

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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E.B., *et al.*,

Plaintiffs,

02 CV 5118 (CPS) (MDG)

-against-

NEW YORK CITY BOARD OF EDUCATION, *et al.*,

Defendants.

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**DEFENDANTS' REPLY MEMORANDUM OF
LAW IN SUPPORT OF THEIR MOTION
PURSUANT TO RULE 23(c)(1)(C) OF THE
FEDERAL RULES OF CIVIL PROCEDURE**

PRELIMINARY STATEMENT

As set forth in defendants' moving papers, at oral argument of plaintiffs' motion for class certification, this Court expressed concern regarding plaintiffs' amalgamation of a number of varied complaints together in a single lawsuit. While the Memorandum and Order certifying a class in this case noted that the class was defined less broadly than plaintiffs' proposal, it appears that plaintiffs have disregarded the Court's intention to narrow the class definition, and instead interpret the class certified by this Court to include a wide variety of circumstances that could lead to exclusion from school. Because defendants believe that plaintiffs' expansive view of the scope of the E.B. class is precisely what this Court sought to avoid by defining the class less broadly than plaintiffs proposed, defendants have moved pursuant to Rule 23(c)(1)(C) of the Federal Rules of Civil Procedure to amend the class definition.

Contrary to the arguments set forth in plaintiffs' opposition papers, defendants' motion is squarely based on the development of this case since the class was certified. Based on the discovery sought by plaintiffs in this action, as well as plaintiffs' counsel's submissions to the Court, defendants submit that plaintiffs' interpretation of the scope of the E.B. class is broader than this Court intended. Therefore, in order to clarify the scope of the E.B. class, as well as the issues to be tried in this action, defendants move to amend the class definition to more accurately reflect the class claims identified by this Court.

ARGUMENT

PURSUANT TO F.R.C.P. 23(c)(1)(C), THE CLASS DEFINITION SHOULD BE AMENDED IN ORDER TO CLARIFY THE SCOPE OF THE CLASS, AS WELL AS THE ISSUES TO BE TRIED IN THIS ACTION.

Plaintiffs' opposition papers note that under Rule 23(c)(1)(C), courts are required to reassess their class rulings as the case develops. See plaintiffs' Memorandum of Law in Opposition to Defendants' Motion Pursuant to Rule 23(c)(1)(C) of the Federal Rules of Civil Procedure, dated March 2, 2005 ("plaintiffs' Opposition"), page 4; see also Boucher, et al. v. Syracuse University, et al., 164 F.3d 113, 118 (2d Cir. 1999). According to the case law cited in plaintiffs' papers, the district judge must define, redefine, create subclasses, and decertify as appropriate in response to the progression of the case from assertion to facts. See plaintiffs' Opposition, page 4; see also Boucher, 164 F.3d at 118 (quoting Richardson v. Byrd, 709 F.2d 1016, 1019 (5th Cir. 1983)). Plaintiffs note that the district court is charged with the duty of monitoring its class decisions in light of the evidentiary development of the case, and that the original definition and certification may require alteration or amendment as the case unfolds. See plaintiffs' Opposition, page 5; see also Richardson, 709 F.2d at 1019; Burns v. United States Railroad Retirement Board, 701 F.2d 189, 191-192 (D.C. Cir. 1983). Therefore, while plaintiffs

question the legal basis of defendants' motion, defendants submit that plaintiffs' own papers provide ample support for defendants' arguments.

As set forth in defendants' moving papers, this Court's decision granting plaintiffs' motion for class certification noted that plaintiffs' proposed class definition, which was explicitly not adopted by this court, would encompass students excluded for any reason, pursuant to any policy, that violates any law. See Corrected Memorandum and Decision, dated August 17, 2004 ("Memorandum and Order"), annexed to the Declaration of Carolyn Wolpert, dated February 15, 2005 ("Wolpert Declaration"), as Exhibit B, page 10. Defendants submit that plaintiffs have interpreted the inclusion of the terms "discharge," "transfer" and "denial of access" in the class definition to expand the claims at issue in this case, effectively nullifying the narrowing construction imposed by the Court in its definition of the plaintiff class.

For example, due to the inclusion of the terms "transfer" and "discharge" in the class definition, plaintiffs maintain that the members of the E.B. class challenge the legality of defendants' alleged policy and procedure of discharging and transferring all students who have a history of truancy, including those students marked as long-term absentees (LTAs). See plaintiffs' motion to compel, dated February 1, 2005, annexed to the Wolpert Declaration as Exhibit D, pages 5-6.

Due to the inclusion of the terms "denial of access" and "discharge," plaintiffs maintain that almost half of the proposed class members in the J.G. case who allege illegal exclusions due to a "denial of access" or a "discharge" from one of defendants' correctional education schools, and who were allegedly deprived of a free and appropriate public education, also appear to the E.B. class members. See Letter from Elisa Hyman to the Honorable Charles P. Sifton, dated December 28, 2004, annexed to the Wolpert Declaration as Exhibit F, at pages 1-2.

Plaintiffs further claim that students with disabilities who are excluded from their regular schools and “pushed into” alternative schools and programs, including GED programs and New Beginnings¹ programs, are also members of the E.B. class. See Exhibit D to the Wolpert Declaration, page 6; see also plaintiffs’ Opposition, page 7. Defendants submit that plaintiffs’ broad interpretation of the E.B. class has the effect of lumping every type of illegality that could lead to exclusion together in a single cause of action, and encompasses students excluded for any reason, pursuant to any policy, that violates any law.

Therefore, defendants propose an amendment to the class definition that more clearly focuses this case on the class claims identified by this Court. As set forth in this Court’s decision granting plaintiffs’ motion for class certification, the issues of law that plaintiffs claim that the members of the proposed class have in common are: (1) They failed to receive sufficient notice prior to their exclusion; and (2) While excluded, they did not receive a free and appropriate education as required by the IDEA. See Order, page 14. Defendants submit that limiting the class definition to disciplinary exclusions -- i.e., teacher removals, suspensions and expulsions -- will more accurately reflect the class claims identified by this Court, will clearly

¹ While plaintiffs claim that defendants’ own policies characterize “New Beginnings” as a place where students with disciplinary and behavioral problems are sent after suspensions, this claim is not supported by the citation provided by plaintiffs. See plaintiffs’ Opposition, page 7. The document referred to by plaintiffs describes New Beginning Programs and Centers as providing middle and high school students whose pattern of behavior has been a barrier to effective learning the support services they need to graduate high school. See “Authorization to Enter into Agreements with Eligible Providers for the Provisions of Transitional Support Services for Students” (“Authorization”), at <http://www.nycenet.edu/opm/opm/awards/ra1c215.pdf>. The Authorization notes that students are referred to New Beginning Programs and Centers by their home schools. See id. In contrast, the Authorization describes Off-Site Suspension Centers, Second Opportunity Schools and Regional In-School Suspension Centers as serving students who are removed and/or suspended from their schools. See id.

identify the issues to be tried in this action, will focus discovery, and will avoid the difficulty inherent in lumping every type of illegality that could lead to exclusion together in a single case.

CONCLUSION

Defendants respectfully request that this Court issue an Order amending the definition of the class certified herein as follows: “disabled New York City children age three through twenty-one who have been, will be, or are at risk of being excluded from school without adequate notice and deprived of a free and appropriate education for disciplinary reasons through teacher removals, suspensions, and expulsions,” and granting such other and further relief as may be just, proper and equitable.

Dated: New York, New York
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