Nos. 17-2255/2257/2260

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 28, 2017
DEBORAH S. HUNT, Clerk

D.R., as a minor through parent and next friend Dawn Richardson, et al.,

Plaintiffs-Appellees,

v.

GENESEE INTERMEDIATE SCHOOL DISTRICT; MICHIGAN DEPARTMENT OF EDUCATION; FLINT COMMUNITY SCHOOLS,

Defendants-Appellants.

O R D E R

Before: SUHRHEINRICH and KETHLEDGE, Circuit Judges; HOOD, District Judge.*

In this putative class action under the Individuals with Disabilities Education Act ("IDEA"), Defendants Genesee Intermediate School District ("Genesee"), Michigan Department of Education ("MDE"), and Flint Community Schools ("Flint") appeal the denial of their motion to dismiss for failure to exhaust administrative remedies. The Plaintiffs move to dismiss the appeals for lack of jurisdiction. The Defendants oppose the motion to dismiss on the ground that the district court's ruling is an appealable collateral order. The Plaintiffs reply in support of the dismissal of the appeals and move for an expedited ruling on their motion to dismiss.

* The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

In addition, MDE moves for a stay of the district court proceeding pending its appeal. MDE seeks an expedited ruling on its motion, which is supported by Genesee and Flint. The Plaintiffs oppose the motion for a stay.

We consider appellate jurisdiction prior to considering the expedited motion for a stay pending appeal. We have jurisdiction of appeals from final judgments pursuant to 28 U.S.C. § 1291. The collateral-order doctrine, which is a practical construction of the final-judgment rule, permits certain categories of non-final rulings to be immediately appealed. To be appealable, a non-final order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will v. Hallock*, 546 U.S. 345, 349 (2006) (internal quotation marks omitted). To conclude that a category of claims constitutes collateral orders, "[t]he justification for immediate appeal must therefore be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009).

In an action similar to the instant case that alleged widespread, systemic violations of IDEA, the Third Circuit held that the denial of a motion to dismiss on the basis of failure to exhaust administration remedies was not appealable as a collateral order. *M.A. ex rel. E.S. v. State-Operated Sch. Dist. of City of Newark*, 344 F.3d 335, 343 (3d Cir. 2003). And we have previously concluded that denials of motions to dismiss for failure to exhaust are not final or otherwise appealable. *See Henricks v. Pickaway Corr. Inst.*, 782 F.3d 744, 752 (6th Cir. 2015); *Wright v. Leis*, 335 F. App'x 552, 554 (6th Cir. 2009); *Simon v. Pfizer Inc.*, 398 F.3d 765, 771 (6th Cir. 2005). Other Circuits likewise have concluded that the denial of a motion to dismiss on exhaustion grounds is not an appealable collateral order. *See, e.g., Langford v. Norris*, 614 F.3d

445, 456–57 (8th Cir. 2010); *Stewart v. Oklahoma*, 292 F.3d 1257, 1260 (10th Cir. 2002); *Davis v. Streekstra*, 227 F.3d 759, 762–63 (7th Cir. 2000).

Moreover, the district court's ruling is not a collateral order because it can be effectively reviewed on appeal from the final judgment. An exhaustion requirement is not immunity from suit and does not implicate a right not to be tried. *Henricks*, 782 F.3d at 752 ("[T]he exhaustion requirement, unlike qualified immunity, is not a protection from litigation."); *Davis*, 227 F.3d at 763 ("Exhaustion requirements do not create absolute (or even qualified) rights to be free from litigation."). And exhaustion does not confer any right to be free from the costs of litigation. *Langford*, 614 F.3d at 457. "[T]he possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436 (1985).

Accordingly, the motion to dismiss these appeals for lack of jurisdiction is **GRANTED**. The motion for a stay pending appeal and the motion to expedite are **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: November 28, 2017

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Re: Case No. 17-2255/17-2257/17-2260, *D.R., et al v. Genesee Intermediate Sch Dist*
Originating Case No. : 2:16-cv-13694

Dear Counsel:

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Leon T. Korotko for Roy Ford
Case Manager
Direct Dial No. 513-564-7014

cc: Mr. David J. Weaver

Enclosure

No mandate to issue