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COURT OF APPEALS
STATE OF NEW YORK

MATTER OF EAST RAMAPO CENTRAL SCHOOL
DISTRICT,

Appellant,

-against-

No. 21

KING,

Respondent.

20 Eagle Street
Albany, New York
February 8, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 21, the Matter of
3 East Ramapo Central School District v. King.

4 Good afternoon, counsel.

5 MR. LEVINE: Good afternoon. And may it please
6 the court, my name is Randall Levine for appellant the East
7 Ramapo Central School District, the petitioner in this
8 Article 78 proceeding. I'd like to reserve two minutes of
9 time for rebuttal.

10 CHIEF JUDGE DIFIORE: You may.

11 MR. LEVINE: Thank you, Your Honor.

12 CHIEF JUDGE DIFIORE: You're welcome.

13 MR. LEVINE: The question on appeal is whether
14 state law allows a school district to obtain judicial
15 review in state court of the State Education Department's
16 annual IDEA compliance determinations. SED argues that
17 Article 78 review is barred by federal law, and as a
18 result, its compliance determinations are completely immune
19 from all judicial review, either in state or federal court.
20 That result would be - - -

21 JUDGE GARCIA: Counsel. Counsel.

22 MR. LEVINE: Yeah.

23 JUDGE GARCIA: I'm sorry to interrupt you. But
24 you can call it right of private action under the federal
25 statute or you can call it a right to challenge under

1 Article 78. But isn't this essentially the same analysis
2 which, under our case law, is does the legislature want you
3 to - - - prohibit you from doing this? So what's
4 interesting here is it's really the congress, right, that's
5 enacted this statute, and the State has a certain role in
6 enforcing it and in carrying it out. So isn't the analysis
7 really the same? It's - - - under our law, is - - - does
8 the legislature, and here the congress, intend for there or
9 prohibit a right to challenge this type of action. And it
10 seems if you look at the congressional scheme, the federal
11 scheme, there are certain ways you can do that if you're a
12 parent or if you're a school district. So whether you're
13 calling it a right to private action or a right to bring an
14 Article 78 proceeding, it seems to me just different ways
15 of labeling the same analysis.

16 MR. LEVINE: No. They are not the same analysis.
17 In fact, they are not even similar. Article 78 provides an
18 independent right to anyone aggrieved by Agency
19 action - - -

20 JUDGE STEIN: Well, but doesn't - - -

21 JUDGE GARCIA: Unless the - - -

22 JUDGE STEIN: Go ahead.

23 JUDGE GARCIA: - - - legislature intends
24 otherwise.

25 MR. LEVINE: Even if the legislature does intend

1 otherwise, this court has held repeatedly that the
2 legislature cannot abrogate all right to judicial review.
3 That for a statute to be valid there must be a means of
4 obtaining judicial review. And in those earlier cases,
5 this court has held that judicial review always must be
6 available where an - - - an agency disregards the standards
7 required by the statute or acts in a way that's contrary to
8 the language of the statute or otherwise acts in - - - in a
9 way that is, you know, abusive or discriminatory.

10 JUDGE STEIN: But - - -

11 MR. LEVINE: And - - -

12 JUDGE STEIN: But we - - - we do - - - there
13 are - - - there are always certain limitations that
14 certainly we allow in terms of access to judicial review.
15 There's standing, there's mootness, there's timeliness.
16 So - - - so it's not an absolute right. And - - - and so
17 it isn't - - - and here, in fact, the statute does provide
18 for some judicial review in some circumstances but doesn't
19 explicitly provide for the right that you're seeking. So
20 doesn't that tell us something?

21 MR. LEVINE: That tells you that Article 78 is
22 available, actually. The way Article 78 works is it
23 provides a right to judicial review when no other statute
24 provides its own procedures for judicial review.

25 JUDGE STEIN: But doesn't there have to be some

1 right first for - - - to me Article 78 seems more like a
2 procedural mechanism to obtain review which - - - which a
3 party is otherwise entitled to. And so that entitlement,
4 the way I see it, has to come from somewhere. It's not
5 inherent in - - - in Article 78.

6 MR. LEVINE: Yeah. And that's not correct.
7 Article 78 creates both a right and a procedure. It
8 creates a right to be free and - - - and not to be
9 subjected to arbitrary capricious or legally erroneous
10 actions by state agencies and it provides a procedure to
11 obtain judicial review to - - - to - - -

12 JUDGE FAHEY: Does a - - -

13 MR. LEVINE: - - - achieve that remedy. And it's
14 a - - -

15 JUDGE FAHEY: Does a distinction have to be drawn
16 between an administrative act and a regulatory act that's
17 being reviewed?

18 MR. LEVINE: There's - - - that distinction is
19 not one that appears in any of the cases. It's not in the
20 statute. It's any agency action by which a party is
21 aggrieved; they can have Article 78 review. They can have
22 judicial review.

23 CHIEF JUDGE DIFIORE: So was the school aggrieved
24 here?

25 MR. LEVINE: Yes.

1 CHIEF JUDGE DIFIORE: How?

2 MR. LEVINE: The State Education Department
3 determined that the - - - the district had violated the
4 IDEA and the related state laws and regulations by settling
5 with the parents of students with disabilities, even though
6 the IDEA and the related state laws and regulations
7 explicitly authorized those settlements.

8 CHIEF JUDGE DIFIORE: What was the consequence of
9 that?

10 MR. LEVINE: The consequence of that, and to
11 literally follow the - - - the Department's order, would
12 mean that the district can't settle any IDEA disputes with
13 parents at all.

14 CHIEF JUDGE DIFIORE: The consequence is not the
15 ultimate withholding of the funds
16 that - - - where - - - where the State disagreed with the
17 process that was employed?

18 MR. LEVINE: Well, it may lead to that. The
19 Department in its - - - in its directive threatened that it
20 would withdraw federal funds and refuse to provide
21 additional federal funds to the district.

22 CHIEF JUDGE DIFIORE: So does the school district
23 need to run that process out and get to the end?

24 MR. LEVINE: No. There's no indication that it
25 would need to wait to actually have the Department deprive

1 it of - - - of federal funds.

2 JUDGE WILSON: Doesn't Article 78 have an
3 exhaustion requirement?

4 MR. LEVINE: Article 78 has an exhaustion
5 requirement but there - - - there's no administrative
6 review procedure - - -

7 JUDGE WILSON: But once the district - - -

8 MR. LEVINE: - - - for this determination.

9 JUDGE WILSON: Once the district is fined, can't
10 it appeal to the secretary?

11 MR. LEVINE: In that narrow set of circumstances,
12 which are not where we are here, it - - - it could appeal
13 to the secretary. But - - -

14 JUDGE WILSON: But that's my question is if we're
15 not here yet, have you exhausted your administrative
16 remedies?

17 MR. LEVINE: There is no administrative remedy
18 for these determinations. This determination, this finding
19 that the district violated the IDEA, has real consequences
20 for the district. And the district should be able to
21 obtain judicial review to be relieved of those consequences
22 because the - - - the Department's order is irrational and
23 it's inconsistent with the statute.

24 JUDGE ABDUS-SALAAM: The consequence that you're
25 referring to, counsel, would be that you couldn't

1 enter - - - the district couldn't enter into any more
2 settlements as - - - as it had been doing? Is that what
3 you're saying?

4 MR. LEVINE: No. My - - - what I'm saying is
5 that to follow the Department's order literally would
6 require the district never to settle at all and to litigate
7 all the way through due process hearings and all the way
8 through appeals all due process hearings.

9 CHIEF JUDGE DIFIORE: Never to settle at all or
10 never to use the process that was determined by the State
11 to be inappropriate?

12 MR. LEVINE: Never to settle at all. I mean
13 that - - - that's one of the key points here
14 that - - - that is worth - - - worth reemphasizing. What
15 the Department did was it - - - it applied all of the rules
16 for - - - for district placements, all - - - all of the
17 rules the CSE has to follow in placing children, to a
18 settlement. But a settlement never results in the same
19 kind of placement or the same kind of services that the CSE
20 recommended because, by definition, it's an agreement. So
21 if the - - - the district can be held - - -

22 JUDGE ABDUS-SALAAM: You could - - - you could
23 continue - - -

24 MR. LEVINE: - - - to have violated the law
25 but - - -

1 JUDGE ABDUS-SALAAM: Counsel, excuse me.

2 MR. LEVINE: Yes.

3 JUDGE ABDUS-SALAAM: You could continue to
4 negotiate with parents but only use the - - - the scheme
5 that allows that type of negotiation under the statute,
6 right?

7 MR. LEVINE: The - - - the State Education
8 Department did not find at any point that the district
9 violated any particular rule that applies to the settlement
10 provisions in the IDEA. It - - - that is not what the
11 Department found. The Department find that the results of
12 those settlements violated other parts of the IDEA that
13 applied to CSE placements. That's what irrational about
14 the Department's order. But I'll just point out that the
15 confusion generated by the Department's order and the
16 reason there's so much to discuss here is exactly why the
17 Article 78 review that we're seeking should be allowed.
18 Because these are serious questions, and these have serious
19 consequences for the district. And that's why it was wrong
20 for the Appellate Division to focus on the question whether
21 there's private right of action under the IDEA when we're
22 not seeking any relief under the IDEA. We're not bringing
23 any claims under the IDEA.

24 JUDGE FAHEY: So - - - so all right. So Supreme
25 Court ruled against you on the merits, right, under Article

1 78?

2 MR. LEVINE: No, actually.

3 JUDGE FAHEY: Okay.

4 MR. LEVINE: The Supreme Court didn't consider
5 the merits. Instead, the Supreme Court simply deferred to
6 the Department's conclusion, and the Supreme Court ruled
7 that if you - - -

8 JUDGE FAHEY: So you're saying the Supreme Court
9 decision wasn't a merits determination?

10 MR. LEVINE: The Supreme Court did not actually
11 consider the merits of our petition. The Supreme Court
12 characterized what it did as a - - -

13 JUDGE FAHEY: All right.

14 MR. LEVINE: - - - as a ruling on the merits.
15 But - - -

16 JUDGE FAHEY: All right. So they - - - so for my
17 purposes, anyway, maybe not for yours, but for my purposes,
18 it looks to me like they ruled on the merits given what
19 they said. So if they ruled on the merits and
20 then - - - but then it went to the Appellate Division and
21 the Appellate Division did not rule on the merits.
22 Instead, they didn't rule on that - - - they didn't make a
23 determination on the merits rule. Instead, they said they
24 took a different path and a different analysis. So if you
25 were successful, what would you want us to do?

1 MR. LEVINE: The appropriate thing for this court
2 to do, and in the ordinary course, would be to reverse
3 the - - - the holding of the Appellate Division below and
4 find that Article 78 review is available. And then because
5 the Appellate Division didn't rule on the merits, this
6 court should remit to the Appellate Division for
7 consideration of those contentions. However, this court
8 does have discretion to consider the merits if it chooses
9 to do so. And if it - - - if it does choose to do so, the
10 court should find that the petition should be granted.
11 Thank you.

12 CHIEF JUDGE DIFIORE: Thank you, counsel.
13 Counsel.

14 MR. LANG: Good afternoon, Your Honors; Jeffrey
15 Lang on behalf of respondents. Judge Garcia asked isn't it
16 the same analysis under federal law as - - - as it is under
17 state law as to whether there is a - - - a federal right,
18 an enforceable right, in this case, and it's exactly the
19 same analysis. And in - - - in fact, what happened here is
20 that congress didn't want judicial review generally of this
21 type of intragovernmental dispute between the - - - the
22 state and one of its subdivision school districts.

23 JUDGE GARCIA: Counsel, to follow up on that
24 point and it seems the difference here, to me, is I think
25 that you can argue this is the same analysis. And our

1 analysis in Dairylea and the other cases is - - - is does
2 the legislature intend to - - - for there to be a private
3 right of action. You can fool with what that means
4 linguistically and say does - - - is it standing, is it not
5 everyone has the right to challenge every agency action.
6 So there is this intent by the legislature to limit Article
7 78 review that we would follow according to Dairylea. But
8 here, we have a - - - a federal statute, and is there
9 something in the state enactment of their roles and
10 responsibilities that would give rise to this type of an
11 Article 78 review separate and apart from the federal
12 statute?

13 MR. LANG: No. Because their case is premised
14 entirely on the violation of their purported federal right
15 under the statute, and in the - - - in the parallel federal
16 action that they brought in Southern District of New York,
17 the district court said there is no such enforceable right
18 under the statute to - - -

19 JUDGE WILSON: Let me - - - let me come at Judge
20 Garcia's question a different way. Is the State of New
21 York free to turn down the federal funding?

22 MR. LANG: It - - - yes.

23 JUDGE WILSON: It doesn't have to comply with the
24 regulations if it doesn't want - - -

25 MR. LANG: That's true.

1 JUDGE WILSON: - - - the money, right? So this
2 isn't a preemption case, really, is it?

3 MR. LANG: I - - - I wouldn't say it - - - it's
4 not so much that it's preemption. It's - - -

5 JUDGE WILSON: So let me then - - - I'm going to
6 ask you this.

7 MR. LANG: Sure.

8 JUDGE WILSON: If the State of New York did that,
9 would there be an Article 78 action available here?

10 MR. LANG: If - - -

11 JUDGE WILSON: If the State said we don't want
12 the money. We're not going to comply with your federal
13 regulations.

14 MR. LANG: Well, if the State violated some - - -

15 JUDGE WILSON: Well, not if - - - it's free to
16 say I don't want the money, right?

17 MR. LANG: Yes.

18 JUDGE WILSON: And if it said that it can promote
19 its own regulations. They could be the same as the
20 federal. They could be different. And there would be an
21 Article 78 proceeding, no?

22 MR. LANG: Yes. Because that would be outside
23 the framework of the IDEA and there - - - there could be.
24 Yes. There could - - -

25 JUDGE WILSON: And so it's the State's decision

1 to take the money that eliminates Article 78?

2 MR. LANG: It - - - it is the State's enforcement
3 action - - - decision to take the money and enforce the
4 statute. In other words, uphold its - - - its end of the
5 bargain. It - - - it receives federal money that
6 ultimately would go to the school districts. And in
7 exchange, it has an obligation under the federal statute to
8 implement all of the statutory procedures. And - - - and
9 so if it takes an enforcement action against a school
10 district within that framework and the challenge revolves
11 around a purported right under the federal statute, then
12 there is no Article 78 review.

13 JUDGE RIVERA: All right. So - - - so then
14 what - - - what, if any, is - - - is the district's
15 recourse?

16 MR. LANG: Well, I mean, the only real
17 administrative sanction under the statute is the
18 withholding of money. And if the State withholds money
19 then the district has a right to a hearing and to take an
20 appeal to the U.S. Secretary of Education, and then if
21 there were to be a lawsuit after that, you know,
22 the - - - the school district could always sue the
23 Secretary of Education under the
24 administrative - - - Federal Administrative Procedures Act.

25 JUDGE RIVERA: Well, short - - - short of denying

1 money. This - - - this complaint now - - -

2 MR. LANG: Sure.

3 JUDGE RIVERA: - - - that they say the State has
4 misinterpreted the statute. Right. That's their argument
5 right now.

6 MR. LANG: Yeah. They - - - I have - - -

7 JUDGE RIVERA: We - - - we are suffering a
8 consequence as a - - - a real consequence as a result of
9 that misinterpretation. You're saying, well, you
10 can't - - - you can't pursue that in state court on Article
11 78. So what - - - short of waiting for the action where
12 the money is not trickling down to them, what recourse
13 if - - - maybe you don't think they have any, what
14 recourse, if any, do they have for - - - for this claimed
15 mis - - - misinterpretation of the federal statute?

16 MR. LANG: Well, they - - - they have a couple.
17 One is that the Secretary's Office of Special Education
18 Programs responds to inquiries concerning the meaning of
19 the statute and the Secretary's regulations.
20 That's - - - and there are - - - there a number of
21 responses. This is on - - - we - - - as we cited in our
22 brief on the U.S. Department of Education website. So if
23 they have a question about the meaning of the statute and
24 they think that the State is misinterpreting the statute,
25 they can proceed that way. And - - -

1 JUDGE RIVERA: And what happens in the interim?

2 MR. LANG: Well - - -

3 JUDGE RIVERA: That - - - I think you might
4 concede that might take some time.

5 MR. LANG: It could. And - - - and there - - - I
6 mean in the interim - - - in the interim the State would
7 only withhold money in - - - in the very last resort.

8 JUDGE RIVERA: Um-hum.

9 MR. LANG: I mean we try to work collaboratively
10 with school districts to - - - to remedy problems. So I
11 mean in the - - - and, you know, in the interim the State
12 would expect the school districts - - -

13 JUDGE FAHEY: I - - -

14 MR. LANG: - - - to - - - to correct the issue.
15 The - - - sorry.

16 JUDGE FAHEY: Go ahead. Go ahead. I just - - -

17 JUDGE RIVERA: Just finish the second one.

18 MR. LANG: The second - - - I mean the - - - the
19 second avenue that a school district would have would
20 simply be to - - - you know, even outside a written inquiry
21 would be to approach the - - - the U.S. Department of
22 Education informally and, you know, complain that the State
23 is misinterpreting the law. And the one thing I do want to
24 make clear is that, you know, the State isn't operating in
25 a vacuum here. Just like the State monitors local

1 implementation, the Secretary of Education monitors very
2 closely state implementation.

3 JUDGE FAHEY: So - - - so - - -

4 MR. LANG: And there's the annual review.

5 JUDGE FAHEY: - - - what - - - what is the
6 meaning of the federal district court's dismissal of the
7 action? How do you interpret that? Does that support your
8 position or not?

9 MR. LANG: Well, it supports our position because
10 it says that the district is trying to vindicate a federal
11 right, and the federal court has said there is no such
12 right. So if there's no such federal right, you can't
13 proceed under the federal statute directly - - -

14 JUDGE FAHEY: So - - - so that decision would be
15 consistent with the Third Department decision?

16 MR. LANG: It's - - - it's absolutely consistent
17 with the Third Department - - -

18 JUDGE FAHEY: I see.

19 CHIEF JUDGE DIFIORE:

20 MR. LANG: - - - decision. I mean I - - - I
21 would say that the Third Department decision is consistent
22 with a line of cases in the Third, Fourth, and - - - and
23 First Departments where parties tried to assert purported
24 federal rights under the federal statute. In a couple of
25 those it was the Medicaid Act. And the court said well,

1 there is no enforceable - - - judicially enforceable right
2 under those federal statutes, so you can't proceed
3 indirectly. You can't bring an enforceable - - -

4 JUDGE FAHEY: Well - - - well, there is a private
5 cause of action language that - - - that Judge Garcia
6 referred to before.

7 MR. LANG: Right. I mean the - - - there was no
8 private cause of action, so you couldn't proceed indirectly
9 under Article 78 because you just don't have an enforceable
10 claim. And those were - - -

11 JUDGE STEIN: Under our regs there's a provision
12 8 NYCRR 200.5(1) that provides for the right to file a
13 complaint claiming that either a school district or State
14 Education Department has violated state or federal law
15 regarding educational students with disabilities, right?
16 Education - - - so who does that apply to? Who has a right
17 to file a claim under that regulation? It doesn't - - - it
18 doesn't

19 MR. LANG: No. Anyone can file a claim, but
20 if - - - if the claim concerns the individual - - - the
21 treatment of an individual child, then you go through the
22 due process procedures that the statute provides for
23 a - - - a parent to contest - - -

24 JUDGE STEIN: I understand that. But
25 this - - - isn't this something different, or is - - - is

1 that what this pertains to?

2 MR. LANG: No. It's - - - it's something
3 different but what I'm saying is that the regulation
4 specifically says that if the - - - if the administrative
5 complaint pertains to an individual child then you have the
6 right to a hearing and you - - - you follow the due process
7 procedures that - - -

8 JUDGE STEIN: But who - - - who - - - can you
9 give me an example of what or, you know, whether it's an
10 organization or an individual or who would be able to file
11 such a complaint?

12 MR. LANG: Oh, any - - - an individual, a parent,
13 the school district can file - - -

14 CHIEF JUDGE DIFIORE: And is it your argument,
15 counsel, that this litigation is focused not on an
16 individual child's needs being satisfied appropriately by
17 the school district but rather on the process that's being
18 employed?

19 MR. LANG: Yes. That's precisely our - - - our
20 argument because a number of the federal courts looked at
21 the statutory scheme and they said that the - - - congress
22 had one express provision for - - - for a lawsuit, and that
23 had to do with the treatment of an individual child. And
24 this also goes to our standing argument which is that the
25 school - - - school districts are just outside the zone of

1 interest protected and promoted by the - - - the statute.
2 Congress wanted to protect parents and individual children
3 with - - - with disabilities, not the financial interests
4 of school districts. I just want to make one quick point
5 about the - - - the settlement. Nothing that the State
6 ordered made it impossible for the school district to enter
7 into settlements. We just didn't want them doing it
8 without adequate support. In fact, they - - - the school
9 district has since this district, we know, entered into
10 settlements and they've been found in compliance. So it's
11 just incorrect that we have prevented them from entering
12 into any type of - - -

13 CHIEF JUDGE DIFIORE: Thank you.

14 JUDGE FAHEY: Chief Judge, I'm sorry.
15 One - - - one question.

16 CHIEF JUDGE DIFIORE: Yes, of course.

17 JUDGE GARCIA: When can the school district go to
18 the Secretary of Education?

19 MR. LANG: If the State withholds or reduces
20 money at all and then there's a dec - - - a decision to do
21 so there's an appeal to the Secretary of Education in that
22 case, and that's the formal administrative procedure. And
23 then - - -

24 JUDGE GARCIA: But triggered by the withhold of
25 funds, specifically.

1 MR. LANG: Triggered by - - - triggered by the
2 decision to withhold money.

3 JUDGE GARCIA: Thank you.

4 CHIEF JUDGE DIFIORE: Counsel.

5 MR. LEVINE: Thank you. Just a few points. The
6 State Education Department argues that the only possible
7 way for the district to obtain relief would be to go to the
8 U.S. Secretary of Education with this challenge. If that
9 was a possibility we would be there because the U.S.
10 Secretary of Education agrees with us on every single one
11 of the points in contention.

12 JUDGE STEIN: That's because no funds have been
13 withheld or - - - or it hasn't been determined that funds
14 will be withheld so you haven't gotten to that point.
15 Isn't that why?

16 MR. LEVINE: Yes. That's - - - that's correct.

17 JUDGE STEIN: Okay. So the - - - so what's the
18 harm to you, then, as you stand here today?

19 MR. LEVINE: Well, the harm is that the State
20 Education Department found the district to be in violation
21 of the IDEA for settling complaints as we are authorized to
22 do under the IDEA.

23 JUDGE STEIN: That's not the harm. That's what
24 they found.

25 MR. LEVINE: Well - - -

1 JUDGE STEIN: What is the harm?

2 MR. LEVINE: Right. That harm - - - well,
3 there's - - - there's two pieces. One is the harm
4 that - - - of preventing the district from being able to
5 settle and - - - and apparently there's a - - - there's a
6 difference over what the - - - the order actually requires.
7 That's another good reason why - - -

8 JUDGE STEIN: I hate to be repetitive but - - -

9 MR. LEVINE: - - - Article 78 should be
10 available.

11 JUDGE STEIN: I hate to be repetitive but
12 preventing them from settling is that - - - that's not a
13 harm. What is the harm that results from being prevented
14 from settling this?

15 MR. LEVINE: Oh, it - - - it requires the
16 district to - - -

17 JUDGE STEIN: If, in fact, you are.

18 MR. LEVINE: Yeah. It requires the district to
19 litigate due process complaints that it prefers to settle
20 that costs money.

21 JUDGE STEIN: Or does it just require the
22 district to document the basis for the particular
23 settlement reached under the principals of the IDEA?

24 MR. LEVINE: That's not what the Department's
25 order says, and that's certainly not what the law says.

1 There is no requirement in any regulation or in any statute
2 that requires the district to document - - -

3 JUDGE ABDUS-SALAAM: How are you settling - - -

4 MR. LEVINE: - - - the reasons.

5 JUDGE ABDUS-SALAAM: - - - cases differently now
6 than you were before this finding?

7 MR. LEVINE: I'm - - - I'm not aware of that and
8 that's not on the record, and that's not something that
9 I've been part of.

10 JUDGE WILSON: Well, doesn't the order actually
11 say you can settle cases as long as you do it the following
12 ways? It doesn't say you can't settle.

13 MR. LEVINE: It doesn't say as long as you do it
14 the following ways. It says you can't settle by having a
15 single district representative overrule the CSE. But - - -

16 JUDGE WILSON: Right. So you could have two
17 district representatives or five or seven. It - - - right?

18 MR. LEVINE: Well, that - - - first of all, to
19 find that that would violate the IDEA would be arbitrary
20 because there's no requirements - - -

21 JUDGE WILSON: Not talking about whether it's
22 right or wrong.

23 MR. LEVINE: - - - in the IDEA or any other rule.
24 But - - -

25 JUDGE WILSON: We're asking about whether the

1 terms of the order prevent you from absolutely from
2 entering into any kind of settlement.

3 MR. LEVINE: Right. If - - - if the order says
4 that the district can't overrule the CSE - - -

5 JUDGE WILSON: Not if it says. What does it say?

6 MR. LEVINE: Right. It says the district can't
7 overrule the CSE by agreeing to a parents' requested
8 placement in a settlement. But that describes every single
9 settlement. So if the district can't agree with a parent
10 to an alternative settlement, it can't - - - an alternative
11 placement, it can't settle at all. That's why
12 the - - - the order that the Department gave is so
13 difficult for the district and it poses such a burden on
14 the district. There were also administrative burdens
15 that - - - that were - - - were more minor. But, you know,
16 those, too, give the district standing and a reason to be
17 aggrieved and to seek Article 78 review. Thank you.

18 CHIEF JUDGE DIFIORE: Thank you, counsel.

19 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. King, No. 21 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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