

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PAULA GRUSZCZYNSKI for herself and
as next friend of DUSTIN KROPP,

Plaintiff,

OPINION AND ORDER

02-C-0589-C

v.

WISCONSIN SCHOOL FOR THE DEAF,
STATE OF WISCONSIN DEPARTMENT
OF PUBLIC INSTRUCTION,

Defendants.

This is a civil suit for injunctive and declaratory relief and monetary damages brought by plaintiff Paula Gruszczynski on behalf of herself and her son, Dustin Kropp. Plaintiff brings the suit pursuant to the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131-12213 and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

Plaintiff has moved for a preliminary injunction. Defendants oppose the motion and have moved to dismiss the complaint on the ground that plaintiff has not exhausted the administrative remedies available to her under the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(l). A hearing was held on both motions on November 8, 2002.

Plaintiff contends that she is not restricted to the Individuals with Disabilities Education Act remedies and procedures for challenging defendants' refusal to provide her son with the reasonable modifications and accommodations he needs to continue his education at the Wisconsin School for the Deaf. She argues that an administrative proceeding would be useless because there is no dispute to be resolved through the administrative process. Dustin's school district placed him at the Wisconsin School for the Deaf and is willing to pay for an aide to provide Dustin the close supervision he needs in order to remain at the school. Why, she asks, should she be relegated to an administrative proceeding when the only two parties with standing to contest Dustin's placement (his mother and the school district responsible for Dustin's education) agree on the correct placement? Defendants respond by asserting that plaintiff's dispute does concern her son's educational placement; they challenge her contention that she and the school district have no dispute at the present time, pointing out that under the operative individualized education plan for Dustin, his placement is at John Marshall High School in Milwaukee and not at the School for the Deaf. Therefore, they maintain, plaintiff should be proceeding by way of a state due process hearing at the Department of Public Instruction, where a hearing officer can determine whether Dustin's individualized education plan is appropriate for him or should be changed.

I conclude that plaintiff has not shown that it would be futile to pursue her

administrative remedies and that until she does so, she cannot bring a suit under the Americans with Disabilities Act. Section 1415(f) of the IDEA makes it clear that although students are not restricted by the IDEA from seeking rights and remedies under other statutes or constitutional provisions, they cannot pursue those other remedies without exhausting their available remedies under the IDEA. Plaintiff could achieve a change in Dustin's individualized education plan if she can persuade the hearing officer that Dustin's present placement is inappropriate. The hearing officer could agree with her that Dustin should return to the School for the Deaf if he had the assistance of an aide when he was in the dormitory. Accordingly, I will grant defendants' motion for dismissal of plaintiff's complaint. This disposition of defendants' motion makes plaintiff's motion for a preliminary injunction moot.

For the sole purpose of deciding the motions, I find that the following material facts proposed by the parties are not in dispute.

UNDISPUTED FACTS

Plaintiff Paula Gruszczynski is the parent and natural guardian of Dustin Kropp. The Wisconsin School for the Deaf is a subdivision of the Wisconsin Department of Public Instruction that provides education and other services to children with hearing impairments.

Dustin Kropp was born on August 18, 1985. He is 17 years old. At age six months,

he was diagnosed with deafness; at age 5, he was diagnosed with cerebral palsy; and at 10, he was diagnosed with autism. His autism affects his daily life activities, including learning, social interaction with peers and adults and other major life activities. For the past seven years, until May 2002, he attended the Wisconsin School for the Deaf pursuant to an individualized education plan developed by the Milwaukee Public Schools, in conjunction with plaintiff and staff at the School for the Deaf.

For most of the time he spent at the School for the Deaf, Dustin functioned successfully. However, as he grew older, his autistic characteristics and behaviors became more pronounced. As of May 22, 2003, the School for the Deaf suspended Dustin for aggressive behavior linked to his autism.

An Individualized Education Plan Team met on May 22, 2002, to develop a new plan for Dustin. Staff members from both the Milwaukee Public Schools and the School for the Deaf participated, along with plaintiff. The School for the Deaf staff expressed their opinion that Dustin's current placement there was not appropriate "because the environment is too stimulating in both the school and the dorm." Exh. B. to Gruszczynski Aff., dkt. #5, page following 21A. The team recommended placement at John Marshall High School in Milwaukee, where Dustin could receive vocational training.

On August 8, 2002, plaintiff submitted a request for a due process hearing to the Director of the Special Education Team at the Department of Public Instruction. Plaintiff

raised five issues concerning what she believed was the failure to provide her son with an appropriate education for the school years 2001-02 and 2002-03. The matter was assigned to a hearing officer. Differences of opinion ensued between plaintiff and defendants over the provision of an aide at the School for the Deaf. On September 11, 2002, plaintiff's counsel sent the hearing officer a formal motion to adjourn the hearing on the ground that the School for the Deaf's refusal to allow the Milwaukee Public Schools to fund an aide to care for Dustin in the dormitory violated the Americans with Disabilities Act and the Rehabilitation Act. Plaintiff asserted that the hearing officer had no authority to rule on the possible violations of these other acts and advised the officer that plaintiff would be filing suit in federal court. Defendants objected to any delay in the hearing, arguing that plaintiff's argument rested on the presumption that the appropriate educational placement for Dustin was the School for the Deaf, when in fact that was the issue the hearing officer had to resolve. Eventually, plaintiff withdrew her due process hearing request, although a hearing had been scheduled for October 14, 18 and 21, 2002. On October 30, 2002, plaintiff filed this federal court complaint, together with her motion for a preliminary injunction.

OPINION

The Individuals with Disabilities Education Act contains an unusual provision that guarantees to children and youth that the IDEA will not restrict the rights, procedures and

remedies available to them under “the Constitution, title V of the Rehabilitation Act of 1973, or other federal statutes protecting the rights of children and youth with disabilities” but conditions their use of other statutes or constitutional provisions upon their exhaustion of the IDEA procedures set out in the act. 20 U.S.C. § 1415(f). A student seeking relief “that is available” under the IDEA must use the administrative procedures of the IDEA even if she wants relief under another statute. She is relieved of this requirement only if she is seeking relief that is not available under the IDEA. Charlie F. v. Board of Educ. of Skokie School Dist. 68, 98 F.3d 989, 991 (7th Cir. 1996).

In an effort to avoid the holding of Charlie F., plaintiff has presented her case as one in which there is no dispute relating to Dustin’s educational placement. She wants him to be at the School for the Deaf, the Milwaukee Public Schools want him to be there, end of story. The flaw in this scenario is that the operative individualized education plan shows Dustin’s placement as Marshall High School, not the School for the Deaf. That plan was prepared by a team that included plaintiff, representatives of the Milwaukee Public Schools and staff members from the School for the Deaf. Whatever views plaintiff and the Milwaukee Public Schools’ representatives had about the propriety of Dustin’s placement at the School for the Deaf, the plan is evidence that the team as a whole did not agree that the School for the Deaf was the appropriate placement for Dustin under his 2002-03 individualized education plan. The plan reflects concerns about Dustin’s ability to benefit

from further education at the School for the Deaf and a belief that he would have a better chance of success in a vocational setting, such as at Marshall High School.

It may be, as plaintiff seems to argue, that the team agreed on the vocational setting only because the members were under the misapprehension that the School for the Deaf would not allow Dustin to return under any circumstances or because they believed that even if the School for the Deaf would allow Dustin to return so long as he had an aide during the time he spent in the dormitory, the school was prohibited from billing the Milwaukee Public Schools for the cost of an aide. Whatever the team members' understandings, they agreed upon a plan. Until the team meets again to change the plan or the plan is ruled invalid in an administrative or judicial proceeding, the plan remains operative.

It is perfectly possible that an administrative proceeding will provide plaintiff the result she wants for Dustin, which is continued placement at the School for the Deaf and an aide to help him in the dormitory setting. The Department of Public Instruction has agreed in writing that it will provide such an aide to Dustin if the hearing officer determines that Dustin should return to the School for the Deaf and that he requires the services of an aide in order to do so. The only relief that plaintiff cannot obtain is money damages. However, it does not appear that money damages are as critical a matter to plaintiff as obtaining an appropriate placement for Dustin. Even if they were, the Court of Appeals for the Seventh Circuit has held that the unavailability of money damages does not make administrative

proceedings futile. Charlie F., 98 F.3d at 991 (“what relief is ‘available’ does not necessarily depend on what the aggrieved party wants”).

The IDEA does not refer specifically to the Americans with Disabilities Act in § 1415(f), because that statute was enacted after the IDEA, but there is no reason to think that the section does not apply to the ADA, just as it applies to the Rehabilitation Act. There is good reason for it to do so, as this case makes clear. No factfinder can determine the benefits of an aide and the discriminatory import of withholding one without evaluating the propriety of Dustin’s educational placement at the Wisconsin School for the Deaf. It is sensible for the hearing officer to make this evaluation, at least initially. The hearing officer specializes in this kind of decision and is far more familiar with the process and the relevant considerations.

Plaintiff has cited a number of cases that she believes support her position that she does not have to exhaust any remedies under the IDEA before pursuing her ADA claim. The cases are either inapposite because they do not concern educational placements, see, e.g., Burriola v. Greater Toledo YMCA, 133 F. Supp. 2d 1034 (N.D. Ohio 2001) (mother of autistic child suing YMCA on ground that termination of her child from the daycare program violated Title III of the ADA), or unpersuasive.

ORDER

IT IS ORDERED that the motion to dismiss filed by defendants Wisconsin School for the Deaf and Wisconsin Department of Public Instruction is GRANTED; plaintiff Paula Gruszczynski's motion for a preliminary injunction is DENIED as moot.

Entered this 19th day of November, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge