of defendant to the original plaintiff and may grant recovery against him... Absent a showing of surprise or prejudice, it is not error for a trial court upon perceiving both the issues and parties before it to be other than as pleaded, to realign parties and redefine issues..." Harding v. Will, 81 Wn.2d 132, 136-37, 500 P.2d 91, 95-6 (1972)

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> or in the future incarcerated at the King County Detention Facility (KCDF).[6]

Order Establishing Plaintiff Class.

Prior to entry of this Order and in response to Plaintiffs' certification motion, the School specifically conceded that S.K. and B.I. were adequate representatives.

> Two plaintiffs, S.K. and B.I., request the Court to certify them as the representatives of a class consisting of "[a]ll youth confined in KCDF since the closure of the Spruce Living Unit at KCDF". . . <u>The School District defendants do not oppose plaintiffs' motion insofar as it relates to claims that the School District does not commit adequate resources to serving school age youth</u>."[7]

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[6] The Settlement Agreement to which the Order refers resolved plaintiffs' claims that "youth should not be removed from a regular school program (a) due to lack of space or staff; (b) for non-school related conduct; and (c) without adequate procedural safeguards (Stipulation and Order of Partial Settlement, ¶ 6). The Settlement specifically reserved all other school-related claims:

> To the extent plaintiffs have raised issues regarding inadequate resources, evaluation of the students, and tailoring of educational materials to the needs of the students in dorm and regular school programs, those claims are not resolved by this stipulated Order and are specifically reserved for adjudication at a later time.

<u>Id</u>.

[7] While the School claimed that certification should not occur with respect to claims that "youth are not adequately assessed and educated for reasons other than limited resources," the Court rejected that argument in certifying the class. The School District, in any event, conceded that if "no negligent misassessment claim" was brought, it would "accept [plaintiffs] representation and agree that class certification is appropriate on the issue of the School District's provision of resources for the facility." Defendants' Reply to Plaintiffs' Motion for Class Certification at 13, n 4.

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Defendant's Reply to Plaintiffs' Motion for Class Certification at 2. The School reiterated this concession a number of times. See id. at 6 and 13.

As discussed above, plaintiffs' special education claim addresses solely the adequacy of resources to provide minimum special education services to handicapped students in detention. Thus, given the School's earlier concessions with respect to the standing of S.K. and B.I. to raise this "resource" claim, this Court should reject the school's renewed standing claim.[8]

Regardless of the School's earlier concessions on class certification, at least one of the named plaintiffs, B.I., has standing to sue because: (1) he was eligible for special education services in detention, and (2) he was subject to the Interim IEP process (or some predecessor process) and lack of resources to which all special education eligible students in detention are subjected, and which results in limited special educational services that are not based on the "unique needs and limitations" of detained youth. RCW 28A.190.030(b)(4).

In a case relied upon by the School, the Washington Supreme Court has previously acknowledged that the "systemic" nature of a defendant's challenged actions or practices is a factor that bears on the injury suffered by an individual plaintiff required to confer standing. See WEA v. Shelton School Dist., 93 Wn.2d 783,

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[8] Assuming, arguendo, that the School had not conceded this claim by agreeing to standing during class certification proceedings, the relief would not be dismissal but rather substitution of class representatives or decertification of the class. Plaintiffs are prepared substitute or add new plaintiffs if the court so requires.

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790-91, 613 P.2d 769 (1980). In WEA the Court rejected the claim, similar to the one advanced by the School here, that the named plaintiffs did not have standing because they were not injured by the actions of the defendant school districts.

The Court in WEA ruled:

> [T]he determination that the named individual parties were therefore not injured by the actions of these school districts disregards the allegations of systemic discrimination in this suit. If the discrimination is the result of collusion among school districts statewide [a systemic problem], as alleged in the complaint, then the actions of these school districts presumably do injure the named plaintiffs.

93 Wn.2d at 790-91. Similarly, in this case, if, as we contend, the statutory violations in the special education program are systemic and a result of inadequate resources, the named plaintiffs who are, like B.I., eligible for special education services were injured by the inadequacy of those resources.

Finally, if this court were to decide, contrary to its class certification ruling, that the named plaintiffs do not have a personal stake in the outcome of this case, it may still permit the named plaintiffs to litigate this claim despite the loss of a personal stake in the outcome of the case. See U.S. Parole Commission v. Geraghty, 445 U.S. at 398, 100 S. Ct. at 1209, citing Gerstein v. Pugh, 420 U.S. 103, 100, n. 11, 95 S. Ct. 854, 861 n. 11 (1975) (holding that when a claim on the merits is capable of repetition yet evading review a named plaintiff may litigate a claim despite the loss of a personal stake in the outcome of the case).

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The School's belated claim that the named plaintiffs do not have standing should be rejected.

III. CONCLUSION

For the foregoing reasons, the School's Motion to Dismiss should be denied.

DATED this 21 day of July, 1993.

Respectfully submitted,

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