

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

STEPHANIE SUSAVAGE and : CIVIL ACTION  
SCOTT SUSAVAGE, :  
Administrators of the Estate :  
of CYNTHIA SUSAVAGE :  
 :  
 :  
v. :  
 :  
BUCKS COUNTY SCHOOLS : NO. 00-6217  
INTERMEDIATE UNIT NO. 22, :  
et al. :  
 :

**MEMORANDUM**

Giles, C.J.

June 20, 2002

**I. INTRODUCTION**

Alleging violations of federal constitutional and statutory rights, plaintiffs filed a complaint in the above-captioned matter on December 8, 2000 as Administrators of the Estate of Cynthia Susavage, a minor, and in their own right, as parents, against the Bucks County Schools Intermediate Unit No. 22 (“BCIU”), the Quakertown Community School District (“School District”) and the LifePath Special Care Facility (“LifePath”). On March 14, 2002, BCIU filed a Third Party Complaint against the Commonwealth of Pennsylvania, Department of Education (“PDE”).

Plaintiffs have claims remaining under 42 U.S.C. § 1983 for violation of their due process rights under the Fourteenth Amendment to the United States Constitution for termination of the parental relationship, as well as claims as Administrators of the Estate of Cynthia Susavage for 1) violation of the decedent’s rights under the Individuals with Disabilities Education Act (“IDEA”), 2 U.S.C. § 1400, et. seq. and the 42 U.S.C. § 1983 action predicated thereon;

2) violation of the decedent's rights under §504 of the Rehabilitation Act of 1973 ("§ 504"), 29 U.S.C. § 794 and the 42 U.S.C. § 1983 action predicated thereon; 3) violation of the decedent's rights under the Americans with Disabilities Act, 42 U.S.C. § 12101, et. seq. and the 42 U.S.C. § 1983 action predicated thereon; and, 4) violation of the decedent's due process rights under the Fourteenth Amendment to the United States Constitution (42 U.S.C. §1983 action).

Currently before the court is PDE's motion to dismiss the third-party complaint filed against it by BCIU. For the reasons that follow, the motion is granted.

## **II. FACTUAL BACKGROUND**

The factual background of the underlying case is outlined in detail in Susavage v. Bucks County Schools Intermediate Unit No. 22, 2002 WL 109615 (E.D. Pa. January 22, 2002). The court only relates those facts necessary for an understanding of the instant motion. The claims in this case all arise out of the death of Cynthia Susavage on September 25, 1999, when the child was strangled by a harness on her way to school riding on a Levy bus. BCIU is a political subdivision; an entity created by the Commonwealth of Pennsylvania pursuant to the Public School Code to provide educational and early intervention services to pre-school and school-aged children. Pursuant to a "Mutually Agreed Upon Written Arrangement" ("MAWA") with PDE, BCIU received a grant for the provision of services to several school districts, including Quakertown, the school district covering the decedent's home area.

## **III. DISCUSSION**

Dismissal under Federal Rule of Civil Procedure 12(b)(6) is appropriate if, accepting the well-pled allegations of the complaint as true, and drawing all reasonable inferences in the light most favorable to plaintiff, it appears that a plaintiff could prove no set of facts that would entitle

it to relief. See H.J. Inc. v. Northwest Bell Tel. Co., 492 U.S. 229, 249 (1989); Weiner v. Quaker Oats Co., 129 F.3d 310, 318 (3d Cir. 1997); Unger v. National Residence Matching Program, 928 F.2d 1392, 1394-95 (3d Cir. 1990).

BCIU's third-party complaint against PDE asserts that the Commonwealth of Pennsylvania and its agencies are solely responsible for the establishment and maintenance of a state-wide system of early intervention services. BCIU argues that since it provided these services to Cynthia Susavage on behalf of PDE pursuant to a contract, should plaintiff establish they are entitled to damages in this matter, PDE is alone liable to plaintiffs, jointly and severally liable with BCIU and/or liable over to BCIU for contribution and/or indemnity both at law and pursuant to contract.

Due to the indefinite nature of the third-party complaint, PDE's motion to dismiss addresses all of plaintiffs' remaining claims through the following arguments: 1) PDE is not a "person" subject to suit under 42 U.S.C. § 1983; 2) the Eleventh Amendment of the U.S. Constitution immunizes PDE from claims under § 1983, the ADA, and § 504; 3) IDEA does not authorize the action against PDE; 4) neither the original complaint nor the third-party complaint allege that PDE violated any federal statute; and, 5) the contract between BCIU and PDE did not give BCIU a right to indemnification or contribution from PDE.

Luckily, in its brief in opposition to the motion to dismiss, BCIU clarifies that it "filed a third-party complaint against PDE because if BCIU is to be held liable under the [IDEA], then PDE, as the 'state educational agency' under IDEA is liable too." BCIU Mem. in Opp. to PDE Mot. to Dismiss at 1. The court disagrees.

BCIU's misunderstanding of this court's holding in Susavage, 2002 WL 109615, at \*11, is clear from its argument that if the state's duty under IDEA is non-delegable then PDE rather than BCIU must be the party ultimately liable. This court's holding in Susavage was that the state could not delegate to a private entity its federal statutory duty for transportation of disabled children. Id.; see Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1037 n.5 (3d Cir.1993) (34 C.F.R. §§ 300.347(a)(2) & 300.348 "are aimed at ensuring that a public agency that would otherwise be responsible for the education of a handicapped child does not abdicate that responsibility merely because a child is or will be enrolled at a private institution.").

BCIU is not a private entity, but a political subdivision of the state of Pennsylvania. This court has previously noted that IDEA specifically defines "public agencies within the State" to include the "political subdivisions of the State that are responsible for providing education to children with disabilities." 34 CFR § 300.2; see St. Johnsberry Academy v. D.H., 240 F.3d 163, 171 (2d Cir. 2001); Susavage, 2002 WL 109615, at \*11. Moreover, "[e]ach public agency in the State is responsible for ensuring that the rights and protections under Part B of [IDEA] are given to children with disabilities" who are "(1) [r]eferred to or placed in private schools and facilities by that public agency; or (2) [p]laced in private schools by their parents under the provisions of § 300.403(c)." 34 CFR § 300.2; see 20 U.S.C. 1412.

As part of its system of federal compliance, Pennsylvania establishes by statute that "the Department of Education shall be responsible for the delivery of early intervention services for all eligible young children," subject to the provisions of PA ST 11 P.S. § 875-304, which states in pertinent part:

The department may provide for the delivery of some or all of such services through [MAWAs]. An intermediate unit or school district may provide for some or all of such services through subcontracts with other public or private agencies which comply with the regulations and standards developed under this act. An intermediate unit or school district shall be responsible for the delivery of early intervention services only to the extent to which the intermediate unit or school district agrees to provide the services through [MAWAs] with the department.

PA ST 11 P.S. § 875-304.

In the MAWA between BCIU and PDE, BCIU “agrees to provide programs, services and procedures that fulfill all federal and state requirements applicable to eligible young children including all applicable requirements in . . . Part B of the Individuals with Disabilities Education Act, §§ 1410-1420; and federal regulations at 34 C.F.R. Parts 300 and 301.” Third-Party Compl., Exhibit at 2, ¶ 3. The MAWA specifically explains that “[d]evelopment of an Individualized Education Program (“IEP”) and all of the responsibilities for fulfilling the IEP and providing procedural safeguards are the responsibility of [BCIU].” *Id.* at 3-4, ¶ 4. Thus, it is clear that BCIU was the public agency specifically responsible for the development of an appropriate IEP for Cynthia Susavage and for the implementation of procedural safeguards to ensure that the requirements of the IEP were satisfied.

The court will not address the question of whether IDEA validly abrogates Eleventh Amendment immunity. Even if IDEA does abrogate state immunity, neither the complaint nor the third-party complaint allege facts that would support a finding that PDE caused the harm to Cynthia Susavage or that any PDE official was aware of the alleged deprivations of Cynthia’s rights. In addition, there is absolutely nothing in the MAWA indicating that BCIU is entitled to indemnification or contribution from PDE.

#### **IV. CONCLUSION**

For the foregoing reasons, the motion to dismiss the third-party complaint against PDE is granted. An appropriate order follows.