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summary

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Parents Enjoy Independent, Enforceable Rights under the IDEA and Are Entitled to Prosecute IDEA Claims on Their Own Behalf

Winkleman v. Parma City Sch. Dist., ____ U.S. ____, 2007 U.S. Lexis 5902 (2007).

Mr. and Mrs. Winkelman have five children; their youngest, Jacob, is six years old, and has autism spectrum disorder. For the 2003-04 school year, the Parma City School District (district) in Parma, Ohio, proposed an IEP that would place Jacob in one of its elementary schools. The Winkelmans, challenged the IEP, and filed a complaint alleging that it denied Jacob a FAPE. While the litigation was proceeding, the Winkelmans placed Jacob at a private school at their own expense.

The hearing officer rejected the Winkelman's complaint, and they appealed the administrative decision to a state-level review officer. That appeal was also rejected, and they filed a complaint, on their own behalf and on behalf of Jacob, in federal district court to challenge the administrative decision. The Winkelmans had some assistance in the litigation from an attorney, but they filed their federal complaint without the aid of an attorney.

Once again, the district court ruled in favor of the district, and found that Jacob had been provided a FAPE. The Winkelmans again appealed that decision, without an attorney, to the Sixth Circuit Court of Appeals. The appellate court, relying on its decision in *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005), entered an order dismissing the appeal unless the Winkelmans obtained an attorney to represent Jacob. The court in *Cavanaugh* held that the right to a FAPE belongs to the child alone, and therefore,

parents, who are non-lawyers, cannot proceed *pro se* in federal court. The court in *Cavanaugh* acknowledged that its decision was in direct conflict with a First Circuit case, *Maroni v. Pemi-Baker Reg. Sch. Dist.*, 346 F.3d 247 (1st Cir. 2003), which held that the IDEA affords parents the right to assert IDEA claims on their own behalf. The Winkelmans then appealed to the Supreme Court.

The Supreme Court ruled in favor of the Winkelmans and held that the IDEA grants parents independent, enforceable rights, and as a result, they are entitled to prosecute claims on their own behalf. In reaching this conclusion, the Court explained that the IDEA contains four areas of particular relevance to parental involvement: (1) procedures to be followed when developing a child's IEP; (2) criteria governing the sufficiency of a child's education; (3) procedures for review when challenging an IEP; and (4) the requirement that states reimburse parents for various expenses in certain circumstances.

With regard to the first and second areas, the Court indicated that the IDEA requires school districts to develop an IEP for disabled students, and that parents serve as members of the IEP team. The IDEA requires the team to consider parental concerns in that process. Furthermore, the IDEA gives parents additional protections throughout the IEP process including the opportunity to review relevant records, and the requirement that the IEP team revise the IEP to address information provided by parents. The Court stated that the purpose of these parental protections is to facilitate the provision of a FAPE, and citing 20 U.S.C.A. §1401(29), it stated that part of the provision of a FAPE is that the education be provided "at no cost to parents."

With regard to the third and fourth areas, the Court explained that the IDEA requires that states provide parties with an opportunity to

present a complaint with respect to any matter relating to the identification, evaluation, or educational placement of a child, and/or relating to the provision of a FAPE to the child. The process begins with a preliminary meeting in which the parents of the child discuss the complaint and attempt to reach a resolution with the school district. If the complaint is not resolved to the parents' satisfaction, they may then request an impartial due process hearing. A court or hearing officer may then order reimbursement to the parents for the cost of a private school placement if the district failed to provide a FAPE. A court may then award attorney's fees to the parents if they are the prevailing party.

The Court found that these references to parents' rights means that the IDEA conveys rights to parents as well as children. Thus, the Court concluded that the proper way to construe these various provisions is to find that they accord parents independent, enforceable rights under the IDEA. The Court stated that these rights are not limited to certain procedural and reimbursement-related matters but encompass the entitlement to a FAPE for their child. The Court commented that, if parents enjoy enforceable rights at the administrative stage, it would be inconsistent with the statutory scheme to bar them from asserting these rights in federal court.

Based on the foregoing, the Court determined that the Winkelmans are entitled to prosecute IDEA claims on their own behalf. In making this determination, the Court did not address the specific issue of whether the IDEA entitles parents to litigate their child's claim *pro se*. Therefore, the Court reversed the Court of Appeals' decision and remanded the case for further proceedings.

ALJ Grants Parents' Request for "Stay Put" Order, after Board Unilaterally Changed ESY Program

S.A. and D.A., on Behalf of T.A., Petitioners, v. Caldwell-West Caldwell Board of Education, Respondent, EDS No. 07645-06 (November 2, 2006) [Decided by Leslie Z. Celentano, ALJ].

T.A. is nine years old and has been diagnosed with autism and other learning disabilities. For the 2005-06 school year, the board placed him in an out-of-district placement at the Banyan School.

In November 2005, the IEP team met to discuss T.A.'s extended school year (ESY) program for the summer of 2006. The IEP team agreed that the appropriate ESY program for T.A. would be the Harbor Haven Summer Camp (Harbor Haven). Harbor Haven provides a full-day, multi-sensory program for six weeks.

The ESY program was scheduled to begin July 3, 2006. However, on June 23, 2006 an IEP meeting was held, and the board informed T.A.'s parents that the ESY program had to be changed and was no longer a viable option. The board maintained that it was precluded by law from sending T.A. to Harbor Haven because it could not receive "Naples Act" approval and because Harbor Haven did not fingerprint all of its employees. The board instead offered an in-district program for T.A., which T.A.'s parents rejected.

On July 11, 2006, T.A.'s parents filed a due process petition seeking enforcement of the IDEA's "stay put" provision, so as to maintain T.A. at Harbor Haven for the summer. The ALJ framed the legal issue as whether the board was obligated to fund the ESY program agreed to in T.A.'s last agreed upon IEP, pursuant to the IDEA's stay put provision.

The stay put provision is codified at 20 U.S.C.A. §1415(j) and states, in relevant part, as follows:

During the pendency of any proceedings . . . the child shall remain in the then-current educational placement . . . or, if, applying for initial admission to a public school . . . shall be placed in the public school program until all such proceedings have been completed.

The ALJ explained that this provision “bars a school district from unilaterally changing a child’s placement during the pendency of a challenge to an IEP.” The determination of whether a change in placement has occurred is fact specific, and turns on whether the change will significantly impact the child’s learning experience; a change in physical placement alone is not a change in educational placement.

The ALJ further explained that, pursuant to the Naples Act, *N.J.S.A.* 18A:46-14(h), in general, special education students may only be placed in facilities that are approved for the education of disabled students. In circumstances where it is determined that there is no approved public school that can provide adequate services, the disabled student can be placed in an accredited nonpublic school so long as the services are nonsectarian, and the Commissioner consents or a court order is obtained.

In this case, Harbor Haven was the ESY placement in the last agreed upon IEP. Harbor Haven is not a school but is a summer day camp. Camps like Harbor Haven are regulated by the Department of Health and Senior Services (DHSS). DHSS issues certificates of approval under the Youth Camp Safety Act, and Harbor Haven has received a certificate of approval. Since Harbor Haven is not a school, the Naples Act does not apply, and would not preclude T.A.’s placement there.

The ALJ also rejected the board’s argument that it could not send T.A. to Harbor Haven because it does not fingerprint all employees. *N.J.S.A.* 18A:6-7.1 requires schools and facilities under the supervision of the Department of Education to have criminal background checks on school workers before they are hired. However, Harbor Haven is not under the supervision of the Department of Education. Therefore, this statute did not apply.

The ALJ also rejected the board’s argument that it did not change T.A.’s placement because it offered an appropriate alternative. The board did not offer any proof that its proposed alternative program is substantially similar to Harbor Haven. Based on the foregoing, the ALJ determined that the stay put provision applies and the board must pay for the ESY program at Harbor Haven.

Disabled Student, Who Turned Age 21 in August, Entitled to Special Education Through the next School Year Ending June 30th

C.T., ex rel. M.T., Plaintiff, v. Verona Board of Education, Defendant, 464 F.Supp.2d 383 (D.N.J. 2006) [Decided by Hon. William J. Martini].

M.T. was born on August 2, 1985 and is severely disabled. For the 2005-06 school year, he was placed in a full-day, full-year residential program at the Mollie Woods Program and Gardner Education Center at Woods Services (Woods Services) in Langhorne, Pennsylvania. His program included an extended school year (ESY) program, which was to conclude on August 21, 2006. M.T. would turn age 21 on August 2, 2006.

On March 15, 2006, a petition was filed by M.T.’s mother requesting that he be provided with special education and related services for

the 2006-07 school year. At that time, no IEP was developed for the 2006-07 school year because M.T. was about to turn 21. M.T.'s mother argued that M.T. was entitled to receive special education services for the subsequent school year since he turns age 21 on or after July 1st (which marks the start of a new school year) and will still be receiving special education services. The board argued that M.T. "aged out" of the program because he turned age 21 before the start of the new academic school year beginning in September.

Citing 20 U.S.C.A. §1412(a)(1)(A), the ALJ explained that, in order to be eligible for services under the IDEA, a disabled child must be between the ages of 3 and 21. According to *N.J.A.C. 6A:14-1.3*, age 21 means "[a]ttainment of the 21st birthday by June 30 of that school year." Therefore, disabled children are entitled to special education services until their 21st birthday, and if they reach age 21 during that school year, they must continue to be provided with services for the balance of the school year.

Citing *N.J.S.A. 18A:1-1*, the ALJ explained that a school year refers to the academic school year which is the period between the time school opens following summer vacation until the next succeeding summer vacation. The ALJ further explained that an ESY program is an extension of special education services beyond the regular school year which is provided in accordance with a student's IEP. The ALJ determined that M.T.'s ESY program that ended on August 21, 2006 belonged to the 2005-06 school year as opposed to the 2006-07 school year. Therefore, the ALJ concluded that M.T. was no longer entitled to receive special education services beyond that date, and dismissed the petition.

M.T. continued his residential placement at Woods Services, and on August 31, 2006, M.T.'s mother filed a complaint in federal court to appeal the ALJ's decision. The parties then

filed cross-motions for summary judgment to decide the issue of whether M.T. was entitled to special education services through the 2006-07 school year.

The district court agreed with M.T. and determined that the IDEA extends services to disabled students through the end of the school year in which they reach age 21. The court explained that 20 U.S.C.A. §1412(a)(1)(A) provides that the IDEA applies to "all children with disabilities . . . between the ages of 3 and 21, *inclusive*." (Emphasis added). Citing *St. Johnsbury Acad. v. State of Vt. Dept. of Educ.*, 240 F.3d 163 (2d Cir. 2001), the court explained that the word "inclusive" means that the relevant time period begins on a child's third birthday and ends of the last day of his 21st year.

The court indicated that, under New Jersey law, specifically *N.J.A.C. 6A:14-1.3*, a disabled student, who reaches age 21 during a school year may continue to receive services only until the end of that school year, and pursuant to *N.J.S.A. 18A:36-1*, a school year begins on July 1st and ends on June 30th. The court therefore concluded that M.T. was entitled to special education services until the end of the school year in which he turned 21. The court commented that this conclusion was supported by a letter from the New Jersey Department of Education stating that a student with a disability, who turns 21 in August of any year, is entitled to services through the following June 30th.

The court rejected the ALJ's analysis of the impact of the ESY on the school year. The court explained that the definition of an ESY under *N.J.A.C. 6A:14-1.3* in no way changes the June 30 end date of a school year. Therefore, the court reversed the ALJ's decision and ordered the board to fund all of the costs for M.T. to receive special education and related services at Woods Services, retroactive to the date the board stopped making such payments and until the end of the 2006-07 school year.

Board Ordered to Reimburse Parents for Cost of Summer ESY Even Though Disabled Child Moved into District in July and Had No IEP in Place

J.M. and S.M. on Behalf of Minor Child, R.M., Petitioners, v. Mountain Lakes Board of Education, Respondent, EDS No. 7173-06 (December 7, 2006) [Decided by Jeffrey A. Gerson, ALJ].

R.M. is six years old and has been diagnosed with autism. On July 9, 2004, R.M. moved with his parents from Rockaway Township to Mountain Lakes. At that time, there was no IEP in effect for R.M., but his parents arranged for him to be placed in an extended school year (ESY) program to begin on July 9th.

Prior to July 9, 2004, R.M.'s mother contacted the director of special services in Mountain Lakes to let the board know about their impending move and to discuss arrangements for R.M. R.M.'s mother also spoke to the director of special services on a second occasion in June 2004 to advise that the family would be moving into the district in July.

On July 9, 2004, R.M.'s mother called the director of special services and informed her that the family was now living in the district. An in-home meeting was then scheduled for early August 2004. Over the course of these conversations, the district was made aware that an ESY program was arranged for R.M. However, there was no agreement about who would pay for the ESY; the director of special services asked about the cost of the program and received no response. The ESY program continued from July 9 to September 2, 2004, which was the start of the school year.

Many months later on March 21, 2005, R.M.'s parents requested reimbursement for the ESY program. The board denied the request on the basis that it did not have the opportunity to

implement an ESY for R.M. R.M.'s parents then filed a due process petition requesting reimbursement for the ESY program less two weeks of vacation between August 14 and August 28, 2004. The board contended that it received inadequate notice to provide a program for R.M. and that R.M.'s parents were not entitled to reimbursement because there was no IEP in place for him.

The ALJ explained that, in accordance with *N.J.A.C. 6A:14-4.1(g)*, once R.M. became domiciled in Mountain Lakes, he became entitled to a FAPE and the board was obligated to provide him with the services he needed. Although the board was not formally obligated to provide a FAPE until he actually resided in the district, the board cannot argue that it was not on notice of his arrival; the director of special services was aware that R.M. was autistic and would be arriving with no IEP. In fact, it was not disputed that ESY programs are necessary for autistic children. The ESY program R.M. attended included intense toilet training, avoidance of self-injurious behavior, and correcting other behaviors such as rocking. The ALJ stated it is erroneous to conclude that the lack of an initial demand for payment by R.M.'s parents relieved the board of its obligation to reimburse them. Therefore, the ALJ ordered the board to reimburse R.M.'s parents for the cost of the ESY program for the period between July 10, 2004 and August 13, 2004.

ALJ Orders Emotionally Disturbed High School Student to Be Placed in Interim Alternative Educational Setting Because He Is a Danger to Others

Lawrence Township Board of Education, Petitioner, v. D.F. on Behalf of D.F., Respondents, EDS No. 12055-06 (January 9, 2007) [Decided by Joseph F. Martone, ALJ].

D.F. is seventeen-years old and resides with his father, D.F., and his stepmother, R.W. He

has been classified as ED since kindergarten. In the tenth grade, during the 2004-05 school year, D.F. had many disciplinary infractions including the following: (1) a fight with another student in October 2004; (2) possessing a knife at school in March 2005; (3) engaging in disruptive behavior in April and May 2005; and (4) four instances of cutting class and six instances of late class arrivals during the course of the school year.

In the spring of 2005, the CST planned to conduct a triennial reevaluation of D.F. Despite notice to his parents, D.F.'s parents did not attend the meetings. Psychological and educational evaluations were completed in June 2005, but no social history could be taken since the family refused to participate. The psychological evaluation showed that D.F. had low average cognitive abilities, and the educational evaluation showed that D.F. was in the average range for math and reading.

Neither Mr. F. nor R.W. attended any of the IEP meetings. D.F.'s IEP for the 2005-06 school year provided for his placement in three classes with in-class support (ICS). If he were successful in those classes, he would be considered for declassification the following year.

During D.F.'s eleventh grade, in the 2005-06 school year, D.F.'s behavior became worse, and included the following disciplinary infractions: (1) multiple instances of lateness, rudeness and insubordination in September and December 2005, and January and February 2006; (2) going through the belongings of wrestling team members in December 2005, and being truant from school the next day; (3) being involved in a major fight and threatening a security officer in March 2006; and (4) in March 2006, cutting classes while lying to teachers by telling them he was going to the nurse's office.

On May 11, 2006, the CST conducted an IEP conference and manifestation determination. Although D.F. attended the meeting, his parents did not. At the conclusion, the CST determined that D.F.'s disruptive behavior and class-cutting was not a manifestation of his disability. The IEP for the 2006-07 school year continued D.F.'s placement at the high school with a mixture of ICS and out-of-class replacement resource center courses.

Following the IEP meeting, D.F.'s conduct deteriorated. He was suspended for profanity and disruptive behavior, and in a separate incident assaulted a student in the boys' locker room in a gang-related attack.

On June 1, 2006, the CST met again to conduct a manifestation determination. Once again, D.F.'s parents did not attend. At the conclusion of the meeting, a determination was made that the assault was a manifestation of D.F.'s disability. The CST then scheduled another IEP meeting on June 19, 2006 to consider changes to D.F.'s program. However, on June 16, 2006, D.F. punched another student in the jaw in an unprovoked attack. D.F. then left school without authorization, and since school was over, he was excluded from summer school.

The CST met on June 19th as planned. D.F.'s parents did not participate. Based on D.F.'s conduct, the CST prepared a new IEP providing for an out-of-district placement. The CST concluded that D.F. could not return to the high school because he was likely to injure someone. The CST also determined that he had not made any educational progress over the past school year. D.F. failed all of his classes except physical education and Spanish, and in those he received D's.

D.F.'s parents refused to consent to the release of records to prospective schools. Therefore, the board filed a due process petition seeking to change D.F.'s placement pursuant to

20 *U.S.C.A.* §1415(k)(3) because he is a danger to others. The board sought emergent relief to authorize the release of records to potential out-of-district placements, and to order D.F.'s parents to cooperate in the taking of the family's social history.

Shortly after the petition was filed, D.F.'s father withdrew D.F. from school, and D.F. went to live with his mother in Morrisville, Pennsylvania. D.F. began the 2006-07 school year in Morrisville. However, on November 17, 2006, he was re-enrolled in the district. At that time, D.F.'s father agreed to authorize the release of D.F.'s records to Rubino Academy (RA), which was one of the proposed out-of-district placements.

On December 6, 2006, RA accepted D.F. into its program. Although D.F.'s father initially agreed to this placement, the next day he reneged and demanded that D.F. be returned to the high school or be placed on home instruction. The board then requested an expedited hearing on its petition.

Because of the board's concerns about safety, on January 5, 2007, the ALJ requested that D.F.'s father show cause why he should not grant the board's request to place D.F. in an alternative educational setting at RA, and direct that D.F.'s father cooperate in the taking of a social history.

At the hearing, D.F.'s father testified that D.F. should not be in special education, that he was punished for each incident reported by the board, and that he is currently on probation for an incident that occurred in the summer of 2006. He testified further that the board's actions were motivated by race, and that the board just wants to get rid of D.F.

The board contended that its high school was an inappropriate placement for safety and academic reasons. In addition, home instruction was not appropriate because of the limited instruction, limited supervision, unavailability of counseling, and lack of social interaction. The board asserted that RA is an approved public school placement which can provide all the services in D.F.'s IEP, and provide him with a meaningful educational benefit.

The ALJ explained that *N.J.A.C.* 6A:14-2.8 authorizes a board to order the removal of a disabled student to an interim alternative educational setting, or to suspend the student, for up to ten consecutive or cumulative school days in a school year for disciplinary reasons. If the removal exceeds ten days, it is considered a change in placement. Any disciplinary action which involves removing the student to an interim educational setting must be done in accordance with 20 *U.S.C.A.* §1415(k), and can be for no more than 45 calendar days. A disabled student can be removed to an interim educational setting because s/he poses a danger to others.

Based on D.F.'s history, the ALJ concluded that D.F. is a clear danger to others, and that the board is justified in seeking an interim alternative educational setting. The ALJ found RA to be an appropriate interim alternative setting. If D.F. complies with all the rules and requirements at RA, and there are no further incidents, the board will reconsider whether to return him to the high school. The ALJ also determined that it was necessary to order D.F.'s father's participate in the social assessment, even though there is no remedy if he fails to cooperate.