1994 WL 262193
United States District Court, N.D. Illinois, Eastern Division.

MARIE O., et al., Plaintiffs,
v.
Jim EDGAR and Mary Jayne Broncato, Defendants.

No. 94 C 1471.
|
June 13, 1994.

MEMORANDUM OPINION

KOCORAS, District Judge:

***1** This matter is before the Court on Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons that follow, Defendants' motion is denied in part and granted in part.

BACKGROUND

This action arises out of the state of Illinois' alleged failure to provide critical early intervention services to developmentally-delayed infants and toddlers. The plaintiffs purport to represent a class of infants and toddlers who are entitled to but are not receiving the educational and developmental services needed to prevent or ameliorate their developmental-delay and other disabling conditions. The plaintiffs allege that there are roughly 26,000 eligible children that are not presently receiving early intervention services which they are allegedly entitled to under Part H of The Individuals With Disabilities Education Act, 20 U.S.C. § 1471 *et seq.* ("Part H").

Part H is a federal program under which federal funds are granted to states developing and implementing coordinated systems for the provision of early intervention services to developmentally-delayed infants and toddlers. Congress enacted Part H for the purpose of addressing five "urgent and substantial" needs:

> (1) to enhance the development of handicapped infants and toddlers and to minimize their potential for developmental delay,
>
> (2) to reduce the educational costs to our society, including our Nation's schools, by minimizing the need for special education and related services after handicapped infants and toddlers reach school age,
>
> (3) to minimize the likelihood of institutionalization of individuals with disabilities and maximize the potential for their independent living in society,
>
> (4) to enhance the capacity of families to meet the special needs of their infants and toddlers with disabilities, and
>
> (5) to enhance the capacity of State and local agencies and service providers to identify, evaluate, and meet the needs of historically unrepresented populations, particularly minority, low-income, inner-city, and rural populations.

20 U.S.C. § 1471(a)(1)–(5).

The plaintiffs allege that Illinois opted to participate in the Part H program in 1987, and that since that time Illinois has received more that $24 million dollars in federal funds under Part H to plan and implement a coordinated statewide system of service. Part H provides that a state entering into its fifth year of participation in the program must assure in its application for federal funds that it has in effect a statewide system that provides early intervention services to all eligible handicapped infants and toddlers and their families. 20 U.S.C §§ 1475(c) and 1476(a).[1]

On September 23, 1991, the Illinois Early Intervention Services System Act, 325 ILCS 20/1 *et seq.* ("the Illinois Act"), became effective. Under the Illinois Act, an early intervention services system was formally established in Illinois. On December 1, 1992, Illinois began its fifth year of participation in Part H, and was therefore allegedly required under federal law to serve all eligible infants and toddlers.

***2** The plaintiffs allege that Illinois is not in compliance with several of the components of Part H. For instance, according to the plaintiffs, the state has failed "to develop policies and procedures for standards for training early intervention personnel, has not established a procedure securing timely reimbursements of funds used to provide services, and has not established a system for compiling data on the numbers of infants and toddlers with disabilities in need of services, the number served, and the

types of services provided." Class Action Complaint, ¶ 32. According to the plaintiffs, Illinois was allegedly required by federal law to have these policies, procedures and services implemented at the beginning of Illinois' fifth year of participation in the Part H program. The plaintiffs allege that as a result of the state's noncompliance, the plaintiffs have been denied adequate early intervention services which they are allegedly entitled to under Part H.

The plaintiffs bring this action on their own behalf, and behalf of all others similarly situated, seeking declaratory and injunctive relief. Plaintiffs seek a judgment declaring that the defendants' acts and omission are in violation of the rights of the plaintiffs and other similarly situated Illinois children under both Part H and 42 U.S.C. § 1983. The plaintiffs further seek an injunction directing the defendants "to recognize Part H as an entitlement for all eligible children, begin providing early intervention services to all children entitled by law to those services, and bring the State of Illinois into compliance with the components of a statewide system of early intervention required under Part H." In addition, the plaintiffs seek an award of attorneys' fees and costs as allowed under 42 U.S.C. § 1988.

The named defendants in this action are Jim Edgar ("Governor Edgar"), the Governor of the State of Illinois, and Mary J. Broncato ("Interim Superintendent Broncato"), the Interim State Superintendent of Education.[2] Each defendant is sued in his or her official capacity. The defendants move to dismiss the plaintiffs' complaint on three grounds. Each ground will be addressed separately below. However, before addressing the merits of the defendants' motion we first examine the legal principles which guide our decision.

LEGAL STANDARD

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. Defendants must meet a high standard in order to have a complaint dismissed for failure to state a claim upon which relief may be granted since, in ruling on a motion to dismiss, the court must construe the complaint's allegations in the light most favorable to the plaintiff and all well-pleaded facts and allegations in the plaintiff's complaint must be taken as true. *Ed Miniat, Inc. v. Globe Life Ins. Group Inc.,* 805 F.2d 732, 733 (7th Cir.1986), *cert. denied,* 482 U.S. 915 (1987). The allegations of a complaint should not be dismissed for failure to state a claim "unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45–46 (1957). *See also Hishon v. King & Spalding,* 467 U.S. 69 (1984); *Doe on Behalf of Doe v. St. Joseph's Hospital,* 788 F.2d 411 (7th Cir.1986). Nonetheless, in order to withstand a motion to dismiss, a complaint must allege facts sufficiently setting forth the essential elements of the cause of action. *Gray v. County of Dane,* 854 F.2d 179, 182 (7th Cir.1988).

***3** In reviewing a Rule 12(b)(6) motion to dismiss for failure to state a claim the Court is limited to the allegations contained in the pleadings themselves.[3] However, a court is not so bound in reviewing a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Rather, in addressing a motion to dismiss for lack of subject matter jurisdiction, a district court may look beyond the complaint and view any extraneous evidence submitted by the parties to determine whether subject matter jurisdiction in fact exists. *Gervasio v. U.S.,* 627 F.Supp 428, 430 (N.D.Ill.1986); 5A Wright & Miller, Federal Practice and Procedure at § 1350 (1990); *see also Schaefer v. Transportation Media, Inc.,* 859 F.2d 1251, 1253 (7th Cir.1988). On a Rule 12(b)(1) Motion to Dismiss, the plaintiff bears the burden of establishing that the jurisdictional requirements have been met. *Kontos v. United States Dept of Labor,* 826 F.2d 573, 576 (7th Cir.1987). When the party moving for dismissal under Rule 12(b)(1) challenges the factual basis for jurisdiction, the nonmoving party must support is allegations with competent proof of jurisdictional facts. *Id.; Western Transp. Co. v. Couzens Warehouse & Distributors, Inc.,* 695 F.2d 1033, 1034 (7th Cir.1982).

We turn to the motions before us with these principles in mind.

DISCUSSION

Defendants Governor Edgar and Interim Superintendent Broncato raise a number of arguments as to why the plaintiffs' complaint must be dismissed. First, the defendants argue that this action is barred by the Eleventh Amendment. Next, the defendants maintain that Governor Edgar is not a proper defendant in this action because he has no direct involvement in the administration of the statute at issue, and therefore he must be dismissed as a named party defendant. Finally, the defendants argue that Part H of the statute confers no private right of action separately enforceable under 42 U.S.C. § 1983.

With respect to the defendants' Eleventh Amendment Immunity claim, we are unpersuaded by the defendants' arguments. The defendants maintain that although this case is "couched in terms of 'injunctive relief' " it is, in reality, an action seeking an award of money damages. Accordingly, the defendants claim that this Court lacks the subject matter jurisdiction to compel the Illinois General Assembly to appropriate more money for early childhood intervention.

The U.S. Supreme Court, however, has recognized that complying with an injunction will often necessarily involve the expenditure of state funds. As the Court recognized in *Ex Parte Young,* 209 U.S. 123 (1908), the Eleventh Amendment will not bar official capacity suits against state officials for prospective relief tailored to redress a violation of federal law. *Id.* at 159–160. Moreover, in *Edelman v. Jordan,* 415 U.S. 651 (1974), the U.S. Supreme Court explicitly recognized that fiscal consequences to a state treasury are permissible where they are the necessary result of compliance with a decree which is prospective in nature:

> ***4** State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex Parte Young*.

Id. at 668. Thus, the relevant inquiry is not whether or not the plaintiff's request for relief will impact the state treasury, but whether the relief requested is prospective or retrospective.

As the Court explained in *Edelman,* the question of whether relief is prospective or retrospective is determined by reference to the purpose of the intended remedy. *See Id.* at 668; *Bennett v. Tucker,* 827 F.2d 63, 71 (7th Cir.1987). Here, the plaintiffs are not seeking a retroactive award of state funds as compensation for the state's alleged past violations of Part H. Rather, the plaintiffs seek to enforce Illinois' prospective compliance with the federal act. Thus, even though "conforming to the dictate" of Part H may require the state to expend considerable[4] funds, we find that this does not serve as a bar to plaintiffs' cause of action.[5]

Next, the defendants argue that Governor Jim Edgar should be dismiss from this action because he is an improper party defendant. Specifically, the defendants maintain that under the doctrine of *Ex Parte Young,* the state official being sued for non-compliance with a federal act must have some connection with the enforcement of the act. According to the defendants, the plaintiffs have failed to set forth the requisite nexus in their complaint to assert a claim against Governor Edgar for violation of Part H. We agree.

In their complaint, the only allegations relating to Governor Edgar and his involvement in the alleged violations of Part H relate to his general responsibility to faithfully execute the laws of Illinois:

> Defendant, Jim Edgar, is the Governor of the State of Illinois. In that capacity, Governor Edgar has the supreme executive power in Illinois and is charged under the Illinois Constitution with responsibility for the faithful execution of the laws.

Class Action Complaint, ¶ 8. Such a basis does not, as a matter of law, provide the nexus required to name Governor Edgar as a party defendant. A Governor's generalized duty under Article 5, § 8 of the Illinois Constitution to "faithfully execute" Illinois law, is insufficient to satisfy the requirement that a state official bear some connection with the enforcement of a challenged statute. *Weinstein v. Edgar,* 826 F.Supp. 1165, 1166 (N.D.Ill.1993).

In their Response Brief in Opposition to Defendants' Motion to Dismiss ("Plaintiffs' Response Brief"), the plaintiffs argue that Governor Edgar is a proper party defendant because under the statutory provisions of Part H, Governor Edgar's responsibilities in connection with Part H go beyond a "generalized duty" to enforce the laws of Illinois. *See* Plaintiffs' Response Brief at 8–9; 20 U.S.C. §§ 1476, and 1482; The Early Intervention Services System Act, 325 ILCS 20/1 *et seq.* While we recognize that Part H, along with the Illinois Act, charge the Governor with a number of duties in establishing and implementing of a statewide early intervention system, it is "axiomatic" that a plaintiff cannot amend his complaint through a brief in opposition to a motion to dismiss. *Car Carriers, Inc. v. Ford Motor Co.,* 745 F.2d 1101, 1107 (7th Cir.1984), *cert. denied,* 470 U.S. 1054 (1985). Accordingly, if the plaintiffs wish to assert the duties of Governor Edgar, as charged by the provisions of Part H and the Illinois Act, as a basis for his "connection" to the enforcement of Part H they must do so through the proper

channels.

***5** Thus, because the complaint does not, as matter of law, set forth a sufficient basis upon which we can keep Governor Edgar in as a party defendant, Defendants' motion to dismiss Governor Edgar as a party defendant is granted.

Finally, the defendants maintain that the plaintiffs' complaint must be dismissed because Part H of the statute confers no private right of action separately enforceable under section 1983. The plaintiffs have filed this action under 42 U.S.C. § 1983. Although a violation of a federal statute can serve as the basis of an action under section 1983, *Maine v. Thiboutot,* 448 U.S. 1, 4–6 (1980), section 1983 cannot serve as the basis for enforcing a violation of a federal statute "where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983." *Suter v. Artist M.,* 503 U.S. 347, 112 S.Ct. 1360, 1366 (1992) (citation and internal quotation marks omitted). *See also Middlesex County Sewerage Authority v. National Sea Clammers Assn.,* 453 U.S. 1 (1981).

In support of their argument that Congress did not create a § 1983 private cause of action under Part H, the defendants cite to *Smith v. Robinson,* 468 U.S. 992 (1984). There, the U.S. Supreme Court held that IDEA precluded reliance on section 1983 as a remedy because Congress included within the act an elaborate set of administrative remedies. *Id.* at 3467–68. However, Congress responded to the *Smith* decision by amending the IDEA in 1990 to specifically allow individuals to seek redress under other federal statutes, such as section 1983:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 790 *et seq.*], or other Federal statutes protecting the rights of children and youth with disabilities....

20 U.S.C. § 1415(f) (emphasis added). Since the passage of § 1415(f) courts have recognized that the IDEA's remedies are not exclusive, and that plaintiffs can bring section 1983 actions based on alleged violations of the IDEA. *See Mrs. W. v. Tirozzi,* 832 F.2d 748, 754–55 (2d Cir.1987); *Board of Educ. v. Diamond,* 808 F.2d 987, 994–95 (3d Cir.1986).[6]

The defendants acknowledge § 1415(f) of the IDEA, but argue that it is inapplicable to Part H of the IDEA. According to the defendants, Part H is not a part of the "main IDEA" and therefore section 1415(f) has no effect on Part H. We reject this argument, for Congress explicitly used the word "chapter," and not "section" or "subsection," in declaring that "nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, ... or [ ] Federal statutes protecting the rights of children and youth with disabilities." 20 U.S.C. § 1415(f). The defendants are essentially asking us to ignore the fact that Part H falls under, and is therefore an inseverable part of Chapter 33, the Individuals with Disabilities Education Act. Accordingly, Defendants' motion to dismiss plaintiffs' complaint on the grounds that Part H of the IDEA is not enforceable under section 1983 is denied.

CONCLUSION

***6** For the foregoing reasons, Defendants' motion to dismiss Governor Edgar as a named party defendant is granted. Defendants' motion to dismiss is denied in all other respects.

All Citations

Not Reported in F.Supp., 1994 WL 262193, 5 A.D.D. 965

Footnotes

1 Section 1475(c) provides:

> In order to be eligible for a grant under section 1473 of this title for a fifth and any succeeding year of a State's participation under this subchapter, a State shall include in its application under section 1478 of this title for that year information and assurances demonstrating to the satisfaction of the Secretary that the State has in effect the statewide system required by section 1476 of this title and a description of services to be provided under section 1476(b)(2) of this title.

2 As alleged in the complaint, Interim Superintendent Broncato is the chief executive officer of the Illinois State Board of Education ("the Board"), the entity designated as the lead agency charged with implementing the provisions of Part H in Illinois.

3 Although for the purposes of a Rule 12(b)(6) motion a court may not look beyond the pleadings, documents incorporated by reference into the pleadings, and all documents attached to the pleadings as exhibits, are considered a part of the pleadings for all purposes. F.R.Civ.P. 10(c).

4 Defendants' arguments that the plaintiffs should be barred from pursuing their action because forced compliance with the federal statute would be costly are unavailing.

5 We note that in responding to Defendants' claim that this action should be dismissed on Eleventh Amendment grounds the plaintiffs raise the argument that immunity with respect to Part H was expressly abrogated by 20 U.S.C. § 1403(a), an amendment to the IDEA. While this may serve as an alternative ground for allowing the plaintiffs to proceed on their action, we need not decide this issue, since we have determined that the plaintiffs' claim, which seeks only prospective relief, is not barred by the Eleventh Amendment. The better argument, however, is that the Eleventh Amendment abrogation found in section 1403(a) applies to Part H actions as well.

6 In citing to H.R.Rep. No. 296, 99th Cong, 1st Sess. 4 (1985), both the Second Circuit and the Third Circuit recognized that Congress intended the non-exclusivity provision § 1415(f) to "permit parents or guardians to pursue the rights of handicapped children through [IDEA], section 504 and section 1983." *Mrs. W.,* 832 F.2d at 754–55; *Board of Educ. of E. Windsor,* 808 F.2d at 994 n. 4.