

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FILED

JUL - 2 1997

Clerk, U.S. District Court  
District of Columbia

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NIKITA PETTIES, et al., )

Plaintiffs, )

v. )

THE DISTRICT OF COLUMBIA, et al., )

Defendants. )  
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Civil Action No. 95-0148 (PLF)

OPINION AND ORDER OF REFERENCE

Plaintiffs filed this class action on January 20, 1995, because the District of Columbia had failed to fulfill its obligation to pay for the special education and related services to which students with special education needs are entitled under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., and its implementing regulations. Over the course of nearly three years of litigation, this case has touched many aspects of the special education system, including payments to private education providers, communications between the school system and parents of special education students, and the allocation of responsibility among various governmental entities in the District, particularly the District of Columbia Public Schools ("DCPS"), the Department of Human Services ("DHS"), and, most recently, the Receiver appointed by Judge Hogan through which special education and related services are provided to children who depend on the District of Columbia's child welfare and foster care systems (the "LaShawn Receiver").

In some areas, the District has made substantial improvements, for example in the area of payments to providers of services provided through DCPS and DHS. In other areas, however, problems remain intractable and the District of Columbia has remained out of compliance with the IDEA and this Court's orders. The Court has considered appointing a Special Master several times but has refrained from doing so, either because the parties appeared to be making progress without one or because defendants represented that they were taking unilateral steps that would render such an appointment unnecessary. See, e.g., Order of February 14, 1997; Order of February 3, 1997; Memorandum Opinion and Order of June 3, 1996.

Plaintiffs have once again requested the Court to appoint a Special Master, primarily because of the disturbing problems with special education transportation. Special education students are entitled by law to safe and adequate transportation to and from their schools and to and from related service providers, and such students very often have special transportation needs. The District, however, has repeatedly failed to provide class members with the transportation services to which they are entitled. Students are often forced to ride busses for two or three hours at a time, and, on occasion, students are not picked up at all. The busses are not always properly equipped for students who are in wheelchairs, and drivers may not be trained to deal with students who are on medication or who have physical, emotional or other problems.

The troubling inadequacy of the District's transportation system was first brought to the attention of the Court on April 10, 1996. At that time, the District's transportation system was in obvious crisis -- busses were not being repaired and routes were being doubled or even tripled, sending student ride times to unacceptably high levels. The Court notified defendants that it was considering appointing a Special Master because of the magnitude of the problem;

defendants proposed instead to retain a special consultant who would help the District resolve the crisis internally. Based on the representations of then-Superintendent Franklin L. Smith that he was committed to solving the problem, the Court did not appoint a Special Master and the District hired Mr. Badi Foster, a transportation consultant. See Memorandum Opinion and Order of June 3, 1996. In addition, plaintiffs' expert, Tony Records, has performed a monitoring function and provided the Court, through plaintiffs' counsel, with information about the transportation system.

Mr. Foster remained with the District for only a short time; in that time he produced a report that identified the transportation system's many failings. Based on Mr. Foster's report, plaintiffs and defendants worked out a proposed transportation plan. The Court approved the plan but it was not implemented. See Order of August 22, 1996.

Subsequently there was a change in the school administration. General Julius Becton took over as CEO of DCPS, Jeff Myers took over as director of Special Education for DCPS, and both immediately acknowledged that transportation of special education students was of great concern to them. Plaintiffs reiterated their support for the appointment of a Special Master because the new administration did not appear to be remedying the situation with adequate speed and commitment, but the defendants, through Deputy Corporation Counsel Michael Zielinski, represented that they were committed to solving the problem and asked the Court for more time to create a new transportation plan that would have the backing of the highest levels of the new administration. The Court granted defendants' request and did not appoint a Special Master at that time. See Order of February 14, 1997.

The parties worked together to produce a new transportation plan. The parties agreed on specific tasks, such as the creation of individual transportation plans for each student, driver training and the designing of more efficient bus routes. The parties also agreed to specific deadlines for the completion of these tasks. The Court approved the plan on March 21, 1997, and it now constitutes the governing blueprint for resolution of the school system's special education transportation problems. See Order of March 21, 1997.

Unfortunately, no sooner was the plan in place than it was violated. Deadlines were missed, tasks were not completed, or they were, at least according to plaintiffs, completed inadequately. See Defendants' Submission to the Court and Declaration of Jeff Myers, Acting Director of Special Education Branch, DCPS (June 24, 1997); Plaintiffs' Supplement to Status Report of June 20, 1997 and to June 26, 1997 Request for Appointment of Special Master (July 1, 1997). Meanwhile, the school year came to an end without a plan in place for next year. Without an operating transportation plan, the Court is concerned that the special education students will experience the same hardships and deprivations next year as they did this past year. This prospect is unacceptable, particularly in view of the fact that the parties and the Court have been wrestling with this problem for over a year, and parents and students have been suffering for much longer.

Another problem has arisen in this case of equal magnitude and concern. Although DCPS and DHS have made significant progress in regularizing their payments to private providers, over one million dollars in outstanding payments is owed by the LaShawn Receivership. The LaShawn Receiver was appointed by Judge Hogan and is not a party to this case, but the Receivership apparently is responsible for providing special education to over 400

class members, that is, students with disabilities who are entitled to special education and related services from private providers. See Report of the Parties Regarding Class Members Served Through the LaShawn Receivership (June 18, 1997).

Counsel for both sides have worked together to compile a list of class members under the Receiver's care, and to establish how much money is actually owed to private providers on their behalf. See Report of the Parties Regarding Analysis of Payments Outstanding By the LaShawn Receivership (June 11, 1997). The difficulties in gathering and checking this information have apparently made data collection by itself a gargantuan task, but it is only the first step. It is very important that lines of communication and cooperation be established between the Receiver, DCPS, the Office of the Corporation Counsel, plaintiffs and the Court so that the class members and providers, who are caught in the middle of this institutional tangle, are protected.

The Court has permitted the parties to try to work out these problems time and time again. The Court even scheduled bi-weekly status conferences for several months to facilitate this process, but the transportation plan remains unfulfilled and the private providers to whom the LaShawn Receiver owes money for services rendered remain unpaid, thereby putting students' placements in constant jeopardy.

In view of these intractable problems and the time and effort required to sort through the important details that each involves, the Court has decided that it is time to appoint a Special Master to accomplish two very specific tasks. The first is to monitor, facilitate, take steps to achieve implementation of and eventually, if necessary, assist the Court in enforcing the implementation of the transportation plan already agreed to by the parties and approved by the

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Court. Until now, plaintiffs' counsel has served this function; it is apparent, however, that a Special Master serving as the eyes, ears and arm of the Court is required. In addition, the Special Master shall facilitate communication and coordination on behalf of the class members receiving special education services through the LaShawn Receivership to ensure that they receive the special education and related services to which they are entitled and that the private providers who provide those services are paid in a timely fashion. The Court asked both sides to submit names of proposed Special Masters and the Court has considered all candidates.

The Court finds that the appointment of a Special Master for these two limited purposes will be the least intrusive and most effective remedy for defendants' noncompliance at this stage. The Court has already imposed heavy monetary sanctions on defendants for their repeated contempt of and failure to comply with this Court's orders. Some of those fines have been collected, some have been held in abeyance. The cost of a Special Master should be less than the costs of further sanctions, while a Special Master will better serve the Court and the parties by increasing communication, cooperation, efficiency and resolution of critical problems. The need to obtain results before the next school year begins, and the historic inability of defendants to resolve such issues over the summer, further mandates the appointment of a Special Master.

In order to further ensure that this appointment is effectuated in the least intrusive way, the Court will establish two phases of Special Master involvement with transportation issues. The first phase shall be primarily one of communication, information gathering, mediation, facilitation and, if necessary, the identification of remaining problems with defendants' compliance with the transportation plan. This phase should be completed before the

next school year begins. At the end of that phase the Special Master shall issue an initial report and recommendations, and the Court shall then evaluate the level of defendants' compliance in deciding whether or not to increase the level of judicial involvement by granting the Special Master additional powers or by issuing further direct orders regarding transportation. The level of any future judicial involvement shall be determined by the actions or inactions of the defendants and the quality, reliability and effectiveness of the transportation system put in place as a result.

Accordingly, pursuant to Rule 53, FED. R. CIV. P., and the inherent power of this Court, it is hereby

**ORDERED** that Elise T. Baach is appointed as Special Master in this action to work with the parties and to assist the Court in evaluating, monitoring and ensuring defendants' compliance with this Court's Orders relating to transportation, the transportation plan and applicable federal and local laws, regarding the provision of safe and appropriate special education transportation services. The Special Master is also entrusted with facilitating communication and cooperation between the LaShawn Receiver, the parties and their counsel and the Court regarding the payment of private providers for special education and related services, and will attempt to resolve with the Receivership issues relating to and payment of the outstanding payments. The Court will have direct supervisory power over the Special Master and will review periodically, as necessary, the scope, nature and duration of the Special Master's powers and duties; it is

**FURTHER ORDERED** that the Special Master shall have the following powers and duties:

1. The Special Master shall have all powers accorded under Rule 53, FED. R. CIV. P. and shall act as an agent and officer of the Court.
2. The Special Master shall meet with the parties and their counsel together or separately, as she shall determine necessary; receive information and reports as requested from the parties; submit to the parties and the Court proposed findings of fact, conclusions of law and recommendations as appropriate, including but not limited to recommendations regarding specific remedial actions.
3. The Special Master shall have the full cooperation of the parties and their counsel, who shall promptly provide any and all documentation and information requested by the Special Master, whether requested orally or in writing, and in whatever form requested, and shall afford the Special Master full access to the parties, including DCPS, DHS and other necessary District of Columbia officials, staff, facilities, records and documents.
4. The Special Master may schedule meetings and/or confer informally and confidentially with employees and agents of the defendants, and also may schedule meetings and/or confer informally and confidentially with counsel for the parties, plaintiffs and their family members. Defendants shall require their agents and employees to cooperate fully with the Special Master.
5. Within ten days of this Order, the Special Master shall submit a proposed budget to the Court. If the Special Master subsequently determines that she needs to employ staff, independent experts and/or specialists, she shall request permission of the Court.
6. The Special Master shall submit an initial report and recommendations to the Court by August 22, 1997, detailing the defendants' implementation of the transportation

plan, the status of special education transportation services, remaining problems and disputes, and making any findings of fact, conclusions of law and recommendations as are appropriate at that time and in light of the needs of the students and the commencement of the school year.

7. Either side may file objections to the Special Master's report within ten calendar days of receipt, unless the Court determines otherwise.

8. The Special Master shall work with the parties and attempt to secure their agreement and cooperation in resolving specific special education transportation problems as they arise. In the event that they cannot be resolved informally within a reasonable period of time, the Special Master shall submit a recommendation to the Court with notice to the parties. In the event that any party feels that an action taken or request made by the Special Master is beyond the scope and purpose of this Order, such party is free to bring the matter to the Court's attention.

9. The Special Master shall work with the parties and the LaShawn Receiver and the Court to facilitate communication and the flow of information regarding the needs of special education students under the Receiver's care and the payment of private providers on behalf of those students and will attempt to resolve with the Receivership issues relating to and payments of the outstanding payments.

10. Defendants shall pay the reasonable fees and expenses incurred by the Special Master in carrying out her duties and responsibilities under this Order. The Special Master shall submit to the Court and the parties each month an account of her activities and an invoice for the reasonable fees and expenses incurred in the performance of her duties under this Order, and defendants shall pay such reasonable fees and expenses within thirty (30) calendar

days.

11. Insofar as plaintiffs' expert Tony Records has been performing monitoring functions and other duties now delegated by the Court to the Special Master, defendants shall no longer be responsible for paying the fees and expenses for Mr. Records' services in this regard. Insofar as Mr. Records performs services for plaintiffs' that are not to be performed by the Special Master, plaintiffs may continue to use and be reimbursed for his services. The parties are urged immediately to discuss and resolve any questions with regard to Mr. Records' role in view of the terms of this Order. If necessary, the Court will decide any issues that may remain after the parties' discussions.

12. Henceforth counsel shall serve upon Ms. Baach, along with the Court and opposing counsel, a copy of any filing that relates to special education transportation or the LaShawn Receivership.

SO ORDERED.

  
PAUL L. FRIEDMAN  
United States District Judge

DATE: 7/8/97