IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GRAY AND ASSOCIATES, INC.,
A MISSISSIPPI NON-PROFIT CORPORATION
D/B/A THE LEARNING CURVE — APPELLANT

VERSUS — SUPREME COURT NO. 2009-ca-00199

THE STATE BOARD OF EDUCATION,
THE MISSISSIPPI DEPARTMENT OF
EDUCATION AND JOHN DOES 1-10 — APPELLEES

BRIEF OF APPELLANT

(On Appeal from the Order of the Circuit Court of the First Judicial District of Hinds County, Mississippi)

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DIRECT APPEAL FROM THE JUDGEMENT OF THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI IN THE MATTER

NO. 2009-CA-00199

GRAY AND ASSOCIATES, INC.,
A MISSISSIPPI NON-PROFIT CORPORATION
D/B/A THE LEARNING CURVE — PLAINTIFF

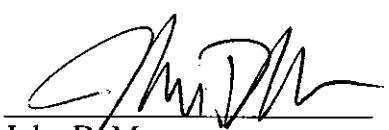
VERSUS — CIRCUIT COURT CAUSE NO. 251-07-1235

THE STATE BOARD OF EDUCATION,
THE MISSISSIPPI DEPARTMENT OF
EDUCATION AND JOHN DOES 1-10 — DEFENDANTS

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable William F. Coleman, Circuit Judge for Hinds County, Mississippi.
2. Robert Niles Hooper and John D. Moore, counsel for plaintiff/ appellant.
3. James T. Metz and the law firm Purdie & Metz, PLLC, counsel for the defendants/appellees.



John D. Moore
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II. STATEMENT OF THE CASE

A) PROCEDURAL HISTORY

This lawsuit stems from the removal of the Plaintiff from the approved Supplemental Education Services Provider list on July 1, 2006. A Notice of Claim letter was served on the Defendants on June 19, 2007. (R. 24) A Complaint was filed on December 11, 2007, (R. 3.) and served within 120 days.

The Defendant moved to dismiss the claim or for summary judgment on July 14, 2008. (R. 63). Following a response by the Plaintiff (R. 68) and a hearing, the Circuit Court granted Summary Judgment as to all claims in its Memorandum Opinion and Order, entered on September 23, 2008. (R. 73). A timely appeal was taken by the Plaintiff.

B) RELEVANT FACTS

As set forth in the Complaint:

NO CHILD LEFT BEHIND - THE LEGAL AND REGULATORY BACKGROUND

In 2001 the United State Congress passed P.L. 107-110, commonly known as the No Child Left Behind Act, or NCLB.

Under the act, every public school which fails to meet certain annual yearly progress benchmarks must provide its students the opportunity for Supplemental Educational Services ('SES').

The Board of Education and the Department of Education, as State educational agencies or "SEAs" under the NCLB, are responsible for adopting objective rules and regulations governing the approval of SES providers to each school district.

The defendants, as SEAs, are required to provide objective criteria for the selection and approval of SES providers and to maintain and provide a list of approved providers to each LEA.

The individual school districts, or LEAs, then hire the SES providers from the list provided by the defendants.

In accordance with Federal Law, defendants must develop, implement, and publicly report on standards and techniques for monitoring the quality and effectiveness of services offered by approved supplemental educational services providers.

Furthermore, defendants are responsible for withdrawing approval from providers that fail, for two consecutive years, to contribute to increasing the academic proficiency of students served by the providers.

Defendants are required to develop and publish objective standards to select SES providers.

Defendants are implicitly and explicitly required to publish those standards and apply a consistent set of criteria in determining which providers are selected as approved SES providers.

Events in this Case

The Mississippi School Board adopted the first Approved Supplemental Education Providers list in January of 2002. Gray and Associates, Inc. d/b/a The Learning Curve, was on that list. R. 13.

The Learning Curve was also on the approved lists for the 2003-2004 school year and the 2004-2005 school year. During that time The Learning Curve provided SES services to the Jackson Public School District for grades K-8. R. 13.

Throughout this time each LEA serviced by the Learning Curve showed improvement in student test scores as measured by the standardized MCT test scores and letter grade improvements. The school districts and the parents also indicated their approval with The Learning Curve's performance. R. 13.

The SES approved list remained unchanged through 2006, when the SES program became fully funded.

In March of 2006, with no notice to plaintiff, the defendants held a "competition" for placement on the AESP list. R. 13.

As a result of this unannounced "competition", without notice, defendants "purged" the AESP list, removing plaintiff as an eligible SES provider as of June 2006. R. 13.

Plaintiff's business suffered because most school districts made their selections for SES providers by July or August of 2006 to provision the SES services for the following 2006-2007 school year. R. 13.

Plaintiff complained about the lack of due process but was unable to secure any hearing or explanation for the blacklisting of the Learning Curve. R. 13, 16.

On August 16th, 2006, however, the defendants "withdrew" the changes to the ASESP list and left the original approved list in place. Defendants stated that at some undetermined time a "new" list would be compiled with "revised" regulations and procedure. R. 19.

Defendants gave no explanation for this arbitrary and capricious action. Defendants gave no notice of the manner in which the SES providers would be "purged" from the list, the criteria for which providers would be "purged", nor any right of appeal from adverse decisions. Furthermore, at the time this action was taken, Section 1116(e) of the NCLB expressly provided that removal from the list required a showing that an SES provider had failed "to contribute to increasing the academic proficiency of students served under this subsection as described in subparagraph D."

On January 8th, 2006, the defendants again "purged" the ASESP list and indicated that every former SES provider would be required to apply again. R. 20.

Again, no hearing, adjudication, or explanation was offered for why existing SES providers were now disqualified and removed from the approved list. Defendants made no findings, gave no explanation, and offered no opportunity for response to plaintiff as to why, after providing effective SES services for 4 years, it was suddenly being stricken from the approved provider list. Defendants have not provided, nor can they provide, any evidence whatsoever that The Learning Curve failed to meet its responsibilities under the act or that the students in the districts served by the Learning Curve had not progressed for two consecutive years.

At the time this action was taken, the federal guidance specifically provided that SES providers could only be removed "for cause":

> An SEA must use a consistent policy for withdrawing supplemental educational service providers from the State-approved list. The statute requires an SEA to remove from the approved list any provider that fails, for two consecutive years, to contribute to increased student proficiency relative to State academic content and achievement standards.

D-4, SES Non-regulatory guidance of 2005, United States Department of Education.

On January 8th, 2007, the defendants published a Request for Proposal, outlining the "revised" procedures for selection of SES providers. The "revised" standards included, among other provisions, the non-regulatory guidance adopted by the United States Department of Education and the SES toolkit, created by Council of Chief State School Officers. The defendants undertook no rule-making, and gave no notice of the adoption of the regulations and procedures. R. 20.

On January 31st, 2007, plaintiff submitted its proposal for reapplication to to the approved list.

On April 20th, 2007, defendants, without explanation, informed plaintiff that its

application was rejected. R. 22.

Defendants then proposed yet another RFP process with a deadline of May 22nd, 2007. The Defendants, after being served with a Notice of Intent to Sue, placed the plaintiff back on the list.

III. SUMMARY OF THE ARGUMENT

Standard of Review

The standard of review for appeal on the grant of a motion for summary judgment is *de novo*. ***Russell v. Orr***, 700 So.2d 619 (Miss. 1997)(*citing*, ***Northern Elec. Co. v. Phillips***, 660 So.2d 1278, 1281 (Miss.1995)).

Statute of Limitations

A cause of action does not accrue until all elements of that cause of action have been completed. In this case, the elements are, essentially: duty, breach, causation, and injury. The fourth element, injury, was not completed until, by Mr. Gray's testimony in his affidavit, July or August, when school districts choose their providers.

Moreover, there was no final action until Mr. Gray was actually removed from the list on July 1, 2006. Here, the plaintiff was approved until certain statutory conditions and standards, outlined in the federal law, were not met. At that time, the plaintiff may have become ineligible for the approved list.

Finally, only one of the claims is arguably outside the statute of limitations - the removal from the approved list in 2006. Other claims were pleaded in the Complaint which are certainly not outside the statute of limitations, including the requirement that the Plaintiff re-apply in 2007.

Discretionary Function

An action is not discretionary if statutes mandate action or inaction. Here, the NCLB Act mandated inaction until the approved provider fell below a certain standard.

Moreover, Rule-Making, as happened in this case, was mandated by the NCLB Act. As such, the making of rules, as well as the mandates related to the procedure for such Rule-Making, was mandatory - not discretionary. There exists a federal law which mandates how the State may make its rules.

IV. ARGUMENT

A) THE COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO ALL CLAIMS BASED ON THE STATUTE OF LIMITATION

1. There were other claims in the Complaint which were not addressed by the Court.

Only one of the claims is arguably outside the statute of limitations - the removal from the approved list in 2006. Other claims were pleaded in the Complaint which are certainly not outside the statute of limitations, including the requirement that the Plaintiff re-apply in 2007.

The 2007 requirement that the Plaintiff re-apply violated all of the same constitutional and legal requirements as the 2006 removal, but was done entirely in 2007, well within the statute of limitations. Therefore, this claim should be remanded for trial. This tort was complete despite the fact that the action had not yet been taken. *Black v. Ansah*, 876 So.2d 395 (Miss.App. 2003).

2. The 2006 removal of the Plaintiff from the Approved List was not complete until July 1, 2006, when the Plaintiff was actually removed -- not April when it was anticipated that the Plaintiff may be removed.

The 2006 removal from the approved SES list was not complete until the Defendants actually removed the Plaintiff from the list on July 1, 2006. Any actions prior to that date were nothing more than anticipatory actions. Before there can be a cause of action for a tort, there must be both the tortious conduct and an injury. *McMillan v. Puckett*, 678 So.2d 652, 654 (Miss.1996). The Appellant, of course, recognizes that this argument is contradictory to the argument in *Black v. Ansah* which is cited above. However, Appellant asserts that the instant

case is distinguishable in that the instant case was such a clear violation of Federal law, that the Plaintiff honestly believed that the matter would be corrected upon the Plaintiff's bringing this clear violation of law to the Defendants' attention.

B) The Removal of Plaintiff from the Approved List was not a Discretionary Function

An action is not discretionary if statutes mandate action or inaction. Here, the NCLB Act mandated inaction until the approved provider fell below a certain standard. Moreover, Rule-Making, as happened in this case, was mandated by the NCLB Act. As such, the making of rules, as well as the mandates related to the procedure for such Rule-Making, was mandatory - not discretionary. There exists a federal law which mandates how the State may make its rules.

This Court has held:

> Regarding question (1), this Court must determine whether the function "involved an element of choice or judgment," id., i.e. is the function discretionary or ministerial? This Court has stated that "[a] duty is discretionary if it requires the official to use her own judgment and discretion in the performance thereof." T.M. v. Noblitt, 650 So.2d 1340, 1343 (Miss.1995) (citing *Poyner v. Gilmore*, 171 Miss. 859, 158 So. 922, 923 (1935)). By contrast, an act is ministerial "[if] the duty is one which has been positively imposed by law and its performance required at a time and in a manner or under conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion." L.W., 754 So.2d at 1141. *See also* Collins, 876 So.2d at 289.

Dancy v. East Mississippi State Hospital, 944 So2d 10, 16 (Miss. 2006). In the instant case, Federal Law mandated that no provider be removed from the approved list unless it is "for cause":

> An SEA must use a consistent policy for withdrawing supplemental educational service providers from the State-approved list. The statute requires an SEA to remove from the approved list any provider that fails, for two consecutive years to contribute to increased student proficiency relative to State academic content and achievement standards.

D-4, SES Non-regulatory guidance of 2005, United States Department of Education. The Plaintiff did not fall below this standard and, therefore, the Defendants were mandated to leave the Plaintiff on the approved list. This was a ministerial function – not discretionary – under Mississippi case law.

V. CONCLUSION

Based on the above authority and argument, plaintiff requests that this Court reverse the lower court's grant of summary judgment and remand this matter to the Circuit Court of the First Judicial District of Hinds County for Trial.

For the foregoing reasons it was error to grant the motion for summary judgment in this case. Plaintiff requests that this court reverse the lower court and remand this matter to the Circuit Court of the First Judicial District of Hinds County for trial.

Respectfully submitted this 12th day of October, 2009.

Gray and Associates, Inc., a Mississippi
Non-Profit Corporation d/b/a
The Learning Curve, Appellant

By: 
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Certificate of Service

I certify that I have served via First Class United States Mail, postage prepaid, a true and correct copy of the above and foregoing *Brief of Appellant* to:

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Honorable William F. Coleman
Circuit Court Judge
Via Hand Delivery
Hinds County Courthouse
Jackson, Mississippi

This 12th day of October, 2009.

JOHN D. MOORE