

Case No. 13-6514

IN THE UNITED STATE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BOONE COUNTY BOARD OF EDUCATION et al.
PETITIONERS-APPELLANTS;

-v-

N.W., et al.
DEFENDANTS-APPELLEES

On Appeal from the United State District Court
Eastern District of Kentucky at Covington

BRIEF OF AMICI CURIAE OF KENTUCKY SCHOOL BOARDS
ASSOCIATION, NATIONAL SCHOOL BOARDS ASSOCIATION,
KENTUCKY ASSOCIATION OF SCHOOL ADMINISTRATORS, GREEN
RIVER REGIONAL EDUCATIONAL COOPERATIVE, NORTHERN
KENTUCKY COOPERATIVE FOR EDUCATIONAL SERVICES and
OHIO VALLEY EDUCATIONAL COOPERATIVE IN SUPPORT OF
PETITIONERS-APPELLANTS

Respectfully submitted,

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STATEMENT OF INTEREST

The primary issue in this appeal has drawn the interest of multiple, public school district organizations, including Kentucky School Boards Association (KSBA), National School Boards Association (NSBA), Kentucky Association of School Administrators (KASA), Green River Region Educational Cooperative (GRREC), Northern Kentucky Cooperative for Educational Services (NKECS), and Ohio Valley Educational Cooperative (OVEC).

KSBA is a nonprofit association serving 173 elementary and secondary public boards of education in Kentucky. It is the leading advocate and resource for public school boards in Kentucky. Its mission is to enhance school board leadership to maximize student achievement through superior support and services. Among its goals are support of legislation and other state and national actions that strengthen public education, promote student achievement and protect local control. In particular as applies to this case, KSBA supports ensuring that local school districts and parents both adhere to the mandates and protections applicable to all the providers and recipients of special education services in public school systems in the Commonwealth of Kentucky.

NSBA is a non-profit organization representing through its state associations of school boards, the school board members governing over 13,800 local school districts serving

approximately 50 million public school students. NSBA believes this case implicates the legal position of school districts nationwide, as it addresses the interplay between two provisions of

STATEMENT PURSUANT TO FRAP 29(c)(5)

The brief was not authored by counsel for the parties in this case. No party nor any counsel for party contributed money to fund the preparation or submission of this brief. No person, other than ~~Amici~~ Curiae contributed money that was intended to fund the preparation of or submission of this brief.

STATEMENT OF FACTS

This matter involves a dispute between the parents of N.W. and the Boone County Board of Education regarding the appropriate educational program for N.W., a student with apraxia and autism.

By agreement, the parents and the School District placed N.W. at St. Rita's School for the Deaf beginning in pre-school, due to the student's need for special services to address his apraxia diagnosis. At an Admission and Release Committee (ARC) meeting in June of 2010, the members noted that N.W. made "tremendous growth . . . in academics and also in behavior." Despite this progress, that same month N.W.'s parents unilaterally enrolled him in Applied

Behavioral Services School (ABS), another private school, so that N.W. could attend a program addressing his educational needs resulting from an autism diagnosis. The parents also filed a due process complaint, seeking reimbursement for the costs of educating their son at ABS.

At a subsequent ARC meeting, the parties could not reach an agreement as to the proper educational placement for the student. In November of 2010, the parties entered into a mediated agreement to resolve the due process complaint. In the agreement, the School District committed to pay for one year's tuition and other costs at ABS. Additionally, the parties agreed to reconvene an ARC in the Spring of 2011 to develop a transition plan to enroll N.W. in the School District for the 2011-2012 school year. At the next several ARC meetings held in 2011 prior to the beginning of the school year, the parents and the District could not agree on a transition plan to facilitate the transfer. These efforts ceased when the parents abruptly stopped participating in the ARC meetings shortly before the beginning of the school year. N.W. remained enrolled at ABS over the District's objection, and his parents filed a second due process request in October of 2011, seeking among other relief, the continued enrollment of N.W. at ABS at the School District's expense.

A due process hearing was convened in March of 2012. At its conclusion, the Hearing Officer (HO) found that the District had not provided N.W. a free appropriate public education; rather the District had established that it could provide a FAPE. However, the HO also found that N.W.'s "stay-put" placement was ABS, the school unilaterally chosen by the parents. Both parties appealed this decision to the Exceptional Children's Appeal Board (ECAB). It upheld the HO's decision regarding the School District's ability to provide FAPE, but reversed the "stay-put" finding, denying N.W. compensatory education, attorney's fees and reimbursement

for expenses at ABS.

N.W. appealed this decision to the U.S. District Court, which decided the dispute on the administrative record without additional evidence. On November 4, 2013, the Court agreed that the School District could provide N.W. a FAPE both the HO and ECAB previously held, but reversed the ECAB and reinstated the HO's decision on the "stay put" issue. The School District filed a timely appeal. N.W. did not appeal the district court's finding that the District could provide the student a FAPE.

ARGUMENT

A. GRANTING TUITION REIMBURSEMENT TO PARENTS WHO UNILATERALLY PLACE THEIR CHILD IN A PRIVATE SCHOOL WHEN THE LOCAL PUBLIC SCHOOL HAS PROVIDED FAPE EXTENDS A PUBLIC SCHOOL SYSTEM'S OBLIGATIONS BEYOND IDEA.

One of the primary purposes of IDEA (or the Act) when it was first enacted was "to reverse the history of neglect" wrought by public school districts, and bring students with disabilities into the mainstream of public schools. *Schaeffer ex rel. Schaeffer v. Weeb*, 546 U.S. 49, 52 (2005). The statute "evinces a congressional intent to bring previously excluded handicapped children into the public education system of the State." *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 189 (1982). Prior to the enactment of the statutory precursor to IDEA, parents often had to pay for costly private schools in order for their children to receive an appropriate education. In other words, Congress sought to ensure that public schools provide a free appropriate public education to children with disabilities in public schools. The district court's decision, however, creates an incongruous rule of law under which public school districts must provide a disabled student with a free, appropriate public education, but also must pay the cost of tuition if the parents unilaterally opt to send the child to

a private school instead and file for due process.

To provide FAPE, public schools must educate students with disabilities in the “least restrictive environment” (LRE). 20 U.S.C. §1412(a)(5). Also known as “mainstreaming,” the Act requires that children with disabilities attend school with non-disabled children whenever possible. *T.F. v. Special Sch. Dist. of St. Louis County*, 449 F.3d 816, 819-820th (8th Cir. 2006);

have the right to attend and actively participate in all IEP team meetings and to see all documents relevant to the identification and evaluation of their child's needs. 20 U.S.C. § 1415 (b)(1). They also have the right to seek an independent evaluation that must be considered by the IEP team in determining the educational placement and related services to be provided the student. Id.

The IDEA provides other extensive rights to parents including the right to raise concerns about their child's educational placement and services at any time. The Act contemplates that schools and parents will work cooperatively to resolve differences as expeditiously as possible to ensure that children with disabilities are receiving the educational services they need. If parents and schools are unable to come to agreement informally, several mechanisms are included in the statutory scheme to achieve that end, including a dispute resolution meeting, mediation, and if

This is contrary to long-established Sixth Circuit precedent that a school district that has developed and is willing to implement or has implemented an appropriate educational plan for a

process to contest the FAPE offer, and obtain "stay-put" status during the entire period of time any review and appeal of the decision they choose to make. Such an outcome is contrary to the underlying reason for stay-put provisions in IDEA.

designate their child's stay-put placement and expect payment from the school district for as long as the dispute is reviewed in administrative and court proceedings. Even where they ultimately lose, they can shrug their shoulders after obtaining several years of the private education at public expense for their child. In fact, parents could continue to enroll their child in a private school over the objections of the local school district on a year-to-year basis, file a subsequent due process request each year, and obtain payment of tuition until each appeal ends. Eventually, a disabled student will age out of the school system, having received a private education entirely at public expense. The potential cost to public schools in the Sixth Circuit is incalculable. There is nothing in IDEA or legal precedent that sanctions this¹ result.

Such a result was not contemplated by Congress in enacting IDEA, including "stay-put" protections for disabled students.

In a 1994 congressional hearing to amend the IDEA, it was noted that "[t]he stay-put provision...established a mechanism to place students in an educational program within the school system." Senator Gorton (WA), "Improving America's Schools Act of 1994, Amendments," Congressional Record 140:101 (July 28, 1994), available at <http://www.gpo.gov/fdsys/pkg/CREC-1994-07-28/html/CREC-1994-07-28-pt1-PgS26.htm> (emphasis added). In a letter responding to an attorney

¹This issue has been addressed but not resolved in other similar disputes. *Doe v. Brookline Sch. Com.*, 722 F.2d 910 (1st Cir. 1983); *Casey K. ex rel. Norman K. v. St. Anne Community High Sch. Dist. No.*, 300 F.3d 508 (7th Cir. 2005); *Bd. of Educ. of Oak Park & River Forest High School District 200 v. Illinois State Bd. of Educ.*, 79 F.3d 654 (7th Cir. 1996).

inquiry, the Department of Education's Office of Special Education Programs, stated that a child's current placement is "the last agreed-upon placement" before the hearings. Available at www2.ed.gov/policy/speced/guid/idea/memosdcltrs/12-002172r-ny-goldstein-pendency-10-18-12.doc (emphasis added). Thus, the key in determining a child's current placement is the agreement and the program, and not the specific location. Department of Education Regulations, 64 Fed. Reg. 12406, 12615 (March 12, 1999). See also *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 379 (5 Cir. 2003). These legislative and executive branch interpretations indicate that a child's current placement for stay-put purposes is the last one mutually agreed upon by the parents and the school district, not the parents' unilateral private school selection despite the school district's attempts to provide a FAPE "within its system."

The IDEA implementing regulations clearly state that the stay-put provision "does not require an LEA to pay for the cost of education...if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility." 34 C.F.R. § 300.148(a) (emphasis added). Thus, if the parents unilaterally put the child in a private school rather than following the plan submitted by the school district, the school district is not required to pay for the private schooling. In fact, a court or hearing officer can only require

reimbursement after finding “that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.” 34 C.F.R. § 300.148(c) (emphasis added).

The regulatory history supports this reading of the regulations. When responding to a comment about the parents’ ability to change their child’s placement unilaterally, the Department noted “[

was appropriate. The focus of these requirements is ensuring that a child with disabilities is receiving FAPE during the dependency of any legal proceedings.

These clear cut guidelines and directives were not followed when the district court found that Boone County School District could provide N.W. a FAPE, that his attendance at ABS was the result of a unilateral placement by his parents, and then also ordered the District to pay the private school tuition for N.W. because it was his “stay-put” placement. The law, applicable regulations and the record do not support this outcome, and it should not be affirmed by this Court.

The Second Circuit addressed a case with analogous facts to those in the case at bar, *D. by Shirley D. v. Ambach*, 694 F.2d 904 (2nd Cir. 1982). In that case, a parent unilaterally enrolled her child in a private school, and filed two due process hearings seeking reimbursement of tuition from the local school district. After the first due process hearing, the parent and the school district entered into a mediated agreement in which the district agreed to pay the cost of the private school for a limited period of time. But, as in this case, when the time to enroll the child in the public school arrived, the parent refused to enroll him, filed a second due process request, and kept him at the private school. The parent also sought a ruling that the private school was his stay-put placement. The Second Circuit easily rejected this argument, basing its finding on the fact that no administrative or judicial body had found that the parent's private placement was appropriate, thus the private school was not the stay-put education placement. *Id.*, at 908. As that Court noted, the parent was free to keep her son in the private school, but it would be at her cost, not the school district's.

The same conclusion should be reached here. Both levels of administrative review at the state level, as well as the district court ~~defend~~ that the School District could provide N.W. with FAPE. His parents can disagree with this decision, and keep their son enrolled at ABS. But

appropriate placement, no administrative review or court of law determined that ABS was the appropriate placement for N.W. during any school year. Under IDEA and years of interpreting the Acts, this finding is critical to trigger a local school district's obligation to reimburse parents who chose a private school placement. The parents must prove both that the local school district did not provide or offer FAPE, and that their private school could meet their child's educational needs. *M.B. ex rel. Berns v. Hamilton Se. Sch.* 668 F.3d 851, 864 (7th Cir. 2011)

At all levels of review in the case at bar, the parents were not able to establish either of these prongs. Rightly, they are not entitled to tuition reimbursement for their continued enrollment of their son in private school. The lower court's decision to the contrary must be reversed by this Court.

CONCLUSION

In this case, the parents did not prove either of the prerequisites for private school reimbursement, namely, that Boone County School District could not provide FAPE and that their private school of choice could. If this Court permits them to prevail on their tuition reimbursement claim, despite losing on the substantive FAPE question, the financial implications for public school districts in the Sixth Circuit will be vast. Consistent with the statute, its implementing regulations and years of case law, a public school district is not required to subsidize a private school education unless it is unable to provide FAPE in a public school setting.

Likewise, the carefully crafted, collaborative process memorialized in IDEA, in which education professionals and parents, working in good faith together to develop an appropriate educational plan for a disabled child, would be meaningless. IDEA's collaborative framework is

designed to allow public schools to provide FAPE to students with disabilities in a public school setting where possible. If parents can frequently ignore an ARC team decision and reject a carefully crafted IEP that provides FAPE for a disabled student, what is the purpose of IDEA's framework?

Where administrative and court review concluded that a school district has offered FAPE to a child with disabilities, the school district should not be penalized financially because the parents disagree, and unilaterally choose to enroll their child in a private school of their choice. The district court's holding to the contrary must be reversed if the spirit and requirements of IDEA are to be preserved for the benefit of all disabled children and the public schools striving to educate them.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2014, I served a true and

correct copy of the foregoing pleading by electronic mail via the Court's ECF to all counsel of record.

/s/ Mary Suzanne Cassidy
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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)

Pursuant to Fed. R. App. P. 32(a)(7), I certify that this document contains 4681 words using Word Perfect's word count program, exclusive of the portions of the brief exempted by Fed. R. App. P. 31(a)(7)(R)(iii).

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