

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2008

(Argued: November 25, 2008 Decided: January 28, 2009)

Docket No. 07-3190-cv

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CARRIE GORTON,
Plaintiff-Appellee,

-v.-

BRUCE GETTEL,
Defendant,
SULLIVAN COUNTY BOCES,
Defendant-Appellant.

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Before: JACOBS, Chief Judge, WALKER and
 CALABRESI, Circuit Judges.

Defendant-Appellant Sullivan County BOCES appeals,
under the collateral order doctrine, the June 22, 2007 order
of the United States District Court for the Southern
District of New York (Robinson, J.) denying Appellant's
motion seeking summary judgment on the ground that it is an
arm of New York State entitled to Eleventh Amendment
immunity. We affirm.

1 ANNA J. ERVOLINA, Morris Duffy
2 Alonso & Faley, New York, NY,
3 for Defendant-Appellant.
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5 MICHAEL H. SUSSMAN, Goshen, NY,
6 for Plaintiff-Appellee.
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10 PER CURIAM:

11 Defendant-Appellant Sullivan County BOCES appeals,
12 under the collateral order doctrine, the June 22, 2007 order
13 of the United States District Court for the Southern
14 District of New York (Robinson, J.) denying summary judgment
15 and holding that Sullivan County BOCES is not an arm of New
16 York State entitled to Eleventh Amendment immunity. We
17 affirm primarily for the reasons given by the district court
18 in its thorough and well-reasoned opinion.

19 New York Education Law § 1950 permits supervisory
20 school districts in New York State to create boards of
21 cooperative educational services ("BOCES") for the purpose
22 of distributing the cost of certain educational services
23 among school districts. Sullivan County BOCES was created
24 in 1950 pursuant to this statute.

25 Plaintiff-Appellee Carrie Gorton filed a complaint in
26 2004 alleging that during her two years of employment as a
27 counselor and recruiter at Sullivan County BOCES, she was

1 harassed repeatedly by defendant Bruce Gettel, a fellow
2 teacher. After discovery, Sullivan County BOCES moved for
3 summary judgment arguing, inter alia, that it is an arm of
4 New York State entitled to Eleventh Amendment immunity. The
5 district court denied Appellant's motion.

6 "[A]s a general rule, state governments may not be sued
7 in federal court unless they have waived their Eleventh
8 Amendment immunity." Woods v. Rondout Valley Cent. School
9 Dist. Bd. of Educ., 466 F.3d 232, 236 (2d Cir. 2006) (citing
10 Lapides v. Bd. of Regents, 535 U.S. 613, 618-19 (2002)).
11 Eleventh Amendment immunity extends to "state agents and
12 state instrumentalities that are, effectively, arms of a
13 state." Id. (internal quotation marks and citations
14 omitted). However, immunity does not extend to suits
15 against "municipal corporation[s] or other governmental
16 entit[ies] which [are] not . . . arm[s] of the State." Id.
17 (quoting Alden v. Maine, 527 U.S. 706, 756 (1999)).

18 "States and state entities that claim to be arms of the
19 state may take advantage of the collateral order doctrine to
20 appeal a district court order denying a claim of Eleventh
21 Amendment immunity." Id. at 235 (quoting Tennessee v. Lane,
22 541 U.S. 509, 514 n.1 (2004)). In considering whether an
23 entity is an arm of the state, we review the district

1 court's factual findings for clear error and its legal
2 conclusions de novo. See McGinty v. New York, 251 F.3d 84,
3 90 (2d Cir. 2001)). The burden is on the party seeking
4 immunity to demonstrate that it is an arm of the state.
5 Woods, 466 F.3d at 237.

6 Six factors determine whether an entity is an arm of
7 the state: "(1) how the entity is referred to in its
8 documents of origin; (2) how the governing members of the
9 entity are appointed; (3) how the entity is funded;
10 (4) whether the entity's function is traditionally one of
11 local or state government; (5) whether the state has a veto
12 power over the entity's actions; and (6) whether the
13 entity's financial obligations are binding upon the state."
14 McGinty, 251 F.3d at 95-96 (citing Mancuso v. New York State
15 Thruway Auth., 86 F.3d 289, 293 (2d Cir. 1996)). If all
16 factors point in the same direction, a court's analysis is
17 complete. Id. at 96. If the factors point in different
18 directions, "a court must ask whether a suit against the
19 entity in federal court would threaten the integrity of the
20 state and expose its treasury to risk." Id. (citing
21 Mancuso, 86 F.3d at 293). "If the answer is still in doubt,
22 a concern for the state fisc will control." Id.

1 We have held that local school districts in New York
2 State are not arms of the state. See Fay v. S. Colonie
3 Cent. School Dist., 802 F.2d 21, 27-28 (2d Cir. 1986),
4 overruled on other grounds by Taylor v. Vt. Dep't of Educ.,
5 313 F.3d 768, 786 (2d Cir. 2002). We reached the same
6 conclusion with respect to New York's local boards of
7 education. See Woods, 466 F.3d at 251. These precedents
8 are influential here, because BOCES share many common
9 features with local school districts and boards of
10 education.

11 Applying the first factor of the six-part test, the
12 district court observed that the authorizing statute refers
13 to BOCES as "bod[ies] corporate," N.Y. Educ. Law § 1950(6),
14 the same term that the New York Education Law uses to
15 describe school districts, see id. at § 1701. In Woods, we
16 held that characterization weighed against immunity. 466
17 F.3d at 243-44. The district court reached the same
18 conclusion.

19 Sullivan County BOCES contests that this factor weighs
20 in favor of immunity because BOCES exist at the discretion
21 of the New York State Commissioner of Education
22 ("Commissioner") and are creatures of New York State law.
23 However, the Commissioner also controls the creation of

1 school districts, see N.Y. Educ. Law §§ 1801-02, which we
2 have held are not arms of the state. Sullivan County BOCES
3 also argues that this factor favors immunity because a
4 BOCES, unlike a board of education, does not govern an
5 entity defined as a municipal corporation. Although this
6 consideration was relevant to our analysis of the first
7 factor in Woods, 466 F.3d at 244, the distinction is
8 insufficient to tip this factor in Appellant's favor. We
9 therefore agree with the district court that the first
10 factor weighs against immunity.

11 The district court concluded, consistent with Woods,
12 that the second and third factors also weigh against
13 immunity because the New York Education Law provides that
14 "[b]oards of education and school trustees, shall elect the
15 members of [a BOCES]," N.Y. Educ. Law § 1950(2-b), and that
16 BOCES shall be funded by constituent school districts, id.
17 § 1950(4), (5). We agree.

18 The district court determined that the fourth factor is
19 neutral because the education function in New York is shared
20 between state and local governments, Woods, 466 F.3d at 245-
21 47, and that the fifth factor weighs in favor of immunity
22 because the New York Education Law grants the Commissioner
23 substantial veto power over BOCES' decisions. See, e.g.,

1 N.Y. Educ. Law § 1950(1) (vesting power in Commissioner to
2 establish BOCES boards); id. § 1950(4)(b)(7) (stating that
3 Commissioner shall have final approval of allocation of
4 BOCES expenses among school districts); id. § 1950(4)(d)(1)
5 (requiring Commissioner's approval for provision of any
6 shared service); id. § 1950(4)(p)(a) (mandating that
7 Commissioner approve lease renewals). The district court
8 was correct.

9 Finally, the district court ruled that the sixth factor
10 weighs against granting immunity, noting our emphasis in
11 Woods, 466 F.3d at 249, on New York Education Law § 1709(8-
12 c), which requires boards of education to "maintain a
13 program of reserves" to cover property loss and liability
14 claims. This provision was deemed significant in Woods
15 because "[t]he existence of this reserve fund suggests that
16 any judgment against a local New York board of education
17 would be paid out of its established fund rather than the
18 state treasury" Id. Section 1950 of the New York
19 Education Law permits BOCES to establish similar reserve
20 funds. N.Y. Educ. Law § 1950(4)(aa).

21 Sullivan County BOCES argued in district court--and
22 here--that any judgment would be binding on New York State
23 because it provides BOCES financial support. But as the

1 district court observed, New York State also provides
2 substantial aid to school districts, which are not arms of
3 the state. There is no evidence that New York State would
4 be liable for indemnifying a judgment against Appellant or
5 that a judgment would come "directly from the state
6 treasury," Fay, 802 F.2d at 27. Moreover, Woods explicitly
7 rejected the argument that, "because some money in the
8 reserve fund may have been derived from state
9 appropriations, a judgment against [a BOCES] is, in effect,
10 a judgment against the state." 466 F.3d at 249. The
11 district court's analysis of the sixth factor was correct.

12 Because the six factors point in different directions,
13 we "must ask whether a suit against the entity in federal
14 court would threaten the integrity of the state and expose
15 its treasury to risk." McGinty, 251 F.3d at 96 (citing
16 Mancuso, 86 F.3d at 293).

17 Both of these factors militate against immunity.
18 Sullivan County BOCES is a locally run entity affiliated
19 with local school districts; its liability would not reflect
20 adversely on New York State.

21 And a judgment in this case would not be paid directly
22 from the New York State treasury. There is some risk of
23 financial harm to New York State by way of increased

1 spending for BOCES services and a reduction in the benefit
2 or value the State gets from its investment. But school
3 districts also receive significant state aid and the same
4 arguments apply to them. Yet we have held they are not
5 entitled to immunity.

6 Sullivan County BOCES argues that it should enjoy
7 immunity because the legislature has promulgated specific
8 laws governing BOCES and because New York State treats BOCES
9 differently than school districts. This argument does not
10 discharge Appellant's burden of showing that it is entitled
11 to Eleventh Amendment immunity.

12 For these reasons, the judgment of the district court
13 denying Appellant's motion for summary judgment on the
14 ground of Eleventh Amendment immunity is affirmed.