

BAR NEWS ITEM

Effective April 12, 1996, the Franklin County Prothonotary's Office will be adopting a new policy concerning divorce decree notices to the defendant. When the praecipe to transmit the record is filed, as self-addressed stamped envelope to the defendant must be provided. The Prothonotary's office will send the notice to the defendant when the divorce decree is final. If an envelope is not provided, a divorce decree notice will not be sent to the defendant. In memo about the matter, the Prothonotary's office suggests it may be contacted, with any question or concerns.

BETH CARBAUGH, as parent and natural guardian for JONATHAN CARBAUGH, a minor, Plaintiff vs COUNTY OF FRANKLIN OPERATION HEAD START (SOUTH MOUNTAIN DIVISION) and DR. BURTON F. TUCKER, Defendants Franklin County branch, Civil Action - Law No. A.D. 1994 - 457

Carbaugh v. Operation Head Start et al.

Governmental immunity-Local agency- Non-profit corporation as political unit

1. Local agencies are immune from suit under Political Subdivision Tort Claims Act.
2. Local agencies are generally departments or other dependent parts of an existing governmental structure.
3. A non-profit corporation has an independent legal existence, so that it does not meet the usual standards for a local agency, even if it performs a public duty assigned by statute.
4. Where a non-profit corporation performs a public function set by a legislative act, and does so through a board of directors not controlled by any local governmental body, without day-to-day supervision by a local governmental body, a court will not grant summary judgment on the basis of governmental immunity.

David W. Knauer, Esquire, Counsel for Plaintiff, Beth Carbaugh, as parent and natural guardian for Jonathan Carbaugh, a minor
F. Lee Shipman, Esquire, Counsel for Operation Headstart (South Mountain Division)
Robert D. MacMahon, Esquire, Dr. Burton F. Tucker

OPINION AND ORDER

WALKER, P.J., April 8, 1996

Findings of Fact

Defendant Franklin County Head Start is a private nonprofit corporation, organized under the laws of Pennsylvania. It receives approximately 80% of its funding from the federal government, and the remainder from local sources, much of it in-kind, such as office space.

Head Start is overseen by a board of directors drawn from a variety of occupations, but none serving ex officio, as a result of holding a public office. There is also a parents, advisory council,

which is drawn from parents of children receiving services. The executive director is hired by the board of directors.

Discussion

Franklin County Head Start (Head Start) brings this motion for summary judgment on the basis that it is a government agency immune from suit generally under the Political Subdivision Tort Claims Act, 42 Pa.C.S. § 8541-8542, and that no exceptions apply. Because this court finds that Head Start is not a governmental agency under that act, the motion is denied and the court will not consider whether any exception to governmental immunity would apply.

Summary judgment should be granted where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035; *Mason & Dixon Lines, Inc. v. Mognet*, 166 Pa. Commw. 1, 645 A.2d 1370 (1994). The key issue in this motion is whether Head Start qualifies as a government agency. If so, Head Start would be entitled to judgment as a matter of law, unless an exception to governmental immunity can be shown.

The standards for determining whether an entity is a government agency are laid out in *Rhoads v. Lancaster Parking Authority*, 103 Pa. Commw. 303, 520 A.2d 122, *alloc. den.* 515 Pa. 611, 529 A.2d 1084 (1987). Under *Rhoads*, the party asserting such immunity must be a "local agency" under 42 Pa.C.S. § 8501, meaning a government unit other than the Commonwealth. *Rhoads* at 302, 520 A.2d at 125.

Were Head Start simply a department of a particular government body no further analysis would be required. Then Head Start would fit the traditional governmental model, having no independent existence outside of the government. However, here Head Start is organized as a non-profit, private corporation under the Non-Profit Corporations Law, 15 Pa.C.S. §§ 5101-5997. One of the characteristics of such corporations, as plaintiff points out, is the capacity "[t]o sue and be sued. . . ." 15 Pa. C. S. § 5502 (a) (2). Such corporations, even though performing government functions, have been found non-immune. Two cases

where this has occurred involved first, the Philadelphia Facilities management Corporation, *Modern Shoppers World v. Philadelphia Gas Works*, 164 Pa. Commw. 257, 643 A.2d 136 (1994), and second, the Community Action Program of Lancaster County, *Sanchez by Rivera v. Montanez*, 165 Pa. Commw. 381, 645 A.2d 383 (1994).

Modern Shoppers World concerned whether the Philadelphia Facilities management Corporation (PFMC) is a local agency protected from subrogation by an insurer under 42 Pa.C.S. § 8553(d). The court stated that "[f]or purposes of tort immunity, an 'agency of a local government' is one that has no independent legal existence, but is merely part of the organizational structure of that local government or authority. 42 Pa.C.S. § 102." [case citations omitted] *Modern Shoppers World* at 262, 643 A.2d at 138. The court went on to hold that as a private non-profit corporation, no matter how much control the City exerted over PFMC, as a private, nonprofit corporation it is not immune from suit. *Id.*

In *Sanchez* the issue was even closer to the one before this court. The Community Action Program (CAP), is a private, non-profit corporation charged with fulfilling the purposes of the Equal Opportunity Act, federal legislation. The *Sanchez* court acknowledged the strength and appeal of CAP's argument that as an officially designated recipient of state and federal funds, under regulations by both sovereigns, and organized and run for the purpose of fulfilling a public, legislatively mandated purpose, that it should be seen as a governmental agency. *Sanchez*, at 386-7, 645 A.2d at 386.

However, the court in *Sanchez* looked beyond this and saw a number of difficulties with it. The court said merely being designated to receive and distribute funds does not confer governmental status, nor is the promulgation of regulations and the award of grants by the State Department of Community Affairs dispositive of the issue. *Id.* at 387, 645 A.2d at 386. Instead, the court looked at the testimony of the executive director, who testified that CAP received approximately 20% of its funding from Lancaster County, and the composition of the board of directors, made up of two-thirds non-public officials.

This latter fact meant that the board could easily overrule the public officials on any question, and showed that CAP was not under the control of local government. The court especially noted that day-to-day operations were not overseen by the county. *Id.*

Finally, the *Sanchez* court looked to the *Modern Shoppers World* case and its reasoning, and found that case helped determine its decision. After quoting extensively from the *Modern Shoppers World* opinion, the court held that "CAP, a private non-profit corporation subject to a variety of governmental regulation and funding, is nonetheless not a local agency entitled to governmental immunity, but a corporate entity capable of being sued." *Id.* at 390, 645 A.2d at 388.

Head Start points out for the court the case of *Weinerman v. City of Philadelphia*, in which the U.S. District Court for the Eastern District of Pennsylvania held that the Philadelphia Housing Development Corporation was immune from suit as a local agency. 785 F.Supp. 1174 (E.D.Pa. 1992). This court notes that this case is a federal case construing state law, and as a state court we are not bound by its determinations, although its reasoning may be persuasive. Furthermore, *Weinerman* predates the two cases cited above, which are Pennsylvania Commonwealth Court cases binding on this court.

Head Start also points to *Community College v. Seibert*, 144 Pa. Commw. 616, 601 A. 2d 1348 (1992) , *aff'd* 533 Pa. 314, 622 A.2d 285 (1993) . However, unlike the cases discussed above, this involves an entity created and operated by a political subdivision, including a county, municipality, a school district, or any combination of them. All of these are entitled to tort immunity, so it is hardly surprising that an entity operated by them would also be so entitled.

Upon review of the above cases, and the facts in this case, this court finds that Head Start is not entitled to tort immunity as a government agency. It is a private, non-profit corporation. Its board is not made up of public officials. Head Start's everyday operations are not directly supervised by public officials. Its executive director is hired by the board. In short, its circumstances so closely match those of CAP in the *Sanchez* case that this court feels that precedent is the best and most persuasive

guide to a decision here. Accordingly, Head Start's motion for summary judgment must be denied.

ORDER OF COURT

April 8, 1996, defendant Franklin County Head Start Inc.'s motion for summary judgment is denied.