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by Jay E. Grenig

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ISSUE

To what extent may a non-lawyer parent of a child with a disability proceed pro se in a federal court action brought pursuant to the Individuals with Disabilities Education Act?

FACTS

Jeff and Sandee Winkelman of Parma, Ohio, are the parents of Jacob Winkelman, a young boy diagnosed with autism. In July 2001, Jacob attended preschool at the Achievement Center for Children, a nonprofit agency that specializes in helping children with special needs. The Parma City School District paid for this program because Jacob did not respond well to its own program. The Achievement Center offers a special education intervention program including physical therapy, occupational therapy, speech therapy, and music therapy.

In September 2001, Parma school officials met with the Winkelmans to discuss an Individualized Education Program (IEP) for Jacob. The parties agreed that Achievement Center was an appropriate placement for the 2001–02 and 2002–03 school years.

In June 2003 the parties met to discuss Jacob's IEP for the 2003–04 school year. The 2003–04 IEP proposed educating Jacob in a special education classroom at Pleasant Valley Elementary School. Pleasant Valley is a public school offering speech and occupational therapy. The educators at Pleasant Valley are trained to educate children with autism.

The Winkelmans were unhappy with the proposed 2003–04 IEP. Specifically, they complained that the proposed 2003–04 IEP did not include music therapy, did not contain a sufficient amount of speech therapy or one-on-one interaction, and did not contain any specific plan to address their son's need for occupational therapy. Moreover, they preferred placing Jacob at Monarch School—a private school

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WINKELMAN ET AL. V. PARMA CITY SCHOOL DISTRICT
DOCKET NO. 05-983

ARGUMENT DATE:
FEBRUARY 27, 2007
FROM: THE SIXTH CIRCUIT

Case at a Glance

When the parents of a child with disabilities appealed a federal district court's denial of their request for relief under the Individuals with Disabilities Education Act, they appealed to the U.S. Court of Appeals for the Sixth Circuit. The Sixth Circuit held the parents could not represent themselves without the assistance of a lawyer.

specializing only in autism and emphasizing one-on-one interaction between students and educators with limited peer interaction. Nonetheless, the Winkelmans signed the proposed 2003–04 IEP. Although they objected to his placement, they consented to the initiation services.

In June 2003 the Winkelmans filed a request for a due process hearing, alleging that Parma had failed to provide Jacob with a free appropriate public education (FAPE). On August 27, 2003, the hearing officer issued an interim order designating Achievement Center as Jacob's stay-put placement. Despite this, the Winkelmans unilaterally pulled Jacob from that program and placed him at Monarch School. Jacob performed well at Monarch School during the 2003–04 school year. However, because of the expense of private education, the Winkelmans did not enroll Jacob in Monarch School for the 2004–05 school year. Presently, Jacob is not enrolled at any school but does participate in a 1–2 hour per week outreach program at Monarch School.

On February 25, 2004, the hearing officer issued a 56-page decision finding that Parma provided Jacob with a FAPE and, thus, did not violate the mandates of the Individuals with Disabilities Education Act (IDEA). The Winkelmans appealed to a state level review officer, who on June 2, 2004, issued a 44-page opinion affirming the hearing officer's decision.

The Winkelmans represented themselves in the district court proceedings. On March 2, 2005, they filed a Motion for Judgment on the Pleadings Based on the Administrative Record. Two weeks later, Parma filed a Motion for Judgment on the Pleadings Based on the Administrative Record.

The Winkelmans argued that the hearing officer had violated IDEA procedures by allowing another person to "co-preside" over their due process hearing. The district court rejected this argument, stating that nothing in the record suggested the hearing officer's research assistant had co-presided over the proceedings. It also rejected the Winkelmans' argument that Parma had predetermined to place Jacob in its own program before it had developed his 2003–2004 IEP.

Given that Jacob was entering a completely new school setting and given the overall consensus that a one-month reassessment was in Jacob's best interest, the district court ruled that the lack of goals and objectives in the IEP for occupational therapy only constituted a technical, procedural violation of the IDEA and was not reversible error. The court also found that the reduction of speech therapy from 90 minutes to 60 minutes and the lack of one-on-one academic instruction did not constitute a substantive violation of the IDEA. Acknowledging that Jacob loves and responds well to music, the court nevertheless found that the record did not support the notion that Jacob needed music therapy in order to receive educational benefits. The district court granted Parma's motion for judgment on the pleadings and ordered each party to bear its own costs. *Winkelman v. Parma City School District,* 411 F. Supp. 2d 722 (N.D. Ohio 2005).

The Winkelmans filed two appeals pro se representing themselves without the help of a lawyer. The first appeal challenged the district court's denial of a preliminary injunction regarding Jacob's stay-put placement. The Sixth Circuit ordered dismissal of that appeal unless petitioners retained counsel within 30 days. The court relied on *Cavanaugh v. Cardinal Local School Dist.,* 409 F.3d 753 (6th Cir. 2005), a case that held the IDEA does not grant parents the right to represent their child pro se in federal court and that "parents cannot pursue their own substantive IDEA claim pro se." The Winkelmans also filed a pro se appeal from the district court's merits decision. The court of appeals ordered dismissal of that appeal unless the Winkelmans retained counsel within 30 days.

The Winkelmans sought review of the Sixth Circuit's decision by the U.S. Supreme Court. The Supreme Court granted the Winkelmans' petition for a writ of certiorari. 126 S.Ct. 467 (2006).

Case Analysis

The IDEA (20 U.S.C. § 1400) provides federal grants to states for assistance in the education of children with disabilities. The IDEA seeks to ensure that all disabled children have available to them a free appropriate public education. (The IDEA was amended by the Individuals with Disabilities Education Improvement Act of 2004 effective July 1, 2005.) Under the IDEA, a state participating in the grant program must ensure that each child with a disability receives a "free appropriate public education" (FAPE), which includes special education and related services necessary to meet the child's particular needs.

Under the IDEA, school districts must create an IEP for each disabled child. If parents believe their child's IEP is inappropriate, they may request an impartial due process hearing. A party dissatisfied at the conclusion of an impartial due process hearing may seek further administrative review of the dispute by the state educational agency. If still dissatisfied, a party may pursue a civil action in either

state or federal court. The IDEA uses the phrase "[a]ny party aggrieved by the findings and decisions" to define those entitled to bring a civil action under the IDEA. 20 U.S.C. § 1415(i)(2)(A).

The Winkelmans argue that parents of a child with a disability may proceed pro se when they bring a civil action in a federal court either to enforce procedural rights under the IDEA or to seek relief for a substantive violation of the right to a free appropriate public education. They reason that parents are the real parties in interest in such cases.

Parma rejects the Winkelmans' argument, asserting that the common law prohibits lay parents from representing their children in court. Parma contends that the common law rule furthers several important policy objectives. First, it says pro se representation carries with it risks that are not present when a party is represented by counsel. Second, Parma states that attorneys inject a measure of objectivity often lacking in an area punctuated by emotion. According to Parma, Congress has not abrogated the common law rule.

Parma stresses that while Congress provided substantive rights to children with disabilities, it did not grant their parents any judicially enforceable rights. Parma declares that parental safeguards under the IDEA are collateral, not independent substantive, rights.

According to the Winkelmans, however, Congress viewed parents as parties aggrieved by adverse administrative decisions and therefore the real parties in interest to IDEA suits. They note that parents are the real parties in interest to the administrative-level proceedings that must be completed prior to filing a law suit and are also the real parties in interest to the administrative appeals from due process hearings in those systems that have two tiers of administrative hearings.

According to the Winkelmans, because Congress used the same "parties aggrieved" language in granting the right to administrative appeal under both 20 U.S.C. § 1415(g)(1) and 20 U.S.C. § 1415(i)(2)(A), the term should be given a consistent meaning. The Winkelmans suggest that Congress had no need to single out parents from the collective group of "parties aggrieved" referenced in § 1415(i)(2)(A).

Parma argues that the IDEA says nothing about the right of parents to proceed in pro se in federal court. While Congress has expressly allowed non-attorneys to prosecute and defend administrative due process hearings, Parma says it is difficult to imagine that Congress meant to instill greater rights in federal proceedings through its silence on this issue. According to Parma, the dispute resolution mechanisms under the IDEA underscore the conclusion that parents are not real parties in interest. The school district says the purpose of the due process hearing is to settle disagreements regarding a child's educational program, not to create a fountain of rights for parents. For that reason, Parma contends the references to "parents" relied upon by the Winkelmans in the context of administrative proceedings effectively treat the parent as the child's "next friend." Asserting the administrative proceedings are by nature designed to be a less formal and more expedient method of dispute resolution, Parma says that, once the matter arrives in court, the IDEA and procedural rules present a maze of requirements that pro se litigants will often have trouble navigating.

The Winkelmans disagree and argue that the IDEA's provisions, 20 U.S.C. § 1415(i)(2)(A), prohibiting challenges to the qualifications of educational agency personnel and conferring jurisdiction to award attorney fees confirm that parents are real parties in interest. The Winkelmans note that the prohibition on challenges to the qualifications of personnel applies "[n]otwithstanding any other individual right of action that a parent or student may maintain under this subchapter." 20 U.S.C. §§ 1401(10)(E), 1412(a)(14)(E). In addition, the attorney fee provisions of the IDEA allow the courts "[i]n any action or proceeding brought under this section," to "award reasonable attorneys' fees ... to a prevailing party who is the parent of a child with a disability."

According to the Winkelmans, parents are real parties in interest regardless of whether they are bringing claims alleging violations of IDEA's substantive right to a FAPE or violations of IDEA's procedural safeguards. They stress that parents have their own right to ensure that their child receives IDEA's statutorily guaranteed FAPE. The Winkelmans assert that neither IDEA's right-to-administrative appeals provision (20 U.S.C. § 1415(g)(1)) nor its right-to-sue provision (20 U.S.C. § 1415(i)(2)(A)) precludes "parties aggrieved" from suing for a substantive violation.

Even if only the child possesses the substantive statutory right to a FAPE, the Winkelmans argue, his or her parents should be able to bring that claim pro se. They say that lay (non-lawyer) representation has been permitted frequently in cases in which the real party in interest lacks the ability to represent him- or herself and otherwise might go without adequate representation,

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such as cases involving children from families too poor to afford a lawyer.

Parma responds that, lacking any clear language to abrogate the common law rule, the Winkelmans now seek to carve a novel exception to it by relying on Supplemental Security Income (SSI) cases, among others. According to Parma, IDEA claims and SSI claims are sufficiently dissimilar to justify different results. Parma says children's rights are protected both by Congress and the Federal Rules of Civil Procedure. It points out that the IDEA permits an award of attorneys' fees in order to encourage participation of counsel. Parma also states that Congress permits grants to "parent organizations," which would, among other things, provide guidance to parents involved in disputes under the IDEA.

The Winkelmans acknowledge that in 2004 Congress refused to enact a provision allowing parental pro se representation but claim the failed amendment lacks persuasive significance.

It is Parma's position that Congress's recent rejection of amendments that would have permitted parents to represent their child pro se is indeed persuasive. It also argues that the failed Senate amendment provides a stark contrast with the language in the present statute by demonstrating what would be necessary for Congress to "speak directly" to the question presented in this case. In order to abrogate the common law or impose obligations of the states under the Spending Clause, Parma asserts that Congress must speak clearly and with precision.

Parma concludes that Congress must provide clear notice to the states before subjecting them to conditions, obligations, or liabilities. Parma argues that particularly in Spending Clause cases, the Supreme Court has exhibited reluctance to allow implied rights of action. Parma declares that the Winkelmans' proposed rule would inflict conditions, obligations, and liabilities for which states did not receive clear notice.

Significance

Six circuits—the Second, Third, Fourth, Sixth, Seventh, and Eleventh—have held that parents cannot proceed pro se on behalf of their child or that the parents lacked substantive rights. See *Wenger v. Canastota Cent. Sch. Dist.,* 146 F.3d 123 (2d Cir. 1998); *Collinsgru v. Palmyra Bd. Of Educ.,* 161 F.3d 225 (3d. Cir. 1998); *Doe v. Board of Educ.,* 165 F.3d 260 (4th Cir. 1998); *Cavanaugh v. Cardinal Local School Dist.,* 409 F.3d 753 (6th Cir. 2005); *Mosely v. Board of Educ.,* 434 F.3d 527 (7th Cir. 2006); and *Devine v. Indian River County Sch. Bd.,* 121 F.3d 576 (11th Cir. 1997). One circuit—the First—has reached a contrary result. *Maroni v. Pemi-Baker Regional Sch. Dist.,* 346 F.3d 247 (1st Cir. 2003).

In *Arlington Central School District v. Murphy,* 126 S.Ct. 2455 (2006), a case decided last term, the Supreme Court relied on the principle that, when Congress attaches conditions to a state's acceptance of federal funds in legislation enacted pursuant to the Spending Clause, the conditions must be set out unambiguously. That is, the legislation must provide clear notice of the conditions Congress seeks to place on the states in order for a state to knowingly accept and be bound by them. A divided Supreme Court ruled in that case that non-attorney expert's fees for services rendered to prevailing in an IDEA action are not "costs" recoverable from the state under IDEA's fee-shifting provision.

The Supreme Court's decision in this case should resolve the conflict among the circuits regarding pro se representation in IDEA cases. A decision in favor of the Winkelmans will make it easier for parents who are unable or unwilling to obtain legal counsel to challenge decisions under the IDEA in court. A decision affirming the Sixth Circuit could possibly save school districts money by discouraging some parents from bringing lawsuits against them under the IDEA.

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Senator Edward M. Kennedy et al. (Jody Manier Kris (202) 663-6000)

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