

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

K.S. and K.L., through her parent L.L., :
on behalf of a class of those similarly :
situated, :
Plaintiffs, :

vs. :

Civil No. CA14-77S

RHODE ISLAND BOARD OF :
EDUCATION, EVA-MARIE MANCUSO :
in her official capacity as Chair, and :
WARWICK SCHOOL COMMITTEE, by :
and through its Chair, BETHANY A. :
FURTADO, and CHARIHO REGIONAL :
SCHOOL COMMITTEE, by and through its :
Chair, WILLIAM DAY, as representatives :
of a class of Local Educational Agencies :
similarly situated, :
Defendants. :

**FIRST AMENDED CLASS ACTION
COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF.**

**FIRST AMENDED CLASS ACTION COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs, on their own behalf and on behalf of a class of those similarly situated, alleges as follows against Defendants: (1) the Rhode Island Board of Education (“Board”), by and through its Chair Eva-Marie Mancuso, in her official capacity; (2) the Warwick School Committee, in its individual capacity and as representative of a class of Rhode Island Local Educational Agencies similarly situated, by and through its Chair Bethany A. Furtado, in her official capacity only; and (3) the Chariho Regional School Committee in its individual capacity and as representative of a class of Rhode Island Local Educational Agencies similarly situated, by and through its Chair William Day, in his official capacity only.

INTRODUCTION

1. This is a bilateral class action to establish the rights of Plaintiffs and the class they seek to represent to a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”).

2. Plaintiff K.S. is a disabled individual who became over 21 years old on March 28, 2014. She has been provided a FAPE under the IDEA by the Local Educational Agency (“LEA”) for her region, Defendant Warwick School District, but as of March 28, 2014 would have been denied such an education in the absence of this action because she had reached the age of 21.

3. Plaintiff K.L., who is incompetent and thus sues through her mother, L.L., is a disabled individual who became over 21 years old on July 17, 2012. Prior to that date, she was provided a FAPE under the IDEA by the Chariho Regional School District. Her FAPE was terminated effective July 17, 2012 because she had reached the age of 21.

4. The attempted or actual terminate of a FAPE to both K.S. and K.L. was pursuant to a regulation promulgated by the Board that targets only disabled students. Regulations Governing the Education of Children With Disabilities § 300.101 provides in relevant part that “[a] free appropriate public education must be available to all eligible children residing in the LEA, between the ages of 3 and 21, inclusive (until the child’s twenty first birthday or until the child receives a regular high school diploma)” Although stated as the minimum obligation of the LEA, in practice it is treated as the statewide maximum obligation of the LEAs and purports to impose an absolute age limitation for entitlement to IDEA special education services. There is no comparable Rhode Island law or regulation that imposes a maximum age limit for entitlement to public education for general education students.

5. Under the IDEA, however, Plaintiffs are and were entitled to receive a FAPE until the age of 22. Plaintiffs would meaningfully benefit from an additional year of special education and related services under the IDEA.

6. As set forth below, Warwick School District's imminent denial of any further education to K.S. and the Chariho Regional School District's actual denial of any further education to K.L. violate the IDEA and Section 300.101 is unenforceable as contrary to federal law.

JURISDICTION AND VENUE

7. This Court has jurisdiction over Plaintiffs' claims and the parties pursuant to 28 U.S.C. § 1331 because such claims arise under federal law, specifically the IDEA, 20 U.S.C. § 1400 *et seq.*

8. This Court has jurisdiction to award declaratory and preliminary and permanent injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202 and Rule 65 of the Federal Rules of Civil Procedure.

9. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because all Defendants reside in this district and the events and omissions giving rise to Plaintiffs' claims occurred in this district.

10. As this Court has ruled with respect to K.S., exhaustion of administrative remedies is not required before this Court may exercise jurisdiction over Plaintiffs' claims. As the First Circuit has recognized, exhaustion is not required where "the issues raised involve purely legal questions." *Phil v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 190 (1st Cir. 1993). Furthermore, exhaustion is not required where "the agency's adoption of an unlawful general policy or practice would make resort to the agency futile." *Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 52 (1st Cir. 2000). Here, the Board has adopted a regulation, Section 300.101, which is

contrary to the IDEA. This raises a purely legal issue. Furthermore, it would be futile to request that the Board and the LEAs that it governs ignore the Board's own regulation.

THE PARTIES

11. K.S. is a now 21-year-old IDEA-eligible student who has been enrolled at Toll Gate High School in the Warwick School District. She suffers from, among other things, Asperger Syndrome, Attention Deficit / Hyperactivity Disorder, and severe social anxiety. She needs and would meaningfully benefit from continued special education and related services under the IDEA. Because of her disability, she requires a supportive and structured environment to develop her academic and prevocational skills. At the time this action was filed, K.S. was 20 years old.

12. K.S. was and is working towards earning a conventional Rhode Island high school diploma but was not be able to complete the requirements for such a diploma before she attained the age of 21. She may be able to complete such requirements if she were provided an additional year of FAPE. Obtaining such a diploma would have enormous value for her future career prospects as well as her emotional well-being.

13. K.S. proceeds under a pseudonym because this Complaint discloses sensitive, private information about her medical conditions and diagnoses, including mental health information, protected by federal and state law.

14. K.L. is a now 23-year old individual who was previously IDEA-eligible and who was enrolled at Chariho High School. She suffers from CHARGE syndrome, a cluster of serious health problems arising from a genetic disorder. She suffers from, among other things, severe mental retardation, developmental delay, legal blindness, and seizure disorder. For the most part, she functions at the cognitive level of a toddler. Because of her disability, she requires a supportive and structured environment to develop her academic and prevocational skills.

15. K.L. sues through her mother, L.L. Although past the age of majority, K.L. is wholly incompetent to manage her own affairs. Defendant Chariho Regional School Committee has long recognized this fact and interacted with K.L. through her mother at all relevant times even after K.L. attained the age of majority. K.L. did not attend any of the required annual Individual Education Program meetings past the age of 18: L.L. attend on her behalf. The United States Social Security Administration has certified K.L. as incompetent and approved the appointment of L.L. as the payee for K.L.'s social security disability benefits.

16. K.L. proceeds under a pseudonym because this Complaint discloses sensitive, private information about her medical conditions and diagnoses, including mental health information, protected by federal and state law. L.L. proceeds under a pseudonym because disclosing her identity would necessarily disclose K.L.'s identity.

17. On July 10, 2014, prior to this Court's ruling that exhaustion of administrative remedies was not required for K.S. (a ruling that should apply equally to K.L.), K.L., through L.L., initiated a due process proceeding pursuant to 20 U.S.C. § 1415(b). This due process proceeding was timely pursuant to 20 U.S.C. 1415(b)(6) because the violation occurred on July 17, 2012, when K.L.'s FAPE was terminated contrary to the IDEA.

18. Defendant Board is responsible for providing public education for Rhode Island residents, both children and adults. The Board is, as of January 1, 2013, the successor to the powers and duties of the Rhode Island Board of Regents for Elementary and Secondary Education. Where applicable, references to the Board include both the current Board and its predecessor.

19. Under both federal and state law, the Board is responsible for ensuring that the LEAs provide appropriate special education services to Rhode Island residents. Specifically, 20 U.S.C. § 1407 provides that each State that receives IDEA funds must "ensure that any State

rules, regulations, and policies relating to this chapter conform to the purposes of this chapter.” Similarly, 20 U.S.C. § 1412(11) requires that the State educational agency “is responsible for ensuring that – (i) the requirements of this subchapter [referring to 20 U.S.C. §§ 1411-1419] are met.” Under Rhode Island law, it “shall be the duty of the [Board] to set up regulations for the purpose of carrying out the intent of [Chapter 24 – Children with Disabilities].” Rhode Island General Laws § 16-24-2.

20. Pursuant to Rhode Island law, the Board is also *required* to provide public education to adults. In Rhode Island General Laws § 16-63-2, the Rhode Island Legislature declares “(1) That the public laws shall address the education needs of adults and young people; (2) That an integrated and coordinated adult education delivery system shall be provided and maintained on a statewide basis; and (3) That public funds shall be appropriated to support that delivery system and fulfill the constitutional mandate.”

21. More specifically, the Board is required to provide the following services, among others, to adults: “*Category I* – Basic education, which shall consist of efforts to alleviate illiteracy and provide opportunities for academic achievement up to grade twelve (12) and which shall include ... preparation for the demonstration of competencies to qualify for the adult high school diploma or for examinations to earn the general education development or high school equivalency diploma.” Rhode Island General Laws § 16-63-5. As set forth below, the Board does in fact offer public education, including secondary education, to adults.

22. Defendant Eva-Marie Mancuso is the Chair of the Board and is sued only in her official capacity as such.

23. Defendant Warwick School Committee is the LEA directly responsible for providing Plaintiff K.S. and other class members residing in that district with a FAPE under the IDEA.

24. Defendant Bethany A. Furtado is the Chair of the Warwick School Committee and is sued only in her official capacity as such.

25. Defendant Chariho Regional School Committee is the LEA directly responsible for providing Plaintiff K.L. and other class members residing in that district with a FAPE under the IDEA.

26. Defendant William Day is the Chair of the Chariho Regional School Committee and is sued only in his official capacity as such.

27. The Warwick School Committee and the Chariho Regional School Committee are sued both in their individual capacities and as representatives of a putative defendant class of LEAs in Rhode Island that are directly responsible for providing class members with a FAPE under the IDEA. Those LEAs that are members of the putative defendant class are referred to collectively as the “Defendant LEAs.”

28. The Board has recognized 71 separate LEAs in Rhode Island. Of these, 36 are locally-governed school districts with direct responsibility for special education and thus members of the putative defendant class. Of the non-district LEAs (e.g. charter schools and statewide programs situated outside the district structure), an unknown number are similarly directly responsible for special education and thus members of the putative defendant class.

FACTUAL ALLEGATIONS

29. The IDEA mandates that a “free and appropriate public education” shall be “available to all children with disabilities . . . between the ages of 3 and 21, inclusive . . .” 20 U.S.C. § 1412(a). Eligibility under the IDEA for special education and related services ends, therefore, when a student becomes 22.

30. States may limit age eligibility for special education students, however, **only** to the extent it is limited for public education generally:

The obligation to make a [FAPE] available to all children with disabilities does not apply with respect to children—

(i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges . . .

20 U.S.C. § 1412(a)(1)(B).

31. Thus, under the IDEA, the Board and the Defendant LEAs are obligated to treat special education students the same as general education students with respect to age eligibility.

32. Section 300.101 of the Regulations Governing the Education of Children With Disabilities purports to terminate the entitlement of Rhode Island residents to a FAPE under the IDEA at the age of 21. This regulation cannot do so consistent with 20 U.S.C. § 1412(a)(1)(B), however, because it applies only to special education students and not to general education students.

33. There is no Rhode Island law or regulation that imposes an age limitation of 21 on the entitlement to public education generally. To the contrary, Rhode Island law specifically directs the Board to provide programs of public education, including secondary education, to adults.

34. There is no Rhode Island practice with respect to public education generally that is inconsistent with providing special education students a FAPE until the age of 22. To the contrary, it is the practice of the Board to offer programs of public education to adults, including a “High School Equivalency Program” which is composed of the General Educational Development (“GED”) Tests (hereinafter “GED Program”), and a National External Diploma Program (hereinafter “the NEDP Program”). Both programs offer a high school equivalency diploma if the requirements for such programs are satisfied and these programs are intended to be the functional equivalent of a secondary education.

35. The United States Court of Appeals for the Ninth Circuit recently held that a Hawai`i law that purported to limit eligibility of students for public education to age 20 was inconsistent with 20 U.S.C. § 1412(a)(1)(B) because, despite this law, Hawai`i continued to provide adults with public education programs that were in all material respects identical to Rhode Island's GED Program and NEDP Program. *E.R.K. v. State of Hawaii Dep't of Educ.*, 728 F.3d 982 (9th Cir. 2013). Therefore, despite this Hawai`i law, that court ruled that disabled students in Hawai`i were entitled to a FAPE under the IDEA until they reached the age of 22. *Id.*

36. Plaintiff K.S. was informed that she would no longer be eligible for a FAPE under the IDEA as of March 28, 2014, her 21st birthday, because of Section 300.101 of the Regulations Governing the Education of Children With Disabilities. Her FAPE would have been terminated as of that date if not for the pendency of this litigation.

37. Plaintiff K.L.'s FAPE was terminated as of July 17, 2012 because of Section 300.101 of the Regulations Governing the Education of Children With Disabilities.

CLASS ALLEGATIONS

38. K.S. and K.L., through L.L., brings this action on their own behalves and on behalf of a class of all those similarly situated pursuant to Rule 23(a) and (b)(1) of the Federal Rules of Civil Procedure. The proposed plaintiff class consists of:

All individuals who turned 21 within two years before the filing of this action or will turn 21 during the pendency of this action who are provided or were provided a FAPE under the IDEA by any Defendant LEA and who but for their turning 21 would otherwise qualify or would have qualified for a FAPE because they have not or had not yet earned a regular high school diploma ("the Plaintiff Class").

39. Membership in the Plaintiff Class is so numerous that joinder of all members is impractical. There are hundreds of Rhode Island students who are receiving or have received a FAPE under the IDEA who are, were during the applicable limitations period, or will be between

the ages of 21 and 22 and who but for their age would otherwise qualify or would have otherwise qualified for a FAPE.

40. Common questions of law and fact exist, including the overarching issue of whether the Board's promulgation of Section 300.101 of the Regulations Governing the Education of Children With Disabilities and the Defendant LEAs' enforcement of that regulation as to Plaintiffs and the Plaintiff Class violates the IDEA.

41. The claim and injury of Plaintiffs are typical of the claims and injuries of the other members of the Plaintiff Class. Plaintiff K.S. would have been denied any further FAPE based on her age but for the pendency of this action and would have been injured by this denial as she would no longer receive a FAPE. Plaintiff K.L. was denied any further FAPE based on her age and was injured by this denial as she was deprived of one additional year of a FAPE. These are the same injuries that members of the Plaintiff Class are suffering, and, unless this Court grants relief, will continue to suffer.

42. K.S. and K.L., through L.L., will fairly and adequately represent and protect the interests of the Plaintiff Class. K.S. and K.L., through L.L., intend to prosecute this action vigorously in order to secure remedies for the Plaintiff Class. Counsel of record for Plaintiffs are experienced in federal civil rights litigation and class actions, including systemic litigation against state defendants challenging disability discrimination. Paul Alston and Jason H. Kim successfully litigated the *E.R.K.* case, which presented the same issues as this case presents.

43. Plaintiffs also seeks certification of a defendant class, to consist of:

All Rhode Island LEAs that period are or were within two years before the filing of this action directly responsible for providing special education services to Rhode Island residents pursuant to the IDEA (the "Defendant Class").

44. Membership in the Defendant Class is so numerous that joinder of all members is impracticable. The Board recognizes 71 separate LEAs, most of which will be members of the Defendant Class.

45. As set forth above, common questions of law and fact exist.

46. The defenses of the Warwick School Committee and the Chariho Regional School Committee are typical of the defenses of the members of the Defendant Class because all such class members will likely make the same or similar arguments in opposition to Plaintiffs' claims. There is no reason to believe that any member of the Defendant Class has any unique defenses.

47. The Warwick School Committee and the Chariho Regional School Committee, assisted by the Board, will fairly and adequately protect the interests of the Defendant Class. These named defendants have the same interest as the other members of the Defendant Class in defeating Plaintiffs' claims.

48. Certification of both the Plaintiff Class and the Defendant Class is appropriate pursuant to Fed. R. Civ. Proc. Rule 23(b)(1) because prosecution of separate actions by individual members of the Plaintiff Class against individual members of the Defendant Class may establish incompatible standards of conduct for the Defendant Class. If the claims brought in this action were litigated numerous times, it is possible that some members of the Plaintiff Class would be entitled to greater IDEA benefits than other members of the Plaintiff Class and/or that some members of the Defendant Class would have greater obligations under the IDEA than other members of the Defendant Class.

49. Alternatively, certification of both the Plaintiff Class and the Defendant Class is appropriate pursuant to Fed. R. Civ. Proc. Rule 23(b)(3) because the common questions of law and fact set forth above predominate over questions affecting individual class members (if any). A class action is superior to other methods for fairly and efficiently adjudicating this controversy

because it allows the issue of the validity of Section 300.101 of the Regulations Governing the Education of Children With Disabilities to be litigated once and for the result of that litigation to be uniformly applied throughout the State.

**FIRST CLAIM FOR RELIEF
(VIOLATION OF THE IDEA)**

50. Plaintiffs repeat and reallege each and every allegation above as if fully set forth.

51. Under the IDEA, the Board and the Defendant LEAs are obliged to provide a FAPE to all disabled individuals until such individuals reach their 22nd birthday unless to do so would be “inconsistent with State law or practice ... respecting the provision of public education to children” in that age range. 20 U.S.C. § 1412(a)(1)(B).

52. Providing disabled students in Rhode Island a FAPE until the age of 22 would not be inconsistent with any Rhode Island law or practice respecting the provision of public education in general to individuals between 21 and 22.

53. Section 300.101 of the Regulations Governing the Education of Children With Disabilities is not a law that relates to the provision of public education in general. Rather, it applies solely to special education students. There is no comparable law or regulation of general applicability that imposes an age limit of 21 for the entitlement to public education.

54. Rhode Island, as a matter of both law and practice, provides a public education to individuals between 21 and 22. Rhode Island law *requires* the Board to provide adults a public education, including secondary education. Rhode Island General Laws § 16-63-2 and § 16-63-5. The Board complies with this legislative mandate by offering its GED Program and NEDP Program to adults, which are intended to provide a secondary education for such adults and prepare them for post-secondary education and vocational opportunities.

55. Thus, the default age limitation of the IDEA continues to apply because, despite Section 300.101, non-disabled students who are over the age of 21 can still pursue the equivalent of a public high school education through the Board's adult education programs.

56. The Board and Defendant LEAs' refusal to provide Plaintiffs and the members of the Plaintiff Class a FAPE on the basis of Section 300.101 violates the IDEA and Plaintiffs and the members of the Plaintiff Class are entitled to a FAPE until they reach the age of 22.

57. The Board has also violated 20 U.S.C. § 1407 by not ensuring that its regulations conform to the IDEA and 20 U.S.C. § 1412(11) by failing to ensure that the Defendant LEAs are meeting the requirements of 20 U.S.C. § 1412(a)(1)(B).

WHEREFORE, Plaintiffs pray that this Court:

(a) Find and declare that the Board and Defendant LEAs' refusal to provide Plaintiffs and the members of the Plaintiff Class with a FAPE violates the IDEA;

(b) Find and declare that, by promulgating and enforcing Section 300.101 of the Regulations Governing the Education of Children With Disabilities, the Board has violated 20 U.S.C. § 1407 and 20 U.S.C. § 1412(11);

(b) Enjoin the Defendants LEAs from terminating FAPes as to Plaintiffs and the members of the Plaintiff Class who have not yet turned 22;

(c) Award compensatory education to Plaintiff K.L. and members of the Plaintiff Class to the extent they have already been denied a FAPE unlawfully;

(d) Award Plaintiffs their reasonable attorney's fees, costs, and expenses under any applicable law; and

(f) Grant such other and further relief as this Court deems just and proper.

DATED: Providence, Rhode Island, September 25, 2014.

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