UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETER MILLS, et al.,

Plaintiffs

v. **Civil Action No. 71-1939 (JGP)**

BOARD OF EDUCATION OF THE DISTRICT OF COLUMBIA, et al.,

Defendants

ROBBY GIBSON,

Applicant

v. **Civil Action No. 71-1939 (JGP)**

THE GOVERNMENT OF THE DISTRICT OF COLUMBIA, et al.,

Defendants

MEMORANDUM

Currently before the Court is applicant Robby Gibson's **Application for Preliminary Injunction** [#5]. For the reasons contained in this memorandum, the Application for Preliminary Injunction is denied.

BACKGROUND

Robby Gibson ("Robby" or "applicant") is an eight year old ward of the District of Columbia ("District"), seeking special education services. Application for Preliminary Injunction ("Application")(filed Sept. 1, 2000) at 1-2. On June 20, 2000, in pursuit of those services, Robby's counsel filed a Form 6 - Consent for Evaluation/Reevaluation ("Form 6") at Ludlow Taylor

Elementary School ("Ludlow" or "Ludlow Taylor") on his behalf. Application at 2. Attached to the Form 6 were copies of a recent psychotherapy report from the Washington Assessment and Therapy Services and a neuropsychological evaluation from the Kennedy Krieger Children's Hospital. Id.

On July 11, 2000, Robby's counsel filed a request for a due process hearing to address the alleged failure of the District of Columbia Public Schools ("DCPS") to complete an evaluation of Robby pursuant to this Court's decree in Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972)(Waddy, J.). Id.[1] On August 2, 2000, DCPS filed a motion to dismiss the request for a due process hearing, claiming that the time limit established by the District of Columbia Appropriations Act of 2000, Pub.L. No. 106-113, 113 Stat. 1501 (Nov. 29, 1999), gave DCPS 120 days to complete the required evaluation of Robby. Id. at 2-3. On August 9, 2000, Robby's counsel filed an opposition to the motion to dismiss, claiming that the time limits established in Mills were controlling, and that any statute which interfered with them was unconstitutional. Id. After a hearing, a DCPS hearing officer granted the motion to dismiss on August 25, 2000. Id.

Robby's counsel then filed an Application for Preliminary Injunction with this Court on September 1, 2000.[2] On September 12, 2000, the Court entered an Order allowing the Application to be filed, conditionally, as captioned by the applicant, despite the fact that the record did not reflect that the applicant was a member of the Mills class. In addition to allowing the Application to be

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[1] Mills is mentioned here for background purposes. A discussion of Mills and its specific requirements follows.

[2] The Application sought a "preliminary injunction compelling [DCPS] to complete all necessary assessments, hold a multi-discipline meeting and issue a notice of placement forthwith in accordance with the timeframe [sic] set forth in this Court's ruling." Application at 1.

filed, the Court ordered all parties (including the applicant, the District of Columbia, and class counsel for the original Mills class) to file briefs addressing whether the Application is properly before the Court. The parties were ordered to specifically address whether the applicant is a member of the Mills class, and, if so, whether the Application must be filed by class counsel, rather than by counsel for the applicant. The parties filed the required papers on these preliminary issues.

On October 5, 2000, the Court entered an Order which scheduled one oral argument to deal with both these preliminary issues and the merits of the Application itself. The Court set a schedule for the District to file its opposition to the Application, and for the applicant to reply. The District's opposition was due on November 9, 2000, with the reply due November 16, 2000. Oral arguments were scheduled for November 21, 2000.

The Court granted an enlargement of time for the District to file its opposition until November 14, 2000. Applicant was advised by the Court that he had until November 21, 2000, to file a reply, but that filing on that date would necessitate rescheduling the hearing. Applicant wanted to proceed with the hearing as scheduled, so he chose to file a reply on November 17, 2000. Oral arguments were heard on November 21, 2000.

At the hearing held on November 21, 2000, counsel for the applicant tendered to the Court and to defendant a copy of the "Five Day Disclosure" ("Disclosure") used in the due process hearing before the District of Columbia Public Schools hearing officer. This Disclosure includes the Form 6 filed on the applicant's behalf, along with a psychological evaluation of the applicant performed by the Kennedy Krieger Children's Hospital, a psychotherapy report on the applicant completed by Washington Assessment & Therapy Services, the applicant's birth certificate and Social Security card, and the order from the District of Columbia Superior Court pertaining to the applicant's status.

Additionally, both parties were given the opportunity to file supplemental memoranda, along with an opportunity to respond to any supplemental memoranda filed. The Court ordered the applicant to provide any additional information pertaining to the applicant's condition and legal status as a ward of the District of Columbia in his supplemental memorandum. Furthermore, the Court ordered defendant to include in its supplemental memorandum a detailed explanation of all actions taken by DCPS to administer the testing of the applicant required by the Individuals with Disabilities Education Act to determine if he requires special education services. Defendant was directed to provide the Court with copies of any and all correspondence directed to the applicant's foster parents and educational advocate regarding arrangements for carrying out the required tests.

DISCUSSION

The factors for obtaining a preliminary injunction are well settled in this circuit and include: (1) whether the petitioner has made a strong showing that it is likely to prevail on the merits of its appeal; (2) whether the petitioner has shown that without such relief, it will be irreparably injured; (3) whether the issuance of injunctive relief would substantially harm other parties interested in the proceedings; and, (4) whether such an injunction is in the public interest. See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 182 U.S. App. D.C. 220, 221-22, 559 F.2d 841, 842-43 (1977)(holding that although these factors originally applied to stays, they are applicable to preliminary injunctions as well).

The Court begins its analysis with the applicant's ability to demonstrate a likelihood of success on the merits. In order to demonstrate such a likelihood, the applicant must demonstrate that he is a member of the Mills class, and thus entitled to placement in special education services within the specific time parameters spelled out in the Mills decree, as follows:

> [DCPS] shall provide each identified member of plaintiff class with a publicly-supported education suited to his needs within thirty (30) days of the entry of this order. With regard to children who later come to the attention of any defendant, within twenty (20) days after he becomes known, the evaluation (case study approach) called for in paragraph 9 below shall be completed and within 30 days after completion of the evaluation, placement shall be made so as to provide the child with a publicly supported education suited to his needs.

Mills, 348 F. Supp. at 866.

Judge Waddy clearly defined who qualified for membership in the Mills class. The Mills decree provided that:

> [the named plaintiffs] sue on behalf of and represent all other District of Columbia residents of school age who are eligible for a free public education and who have been, or may be, excluded from such education or otherwise deprived by defendants of access to publicly supported education.

Mills, 348 F. Supp. at 870.

Thus to be a member of the Mills class, the applicant must demonstrate residency in the District, and exclusion from or deprivation of access to a publicly supported education. The applicant argues that his status as a ward of the District confers on him residency in the District, regardless of the fact that he currently lives with a foster family in Prince George's County, Maryland. The District argues that the fact that he physically lives in Maryland undermines his claim of residency. However, the Court finds that Robby sufficiently meets the standard of residency as contemplated in Mills. Robby is a ward of the District of Columbia, and since he is a ward, the District has ultimate responsibility for ensuring that his educational needs are met. Surely Robby should not to be deprived of the educational opportunities offered by the District because the District itself has placed him with a foster family in Maryland.

Turning to the exclusion requirement, DCPS points out that Robby has not technically been

excluded from public school. Even at the oral argument, Robby's counsel conceded that Robby does attend public school in Prince George's County, which could be called his neighborhood school. Furthermore, Robby maintains enrollment at Ludlow, for the purpose of requesting and obtaining special education services.[3] The Court is unclear as to whether Robby has actually been excluded, since counsel conceded he is still in attendance. However, Mills does not require actual exclusion or expulsion to satisfy class membership. Students who have been "otherwise deprived" of access to publicly supported education also qualify. In this case, the failure to provide necessary special education services tailored to Robby's needs have caused him to be otherwise deprived of a free public education. This is all Mills requires.

Although it appears that Robby is a resident of the District and that he has been deprived of a publicly supported education due to an alleged disability, it still remains to be determined whether Robby can claim membership in the Mills class almost thirty years after that case was decided. The Mills decision itself is not particularly helpful in determining whether Judge Waddy ever intended for the Mills class to remain open in perpetuity. While Judge Waddy did retain jurisdiction of the case, he did so only to "allow for implementation, modification and enforcement" of the Mills decree. Mills, 348 F. Supp. at 883. This is a very limited statement of purpose, and is not particularly relevant in determining whether the Mills class remains open to present day children like Robby.

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[3] According to Robby's counsel, Robby maintains enrollment at Ludlow because Ludlow is the school designated by DCPS for the enrollment of all non-attending students in the District. Non-attending students are those of school age, but who do not attend the District's public schools. This category of students includes, among others, students in private school, students being home schooled, or students temporarily living outside the District. Counsel for the District did not dispute this representation when it was made at oral argument.

The applicant claims that the Mills decree covers all children who have been eligible for public school in the District since the Mills decision was handed down. That construction seems untenable to the Court as there is nothing in the Court's record to support the notion that almost thirty years worth of District children born after the date of the decision were meant to be covered. The Mills decree's very definition of the class is limited to those District children who were eligible for a publicly supported education at the time Mills was decided. See Mills, 348 F. Supp at 870 ("residents of school age **who are** eligible")(emphasis added).

Applicant points to language indicating "children who later come to the attention of any defendant." Mills, 348 F. Supp. at 866. Applicant postulates that all future children born in the District "come to the attention" of DCPS. This construction seems clumsy and unnecessarily broad. A more realistic interpretation is that the language was included to safeguard already existing children in situations similar to Peter Mills, whose situations were not apparent to the Court or class counsel at the time the Mills class action was filed.

Construing the Mills class as closed is consistent with both the original complaint and Judge Waddy's order certifying the class. The complaint states that the class consists of "all other District of Columbia residents of school age who **are** eligible for a free public education and who have been excluded from such education by defendants or otherwise deprived by defendants of access to publicly-supported education." Verified Complaint (filed Sept. 24, 1971) at ¶ 16 (emphasis added).

In the order certifying the class, Judge Waddy ordered that Mills was brought

> on behalf of a class of children who are or will be residents of the District of Columbia and are of an age so as to be eligible for a publicly-supported education and who are now, were during the 1970-71 school year, or will be excluded, suspended, expelled, or otherwise denied a publicly-supported education for any period in excess of 2 days.

Order Certifying Class Action Under Rule 23(b) at 1-2 (filed Dec. 17, 1971)(Waddy, J.).

Applicant emphasizes "children who are or will be residents of the District" as evidence that Judge Waddy contemplated the Mills class to be ongoing. However, applicant ignores the description that all the class members "**are** of an age as to be eligible for publicly-supported education." Id. (emphasis added). This language, which is in the same present tense as the language from the complaint, indicates that Judge Waddy only intended the Mills class to be open to those children who were of an age as to be eligible for a publicly-supported education at the time the Mills class action was filed. As neither the complaint nor the order certifying the class indicate that the Mills class was intended to remain open in perpetuity, the Court will not, almost thirty years after the fact, undertake to construe the class in that way.

The duration of certain requirements imposed on the District also support that the Mills class was not meant to remain open in perpetuity. For example, on December 20, 1971, the plaintiffs and the defendants entered into, with the approval of the Court, an interim stipulation and order which provided, in relevant part, that defendants had until January 3, 1972, "to identify remaining members of the class not presently known to them," and that by February 1, 1972, defendants were required to "provide counsel for plaintiffs with the names, addresses and telephone numbers of such remaining members of the class then known to them." Mills, 348 F. Supp. at 871. Since the District was obligated to conclude its search for unknown class members within two months of the signing of the interim stipulation and order, it appears that the parties and the Court anticipated the class to include only schoolchildren who presently met the requirements for membership in the class.

Concluding that the Mills class is closed comports with the actions of other courts to limit

potential future members from a certified class for a host of reasons, including that "future members do not exist and have no standing to litigate; future members will have the benefit of and obtain prospective relief from any injunctive relief awarded; [and that] inclusion of future members in the class will make the litigation unduly complex or too amorphous to manage... [.]" Newberg, Herbert B. & Alba Conte, Newberg on Class Actions at 3-38 (3d ed. 1992)(collecting authority).

Furthermore, it can be somewhat impractical to construe a class to include all possible future members. As Newberg noted,

> [b]ecause a class that includes future members can easily be an open–ended class which is binding prospectively without limit unless there is a material change in the law or circumstances, and because a class judgment, whether favorable or adverse, is binding on all members of the class ... , it may be best for the plaintiffs or the court to place a reasonable time limit on the scope of future members who will be included in the class. While the trade-off for such a limitation will mean that defendants technically will have to comply with any order for prospective relief for a finite time only, one can set the time limits flexibly enough ... so that a reasonable number of future class members will benefit or be bound by the class judgment.

Newberg on Class Actions at 3-41 (citations omitted).

Judge Waddy's decree in Mills remains the theoretical underpinning for the rights of children to receive a publicly supported education that accommodates individual special education needs. However, the Mills class is now closed. District schoolchildren who are eligible for publicly supported special education must now rely on the appropriate federal and District statutes and regulations to vindicate those rights.[4]

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[4] Applicant also points to an order of this Court issued on June 18, 1980. In that order, the Court found the District to be in violation of the specific guidelines issued in Mills. The Court enjoined the District to take immediate action to place movant-class members, as well as others known to the defendants, in appropriate educational programs. This order does not really speak to the issue of whether the Mills class ever closed or remains open. Since it was still possible for there to be members of the Mills class when the order was issued in 1980, the Court holds that the order was meant to apply to them, not to all future children born in the District.

Robby is a ward of the District who is eligible for special education services to be provided by the District. However, Robby's right to special education services no longer comes directly from Mills. It comes, *inter alia*, from the federal Individuals with Disabilities Education Act ("IDEA"), which the Application itself lists as a basis for relief. In this case, the District's responsibility to evaluate and place Robby arises from IDEA, and his remedy lies there as well. According to the DCPS hearing officer, DCPS has 120 days to perform the required evaluation and placement of Robby.[5] Now that the 120-day deadline has come and gone, without action by DCPS on Robby's case, Robby's next procedural step is to seek relief from the DCPS hearing officer.[6]

Given that Robby is not a member of the Mills class, and that he still has procedural remedies to pursue under IDEA, he is unable to demonstrate a likelihood of success on the merits to the

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[5] At the hearing on the application for preliminary injunction, counsel for the applicant made several arguments that the 120-day deadline imposed by Congress was unconstitutional. First, counsel asserted an equal protection argument because the District is the only jurisdiction in the nation to have its IDEA deadlines set by Congress, unlike all the other states and territories. This argument must be rejected because the District is neither a state nor a territory. It is a unique entity and the federal Constitution gives Congress the authority to manage its affairs. See U.S. Const., Art. I, § 8, cl. 17. Second, counsel argued that the deadline was invalid because it was imposed by Congress in an appropriations act unrelated to education. For similar reasons, this argument must also fail. Third, counsel has argued that Congress's enactment is a violation of the doctrine of separation of powers since it alters the remedy established by this Court in Mills. However, since the Court has held that the Mills class is closed, and since Congress's 120-day timeline is proscriptive, there is no unconstitutional usurpation of this Court's power.

[6] It is the Court's understanding that DCPS has taken steps to remedy Robby's situation since the date of the hearing on the Application. According to defendants, a counselor at Ludlow Taylor arranged a multi-disciplinary team ("MDT") meeting for December 8, 2000. This meeting was set to include Dr. Pamela Butler of the Residential & Interagency Division. See Defendants' Supplemental Memorandum of Points and Authorities in Opposition to Application for Preliminary Injunction (filed Dec. 4, 2000) at 4. Furthermore, defendants represent that Dr. Butler has made an initial assessment of Robby's educational needs, based on her review of the Form 6 and the accompanying documentation submitted with it. Id. This progress might very well make the Application moot, although the Court reaches no conclusion on this point.

Court's satisfaction. Therefore, the Application for Preliminary Injunction must be denied. Finally, since the applicant is not a member of the class, he is dismissed as a party in this case. This dismissal does not affect his right to file a separate action under IDEA.

CONCLUSION

For the reasons contained in this Memorandum, the Application for Preliminary Injunction is denied. An appropriate order accompanies this Memorandum.

Date: JAN 4 2001

JOHN GARRETT PENN
United States District Judge