



## THE COMMONWEALTH EDUCATIONAL POLICY INSTITUTE

CENTER FOR PUBLIC POLICY - L. DOUGLAS WILDER SCHOOL OF GOVERNMENT AND PUBLIC AFFAIRS

**CEPI Education Law Newsletter**

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MARCH 2007: Vol. 5-7

**THE WINKELMAN CASE: PRO SE PARENTS IN COURT****Overview**

On February 27, 2007, the United States Supreme Court heard oral arguments in an Ohio case involving an elementary school student with autism. More specifically, the case, Winkelman v Parma City School District (6th Cir. 2006), presents the Court with the following issue: Does the Individuals with Educational Disabilities Improvement Act (hereafter referred to by its short title IDEA 2004) allow the parent of a child covered by that statute to *pro se* (on one's own behalf without a lawyer) represent his/her child in a court of law? In my view the Supreme Court's answer to this question may be predictable in light of two of the Court's recent decisions involving parent rights under IDEA 2004.

The purpose of this commentary is fourfold. First, parent rights and attorneys' fees under IDEA 2004 will be discussed. Second, the facts involved in the Winkelman case will be briefly summarized. Third, a link between Winkelman and two recent decisions from the Supreme Court having a direct impact on the scope of parent rights under IDEA 2004 will be demonstrated. Finally, implications and suggestions for local school board policy will be presented.

**Parent Rights Under IDEA 2004**

Of all the areas of education law where parents have legally enforceable rights, special education leads the way. Under special education law parents of children with educational disabilities are recognized as integral parties in all aspects of the process. (Vacca and Bosher, 2003) However, parental rights are procedural and not substantive in nature. For example, while IDEA 2004 requires that parents have an opportunity to participate in the drafting of their child's IEP, nothing in the law requires that parent's consent to finalize the IEP. A.E.ex rel.E. v Westport Board of Education (D.Conn. 2006)

To protect their rights parents must be provided "a written copy of IDEA's procedural safeguards on numerous occasions." And, "[n]otice to parents of their rights is not a one-time event." (Clark, 2005) More specifically, IDEA (2004) requires, among other things, that local school systems (LEA's) provide parents with timely and accurate information including, but not limited to, the procedural remedies available to consider complaints. As

a general rule, while court action is a viable alternative, parents are required to exhaust all available administrative remedies (e.g., mediation, due process hearings) prior to filing a law suit, unless exhaustion of administrative remedies would prove futile. McCormick v Waukegan School District #60 (7th Cir. 2004), and Jenkins v Board of Education (S.D. Ohio 2006)

*Legal Representation and Fees.* Seeking settlement in a special education dispute is expensive. In today's litigious environment the assistance of lawyers and/or specially trained non-lawyer advocates to help the parties (both school officials and parents) reach resolution of the dispute is growing in importance. More often than not, the parties must be prepared to expend their personal funds to pay for the specialized services of a lawyer, which certainly is true where the issue ripens into court action. It must be emphasized that IDEA 2004 does not permit "fee shifting," where parties seek reimbursement for legal fees paid. Jester v District of Columbia, (D.C.Cir. 2007)

Ironically, because many parents are without the financial means to pay for professional help, they alone represent their child's best interests. In my experience as a special education mediator I have observed that most parents involved do not come to the table with the assistance of a lay advocate/consultant or an attorney.

### **Winkelman v Parma City School District (6th Cir. 2006)**

As stated at the outset of this commentary, the United States Supreme Court heard oral arguments in the Winkelman case on February 27, 2007. Briefly summarized, the case involves the parents of an elementary school student with autism and their unsuccessful attempts to gain reimbursement for their son's tuition at a private school. What makes the case unique is the fact that the parents in Winkelman represented themselves (*pro se*) both in federal district court (where the court did not rule in their favor), and on appeal to the United States Court of Appeals for the Sixth Circuit. In fact, the Sixth Circuit dismissed the case and barred the parents from future court action on their son's behalf unless represented by a lawyer.

As noted above, the United States Supreme Court granted *certiorari*, where the following issue is involved: Does IDEA 2004 allow a parent to *pro se* represent his/her child in a court of law? In my opinion what the Court likely will say can be found in two of its recent decisions, Schaffer v Weast (2005) and Arlington Central School District v Murphy (2006).

### **Related Case Law**

*Burden of Proof.* Until recently, most legal experts agreed that the question of which party has the burden of proof in special education cases had not been answered. As one source described the situation, "[c]ourts have split on whether the school district or the parent has the burdens of production and persuasion with regard to appropriateness of the district's proposed individualized education program." (Weber, *et al.*, 2004) In 2005, however, the United States Supreme Court decided a Maryland case and clarified the issue. By a vote of 6 to 2, the Court held that because IDEA 2004 is silent on "assignment of the burden of proof...the burden lies, as it typically does, on the party seeking relief." Schaffer v Weast (2005) The Schaffer decision is important for three reasons. First, it demonstrates the Supreme Court's emphasis on the specific language contained in IDEA 2004. Second, it indicates the Court's desire to apply traditional rules of civil procedure in special education cases. Third, it puts parents in a position of having to "make their case;" that is, to persuade the court by the preponderance of the evidence that they prevail. L.E. v Ramsey Board of Education (3rd Cir. 2006)

*Attorneys' Fees and Non-Attorney Representation.* Last May (2006), I devoted my commentary to the legal and policy issues associated with awards of attorneys' fees to prevailing parties in special education disputes. (Vacca 2006) In that piece I pointed out that while recovery of attorneys' fees in court actions is well established, attorneys' fees awards also became possible for prevailing parties (either parents or school officials) during the administrative process. However, IDEA 2004 prohibits the award of attorneys' fees for "services performed subsequent to a written offer of settlement, under specified conditions." For example, a voluntary settlement does not satisfy the standard. Also, and most important to the Winkelman case, "[s]tatutory provisions for attorneys' fees do not extend to special education lay advocates who are not lawyers." Alexander and Alexander (2005)

In last May's issue I treated a New York case, Arlington Central School District v Murphy (2nd Cir. 2005), where an expert (consultant) advised the parent plaintiffs through out the entire case. The consultant did not testify in court. Parents went into federal district court seeking reimbursement for their child's education at a private school as well as reimbursement for the fees paid to their educational consultant. The parents prevailed at trial. Subsequently, the United States Court of Appeals for the Second Circuit affirmed the decision of the federal district court.

The United States Supreme Court granted certiorari, at 126 S.Ct. 978 (2005), where the narrow issue was: Is it possible for a prevailing party under the attorneys' fees provision of IDEA 2004 to recover fees paid to a non-attorney educational consultant? Decided on June 26, 2006, the Supreme Court held that IDEA 2004, 1415(i)(3)(B), does not authorize recovery of costs of fees for educational consultant/experts who advise parents through out the administrative and litigation processes. Thus, Arlington Central School District v Murphy (2006) is important to the Winkelman case because: (1) the parents in that case were in court *pro se* (for themselves and without the representation of a lawyer), (2) the Supreme Court narrowly interpreted the statute's phrase "attorney fees," to apply to lawyers only, and (3) the Court was unwilling to treat a non-lawyer educational consultant as it would a lawyer for purposes of awarding reimbursement of costs of fees under IDEA 2004.

### **Anticipated Decision in Winkelman**

In my opinion the Supreme Court will not rule in the parents' favor in Winkelman. My reasons for saying this are found in Shaffer and Arlington Central reviewed above. In these decisions it is clear to me that the Court: (1) views parent rights under IDEA 2004 as procedural and not substantive, (2) takes a strict constructionist view of the language in the statute and is not willing to broaden the scope of that language, (3) is not willing to recognize and include non-lawyers (including well-trained lay advocates) in the law for purposes of reimbursement of costs for their time as consultants to parents, and (4) shows a reliance on traditional rules of civil procedure (e.g., placing the burden of proof on the party seeking relief) in its analysis of the issue presented.

One other factor must be emphasized. It is clear to me that the rights of children covered under IDEA 2004 are both procedural and substantive, and these rights accrue to the child and not their parent. As such, I am not sure that the parent in this case can separate out and subsume the rights of their child. By appearing *pro se* in court are the parents in this case actually depriving their child of competent legal representation? To put it another way, is it actually the elementary school student (not the parents) who is without a trained lawyer to represent his interests against the other side's lawyers? If so, this is not a fair fight.

### **Policy Implications**

When taken together the policy implications of Shaffer (2005), Arlington Central (2006), and Winkelman (2007) are clear. Local boards of education must continue to:

- Demonstrate a good faith commitment to implementing the mandates of federal and state special education law and regulations.
- Emphasize that the *best interests and the procedural and substantive rights of children* covered under federal and state special education law are of paramount importance.
- Clearly indicate that the *rights of parents are procedural only*.
- Make available and distribute all required information to parents and others who represent children covered under special education law, especially information regarding procedural rights and complaint resolution options.
- Emphasize a willingness to involve and work with parents and others who legally represent the best interests and rights of children covered under federal and state special education law.
- Demonstrate a desire and willingness to seek early resolution (seek settlement) of special education disputes through administrative options available in the law

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Note: The views expressed in this commentary are those of the author.