

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 03 2489

D. D., a minor, by and through his Parent and Next
Friend, V. D.,

03 Civ. ()

Plaintiff,

-against-

**COMPLAINT/DEMAND FOR
JURY TRIAL**

NEW YORK CITY BOARD OF EDUCATION, NEW
YORK CITY DEPARTMENT OF EDUCATION,
JOEL KLEIN, Chancellor of New York City Schools,
DR. ANGELO GIMONDO, Superintendent, Community
School District 30, NELLY REAL-KORB, Chairperson,
Committee on Preschool Special Education (CPSE)
District 30, RICHARD P. MILLS, Commissioner of the
New York State Education Department, THE CITY OF
NEW YORK,

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT, E.D.N.Y.
★ MAY 16 2003
BROOKLYN OFFICE
AMON, J.

MANN, M.J.

Defendants.

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Plaintiff D. D. (by his mother and next friend, V. D.), by his attorneys Emery

Celli Cuti Brinckerhoff & Abady PC, for his Complaint alleges as follows:

PRELIMINARY STATEMENT

1. This is an action arising out of defendants' violations of D. D.'s federal
statutory rights under 42 U.S.C. § 1983, the Individuals with Disabilities Education Act
("IDEA"), the Americans with Disabilities Act, and the Rehabilitation Act of 1973.

2. D. D. is a disabled, developmentally-delayed, four-year-old child. The
Department of Education, its own Committee on Preschool Special Education, its own hearing
officer, and D. D.'s mother all agree: D. D. needs special education services immediately. Yet,

ORIGINAL

notwithstanding its own hearing officer's order, the Department has for over eight months done nothing to provide the "free appropriate public education" which D. D. desperately needs, and to which he is entitled under federal law.

3. D. D. brings this action to compel the defendants to do what they are obligated to do under the statutes cited above: comply with the hearing officer's decision, comply with their own recommendations for special education services, and compensate D. D. for the many months of education that he has lost. D. D. seeks an injunction, damages, and related relief.

THE PARTIES

4. Plaintiff D. D. is a four-year-old child residing at 35-56 77th Street, in Jackson Heights, New York. D. D. has been classified as a child with a disability, as that term is defined in 20 U.S.C. § 1401(3)(B). By reason of D. D.'s disability, D. D. needs special education and related services.

5. D. D. is and was at all times mentioned herein the son of V. D., his mother and Next Friend, in whose custody and care he resides.

6. Defendants Board of Education of the City of New York and Department of Education of the City of New York (referred to collectively as "Department"¹) is an entity organized and existing under the laws of the State of New York whose purpose is to own, maintain, and operate the public schools in New York City. The Department has established

¹Due to the confusing reorganization of the Board of Education into the Department of Education, and their still somewhat murky legal status, plaintiff sues both the Board and the Department.

policies and procedures; both written and informal, concerning the implementation of the IDEA. The Department receives funding pursuant to the IDEA, 20 U.S.C. § 1412, and therefore must comply with the statute's provisions. At all times relevant hereto, defendant Department was responsible for the policy, practice, supervision, implementation, and conduct of all Department and was responsible for the appointment, training, supervision, and conduct of all Department personnel. In addition, at all relevant times, defendant Department was responsible for enforcing the rules of the Department, and for ensuring that Department personnel obey the laws of the United States and of the State of New York.

7. Defendant Joel Klein is Chancellor of the New York City Schools. As Schools Chancellor, defendant Klein has the power and duty to perform any duty imposed upon the Department of Education, including the operation of all special education programs and services. At all times relevant to the events described herein, defendant Klein acted under color of law of the State of New York and in his capacity as an agent, servant, and employee of defendant New York City and/or Department, and within the scope of his employment as such.

8. Defendant Dr. Angelo Gimondo is the Superintendent of Community School District 30. On information and belief, defendant Gimondo, as Superintendent, has authority over and is responsible for the implementation, supervision and provision of educational programs for all children in District 30 including children with disabilities. At all times relevant to the events described herein, defendant Gimondo acted under color of law of the State of New York and in his capacity as an agent, servant, and employee of defendant New York City and/or Department, and within the scope of his employment as such.

9. Defendant Nelly Real-Korb is the Chairperson of the Committee on

Preschool Special Education ("CPSE") in School District 30. On information and belief, Defendant Real-Korb, as Chairperson, has authority over and is responsible for the evaluations and educational programs of all children with disabilities in District 30. At all times relevant to the events described herein, defendant Real-Korb acted under color of law of the State of New York and in her capacity as an agent, servant, and employee of defendant New York City and/or Department, and within the scope of his employment as such.

10. Defendant Richard P. Mills is the Commissioner of the New York State Education Department ("SED"). As Commissioner, defendant Mills has the power and duty to perform any duty imposed upon the SED, including the operation of all special education programs and services. At all times relevant to the events described herein, defendant Mills acted under color of law of the State of New York and in his capacity as an agent, servant, and employee of SED, and within the scope of his employment as such. SED is a recipient of federal funds under the IDEA and is mandated by the IDEA to ensure the administration of special education and related services to all children with disabilities between the ages of three and twenty-one who reside in the State of New York, including the disbursement of IDEA funds to local school districts and on information and belief certification of private schools that can provide special education services to preschool children.

11. Defendant City of New York ("City") is a municipality organized and existing under the laws of the State of New York. At all times relevant hereto, defendant City, acting through the Department of Education, was at least in part responsible for the policy, practice, supervision, implementation, and conduct of all Department matters and was responsible for the appointment, training, supervision, and conduct of all Department personnel.

In addition, at all relevant times, defendant City was at least in part responsible for enforcing the rules of the Department, and for ensuring that Department personnel obey the laws of the United States and of the State of New York.

12. Defendants Mills, Klein, Gimondo, and Real-Korb are referred to collectively as the "individual defendants." Each individual defendant is sued individually and in his or her official capacity. At all times mentioned herein, each individual defendant acted under the color of New York State law, in the capacity of an agent, servant and employee of defendant Department, defendant City, or SED and within the scope of his or her employment.

JURISDICTION AND VENUE

13. This action arises under 42 U.S.C. §§ 1983 and 1988; the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et. seq.*; the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, *et. seq.*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended by the Civil Rights Restoration Act of 1987; and New York State law.

14. The jurisdiction of this Court is predicated upon 28 U.S.C. §§ 1331, 1343(a)(3) and (4), 1367(a), and the doctrine of supplemental jurisdiction.

15. The acts complained of occurred in the Eastern District of New York and venue is lodged in this Court pursuant to 28 U.S.C. § 1391(b).

JURY DEMAND

16. Plaintiff demands trial by jury in this action.

FACTUAL ALLEGATIONS

17. Congress enacted the IDEA to ensure that students with disabilities have meaningful access to public education. States who participate in the IDEA receive substantial federal funds in exchange for their agreement to provide a free appropriate public education to all disabled children in the state, and to comply with the IDEA's procedural and substantive mandates.

18. New York has chosen to participate in the IDEA framework, and has established procedures for providing special educational services to children with disabilities, set forth at N.Y. Educ. Law § 4401 *et seq.*

19. The primary mechanism for ensuring implementation of the IDEA's mandate of a free appropriate public education is the Individualized Education Plan ("IEP"). An IEP is a written statement, prepared for every child with a disability, that sets forth the special education and related services, supplementary aids and services, and program modifications or supports for school personnel, to be provided to the child, or on behalf of the child.

20. D. D. was born on July 27, 1998 and lives with his parents in Jackson Heights, New York. In September 2002, shortly after he turned four, his parents sent him to school for the first time, at BWY preschool. BWY is a regular public school that offers no special education services.

21. Soon after D. D. began attending school, his mother asked the school to evaluate him to determine whether he had any developmental problems. The school referred the matter to the New York City Department of Education Committee on Preschool Special Education ("CPSE"), in school District 30.

22. In October 2002, CPSE arranged for a number of specialists to evaluate D. D. The evaluations revealed that D. D. had significant developmental difficulties. In cognitive development, D. D. functioned in the Slow Learner range according to SB-4, could not comprehend the concepts of 'one' or 'more,' compare sizes, or count with correspondence. D. D.'s fine motor skills and receptive and expressive language skills were all significantly delayed. D. D. was unable to understand descriptive concepts, group objects, or negatives. He was also unable to compare objects, identify pictures, or identify body parts on self. He could not use verb+ing, produce sentences, tell how an object was used, answer questions logically, use several pronouns, or tell about remote events.

23. A licensed speech-language pathologist diagnosed D. D. with "a severe phonological disorder," with "deviant phonological processes" in the areas of "assimilation, syllable reduction, stopping and final consonant deletion."

24. After formal tests, the pathologist concluded that D. D.'s auditory comprehension, expressive communication, and total language skills were all in the 1st percentile, on a scale of 1 to 100, where 1 is the lowest.

25. Based on these scores, D. D., who was 4 years 2 months old, had an age equivalence of 2 years 6 months.

26. The pathologist also concluded that D. D. "exhibits a moderate to sever[e] expressive/receptive/pragmatic language disorder with skills greater than 50% delayed in comparison to his chronological age," as well as "a moderate to severe phonological disorder reducing intelligibility." She recommended that D. D. receive speech/language therapy to improve articulation skills and receptive/expressive/pragmatic language skills to age appropriate

levels:

27. D. D. also received an education evaluation, which determined that he functioned in the 2.6-3.0 year range in cognitive skills, 2.0-2.6 year range for communication, 2.0-2.6 range in fine motor skills, 2.0-2.6 range for social/emotional skills, and 2.0-2.6 range in adaptive skills. The evaluation also noted D. D.'s "limited attention span" and inability to "establish and maintain eye contact" or interact with other children; his inability to use plurals, possessives, pronouns or negative phrases; and fine motor skills so poor that he was unable to open and close scissors.

28. A licensed psychologist also evaluated D. D., concluding that in cognitive functioning, verbal reasoning, abstract/visual reasoning, quantitative reasoning, and short-term memory domain, D. D. was either in the "Low Average" or "Slow Learner" range. The psychologist recommended that D. D. receive special education services to address delays in his cognitive functioning, social skills and communication skills.

29. Finally, D. D. received an occupational therapy evaluation, which found "significant deficits in fine motor skills and visual perceptual-motor skills," and "[c]omposite fine motor" skills "in the 2nd percentile with a rating of *poor*." The occupational therapist recommended that D. D. receive "occupational therapy services . . . two times per week for 30 minutes each individual session to facilitate improved performance in an education setting."

30. As a result of these evaluations, Ms. Dragun met at a formal conference with George Grammatikopoulos, the District 30 CPSE representative, as well as a social worker and a special education teacher to determine what special education services D. D. required.

31. At the end of the conference, Mr. Grammatikopoulos prepared an IEP for

D. D. See 20 U.S.C. § 1414(d), 8 N.Y.C.R.R. § 200.4(d)(2) (describing purpose, creation, and content of IEPs).

32. The IEP recommended special education services of a "Half day integrated class, 2 1/2 hours per day, 5 days per week with speech and occupational therapy as related services," with a staffing ratio in the class of eight students to one teacher. Specifically, the recommended related services were three weekly 30-minute sessions of speech and language—two sessions with one student and one session with three students—and one weekly, one-on-one 30-minute session of occupational therapy.

33. The IEP set a "Projected Date of Initiation of IEP" for December 6, 2002, within two weeks of the IEP conference.

34. Because various doctors who evaluated D. D. had asked Ms. Dragun whether anyone in her family had autism, she also decided to take her son for an evaluation by a neurologist, Dr. Fefer, on December 3, 2002.

35. Dr. Fefer determined that D. D. had "Pervasive Developmental Disorder features" and "speech delay," and recommended speech therapy and twenty hours of ABA (Applied Behavioral Analysis) services per week.

36. Later in December, Ms. Dragun sent a copy of Dr. Fefer's report to Mr. Grammatikopoulos, the District 30 CPSE representative.

37. December 6 came and went and D. D. received none of the services recommended in the IEP. Ms. Dragun repeatedly called Mr. Grammatikopoulos, asking him when D. D. would start to receive the speech and occupational therapy recommended in the IEP. But Mr. Grammatikopoulos was unable to give a date when the services would begin. He would

only say that there were no available slots and that D. D. was on a waiting list.

38. The Department of Education also (apparently) wrote Ms. Dragun a letter on December 5, 2002 (which she did not see until months later) stating: "At this time, there is no availability for a Half Day Integrated program."

39. Nothing changed in January of this year. Ms. Dragun kept calling CPSE, but they were still unable to provide any services or to provide a date when services would begin. D. D. received no speech therapy and no occupational therapy in all of January. He was also not placed in a half-day integrated class.

40. On February 6, Ms. Dragun wrote a letter to CPSE begging them to help her son:

My son . . . had an IEP meeting on November 20th, 2002. He is approved to attend a half day integrated program which he has been waiting for since then with no avail or success.

I would like to request for a meeting so that we can discuss his IEP where he can at least receive some type of services for the present time. Too much time has been wasted where he is not getting any services. I feel it is crucial that my son gets some type of services!!!!

41. But nothing changed in February. Ms. Dragun was still told that D. D. was on a waiting list and that the Department of Education could offer him no special education services at all.

42. In mid-March, Ms. Dragun retained counsel, who immediately filed a request for an impartial hearing before a Department of Education hearing officer, so that the officer would order the Department to provide the services in the IEP.

43. Within two weeks, CPSE scheduled a second conference for March 31, 2003 to consider amending the IEP to add the ABA services recommended by the neurologist,

Dr. Fefer. On March 31, after a formal conference with Mr. Grammatikopoulos and others, the CPSE created an amended IEP for D. D.

44. This second IEP made a "dual recommendation": first, it reiterated all of the recommendations from the November 20, 2002 IEP (half day integrated class, 2 1/2 hours per day, 5 days per week with speech and occupational therapy as related services); second, it added ten hours per week of ABA therapy from a special education itinerant teacher ("SEIT"), which is private, one-on-one therapy that can be given at home.

45. Still, throughout all of March, D. D. received no special education services at all.

46. Instead, on March 31, after the second IEP, the CPSE sent another "awaiting placement notification" letter to Ms. Dragun stating: "At this time, there is no availability for a Half Day Integrated class with speech and occupational therapy, as well as, no availability for a SEIT provider."

47. On April 11, plaintiff had an impartial hearing before Mindy Wolman, Esq., a New York City Department of Education impartial hearing officer ("Hearing Officer"). Mr. Grammatikopoulos testified, as well as Elliot Golden, director of the central based support team for the New York City Department of Education, and Ms. Dragun. Defendant Real-Korb attended the hearing.

48. During the hearing, the Department revealed that D. D. was one of many special needs children who had received IEPs but were not receiving any services. The Department produced a waiting list of 69 such children in District 30 alone (with names deleted).

49. Mr. Golden also testified that there were hundreds of other children

throughout other districts in New York City who had IEPs but received either no services or only partial services.

50. Throughout April, both before the impartial hearing and after, D. D. still received none of the special education services recommended in the first IEP or the second IEP. He received no speech therapy, no occupational therapy, and no ABA therapy.

51. By decision dated April 30, 2003, the Hearing Officer concluded that D. D. required the services listed in the March 31 IEP, and ordered the Department to implement the March 31 IEP by May 10 and to provide him compensatory services this summer.

52. May 10 has come and gone and the Department has not followed the order. They have still provided no special education services to D. D.

53. At the impartial hearing, the Department could not even guarantee that D. D. would receive any special education services by September 2003.

54. In the absence of appropriate services or other assistance, D. D.'s disability has substantially impeded his educational progress.

55. The practice by which school districts do not implement their own IEPs or comply with the decisions of impartial hearing officers, fail to make slots available to children who require special education, fail to certify a sufficient number of schools to provide special education services to preschool children, and fail to provide services mandated by the IDEA—all of which apparently prevented D. D. from receiving the special education services he required—is persistent and widespread.

56. The individual defendants are aware, or should be aware, of this practice, but have failed to take sufficient steps to end it.

57. Defendants' failure to provide D. D. with the services to which he is entitled has had, and continues to have, an irreparable impact on his education and his development.

58. As of the date of this complaint, D. D. has still not received any of the special education and related services recommended by the IEPs or ordered by the Hearing Officer.

59. The acts of the individual defendants were reckless, willful, wanton, malicious, and/or intentional, thus entitling plaintiff to an award of punitive damages.

60. Defendants' acts proximately caused D. D. and his family mental and emotional injuries and anguish, impeded his development, and deprived D. D. of a free appropriate public education for over eight months.

AS AND FOR A FIRST CLAIM FOR RELIEF

42 U.S.C. § 1983

61. Plaintiff repeats and realleges the foregoing paragraphs as if the same were fully set forth at length herein.

62. By refusing to implement the order of the Impartial Hearing Officer, refusing to implement any of the services recommended in the November 2002 and March 2003 IEPs, failing to provide D. D. any special education services at all, and denying D. D. a free appropriate public education, defendants deprived plaintiff of rights, remedies, privileges, and immunities guaranteed to every citizen of the United States, in violation of 42 U.S.C. § 1983, including, but not limited to, rights guaranteed by the IDEA, 20 U.S.C. § 1400 *et. seq.*

63. Defendants acted under pretense and color of state law and in their

individual and official capacities and within the scope of their respective employments as City, SED, and/or Department employees and/or officers. Said acts by defendants were beyond the scope of their jurisdiction, without authority of law, and in abuse of their powers, and said defendants acted willfully, knowingly, recklessly, and with the specific intent to deprive plaintiff of his constitutional rights secured by 42 U.S.C. § 1983, and by the IDEA.

64. As a direct and proximate result of the misconduct, plaintiff sustained the damages hereinbefore alleged, and defendants have caused D. D. injury, including irreparable injury, which will continue unless defendants are enjoined from their unlawful conduct.

AS AND FOR A SECOND CLAIM FOR RELIEF
Individuals With Disabilities Education Act

65. Plaintiff repeats and realleges the foregoing paragraphs as if the same were fully set forth at length herein.

66. The IDEA creates a right for children with disabilities to have a free appropriate public education provided in conformity with a valid IEP.

67. The IDEA creates procedural safeguards to ensure the right to a free appropriate public education, including the right to have an Impartial Hearing Officer's final decision carried out by any local educational agency that receives federal financial assistance under the IDEA.

68. Defendants' failure to (i) follow the order of the Impartial Hearing Officer, (ii) implement any of the services recommended in the November 2002 or March 2003 IEPs; (iii) provide D. D. any special education services at all, and (iv) provide D. D. a "free appropriate public education," are violations of D. D.'s rights under the IDEA.

69. As a direct and proximate result of the misconduct, plaintiff sustained the damages hereinbefore alleged, and defendants have caused D. D. injury, including irreparable injury, which will continue unless defendants are enjoined from their unlawful conduct.

AS AND FOR A THIRD CLAIM FOR RELIEF
Americans With Disabilities Act

70. Plaintiff repeats and realleges the foregoing paragraphs as if the same were fully set forth at length herein.

71. As noted in the IEPs and evaluations of D. D., and as noted above, D. D. has developmental disabilities, is on the autistic spectrum and has physical impairments that substantially limit one or more major life activities, including talking, communicating, learning, and interacting with others.

72. As evidenced by his IEPs, D. D. also has a record of such impairment, and is regarded as having such impairment.

73. D. D. is qualified to receive a free appropriate public education in defendant's schools.

74. Both District 30 (through two IEPs) and an Impartial Hearing Officer have determined that by reason of D. D.'s disability, he needs a placement with various special education services, but defendants have failed to provide this as ordered by the Impartial Hearing Officer and as recommended in the two IEPs.

75. Defendants, in failing to reasonably accommodate D. D.'s disabilities by providing him with these services, and by failing to provide him with an appropriate education, have discriminated against D. D. on the basis of his disability in violation of the Americans with

Disabilities Act of 1990, 42 U.S.C. § 12132.

76. As a direct and proximate result of the misconduct, plaintiff sustained the damages hereinbefore alleged, and defendants have caused D. D. injury, including irreparable injury, which will continue unless defendants are enjoined from their unlawful conduct.

AS AND FOR A FOURTH CLAIM FOR RELIEF
Rehabilitation Act

77. Plaintiff repeats and realleges the foregoing paragraphs as if the same were fully set forth at length herein.

78. Defendants are recipients of federal financial assistance.

79. As noted in the IEPs and evaluations of D. D., and as noted above, D. D. has developmental disabilities, is on the autistic spectrum and has physical impairments that substantially limit one or more major life activities, including talking, communicating, learning, and interacting with others.

80. As evidenced by his IEPs, D. D. also has a record of such impairment, and is regarded as having such impairment.

81. D. D. is qualified to receive a free appropriate public education in defendants' schools.

82. Both District 30 (through two IEPs) and an Impartial Hearing Officer have determined that by reason of D. D.'s disability, he needs a placement with various special education services, but defendants have failed to provide this as ordered by the Impartial Hearing Officer and as recommended in the two IEPs.

83. Defendants, in failing to reasonably accommodate D. D.'s disabilities by

providing him with these services, and by failing to provide him with an appropriate education, have discriminated against D. D. on the basis of his disability, in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended by the Civil Rights Restoration Act of 1987.

84. As a direct and proximate result of the misconduct, plaintiff sustained the damages hereinbefore alleged, and defendants have caused D. D. injury, including irreparable injury, which will continue unless defendants are enjoined from their unlawful conduct.

WHEREFORE, plaintiff respectfully requests judgment against defendants as follows:

(A) an order temporarily, preliminarily, and permanently enjoining defendants, their employees, agents, and all persons in active concert with them to provide all of the services to which D. D. is entitled under the IDEA, and to implement the recommendations of the IEPs and the order of the Impartial Hearing Officer;

(B) an order awarding compensatory education and services, and reimbursement for any and all expenses the D. D. has spent for evaluations and services;

(C) an order awarding compensatory and punitive damages in an amount to be determined at trial;

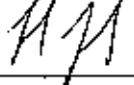
(D) reasonable attorneys' fees and costs under 42 U.S.C. § 1988 and 20 U.S.C. § 1415(i)(3)(B); and

(E) directing such other and further relief as the Court may deem just and proper, together with attorneys' fees, interest, costs and disbursements of this action.

Dated: May 15, 2003
New York, New York

Yours, etc.,

EMERY CELLICUTI BRINCKERHOFF
& ABADY PC

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