UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JAMIE S. et. al.,

Plaintiffs,

v. **Case No. 01-C-928**

MILWAUKEE BOARD OF SCHOOL DIRECTORS, et. al.,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

On November 14, 2003, this court issued its decision certifying a class in resolution of the plaintiffs' second amended motion for class certification. Thereafter, the plaintiffs unsuccessfully sought to file an interlocutory appeal with the Seventh Circuit, and also filed a motion to compel disclosure from the United States Department of Justice over an expert report prepared by Dr. Mary Margaret Kerr. The report concerned the findings of her investigation of the delivery of special education in the Milwaukee public school district.

On April 14, 2004, the court met with counsel for the parties to discuss further scheduling. As a result of that conference, the plaintiffs were directed to file an amended complaint in accordance with the court's order of certification and the procedures and a schedule for class notification were established. A schedule for lay and expert discovery was also put in place.

The plaintiffs filed their amended complaint in May, the defendants answered, and on June 15, 2004, the plaintiffs filed a motion to reconsider the court's order of class certification. The motion has been fully briefed and following the briefing, plaintiffs submitted additional case citations of

recent decisions from several circuits. The plaintiffs' motion is based on "new evidence" obtained in support of their original claim for class certification. Basically, this new evidence is the report of Dr. Kerr, which the plaintiffs contend that they attempted to obtain with all due diligence, but were finally forced to file the aforementioned motion to compel disclosure. The plaintiffs did not receive Dr. Kerr's report until March, 2004, which was several months after the court issued its decision on class certification.

Both defendants MPS and State of Wisconsin DPI oppose the motion for a variety of reasons. The defendants submit that the evidence of Dr. Kerr is not admissible since she is not an expert named in this case, that the evidence is no longer reflective of the current status and that it is not new. They also contend that since the parties have relied on earlier rulings from the court, reconsideration at this juncture of the case would cause unreasonable delay, expense and duplication of effort.

According to the plaintiffs, Dr. Kerr's report "verifies plaintiffs' long-standing contention that there is a systemic failure in the delivery of special education services and compliance with the Individuals with Disabilities Education Act (IDEA) in MPS." (Plaintiffs' brief at 4). Plaintiffs thus again ask the court to expand its definition of class to include systemic failures in both the pre-determination and post-determination processes. Plaintiffs state that, while the findings in Kerr's report are consistent with the findings of plaintiffs' experts, the report is not duplicative and is substantially more in-depth than the expert reports.

Again, the defendants disagree with the plaintiffs' assessment of Kerr's report. They submit that the report's findings and conclusions do not disturb the underlying basis of the court's earlier rulings, i.e. that there is an adequate due process mechanism in place to address and remedy post-determination grievances. In fact, the defendants note that Dr. Kerr declined to offer an opinion on

the availability or adequacy of the due process hearing system. (See, Kerr report at 91 n. 106). However, Dr. Kerr then goes on to briefly note that based upon her "observations," the MPS complaint system lacks appropriate coordination for receiving and dealing with complaints. (Id. at 97).

Even though Kerr's report may be more in-depth and may contain some information not previously set forth by plaintiffs' experts, in the opinion of this court, it is simply cumulative of what has already been presented by the plaintiffs. Nothing here is new. Even if it offers a "new perspective," as the plaintiffs contend (Plaintiffs' reply brief at 4), that is not a basis for reconsideration. Armed with the Kerr report, the plaintiffs' motion for reconsideration is still shooting at the same target of inclusion of post-termination processes; this time the plaintiffs are just using a different caliber of ammunition. This court has tread this same ground before and the bottom line is that the plaintiffs disagree with the decision as to the extent of challenges that are eligible for class certification. From the outset, it has been the plaintiffs' very forceful position that the alleged systemic failures of MPS permeate the entire scope of its attempt to comply with the requirements of the IDEA. Numerous examples of plaintiffs' position have been presented by its named experts and now by Dr. Kerr. But, for reasons previously set out in its class certification decisions, this court is of the opinion that the category of challenges characterized as "post-determination" are subject to administrative exhaustion because they are individual and substantive in nature, and an adequate due process mechanism is in place to consider and remedy these problems . The court further believes that those challenges characterized as "pre-determination" are, on the other hand, systemic or procedural in nature and not likely to be remedied by administrative exhaustion. Parenthetically, Dr. Kerr's report does make findings that are supportive of plaintiffs' position in the pre-determination area.

Subsequent to the completion of briefing on the motion to reconsider, plaintiffs submitted copies of decisions in the cases of J.S. v. Attica Central Schools, 386 f.3d 107 (2nd Cir. 2004) and Christopher S. v. Stanislaus County Office of Education, 384 F. 3d 1205 (9th Cir. 2004). Both decisions discuss the requirement for a student to exhaust administrative remedies before bringing a federal court action under the IDEA. The requirement for exhaustion is excused when such efforts would be futile since the administrative procedures do not provide an adequate remedy. With the IDEA, exhaustion of administrative remedies is required so that disputes relating to the education of disabled students can be first addressed by those with expertise in the area.

Both of the cited cases arrived at the appellate court on review of the district court's ruling on the defendant's motion to dismiss the plaintiff's complaint for lack of subject matter jurisdiction, i.e. the alleged failure to exhaust administrative remedies. In J.S., the circuit court affirmed the decision of the district court in denying the motion to dismiss and, in so doing, discussed a number of different examples of systemic violations precluding the application of exhaustion. In Christopher S., the circuit court reversed the district court's dismissal of the complaint, stating that it had sufficiently alleged subject matter jurisdiction.

Like the Kerr report, neither of these cases presents anything new for the court to consider. Both state the law, which was thoroughly considered by the court when its earlier decisions were issued. There are exceptions to the exhaustion requirement, and this court believes that they exist in the pre-determination challenges. The court has established the scope of this litigation. It is time to move the case forward to its ultimate resolution.

Accordingly, the plaintiffs' motion for reconsideration is **Denied**.

SO ORDERED.

Dated at Milwaukee, Wisconsin, this 24th day of January, 2005.

AARON E. GOODSTEIN
U.S. MAGISTRATE JUDGE