COURT BLOCKS SUIT OVER MISDIAGNOSIS

Claim of Man Who Agency Said Was Retarded Is Rejected

By DAVID MARGOLICK

A divided Court of Appeals yesterday rejected claims of "educational malpractice" filed by a man misdiagnosed as retarded when he was a boy. The court ruled he could not collect damages from New York City and the child-care agency that treated him.

At the same time, the court, the state's highest, unanimously upheld a lower court ruling that a deaf man who was improperly labeled as retarded could collect $1.5 million in damages because the erroneous diagnosis constituted medical malpractice.

The educational malpractice ruling came in a case brought by Frank Torres, a 27-year-old man abandoned as a child and cared for by an agency that had contracted with New York City to provide basic care, as well as religious, educational and vocational training, for foster children.

Shortly after he was placed in the agency, the Little Flower Children's Services Agency of Wading River, L.I., the boy, fluent in Spanish but understanding little English, was diagnosed as borderline retarded. When he left the eighth grade he was unable to read, and he remains illiterate.

The plaintiff in the second case, Donald Snow, 22, was diagnosed as a child to be a "hopeless imbecile" with an I.Q. of 26 when his symptoms actually stemmed from deafness. He was placed in the Willowbrook State School on Staten Island.

The two cases attracted wide interest because they raised questions about the distinctions between malpractice by doctors and medical institutions — a long-established cause of action — and malpractice by educators, which on two previous occasions the Court of Appeals has refused to recognize.

In the Snow case, the court affirmed a lower court decision without issuing an opinion. In the Torres case, it split, by a vote of 4 to 3.

Karen Hutson, who argued the Torres case for the New York City Corporation Counsel, expressed satisfaction with the decision.

But Mr. Torres's lawyer, Marcia R. Lowry of the Children's Rights Project of the American Civil Liberties Union, said the court had "ducked the issue" by labeling the neglect of foster children as educational malpractice and by declaring it beyond its powers to review. She said she would ask the United States Supreme Court to hear the case.

No Second Guessing

In each of its previous educational malpractice decisions, the court ruled that as a matter of public policy, the courts should not second guess the professional judgments of public-school educators and administrators. This reasoning was reiterated yesterday by Associate Judge Judith S. Kaye, who wrote the majority decision in the Torres case.

To examine Mr. Torres's claim, she wrote, "would require the courts to assess the nature of his difficulty in learning, including such elusive factors as his own attitude, motivation, temperament, past experience and home environment, to examine Board of Education policies and their implementation by school officials — the very role we have already declined to assume."

She sought to distinguish the Torres decision from the Snow case, noting that Donald Snow was treated in an institution where clients were considered patients — not students, where they received continuous medical and psychological care, where records were medical rather than educational and where costs were covered by medical insurance.

"While mistaken evaluations are central to both Snow and Torres," she wrote, "such factors as age of the child upon entry, nature of the institution and kind of care administered mark the difference between medical and educational malpractice claims."

A Bitter Dissent

The decision upheld the ruling of a lower court dismissing Mr. Torres's claim. In a bitter dissent, Associate Judge Bernard S. Meyer insisted that Mr. Torres's lawsuit be permitted to proceed. Mr. Torres's illiteracy, Judge Meyer wrote, stemmed from the failure of the city and the child-care agency to discharge its statutory duty to needy foster children.

Little Flower, Judge Meyer noted, was well aware of Mr. Torres's difficulty with English, but did nothing to assist him in overcoming this. Moreover, he remained in classes for the retarded even though his other achievements, notably in mathematics, were inconsistent with such a diagnosis.

"Educational policy is no more involved in Frank Torres's illiteracy than it was in Donald Snow's stunted intellectual growth," he wrote.

Joining in the majority's opinion in the Torres case were Associate Judges Hugh R. Jones, Richard D. Simons and Matthew J. Jasen. Judge Meyer's dissent was signed by Associate Judge Sol M. Wachtler and Chief Judge Lawrence H. Cooke.

Mr. Torres was abandoned by his mother in 1964, when he was 7. The New York City Department of Social Services assumed responsibility for his care and placed him with Little Flower. From the beginning, the school recognized his difficulties speaking English. No steps were taken, however, to rectify the problem. He was expelled from a school for the educable retarded in March 1973.

Treatment at Willowbrook

Mr. Snow was admitted to Willowbrook in 1965, when he was 3. Though there was evidence at the time that his hearing was impaired, he was given an intelligence test that had not been designed for the deaf. It was not until 1971 that his initial diagnosis as being retarded was reappraised. He is now unable to speak and reads at third-grade level.

Lawyers for the state, like the city's lawyers in the Torres case, argued that the treatment constituted educational malpractice, beyond the courts' power to review.

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Judge Judith S. Kaye of the New York State Court of Appeals.

"This was 'educational malpractice' like a teacher sending a blind kid into a machine shop and watching him have his hand sliced off was educational malpractice," said Mr. Snow's lawyer, Robert L. Ellis of Manhattan. "It was physician error from beginning to end."