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United States District Court, S.D. Ohio, Eastern
Division.

John DOE, Plaintiff,
v.
State of OHIO, et al., Defendants.

Case C-2-91-464
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Attorneys and Law Firms

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John D. Holschuh, Judge

***1** On February 20, 1996, the Court granted plaintiff's motion to certify this action as a class action. This matter is before the Court on the motion of defendants for reconsideration of the order of February 20, 1996. Defendants seek to redefine the class.¹

I. Background

The pending motion for reconsideration marks the fourth time the Court has addressed the question of how to define the class. The Court first addressed this issue in an order entered on July 5, 1995. In that order the Court denied plaintiffs' motion for class certification without prejudice, concluding that the proposed class definition was not specific enough to enable the Court or potential class members to identify the members of the class with any reasonable degree of certitude. The definition originally proposed by plaintiffs was as follows:

All Ohio students, ages three through twenty-one, who are or will be eligible for or are receiving special education and related services in Ohio schools and all otherwise qualified students who have the right to benefit from, or participate in, programs or activities of schools and to be free from discrimination on the basis of their handicaps.

(July 5, 1995 Memorandum and Order, p. 5). Because the Court found that this definition lacked sufficient specificity, plaintiff John Doe--then one of two remaining plaintiffs--was ordered to submit another proposed class definition.² Plaintiff did so, renewing his motion for class certification on August 1, 1995 and submitting the following proposed class definition:

All children currently enrolled or seeking enrollment now or in the future in Ohio's public school system who are:

1) ages 3 through 21;

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2) have identifiable disabling conditions, including:

mental retardation; hearing impairment, including deafness; speech or language impairment; visual impairment, including blindness; serious emotional disturbance; orthopedic impairment; autism; traumatic brain injury; other health impairment; multihandicapped; developmentally handicapped; severe behavior handicapped; specific learning disability; attention deficit/hyperactivity disorder; or other physical or mental impairments that substantially affect the child's ability to perform a major life activity; **and**

3) require educational services or aids in addition to or modified from those provided to children who are not so disabled and **the parents or guardians of such children.**

(Plaintiffs' Second Motion for Class Certification, p. 2) (emphasis in original). Plaintiff explained that the foregoing definition "incorporates terms that describe the characteristics of those individuals who have rights under the laws listed in [plaintiff's complaint]."³ (Plaintiffs' Second Motion for Class Certification, Memorandum in Support, second unnumbered page). Plaintiff further explained that the definition "includes all students who are entitled to the protections of the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act." (*Id.*)

***2** The Court was not satisfied with the definition proposed by plaintiff in his renewed motion for class certification, not because it sought to incorporate language related to plaintiff's statutory causes of action, but because it sought to do so without an express reference to the relevant statutes. As a result, the Court proposed a class definition, one that expressly referred to the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. §§ 790 *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* The definition proposed by the Court was as follows:

All children, ages three through 21, currently enrolled or seeking enrollment, now or in the future, in Ohio's public school system, who have a disability under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. §§ 790 *et seq.*, or

the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*, and who require special education and related services as a result of their disability, and the parents or guardians of such children. Children who are disabled include those who are mentally retarded, who are hearing impaired or deaf, who have a speech or language impairment, who are blind or otherwise visually impaired, who have a serious emotional disturbance, who have an orthopedic impairment, who are autistic, who have a traumatic brain injury, or who have some other health impairment or specific disability. Children who are disabled also include those who are multihandicapped, who are developmentally handicapped, who are severe behavior handicapped, who have a specific learning disability, who have attention deficit disorder or hyperactivity disorder, or who have a physical or mental impairment that substantially affects their ability to perform a major life activity.

(January 24, 1996, Memorandum and Order, p. 5). Having proposed a definition itself, the Court permitted plaintiff and defendants to file objections to it, giving the parties ten days to do so.

Defendants filed no objection; however, plaintiff filed a timely objection, contending that the Court's proposed definition was overly restrictive because it improperly excluded children from the class. Children were excluded, according to plaintiff, because the class was limited to children "who require special education and related services as a result of their disability." Plaintiff argued that this language--taken from the definition of "children with disabilities" under the Individuals with Disabilities Education Act, 20 U.S.C. § 1401(1)(A)(ii)--excluded from the class children with disabilities who are not eligible for special education and related services under the Individuals with Disabilities Education Act but who are eligible for accommodations under the Rehabilitation Act of 1973 or the Americans with Disabilities Act. Because the complaint alleges a violation of these Acts as well, plaintiff suggested that language based on the

definition of “appropriate education” under 34 C.F.R. § 104.33, a regulation whose purpose is to effectuate section 504 of the Rehabilitation Act of 1973, be added to the first sentence of the Court’s proposed definition. The Court did so, and therefore the class is defined as follows (the language that was suggested by plaintiff is underlined):

All children, ages three through 21, currently enrolled or seeking enrollment, now or in the future, in Ohio’s public school system, who have a disability under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq., the Rehabilitation Act of 1973, 29 U.S.C. §§ 790 et seq., or the Americans with Disabilities Act, 42 U.S.C. 12101 et seq., and who require, as a result of their disability, special education and related services or accommodations that are designed to meet individual educational needs of students with disabilities as adequately as the needs of nondisabled children are met, and the parents or guardians of such children. Children who are disabled include those who are mentally retarded, who are hearing impaired or deaf, who have a speech or language impairment, who are blind or otherwise visually impaired, who have a serious emotional disturbance, who have an orthopedic impairment, who are autistic, who have a traumatic brain injury, or who have some other health impairment or specific disability. Children who are disabled also include those who are multihandicapped, who are developmentally handicapped, who are severe behavior handicapped, who have a specific learning disability, who have attention deficit disorder or hyperactivity disorder, or who have a physical or mental impairment that substantially affects their ability to perform a major life activity.

***3** In their motion for reconsideration, defendants ask the Court to delete the underlined language from the class definition so that the class is defined in the manner originally proposed by the Court in its order of January 24, 1996. Defendants argue that this language should be deleted because they are not responsible for ensuring compliance with the Rehabilitation Act of 1973 or the Americans with Disabilities Act.⁴ Defendants contend that the class definition proposed by the Court in its order of January 24, 1996 recognized this because it limited class membership to children who require special education and related services. Defendants conclude that because they cannot be held liable for plaintiff’s claims under the Rehabilitation Act of 1973 or the Americans with Disabilities Act, it makes little sense to adopt a definition of the class which includes children with such claims.

Plaintiff opposes defendants’ motion on the ground that it is untimely, that defendants were placed on notice long ago that this action included claims under the Rehabilitation Act of 1973 and the Americans with Disabilities Act, that defendants’ motion improperly addresses the merits of plaintiff’s claims, and that defendants are in fact liable for plaintiff’s claims under the Rehabilitation Act of 1973 and the Americans with Disabilities Act.

The class action complaint, as noted, alleges that defendants violated three federal statutes: the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq., the Rehabilitation Act of 1973, 29 U.S.C. §§ 790 et seq., and the Americans with Disabilities Act, 42 U.S.C. 12101 et seq. As a result, the class is defined to include children with claims under these statutes. Defendants’ contention that they have no liability under the Rehabilitation Act of 1973 and the Americans with Disabilities Act addresses the merits of these claims. In the Court’s view, it is inappropriate to reach the merits of these claims in the context of determining the manner in which the class is to be defined. Instead, this issue must be addressed in response to a motion from defendants for judgment on the pleadings with respect to plaintiff’s claims under the Rehabilitation Act of 1973 and the Americans with Disabilities Act or for summary judgment on these claims. If plaintiff’s claims under these Acts are dismissed from this case in response to such a motion, defendants may renew their motion for reconsideration and ask the Court to redefine the class to reflect the dismissal of these claims. At this point, however, the Court must **DENY** defendants’ motion for reconsideration (docket no. 61).

IT IS SO ORDERED.

Footnotes

- ¹ There are four defendants in this case: the State of Ohio, the State Superintendent of Public Instruction, the Ohio State Board of Education, and the Ohio Department of Education.
- ² The only remaining plaintiffs as of July 5, 1995 were John Doe and the Ohio Legal Rights Service. The Ohio Legal Rights Service subsequently dismissed its claims in this case, leaving John Doe as the sole remaining plaintiff. See Stipulation of Dismissal of Plaintiff Ohio Legal Rights Service's Claims, filed September 5, 1995 (docket no. 56).
- ³ The class action complaint identifies the following statutory causes of action: (1) a cause of action under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401 et seq., (2) a cause of action under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and (3) a cause of action under the Americans with Disabilities Act, 42 U.S.C. § 12131 et seq.
- ⁴ Defendants contend that they are not liable under these statutes because they are not operators of public elementary or secondary education programs. According to defendants, local school districts are operators of these programs, and consequently local school districts are responsible for ensuring compliance with the Rehabilitation Act of 1973 and the Americans with Disabilities Act.