IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARMSTRONG, et al.	:	CIVIL ACTION
V.	:	FILED NOV 20 1980
KLINE, et al.	:	NOS. 78-172, 78-132 78-133

MEMORANDUM AND ORDER

Newcomer, J. November , 1980.

In a memorandum and order dated June 21, 1979 this Court declared that the defendants' refusal to provide or fund a program of special education in excess of 180 days per year to any handicapped child violated the class's and named plaintiffs' right to a "free appropriate public education" under the Education for All Handicapped Children Act, 20 U.S.C. §1401 et. seq. The Court ordered the defendants to provide the named plaintiffs with a publicly funded appropriate educational program consistent with the terms of the Court's opinion, and on July 5, 1979 entered an additional order specifying in greater detail the programs to be provided to the named plaintiffs. As a part of our June 21 Order the Court likewise enjoined the defendants from refusing to provide or fund a program of special education to any member of the class. On August 1, 1979 the Court entered Remedial Order #1 specifying the procedures to be employed for determining which of the "priority class members"[1] were indeed in need of programming in excess of

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1. "Priority class members" were defined as

> "All handicapped school-aged persons who have been placed by the Department of Education and/or their local school districts and intermediate units in day or residential education programs operating on

180 days per year. The issue presently before the Court is one explicitly left open by Remedial Order #1: whether the priority class members found to require programming in excess of 180 days are entitled to reimbursement from defendants as of the date of the Court's initial opinion and order, June 21, 1979, or as of the date of Remedial Order #1, August 1, 1979. Defendants argue for an even more extreme position: reimbursement should run only from the date on which each individual class member is found to be in need of programming in excess of 180 days. For reasons discussed below, the Court finds that priority class members found to require education in excess of 180 days are entitled to reimbursement for such education as of the date of this Court's initial opinion, or June 21, 1979.

Discussion

Defendant Scanlon contends that the reimbursement requested by plaintiffs is barred by the Eleventh Amendment.[2] While the language of the Amendment does not suggest it applies to suits against a state by its own citizens, it has consistently been construed to bar the bringing of such suits in federal court.

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1. (continued)

> a year round basis without admitting or excepting children for a lesser period of time and whose parents or guardians are presently paying for programming in excess of 180 days.

2. The Eleventh Amendment provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Hans v. Louisiana, 134 U.S. 1, 33 (1890); Employees v. Department of Public Health and Welfare, 411 U.S. 279, 280 (1973). In addition, the Amendment has been interpreted to bar an action against individual state officials when the action is in essence one for the recovery of public funds from the state treasury. Ford Motor v. Department of Treasury, 323 U.S. 459, 464 (1945); Edelman v. Jordan, 415 U.S. 651, 663 (1974).

Exceptions to these general rules have been allowed. A federal court may enjoin a state official to conform his future conduct to the requirements of the Constitution. Ex Parte Young, 209 U.S. 123 (1908). Injunctions which will necessitate the payment of funds from the state treasury in order to secure compliance may likewise be issued for "such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex Parte Young." Edelman, 415 U.S. at 668. In the sequel to Edelman the court explained that case as follows:

> In Edelman we held that retroactive welfare benefits awarded by a Federal District Court to plaintiffs, by reason of wrongful denial of benefits by state officials prior to the entry of the court's order determining the wrongfulness of their actions, violated the Eleventh Amendment.

Quern v. Jordan, 440 U.S. 332, 333 (1979). The question in the instant case, then, is on what date this Court determined the wrongfulness of the defendants' actions.[3] We find that the initial opinion and order, entered June 21, 1979, did so.

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3. The priority class members have not requested any monetary reimbursement for their expenditures prior to June 21, 1979.

Defendant Scanlon attempts to distinguish the instant case from those in which the class members are readily identifiable. He argues that this distinction is relevant because the wrongfulness of the defendants' actions with respect to any given class member is not determined until after the procedures in Remedial Order #1 are followed and that in any event the procedures will not determine whether the given individual was a member of the class as of June 21, 1979. The Court finds this argument unpersuasive.

The opinion and order entered June 21, 1979 found that the defendants' 180 day rule "violates the class's and named plaintiffs' right to a 'free appropriate public education' under the Education for All Handicapped Children Act of 1975." Defendants were enjoined from further application of the rule. Remedial Order #1, rather than finding any additional wrongful conduct on the part of the defendants, merely provided a procedure for the identification of class members and implementation of the initial order. Similarly, the evaluation of individual priority class members pursuant to Remedial Order #1 is merely the process by which those injured by defendants' wrongful conduct may be identified. None of this changes the fact that on June 21, 1979 this Court held defendants' 180 day rule to be wrongful, which is the test enunciated by Edelman and Quern. In addition, to adopt defendants' proposed method for calculating reimbursement would only give them additional incentive to adopt dilatory tactics in order to reduce their liability under the Court's order. Accordingly, the Court will enter an Order directing plaintiffs to calculate the amount of educational expenses incurred between June 21 and August 1, 1979 by those members of the priority class found to need education in excess of 180 days per year. Following receipt of this informa-

tion the Court will enter an Order amending Remedial Order #1 to reflect defendants' obligation to reimburse plaintiffs for these expenses.

Clarence C. Newcomer, J.