

*1017 125 F.3d 1017

121 Ed. Law Rep. 490, 25 A.D.D. 82

**K.R., an infant, by her parents and next friends
M.R. and
K.R.R., and M.R. and K.R.R., Plaintiffs-
Appellees,
v.
ANDERSON COMMUNITY SCHOOL
CORPORATION, Defendant-Appellant.**

No. 95-2497.

United States Court of Appeals,
Seventh Circuit.

Remanded June 27, 1997.

Decided Sept. 10, 1997.

Parents of disabled student brought action against school district under Individuals with Disabilities Education Act (IDEA) after district refused to provide full-time instructional assistant to attend classes with student at private parochial school. On parents' request for declaratory and injunctive relief, the United States District Court for the Southern District of Indiana, David F. Hamilton, J., 887 F.Supp. 1217, required district to provide services, but the Court of Appeals, 81 F.3d 673, reversed. The Supreme Court, --- U.S. ---, 117 S.Ct. 2502, 138 L.Ed.2d 1007 vacated and remanded for further consideration in light of statutory amendments. On remand, the Court of Appeals, Cummings, Circuit Judge, held that: (1) IDEA amendment did not require district to provide student with instructional assistant, and (2) district did not violate First Amendment's provisions on religion.

Reversed.

1. SCHOOLS ☞8

345 ----

345I Private Schools and Academies

345k8 Pupils, tuition, and discipline.

[See headnote text below]

1. SCHOOLS ☞148(2.1)

345 ----

345II Public Schools

345II(L) Pupils

345k148 Nature of Right to Instruction in
General

345k148(2) Handicapped Children and Special

Services Therefor

345k148(2.1) In general.

C.A.7 (Ind.) 1997.

School district was not required, under Individuals with Disabilities Education Act (IDEA), to pay for cost of instructional assistant for use by disabled student who voluntarily attended classes at private parochial school, as district was not required to make comparable provisions for disabled student voluntarily attending private school as for disabled public school students, and district afforded student genuine opportunity for services of instructional assistant at public school, which student declined. Individuals with Disabilities Education Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.

2. SCHOOLS ☞8

345 ----

345I Private Schools and Academies

345k8 Pupils, tuition, and discipline.

[See headnote text below]

2. SCHOOLS ☞148(2.1)

345 ----

345II Public Schools

345II(L) Pupils

345k148 Nature of Right to Instruction in
General345k148(2) Handicapped Children and Special
Services Therefor

345k148(2.1) In general.

C.A.7 (Ind.) 1997.

States and localities have no obligation, under Individuals with Disabilities Education Act (IDEA), to spend their money to ensure that disabled children who have chosen to enroll in private schools will receive publicly funded special-education services generally comparable to those provided to public-school children. Individuals with Disabilities Education Act, §§ 601 et seq., 612(a)(10), as amended, 20 U.S.C.A. §§ 1400 et seq., 1412(a)(10)

3. SCHOOLS ☞8

345 ----

345I Private Schools and Academies

345k8 Pupils, tuition, and discipline.

[See headnote text below]

3. SCHOOLS ☞148(2.1)

345 ----

345II Public Schools

345II(L) Pupils

345k148 Nature of Right to Instruction in
General

345k148(2) Handicapped Children and Special
Services Therefor

345k148(2.1) In general.

C.A.7 (Ind.) 1997.

Even if amendment to Individuals with Disabilities Education Act (IDEA) relating to provision of services for children attending private schools did not clarify IDEA but instead created change in law, such change was not applicable to time preceding passage of amendment, as amendment did not specify retroactive application. Individuals with Disabilities Education Act, §§ 601 et seq., 612(a)(10), as amended, 20 U.S.C.A. §§ 1400 et seq., 1412(a)(10).

4. CONSTITUTIONAL LAW ☞ 84.5(4.1)

92 ----

92V Personal, Civil and Political Rights

92k84 Religious Liberty and Freedom of
Conscience

92k84.5 Particular Matters and Applications

92k84.5(4) Private Schools

92k84.5(4.1) In general.

[See headnote text below]

4. SCHOOLS ☞ 8

345 ----

345I Private Schools and Academies

345k8 Pupils, tuition, and discipline.

[See headnote text below]

4. SCHOOLS ☞ 148(2.1)

345 ----

345II Public Schools

345II(L) Pupils

345k148 Nature of Right to Instruction in
General

345k148(2) Handicapped Children and Special
Services Therefor

345k148(2.1) In general.

C.A.7 (Ind.) 1997.

School district's failure to provide disabled student, who voluntarily attended private parochial school, with instructional assistant at private school did not violate First Amendment; district provided student with speech therapy, occupational therapy and physical therapy at public school site while she

attended parochial school and neither infringed on student's right to fully exercise her religious choice, nor conveyed any message of governmental enforcement or disapproval of student's religion. U.S.C.A. Const.Amend. 1.

*1018 Milo G. Gray, Jr. (submitted), Gary W. Ricks, Indiana Protection & Advocacy Services, Indianapolis, IN, for Plaintiff-Appellee.

David W. Gotshall, Anderson Community School Corp., Anderson, IN, for Defendant-Appellant.

Lisa F. Tanselle, Indiana School Boards Association, Indianapolis, IN, for Amicus Curiae Indiana School Boards Association.

William Kanter, Frank A. Rosenfeld, Department of Justice, Civil Division, Appellate Section, Washington, DC, for Amicus Curiae U.S.

Craig J. Bobay, Hunt, Suedhoff, Borrer & Eilbacher, Fort Wayne, IN, for Amicus Curiae Indiana Federation of Catholic School Families.

Jeffrey Spitzer-Resnick, Wisconsin Coalition for Advocacy, Madison, WI, for Amicus Curiae Wisconsin Coalition for Advocacy.

Before CUMMINGS, EASTERBROOK and
DIANE P. WOOD, Circuit Judges.

CUMMINGS, Circuit Judge.

In April 1996 we held that the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*, and the regulations thereunder did not require a public school to make comparable provisions for a disabled student voluntarily attending private school as for disabled public school students. 81 F.3d 673 (7th Cir.1996). We added that public schools are given discretion under the law and need only provide voluntarily placed private school students a genuine opportunity for equitable participation. Anderson Community School afforded plaintiff K.R. a genuine opportunity for the services of an instructional assistant at a public school, and she declined. We added that the public school's provision of other related services demonstrated that it reasonably exercised its discretion rather than eschewed its responsibility once K.R. chose to attend private school. Therefore the decision of the district court was reversed. *Id.*

[1] Plaintiffs' petition for certiorari was granted on June 27, 1997, and the case was remanded for us to give consideration to the Individuals with Disabilities Education Act Amendments of 1997, PL 105-17, 111 Stat. 37. After the case was returned to this Court, the plaintiffs stated that they did not *1019. believe that the Amendments "either resolved or disposed of the issues originally raised." The defendant school corporation advised that the Amendments "provide strong ammunition that the Court should not change its holding." Similarly, the United States filed a statement of position that the 1997 Amendments do not call into question our prior decision and concluded that the Amendments foreclose any prospect of relief. Therefore all parties agree that the 1997 Amendments do not impugn our prior holding.

[2] As the government points out, the Amendments unambiguously show that participating states and localities have no obligation to spend their money to ensure that disabled children who have chosen to enroll in private schools will receive publicly funded special-education services generally "comparable" to those provided to public-school children.

[3] In Section 101 of the IDEA Amendments Act, which amended § 612(a)(10) of the IDEA, Congress explained that,

... this part does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

111 Stat. 63. In light of this legislative clarification, we must again reverse the decision of the district court, which had required the defendant

school board to pay for the cost of an instructional assistant for use by plaintiff K.R. while attending classes at a private parochial school. (FN*) To the same effect, see *Cefalu v. East Baton Rouge Parish School Board*, 117 F.3d 231 (5th Cir.1997).

Although plaintiffs have based their argument partly on regulations of the U.S. Department of Education, they must be deemed superseded by the 1997 Amendments to the extent that any of them are inconsistent. According to the United States, new regulations are being developed based on the 1997 Amendments.

[4] Finally, plaintiffs now contend that defendant's system violates the First Amendment. This ignores the fact that Anderson Community School provided K.R. with speech therapy, occupational therapy and physical therapy at a public school site while she attended parochial school. Anderson Community School has neither infringed on K.R.'s right to fully exercise her religious choice, nor has it conveyed any message of governmental enforcement or disapproval of K.R.'s religion.

As shown, the Individuals with Disabilities Education Act Amendments of 1997 reinforce our 1996 opinion. Therefore the decision of the district court is again reversed.

FN* K.R. also asserts that this Court must reach a result regarding K.R.'s situation from August 1993 until June 1994, when the IDEA Amendments Act became law, because this Court's prior decision was vacated when this case was remanded to us from the Supreme Court. However, even if we were to view the IDEA Amendments Act as not clarifying the IDEA on this issue but instead creating a change in the law (a view which we do not here adopt), that change surely is not applicable to the time preceding the passage of the IDEA Amendments Act, as the Act does not specify retroactive application. See Section 201 of the IDEA Amendments Act, 111 Stat. 156.