

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

US DISTRICT COURT
WESTERN DIST ARKANSAS
FILED

MAY 18 2012

CHRIS R. JOHNSON, Clerk
By

Deputy Clerk

FELECIA TYLER AND LATOYA PENNY
ON BEHALF OF THEMSELVES, THEIR MINOR CHILDREN,
AND ALL OTHER PERSONS SIMILARLY SITUATED

PLAINTIFFS

V.

CASE NO. 12-1052

ARKANSAS DEPARTMENT OF HUMAN SERVICES;
JOHN SELIG, individually and in his official capacity
as Director of the ARKANSAS DEPARTMENT OF
HUMAN SERVICES; JANIE HUDDLESTON, individually
and in her official capacity as Deputy Director of the
ARKANSAS DEPARTMENT OF HUMAN SERVICES;
TONYA RUSSELL, individually and in her official
capacity as Director of Division of Child Care and Early
Childhood Education of ARKANSAS DEPARTMENT OF
HUMAN SERVICES; JAMES C. GREEN, in his official
capacity as the Director of the Arkansas Division of
Developmental Disabilities Services of ARKANSAS
DEPARTMENT OF HUMAN SERVICES; AND
GENE GESSOW, in his official capacity as the Director
of the Arkansas Division of Medical Services of ARKANSAS
DEPARTMENT OF HUMAN SERVICES

DEFENDANTS

COMPLAINT

Introduction

Plaintiffs bring this Complaint for declaratory and injunctive relief against the Arkansas Department of Human Services for violations of state and federal law on behalf of themselves, their children and other similarly situated parents and children who will be adversely affected by

the closing of Sparkman Learning Center. Sparkman Learning Center is a community learning center providing transportation, meals and most importantly educational services to predominantly African American, developmentally disabled children in a multi-county area.

Jurisdiction

1. Jurisdiction is conferred upon this court pursuant to the following provisions: 28 U.S.C. § 1331, which authorizes original jurisdiction to the district court of all civil actions arising under the Constitution, laws or treaties of the United States; 28 U.S.C. §1343 (a)(3) which grants jurisdiction to the district court of any action to recover damages or to secure equitable or other relief under an act of Congress providing equal rights of citizens or of all persons within the jurisdiction of the United States, and action under Title II of the ADA, 42 U.S.C. §§12131-12132 as well as action under the Individuals with Disabilities Act 2004, 20 U.S.C. §1439.
2. Plaintiffs seek declaratory and injunctive relief against the Defendants pursuant to 28 U.S.C. §2201 and 2202. Plaintiff seeks relief pursuant to 42 U.S.C §§1981 and 1982 as well as the Arkansas Civil Rights Act of 1993, Ark. Code Ann. §16-123-101, and Section 504 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. § 794
3. Venue is proper pursuant to 28 U.S.C. §1391(e), which provides that a civil action may be brought in a judicial district in which a substantial part of the events giving rise to the claim

The Parties

4. Plaintiff Felicia Tyler is the parent of Alexandra Stevens and a resident of Camden, Arkansas. Alexandra has been attending Sparkman Learning Center for about 3 years. Alexandra is a qualified individual with a disability, as defined by the ADA and the Rehabilitation Act. Before attending Sparkman Learning center, Alexandra could not

speak. After working with the speech therapist at Sparkman, Alexandra now speaks and continues to improve. Ms. Tyler sends her child 37 miles away to Sparkman because there are no other providers in the area. If Sparkman closes, there are no providers in the area to able to provide services for her children.

5. Plaintiff Latoya Perry is the mother of Michael and Devonte McKenzie and is a resident of Camden, Arkansas. Both children attend Sparkman Learning Center, but only Michael has a qualifying disability as defined by the ADA and the Rehabilitation Act. Because of Michael's behavior problems, every other center refuses to take him. Sparkman was the only center willing to provide services to him. After receiving notice that the State of Arkansas through DHS was de-funding Sparkman, Ms. Perry contacted DHS and all of the other DD providers in the area. There are no other schools in the area accepting children. Every school has a waiting list, which means that her child would not be able to receive any appropriate services if Sparkman were to close. In fact, her kids actually attend a SLC facility 35 miles away from home. There is no other provider in the area for her children. Ms. Perry would also have to quit her job to care for her son if Sparkman Learning Center closed.
6. The Arkansas Department of Human Services, an agency of the State of Arkansas, is a "public entity" within the meaning of the ADA, 42 U.S.C. § 12131(1), and is therefore subject to Title II of the ADA, 42 U.S.C. § 12131 *et seq.*, and its implementing regulations, 28 C.F.R. pt. 35. Further, it is a recipient of federal financial assistance, including Medicaid funds, and is therefore subject to the Rehabilitation Act, 29 U.S.C. § 794. It is also the lead agency for the administration of funds under the Individuals with Disabilities Act 2004.

7. John Selig (“Selig”) is the chief administrative officer of the Arkansas Department of Human Services and is responsible for administration of the single state agency for the Arkansas Medicaid program. Mr. Selig is charged with the ultimate control and administration of DHS, including the duty to administer the Arkansas Medicaid program in compliance with the Medicaid Act, the Americans with Disability Act (“ADA”), Section 504 of the Rehabilitation Act and the IDEA.
8. Janie Huddleston (“Huddleston”), is the Deputy Director of DHS, and oversees that Division of Child Care and Early Childhood Education (“DCC/ECE”) and the Division of Developmental Disabilities Services (“DDS”) and the Arkansas Division of Medical Services (“DMS”).
9. Tonya Russell (“Russell”) is the Director of the Division of Child Care and Early Childhood Education. She is the person responsible for permanently excluding Sparkman from receiving all funding from the DCC/ECE department, which then in turn triggered DDS and DMS from de-funding Sparkman.
10. James Green is the Director of the Arkansas Division of Developmental Disabilities Services and is responsible for all operations of DDS. Green is sued in his official capacity as Director of DDS.
11. Gene Gessow is the Director of the Arkansas Division of Medical Services and is responsible for all operations of DMS. Gessow is sued in his official capacity as Director of DMS.

Facts

12. Sparkman Learning Center provides services to developmentally disabled children in an integrated setting. Sparkman Learning Center been authorized pursuant to federal and state regulations to provide the following programs and services to its constituents:

- a) Early Intervention program for children with developmental delays;
- b) Development Disabilities Treatment Center for children with developmental delays and special needs;
- c) Speech therapy services;
- d) Transportation services; and
- e) Child Nutrition program for food services to children participating in the center.

13. Sparkman serves approximately 150 families in a three county area: Clark County, Dallas County and Ouachita County. Sparkman Learning Center has centers in Camden, Fordyce, Arkadelphia and Sparkman, Arkansas.

14. The majority of the children that Sparkman Learning Center serves are African-American children. In fact, Sparkman Learning Center is the only African-American owned developmental day treatment service (“DDTC”) provider within several counties.

15. It is relatively difficult to obtain a license in Arkansas because enrollment in the DDTC has been legislatively closed since about 1994. At times, the Legislature has allowed centers to open in counties that are unserved or underserved. Sparkman Learning Center was licensed in about 2005 because the Arkansas State Legislature determined there was a dire need for community service providers in that area of the State. Since that time, the State has not added new providers to that area, causing a shortage of available community providers.

16. Ouachita County only has two DDTC centers: Ouachita Child Enrichment and Sparkman Learning Centers. Dallas County only has 2 DDTC centers: Sparkman Learning Centers and First Step. Clark County does not have any DDTC centers. Any services to residents

of Clark County require the DDTC providers to bus children to and from adjacent counties.

17. SLC's teachers are certified to work with developmentally disabled children.

Conversely, it is highly unlikely that a regular day care provider in the areas SLC serves would have the same type of certified teachers to provide a free and appropriate education to its clients.

18. On or about May 2, 2012, the Plaintiffs received a letter from Shelly Lee, DDS Assistant Director for Quality Assurance. The letter stated that as of May 18th, 2012, Sparkman Learning Center would no longer be eligible to provide services that are funded by the Division of Developmental Disabilities Services or the Department of Human Services. (Exhibit A). The letter also provided a list of licensed providers for developmental day treatment services and for providers of early intervention services.

19. By de-funding Sparkman Learning Center, the State of Arkansas, through DHS is failing to provide services in the community in sufficient quality, quantity, and geographic diversity to enable individuals with developmental disabilities to be served in the most integrated setting appropriate to their needs.

20. There are no other available community providers within the area.

21. Ms. Penny called the other providers within a reasonable geographic range, and none of them have spots available for her son. In order to obtain the necessary services coverage for her child's therapies and treatments, she must send her child to an institution away from her home.

Violations Of The ADA And Section 504 Of The Rehabilitation Act

22. The closing of Sparkman Learning Center would result in a violation of the ADA and Section 504 of the Rehabilitation Act. The ADA, 42 U.S.C. §§ 12131- 12134 prohibits public entities from discriminating against individuals with disabilities by, for example, violating the “integration mandate”: “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132
23. Section 504 of the Rehabilitation Act applies the same standards to entities that receive federal financial assistance: “No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a) “The rights, procedures, and enforcement remedies under Title II are the same as under section 504.” *Layton v. Elder*, 143 F.3d 469, 472 (8th Cir. 1998) (citing *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926, 930 (8th Cir.1994)). As the Supreme Court held in *Olmstead v. L.C.*, 527 U.S. 581 (1999), public entities are required to provide community-based services to persons with disabilities when (1) such services are appropriate; (2) the affected persons do not oppose community-based treatment; and (3) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of other persons with disabilities. *Id.* at 607.
24. Persons at risk of institutionalization may make an integration mandate challenge without having first been placed in institutions. *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1185 (10th Cir. 2003).

25. There is no other DDTC available to the Plaintiffs. The only choice for these children is to be placed in an institutional setting, or receive no services at all, both in violation of the above laws. Closure of Sparkman Learning Center would effectively eliminate any community based service options for Plaintiffs' children as well as the rest of the children being treated at SLC.
26. The State has not conducted an adequate assessment of the needs of its developmental disability services system, including, particularly, those services necessary in order to provide services to all children eligible for special education services in the most integrated settings appropriate to their needs. Children in the counties where SLC is located face a particularly acute shortage of community service options.
27. DHS provided the Plaintiffs with a list of providers to replace Sparkman Learning Centers. However, there are no providers with open spaces. After May 18th, 2012, there will be approximately 130 developmentally disabled children who will have nowhere to receive services. Any other service providers in the nearby counties do not have the licensing capacity to receive current Sparkman clients.
28. The Defendants' actions as described above violate the ADA and Section 504 of the Rehabilitation Act.

Violations of the Individuals with Disabilities Education Improvement Act of 2004

29. The first stated purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education ["FAPE"] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). To provide a FAPE, the special education and related services must, *inter alia*, "meet the

standards of the State educational agency [SEA]” and must be “provided at public expense, under public supervision and direction, and without charge.” *Id.* at § 1401(9)(A)-(B). These services must be provided pursuant to an individualized education program (“IEP”), *id.* at § 1401(9)(D), that is “reasonably calculated to enable the child to receive educational benefits,” *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982).

30. The IDEA 2004 covers Infants and toddlers with disabilities (birth-2) under IDEA Part C. Children and youth (ages 3-21) receive special education and related services under IDEA Part B. The term “at-risk infant or toddler” means an individual under 3 years of age who would be at risk of experiencing a substantial developmental delay if early intervention services were not provided to the individual. Plaintiffs’ children are eligible for services under the IDEA.
31. The second stated purpose of the IDEA is to enhance the development of infants and toddlers with disabilities, to minimize their potential for developmental delay, and to recognize the significant brain development that occurs during a child’s first 3 years of life (20 U.S.C. §1431 (a)(1))
32. DHS’s notified the Plaintiffs that there would be a change of placement and service providers for their children. Pursuant to federal and state law, parents have a right to appeal that decision. By de-funding Sparkman, DHS is *de facto* depriving the Plaintiffs of their rights. At the very least, the parents should be allowed to administratively appeal such a drastic placement change for their children prior to the State closing Sparkman Learning Center.

33. Further, according to the language of IDEA, any party aggrieved by the findings and decision regarding an administrative complaint shall have the right to bring a civil action with respect to the complaint in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. (20 U.S.C. §1439)

34. The Defendants' actions as described above violate the Plaintiff's rights under the IDEA.

Prayer for Relief

WHEREFORE, Plaintiffs respectfully request that this Court declare that the State of Arkansas, through the Department of Human Services is in violation of the ADA, Section 504 of the Rehabilitation Act and the IDEA of 2004; immediately enjoin defendants from de-funding Sparkman Learning Center; for any costs and fees with having to bring this action; and for all other relief to which they may be entitled.

Respectfully submitted,



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