UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

E.B., *et al.*,	:	
Plaintiffs,	:	
- against -	:	Index No. 02 CV 5118 (CPS) (MDG)
NEW YORK CITY BOARD OF EDUCATION, *et al.*,	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION PURSUANT TO RULE 23(c)(1)(C) OF THE FEDERAL RULES OF CIVIL PROCEDURE TO AMEND THE CLASS

Plaintiffs E.B., *et al.* respectfully submit this Memorandum of Law in Opposition to Defendants' Motion Pursuant to Rule 23(c)(1)(C) of the Federal Rules of Civil Procedure to Amend the Class.

This case calls into question the manner in which Defendants fail to comply, on a citywide basis, with federal and state laws designed to protect children with disabilities from exclusion without notice and the denial of a free and appropriate public education ("FAPE"). Class members, missing weeks, months, and even years of schooling, continue to be harmed by Defendants' unlawful practices. Despite the importance of these issues, Defendants, in the absence of a single new fact or development in the case, seek to delay its prosecution by attempting to reargue the definition of a class certified by this Court six months ago. Because there is neither a legal nor factual basis for Defendants' motion, it should be denied.

BACKGROUND

On August 17, 2004, this Court certified a class, in the above-captioned matter, of "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 through suspensions, expulsions, transfers, discharges, removals and denials of access." Corrected Memorandum and Order at 27-28, N.T., *et al.* v. New York City Board of Educ., *et al.*, 02 CV 5118 (Aug. 18, 2004) ("Memorandum and Order"), annexed to the Declaration of Carolyn Wolpert, dated February 15, 2005 ("Wolpert Declaration"), as Exhibit B. The Memorandum and Order was the outcome of an extended certification process, in which Plaintiffs overcame Defendants' Motion to Dismiss the Action, were subject to extensive discovery by Defendants and demonstrated the appropriateness of the E.B. class under Rule 23(b)(2) of the Federal Rules of Civil Procedure ("Federal Rules"). Following the grant of class certification, Plaintiffs, pursuant to an order entered by Magistrate Judge Marilyn D. Go, served discovery requests upon Defendants. Those requests have been outstanding for four months, and to date Defendants have produced little more than a handful of documents.

On February 1, 2005, Plaintiffs moved to compel the production of documents responsive to their outstanding discovery requests. On February 15, 2005, Defendants responded to that motion and simultaneously filed the instant Motion before this Court. Defendants requested that Magistrate Judge Go defer consideration of Plaintiffs' Motion to Compel pending the decision by this Court on the instant Motion to revise the class definition. See Defendants' Opposition to Plaintiffs' Motion to Compel at 1-2 (Feb. 15,

2005) ("Defendants' Opposition"), annexed to the Declaration of Matthew Stewart, dated March 2, 2005 ("Stewart Declaration"), as Exhibit A.

In spite of the absence of any change in circumstances since the certification of E.B. or the revelation of any facts relevant to the issues therein, Defendants now seek to reargue the class certification motion by contending that the Court's definition of the class fails to address the very concerns that were raised and addressed by the Court at the time it certified the class. Defendants' Motion to Amend at 2 (Feb. 15, 2005) ("Defendants' Memorandum"). Defendants now seek to eliminate from the class definition all children excluded through "transfers, discharges, removals and denials of access." Thus, contrary to their assertion, the Motion to Amend does not seek to *clarify* the E.B. class,[1] but to *narrow* it to the detriment of certain named plaintiffs and current class members whom Defendants improperly exclude through "transfers, discharges, removals and denials of access," modes which were previously identified and discussed in the class certification order and the order denying Defendants' Motion to Dismiss. Memorandum and Order at 27-28, annexed to Wolpert Declaration as Exhibit B; Denial of Defendants' Motion to Dismiss at 16 (Jan. 26, 2004), annexed to Stewart Declaration as Exhibit B.

Defendants argue that the very class definition that the Court approved, after extensive discovery by Defendants, briefing and deliberation, fails to encompass the issues delineated as common to class members, i.e., that students with disabilities failed to receive sufficient notice prior to their exclusion and, while excluded, failed to receive

[1] Plaintiffs note that under Local Rule 6.3, motions for reconsideration or reargument should be made within ten days after entry of the order at issue.

FAPE. Defendants' Memorandum at 4, 8, 9. Defendants' proposed alteration likely excludes from the class named plaintiffs, such as LB1, SM, KSG, EB, AJ and JW, all of whom survived Defendants' Motion to Dismiss and were certified as class representatives on the basis of exclusions that were not deemed formal "suspensions" or "expulsions" by Defendants. Defendants should not be permitted by their proposed amendment arbitrarily to define out of the class numerous members whom they may continue to subject to exclusions without notice and to denials of FAPE.

ARGUMENT

I. Class Amendment Is Appropriate When a Case Has Developed from Assertion to Facts.

Defendants' motion pursuant to Rule 23(c)(1)(C) of the Federal Rules of Civil Procedure is without legal merit.[2] Under 23(c)(1)(C), a court is "required to reassess [its] class rulings" only "as the case develops," i.e., "'in response to the progression of the case from assertion to facts.'" Boucher v. Syracuse University, 164 F.3d 113, 118 (2d Cir. 1999) (quoting Richardson v. Byrd, 709 F.2d 1016, 1019 (5th Cir. 1983)). Defendants do not offer a single new fact to support their motion but rather seek to amend the class based on arguments rejected by the Court more than six months ago.

A party proposing amendment of a class definition "'should, *at a minimum*, show some newly discovered facts or law in support of their desired action'" and "must not" offer grounds for amendment "that have been given previously, or which could have been argued earlier but were not." In re: Harcourt Brace Jovanovich, Inc. Sec. Litig., 838 F.

[2] Although the text of Rule 23(c)(1)(C) was recently changed and now allows an order certifying a class to be altered or amended "before final judgment," the Committee Notes explain that the reference to "final judgment" was made to avoid possible ambiguity under the prior rule, which referred to "decision on the merits." This change in text does not diminish the authority of the earlier cases cited which refer to language in the Rule that has not changed.

Supp. 109, 115 (S.D.N.Y. Oct. 29, 1993) (internal citations omitted) (emphasis added); see also Richardson, 709 F.2d at 1019 ("the district court is charged with the duty of monitoring its class decisions *in light of the evidentiary development of the case*" and "must define, redefine, subclass[ify], and decertify as appropriate *in response to the progression of the case from assertion to facts*") (emphasis added); Reynolds v. Sheet Metal Workers, 703 F.2d 221, 226 (D.C. Cir. 1981) ("class certification problems are constantly subject to reconsideration *as the facts develop at trial*) (emphasis added); Burns v. U.S. R.R. Retirement Bd., 701 F.2d 189, 191-92 (D.C. Cir. 1983) (Ginsburg, Ruth Bader, J.) ("the original definition and certification may require alteration or amendment *as the case unfolds*") (emphasis added).

The foregoing authority makes clear that Defendants have no legal basis to justify their Motion to Amend.

II. Defendants Improperly Seek to Alter the Class Definition.

The class definition originally proposed by Plaintiffs included "disabled New York City children age three through twenty-one who have been, will be, or are at risk of being excluded from school and deprived of educational services through suspensions, expulsions, transfers, discharges, removals and denials of access conducted in violation of the law." Memorandum and Order at 1-2, annexed to Wolpert Declaration as Exhibit B. The Court noted that Plaintiffs' proposed definition would "include members who shared no point of commonality other than an exclusion from school that in some manner violated some law." Id. at 10. With this in mind, the Court modified the proposed definition to make clear the two points of commonality in the claims of "disabled New York City children age three through twenty-one who have been, will be, or are at risk of

being excluded from school through suspensions, expulsions, transfers, discharges, removals and denials of access": first, that all such exclusions occur "without adequate notice," and second, that such exclusions result in class members' deprivation of FAPE. Id. at 10-11. The class definition also made clear, however, that the narrower definition was *not* intended to differentiate among excluded students with disabilities depending on the mode of their exclusion. Thus, students denied adequate notice and FAPE, whether through *suspensions, expulsions, transfers, discharges, removals or denials of access*, were all expressly included within the class. Id. at 27-28.

Defendants' newly proposed class definition of students with disabilities excluded "for disciplinary reasons through teacher removals, suspensions and expulsions," Defendants' Memorandum at 2, arbitrarily omits certain current named plaintiffs from the proposed class. Defendants, for no discernible reason, other than their articulated desire to narrow the scope of discovery,[3] would have the Court hold that students otherwise transferred, discharged, denied access to or removed from school without adequate notice and deprived of FAPE are somehow not "excluded" from school and therefore do not have claims that are common with those of the proposed class. In fact, if the class were narrowed in this way, Defendants would benefit from circumventing their own suspension policies: Defendants failed to abide by their procedures governing suspensions and expulsions when they removed Plaintiffs SM, LB1, EB, AJ, JW and KSG from school.

[3] See Defendants' Opposition to Plaintiffs' Motion to Compel at 1-3, annexed to Stewart Declaration as Exhibit A, where Defendants explain to Magistrate Judge Go that the grant of Defendants' Motion to Amend "would render much of plaintiffs' motion to compel moot."

Moreover, Defendants' proposed definition also would insert a harmful degree of ambiguity into the class definition through its use of the word "disciplinary." For instance, Defendants have indicated in their Opposition to Plaintiffs' Motion to Compel that they seek to exclude from their proposed definition students labeled Long-Term Absentees who have disabilities and are deprived of FAPE without adequate notice. See Defendants' Opposition at 6, annexed to Stewart Declaration as Exhibit A. But Defendants define long-term absenteeism, which is nothing more than truancy, as a behavioral problem subject to disciplinary redress.[4] Similarly, Defendants intend their proposed definition not to include students with disabilities who are deprived of FAPE without adequate notice by being sent to an alternative program like "New Beginnings." See id. at 3. However, Defendants' own policies characterize "New Beginnings" as a place where students with disciplinary and behavioral problems are sent after suspensions.[5] Given such inconsistencies, Defendants' proposed definition would not only eliminate the claims of significant portions of class members, but also fail to "clarify" the contours of the proposed amended class.

As was made plain in Plaintiffs' Third Amended Complaint, numerous plaintiffs in this action have been excluded through various informal means; their exclusion without adequate notice and denial of FAPE make them appropriate members and representatives of the class certified. See, e.g., Third Amended Complaint at ¶¶ 3, 71-96, 121-23 (alleging illegal exclusions resulting in denial of FAPE to all class members,

[4] See Press Release: Mayor Michael Bloomberg and Schools Chancellor Joel Klein Announce New School Safety Plan, at http://www.nycenet.edu/Administration/mediarelations/PressReleases/2003-2004/12-23-2003-13-2-36-874.htm.

[5] See Authorization to Enter into Agreements with Eligible Providers for the Provisions of Transitional Support Services for Students, at http://www.nycenet.edu/opm/opm/awards/ra1c215.pdf.

whether formally excluded from or informally denied access to educational services), annexed to Stewart Declaration as Exhibit C; Memorandum and Order at 10-11, 17, 22-23, annexed to Wolpert Declaration as Exhibit B. Under the current class definition, if a student with a disability is "suspended" without adequate notice and sent to a place where he is denied FAPE—such as a suspension center—then this student is a class member. Likewise, if a student with a disability is "transferred" without adequate notice from his current school to a place where he is denied FAPE—such as a GED or alternative program like "New Beginnings"—then this student is also a class member. The current definition properly accounts for the fact that it does not, and should not, matter whether Defendants use the label "suspension" or "transfer" to exclude a student without notice, and that it does not, and should not, matter if the denial of FAPE occurs in a setting called a "suspension center," a "GED program," or "New Beginnings." Cf. Third Amended Complaint at ¶¶ 73-76, annexed to Stewart Declaration as Exhibit C.

Moreover, as discussed at length in the Motion for Class Certification and recognized by this Court in its Memorandum and Order, the law does not make the kind of artificial distinction that Defendants seek to impose. Under the law, students are eligible for special education services, including transition services, until they turn twenty-one, even if they drop out or earn a GED diploma,[6] and are entitled to notice and FAPE regardless of the mode of any exclusion to which they are subjected.[7] It is the deprivation of FAPE after the procedurally inadequate exclusion that forms the basis of

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[6] See http://www.vesid.nysed.gov/specialed/transition/faqslist.htm#twenty5.

[7] See, e.g., 20 U.S.C. § 1415 (1997); N.Y. Comp. Codes R. & Regs. Tit. 8 § 200.5 (2000); § 504 of the Rehabilitation Act of 1973; 20 U.S.C. § 1415(k) (1997); Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 203 (1982); Goss v. Lopez, 419 U.S. 565 (1975); N.Y. Educ. Law § 3214 (McKinney 1999).

the claim. Using discharges, transfers and other methods to push students with disabilities, without notice, into settings which do not provide special education services excludes these students from receiving FAPE and makes them appropriate members of the class.

III. The Oral Argument Transcript and Class Certification Order Demonstrate that the Court Resolved Any Concerns It May Have Expressed during Oral Argument.

Defendants invoke a point in the oral argument to argue that the Court did not intend to include students who were transferred to alternative centers or denied access to special education services, despite the fact that the Court specifically included transfers and denials of access in its definition of the class. Defendants' Memorandum at 7. However, at oral argument, as reflected in the certification order, Plaintiffs' counsel demonstrated that the various modes of exclusion included in the class definition—"suspensions, expulsions, transfers, discharges, removals and denials of access"—should be addressed in a single case because, when effected without notice and resulting in a denial of FAPE, these exclusions all violate the same procedural provisions of law designed to protect class members. Transcript at 14-15, annexed to Wolpert Declaration as Exhibit A:

> Ms. Hyman: There are three specific provisions of law that all of these cases share.
>
> The Court: Okay.
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> Ms. Hyman: Provision number one is that the law prevents defendants from denying FAPE to children beyond ten days in any school year. All of these children were out for more than ten days. Two, the IDEA requires that prior to any change in placement and before particular meetings, parents are supposed to receive prior notice. Every—
>
> The Court: And you're saying that's true of every case.

Ms. Hyman: Every single child.

The Court: Within the class?

Ms. Hyman: Yes.

The Court: Okay.

Ms. Hyman: Three, when the children were either excluded from school or put in an alternative center, they did not receive any education whatsoever. If they were out of school completely—

The Court: Okay.

Ms. Hyman: —they received no instruction which I really don't think is an individualized determination.

The Court: All right.

Ms. Hyman: And if they were assigned to an alternative center, the defendants have a policy and practice that we have alleged and which we could prove if need be, that they do not provide any special education service in most, if not all, of their alternative programs.

The Court: All right.

Ms. Hyman: So that cuts across all children.

The Court: Well, don't go off into the most, if not all, because in this—

Ms. Hyman: Sorry. Well, we've alleged all.

The Court: —in this search for commonality.

Ms. Hyman: So, that's the essence of the case.

The Court: Okay.

Ms. Hyman: And so, unlike those other cases, there are very specific provisions of the statute that apply to all of these kids regardless of the nuances.

The Court: Yes, I get that.

By invoking the oral argument as the only support for their Motion to Amend, Defendants demonstrate that they are merely rehashing the very same considerations that

the Court itself addressed when it considered and certified the class.[8] There is no reason for the Court to reconsider these same issues again.

CONCLUSION

For the reasons discussed above, Plaintiffs E.B., *et al.* respectfully request that the Court enter an order dismissing Defendants' Motion to Amend the Class Definition and directing such other relief as the Court may deem just and proper.

Dated: New York, New York
March 2, 2005

Respectfully submitted,

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[8] Defendants refer to J.G., *et al.* v. Mills, *et al.* Defendants' Memorandum at 10. However, that case is not relevant to the present dispute, and in any event the Court has previously noted that the two matters are close to being related. Transcript of Civil Cause at 15, J.G., *et al.* v. Mills, *et al.*, 04 CV 5415 (CPS) (MDG) (Jan. 10, 2005), annexed to Stewart Declaration as Exhibit D.