

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

DONOVAN K., a minor, by his mother and next friend, Carolyn K., and CAROLYN K., on behalf of themselves and all others similarly situated,	:	
	:	
Plaintiffs,	:	C.A. No. 2009 -
	:	
v.	:	
	:	
THE PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE and ESTELLE RICHMAN, in her official capacity as Secretary of Public Welfare,	:	
	:	
Defendants.	:	

COMPLAINT - CLASS ACTION

I. PRELIMINARY STATEMENT

1. Plaintiff Donovan K. is almost two years old, has developmental disabilities, and, due to life threatening medical conditions, resides in a facility licensed and funded by Defendant Pennsylvania Department of Public Welfare (DPW). While Donovan was living with his mother, he was receiving “early intervention” services to help with his severe and multiple physical and cognitive developmental delays. When Donovan was placed, these services stopped. DPW, Pennsylvania’s “Lead Agency” under Part C of the Individuals with Disabilities Education Act, 20 U.S.C. §§1431, *et seq.*, (hereinafter “Part C”) is responsible for ensuring that children under age 3 with developmental delays in the Commonwealth are identified and provided with appropriate early intervention programs. Plaintiffs allege that instead

DPW and its Secretary, also a Defendant herein, have maintained policies and practices that have resulted in the systematic exclusion of Donovan and similarly situated children and their parents from Part C's services and procedural protections. Such denial and exclusion violate the named and class plaintiffs' rights under Part C and under the Equal Protection Clause of the United States Constitution, and cause named and class plaintiffs' irreparable and on-going harm. Plaintiffs seek declaratory and injunctive relief and additional early intervention services to make up for the services the children and families have already lost.

II. STATEMENT OF JURISDICTION

2. This Court has jurisdiction under 20 U.S.C. §1439(a)(1) in that plaintiffs' claim arises under Part C, which permits the filing of a civil action in federal court for violations of that law. This Court also has jurisdiction under 28 U.S.C. §1343 in that plaintiffs allege a violation of the Equal Protection Clause of the U.S. Constitution.
3. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) in that named plaintiffs reside in this judicial district and a substantial part of the events or omissions giving rise to these claims occurred in this judicial district.

III. PARTIES

4. Plaintiff Donovan K. is a 22-month-old toddler with multiple disabilities. He resides at Cambridge Point Pleasant, a facility in Bucks County for medically fragile children that is funded through Medical Assistance and licensed

through DPW. He brings this action through his mother and next friend, Carolyn K., on behalf of himself and all other similarly situated infants and toddlers under age 3 in Pennsylvania.

5. Plaintiff Carolyn K. is Donovan's mother. Ms. K. lives in Northampton County and seeks to represent the families of minor class members.
6. Defendant Pennsylvania Department of Public Welfare ("DPW") is Pennsylvania's "Lead Agency" within the meaning of Part C and is responsible for ensuring, *inter alia*, that all Pennsylvania children with developmental delays under age three are identified, located, evaluated and provided with free, appropriate early intervention services; and that their families receive the supports and services required to enhance their children's development.
7. Defendant Estelle Richman, Secretary of Defendant DPW, is the executive officer charged with overseeing the operations of the Department. She is sued in her official capacity only.

IV. CLASS ALLEGATIONS

8. Named Plaintiffs bring this lawsuit on their own behalf and behalf of all similarly situated individuals pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2). The class named plaintiffs seek to represent is composed of:

All children, currently or in the future, who are under age three, have or may have developmental delays, and live in

facilities licensed or funded by the PA Department of
Public Welfare, and the parents of those children,

9. On information and belief, the size of the class is sufficiently numerous to make joinder of all class members impracticable. On information and belief, there are currently more than 28 infants and toddlers living in at least seven different facilities throughout the Commonwealth. The class also includes future children and their families.
10. Plaintiff children are largely indigent, some are not in the legal custody of their parents, most if not all have significant developmental delays, none are able to institute actions on their own, and they reside in geographically distant group settings; thus they would be unlikely to institute individual actions if this class is not certified.
11. Named Plaintiffs and the members of the class present common questions of law and fact, including whether Defendant DPW and Defendant Richman have violated their rights under Part C by maintaining policies and practices that result in their exclusion from the Infants and Toddlers Early Intervention System and the early intervention services and procedural protections mandated by Part C, and whether Defendant Richman's irrational and disparate treatment of these children living in facilities also violates the Equal Protection Clause of the U.S. Constitution.
12. The claims of the named plaintiffs are typical of those of the class they seek to represent. Like unnamed class members, Donovan K. is a child under age 3 who is eligible for Part C early intervention services and protections and who

lives in a facility licensed and funded by DPW. He and his mother, who is also a plaintiff herein, maintain that Defendants failed to require the County Early Intervention agency in which the facility is located, or any other local or state agency, to serve him in accordance with state and federal laws and procedures.

13. Named Plaintiffs will fairly and adequately represent and protect the interests of the class. Donovan and his mother have no interests adverse to or in conflict with those of other class members.
14. Attorneys for named plaintiffs are experienced in federal class action litigation, experts in this area of the law, and will vigorously pursue this action in the interest of the class.
15. Defendants have acted or refused to act on grounds generally applicable to all members of the class, making final declaratory and injunctive relief appropriate with respect to the class as a whole.

V. FACTUAL ALLEGATIONS

16. Part C of the IDEA requires participating states such as the Commonwealth of Pennsylvania to ensure that each child under age 3 with a “developmental delay” is identified through a “comprehensive child find system” and provided with the “early intervention services” (hereinafter “EI services”) they need to correct or reduce their delays.
17. In 1990, the Pennsylvania Legislature passed the Statewide System for Early Intervention Services Act. 11 P.S. §§875-101, *et seq.* The Act designated Defendant DPW as the agency charged with administering the program for

providing EI services to children with disabilities under age 3 (hereinafter “Infant and Toddler EI Program”). At the local level, families were to obtain services through county mental health and mental retardation offices. 11 P.S. §875-303(a) (hereinafter “Counties”). Counties usually contract with private agencies to provide EI services to eligible children and their families.

18. Although not required by Part C, Pennsylvania also chose to make its EI system free for children and families. In 2003, Pennsylvania adopted regulations to implement Part C and the Statewide System for Early Intervention Services Act. 55 PA Code §§4226.1, *et seq.*
19. Under applicable state and federal law, children under age 3 with a developmental delay in one or more of 5 areas (cognitive, physical, social/emotional, communication, and adaptive or self help) qualify for a program of EI services to meet their needs.
20. The range of EI services is very broad, including but not limited to assistive technology devices and services, nutrition services, health services, medical services for diagnostic or evaluation purposes, physical therapy, psychological services, special instruction, and transportation. Unique to the Part C system is “service coordination” which requires that a “service coordinator” work with the family to coordinate services across agency lines and be the “single point of contact” in helping the family obtain the services and assistance they need. See, 34 C.F.R. §303.23 (Service coordination (case management)).
21. Part C also provides specific services for families to help them enhance their child’s development. One example is “family training, counseling and home

visits” provided by, as appropriate, social workers, psychologists, and other qualified personnel. 34 C.F.R. §303.12(d)(3).

22. The PA regulations state the purpose of the program: “Early Intervention services and supports are provided to families and infants and toddlers with disabilities... to maximize the child’s developmental potential. Service planning and delivery are founded on a partnership between families and early intervention personnel which is focused on meeting the unique needs of the child, addressing the concerns and priorities of each family and building on family and community resources.” 55 PA Code §4226.1 (Policy).
23. Part C also directs each state to operate a “comprehensive child find system” to locate, evaluate, and serve all children under age 3 eligible for EI services. 34 C.F.R. §§303.165, 303.321.
24. A child suspected of needing Part C EI services is referred to the County, which evaluates the child to determine if she has a developmental delay and is eligible for services. If the child is determined to be eligible, the family, the Service Coordinator, appropriate County staff, and private providers meet to develop an Individualized Family Services Plan or IFSP. That plan explains what EI services the child will receive, whenever possible in a “natural environment.” Children’s IFSP’s are reviewed every 6 months, and an IFSP meeting is convened at least annually.
25. When a family and the County do not agree on the type or amount of EI services the child should receive, or whether the services are being provided in the “natural environment,” Part C and state law establish a mediation and

impartial hearing system by which the dispute can be resolved. Hearing officers must “[h]ave knowledge about the provisions [of Part C] and the needs of, and services available for, eligible children and their families.” 34 C.F.R. §§303.420, 300.421(a)(1).

26. Part C requires that before any change, reduction or termination of services in a child’s IFSP, a family must be given written notice of the proposed change and an opportunity to contest the proposal through the EI mediation or hearing system. The child has the right to continue to receive the former services pending the outcome of the hearing process.
27. Part C also requires the Commonwealth and the DPW to have in effect procedures to ensure the appointment of “surrogate parents” for infants and toddlers who do not have “parents,” including infants and toddlers who are wards of the state under the IDEA.
28. The facilities in which class members reside are licensed by DPW and regulated under any one of several chapters of Title 55 of the Pennsylvania Code, each with different requirements regarding assessments, treatment plans and the provision of services. (One type of facility, Intermediate Care Facility for the Mentally Retarded (hereinafter “ICF/MR”), is subject to federal regulations which are incorporated into Title 55.) While these requirements are similar in some ways to those of Part C, they are not the same. They do not require an identical set of services, there is no provision for surrogate parents, and there are no procedural protections.

29. Donovan K. and many class members have significant and often multiple medical problems, and most (if not all) have developmental delays that would qualify them for EI services if they were living with their families in the Counties.
30. However, with respect to children under the age of three who are living in publically-funded and licensed facilities, Defendants Richman and DPW have not directed the Counties in which the facilities are located or any other public agency to provide EI services to these children. As a result, plaintiffs contend that children residing in these facilities are not evaluated for EI services, do not have current IFSPs developed in collaboration with their families or surrogate parents, are not receiving EI services from the Counties, and have not been offered access to the Part C mediation and impartial hearing system.
31. Plaintiff Donovan K. is a 22-month-old toddler with multiple disabilities. He breathes through a ventilator and is fed through a gastrostomy tube. He does not talk or walk, lift his head, sit up, roll over, clap or hold anything.
32. Donovan was born with hypotonia and other disabilities. He lived at home in Northampton County for the first year of his life.
33. While he was living with his family, Donovan was referred to the County for EI services. When he was about six months of age, the County evaluated Donovan and, in consultation with Donovan's mother, developed an IFSP and began providing him with EI services.
34. His initial IFSP provided for up to three hours per week of service coordination, one hour per week with a physical therapist, instructions for his

mother for activities to occur throughout the day, all with the primary goal of strengthening his muscles throughout his body to enable him to lift his head, rollover, sit and explore his environment. EI services were soon increased to include three visits each week from a combination of physical and occupational therapists. The therapies were highly effective and a further increase in services was planned.

35. By March of 2008, when Donovan was eleven months old, he had learned to clap, lift his head a little, almost sit up, lift his arms and feet in the air, and making bubbling noises.
36. That March Donovan became ill and was hospitalized. On the first of May, 2008, he was placed on a ventilator to breath and has needed round-the-clock supervision and care by trained individuals ever since.
37. Between March and August, Donovan was in and out of the hospital. When Donovan's mother was unable to obtain enough nurses to meet his needs at home, she accepted a placement for him at Cambridge Point Pleasant, a facility in Bucks County for medically fragile children. Donovan and the other children at Cambridge Point Pleasant are funded through Defendants' Medical Assistance program.
38. As a result of Donovan's illness, his developmental skills deteriorated.
39. When a child moves with his or her family from one Pennsylvania county to another, the service coordinator from the original county typically contacts the receiving county EI agency to ensure that there are no gaps in services

40. Once Donovan was placed at Cambridge Point Pleasant, his EI services simply ended with no written notice to his family.
41. Donovan's mother was informed by facility staff that EI services are not available for any of the infants or toddlers at the facility.
42. Cambridge Point Pleasant has a treatment plan for Donovan. However, that plan was not developed by the County in accordance with Part C procedures and provides for fewer services than Donovan was receiving from his former EI program.
43. Donovan's treatment plan at Cambridge Point Pleasant does not include an occupational therapist and does not specify an amount of time with a physical therapist. His mother is uncertain, but believes that a physical therapist sees him once or twice a week for about 20 minutes.
44. Donovan has never been evaluated by the County in which the facility is located, and his IFSP has never been reviewed or revised by the County. Donovan's mother has never received written notice or been offered access to the Part C mediation or hearing system.
45. Donovan has made no developmental progress since he arrived at Cambridge Point Pleasant five months ago.
46. Undersigned counsel for Plaintiffs contacted Defendant DPW through its counsel and through personal contact with the Office of Child Development and Learning, the DPW office that operates the Infants and Toddlers Program, to inform them that named and class plaintiffs are being denied access to the benefits of the Part C program.

47. During those communications, undersigned counsel requested that DPW direct the Counties that they are responsible for conducting Child Find activities and for providing EI services and the full range of Part C protections to named and class plaintiffs. They also requested that DPW instruct the facilities to notify the Counties, with the parents' consent, about the children living in the facilities.
48. To date, DPW has taken no action to correct these problems except to collect data regarding the number of children under age 3 in these facilities and whether they are receiving any EI services.
49. DPW's counsel has informed us that they have identified 28 infants and toddlers in Pennsylvania who are living in six (6) DPW licensed facilities and that none of these children is currently receiving EI services.
50. On information and belief, there are additional infants and toddlers in other facilities, not included in the above count of children and facilities, who are not receiving EI services.
51. Plaintiffs do not know how many other infants and toddlers, not yet identified, may be similarly situated but new babies enter DPW licensed facilities every year.
52. Upon information and belief, the Counties in which DPW licensed facilities are located do not consider that they are responsible for providing EI services and other Part C protections to children living in those facilities, nor do the counties from which the children came.

53. Class members are being irreparably harmed in that they are not receiving the services or protections afforded by Part C and the implementing state laws.
54. Exhaustion is not required in this case because the class-wide relief needed to remedy Defendant's systemic failures (including establishing procedures and practices that comply with Part C's Child Find and other requirements) cannot be addressed through individual proceedings. Hence, exhaustion of administrative remedies would be futile and is not required.

VI. CAUSES OF ACTION

Count I – Comprehensive Child Find

55. Part C of the IDEA requires Defendant Commonwealth of Pennsylvania to have in effect policies and procedures to identify, locate, and evaluate all infants and toddlers with disabilities in Pennsylvania, including children who are wards of the state, to determine which children are in need of EI Services. As the Lead Agency, the PA Department of Public Welfare and its Secretary are responsible for implementing Part C of the IDEA, including its Comprehensive Child Find requirement.
56. Defendants have failed to discharge their Child Find duties to named and class plaintiffs, and as a result Plaintiffs have not been identified as eligible for and are not receiving the early intervention services to which they are entitled in violation of 20 U.S.C. §1435(a)(5); 34 C.F.R. §§303.165, 303.321.

Count II - Denial of Early Intervention Services and Other Part C Protections

57. Part C of the IDEA requires the Commonwealth to adopt and implement a policy that ensures that early intervention services are available to all infants

and toddlers with developmental delays and their families in natural environments.

58. Part C of the IDEA also requires the Commonwealth to ensure that eligible children have Individualized Family Service Plans developed in collaboration with their families.
59. Part C of the IDEA also requires the Commonwealth to offer the eligible children and their families a series of procedural safeguards, including but not limited to written notice, access to mediation and an impartial hearing system, pendency of the services on the child's IFSP and, when no birth or adoptive parent is available, a surrogate parent.
60. Defendant Department of Public Welfare, as the lead agency and the agency charged under state law with administering the Infants and Toddlers with Disabilities program, and its Secretary, have the responsibility for assisting the Commonwealth to comply with these and other Part C mandates.
61. Because Defendants have failed to direct the Counties in which these children reside that they are responsible for providing these children with their Part C substantive and procedural protections, these children are being denied their right to evaluations, IFSPs, services, and procedural protections and other substantive and procedural Part C requirements. 20 U.S.C. §§1431, *et seq.*

Count III – (Defendant Richman only) Denial of Equal Protection

62. Defendant Richman's policies and practices deny to children, who live in publically-funded and licensed facilities, access to the Infants and Toddlers Early Intervention System and rights under Part C, while making that program

available to children who do not live in such facilities. These policies and practices discriminate against plaintiffs and class members, are without rational basis, and are in violation of the Equal Protection Clause of the United States Constitution. This claim is raised pursuant to 42 U.S.C. §1983, which authorizes the filing of a civil action for deprivation of rights secured by the United States Constitution.

VII. RELIEF REQUESTED

WHEREFORE, Plaintiffs, individually and on behalf of the class, request that this Court grant the following relief:

1. Assume jurisdiction of this case;
2. Certify this case as a class action pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2);
3. Issue a declaratory judgment in favor of named and class plaintiffs that Defendants have violated their rights under the IDEA and that Defendant Richman has violated their rights under the Equal Protection Clause as is set forth in this Complaint;
4. Issue preliminary injunctive relief with respect to named Plaintiffs, requiring that Donovan be evaluated, provided with an appropriate Individualized Family Service Plan, and provided the services identified in the IFSP;
5. Award appropriate compensatory education services to named Plaintiff Donovan K.;
6. Issue preliminary and final injunctive relief with respect to the Plaintiff class that requires Defendants to:

- a. Fully implement the “Child Find” and other requirements of Part C with respect to Plaintiff children living in facilities;
 - b. Send notice to class members’ parents, surrogate parents or guardians informing them that they may be entitled to an award of compensatory education, and setting out a process for making compensatory education determinations; and,
 - c. Provide the compensatory education determined appropriate through the above process.
7. Award Plaintiffs appropriate attorneys' fees and costs; and,
 8. Award such other and further relief as may be appropriate.

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