New Jersey Law Journal

VOL. CXC– NO.11 – INDEX 990 DECEMBER 10, 2007 ESTABLISHED 1878

IN PRACTICE

EDUCATION LAW

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Court Expands Rights of Disabled Students and Parents

School districts should expect longer, costlier litigation

Recent United States Supreme Court rulings in *Board of Education of the City School District of the City of New York v. Tom F.*, 128 S. Ct. 1 (2007), and *Winkelman v. Parma City School District*, 127 S. Ct. 1994 (2007), have expanded rights afforded both to students and parents under the Individuals with Disabilities Education Act (IDEA).

The Court in *Winkelman* held that IDEA grants parents independent and enforceable rights, not limited to procedural and reimbursement-related matters, including the entitlement to a free, appropriate public education for their child. In *Tom F.*, an equally divided Court (4-4; Justice Anthony Kennedy took no part in the decision) affirmed the Second Circuit's ruling that when a student's enrollment in private school is appropriate, IDEA does not preclude reimbursement even where the student had not previously received special education and related services from the public school. School districts in New Jersey should expect an increase in IDEA complaints in the wake of these decisions. As discussed in more detail below, school districts should understand the limited scope of the Court's ruling in *Tom F.*, and expect longer, costlier litigation as a result of the *Winkelman* decision.

The Court in *Winkelman* addressed whether parents, either on their own behalf or as representatives of their child, may proceed in court, unrepresented by counsel, on an IDEA claim even though they are not licensed as attorneys. The Winkelmans, whose son Jacob has autism spectrum disorder and is covered by IDEA, appealed the District Court's decision that the school district had provided Jacob with a free, appropriate public education. The Court of Appeals for the Sixth Circuit, relying on its decision in *Cavanaugh v. Cardinal Local School Dist.*, 409 F.3d 753 (6th Cir. 2005), dismissed the Winkelmans' appeal because they were not represented by counsel. In *Cavanaugh*, the Court of Appeals ruled that the right to a free, appropriate public education "belongs to the child alone," not to both the parents and the child.

On appeal, the United States Supreme Court, after considering the statutory scheme of IDEA, determined that individualized education program (IEP) proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's educational program. The Court, therefore, determined that a parent may be a "party aggrieved" for purposes of IDEA with regard to "any matter" implicating these rights. Included in these parental rights "is the right to a free appropriate public education for their child." Accordingly, the Court held that parents are entitled to prosecute IDEA claims on their own behalf and without representation of counsel. In so holding, the Court overturned prior New Jersey precedent that had refused to allow parents to proceed pro se with respect to the denial of a free, appropriate public education. See *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225 (3d Cir. 1998).

In *Tom F.*, an equally divided Supreme Court affirmed a Second Circuit decision holding that children who have not previously attended a public school may still receive tuition reimbursement for the cost of private school tuition. The Second Circuit relied solely on its prior decision in *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 372-73 (2d Cir. 2006), where that court adopted the interpretation of the Department of Education's Office of Special Education & Rehabilitative Services that IDEA does not require actual receipt of some form of special education or related services from the public agency as a prerequisite for parents' ability to seek tuition reimbursement. According to that court, all that is required is that the par-

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ents provide reasonable notice to the public agency that the parents plan to reject the placement proposed by the public agency.

The Second Circuit's holding appears contrary to the plain language of IDEA. That statute authorizes reimbursement to the parents of a disabled child "who previously received special education and related services under the authority of a public agency" and who enrolled a child in a private school without the consent or approval of the public agency, if the court or hearing officer determines that the public agency had not made a free, appropriate public education available to the child. 20 U.S.C. § 1412(a)(10)(C)(ii). As such, the statutory language appears to exclude reimbursement to parents who enrolled their child in a public or private school before the manifestation of the need for free, appropriate special education. To the extent that there is any ambiguity in the statutory language, the legislative history clearly establishes that "[p]reviously, the child must have received special education and related services under the authority of a public agency." H.R. Rep. No. 105-95, at 92 (1997).

School districts can expect an increase in the amount of claims filed under IDEA as a direct result of the Supreme Court's rulings in *Winkelman* and *Tom F.* As the Court in *Winkelman* acknowledged, states are likely to bear increased costs "as they are forced to defend against suits unconstrained by attorneys trained in the law and the rules of ethics." As previously explained by the Court, "[*p*]*ro se* petitioners have a greater capacity than most to disrupt the fair allocation of judicial resources because they are not subject to financial considerations — filing fees and attorney's fees — that deter other litigants from filing frivolous petitions." *In re Sindram*, 498 U.S. 177, 179-80 (1991). The *Winkelman* Court attempted to minimize this effect by reinforcing that IDEA empowers courts to award attorney's fees to a prevailing educational agency where a parent has presented a "'complaint or subsequent cause of action … for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.'" Quoting § 1415(i)(3)(B)(i)(III)). In practicality, however, the Supreme Court has instructed that "the Court should be flexible when dealing with a *pro se* litigant." *Perry v. Gold & Laine, P.C.*, 371 F. Supp. 622, 629 (D.N.J. 2005) (citing *In re McDonald*, 489 U.S. 180, 184 (1972)).

The precise issues that school districts may face are described in detail by Justice Antonin Scalia in his dissenting opinion in *Winkelman*. Scalia explains that because pro se complaints are prosecuted essentially for free, without screening by knowledgeable attorneys, the suits are much more likely to be unmeritorious and more difficult for courts to understand without counsel's assistance. Additionally, adjudication of cases prosecuted by pro se parents will likely be more time-consuming as a result of pro se plaintiffs' unfamiliarity with the law and court rules and procedures. School districts, therefore, may anticipate that cases will not be resolved as quickly when they are brought by parents on behalf of their children and without representation by counsel.

School districts should be aware of the limited applicability of the *Tom F.* decision in New Jersey. Because the Second Circuit's decision was affirmed by an equally divided Supreme Court, the decision is not an authoritative precedent for other cases. See *Rutledge v. United States*, 517 U.S. 292, 304 (1996); *In re LifeUSA Holding*, 242 F. 3d 136, 142 n.7 (3d Cir. 2001) ("an affirmance by an equally divided Supreme Court has no precedential value."). As a result, the *Tom F.* decision is not binding on New Jersey courts.

While IDEA plaintiffs will likely argue that *Tom F.* should be adopted by New Jersey courts, school districts may counter by arguing that New Jersey should follow the decision of the First Circuit, where that court held that tuition reimbursement under IDEA is only available for children who have previously received special education or related services. *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 159-60 (1st Cir. 2004). The *Greenland* court denied the parents' claim for reimbursement because of their failure to alert the school district of their daughter's need for special education and related services while she was in public school. The court reasoned that Congress intended that before parents place their children in private school, they must first give notice to the school that special education is at issue. "This serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a free appropriate public education can be provided in the public schools." See also *Schoenfeld v. Parkway Sch. Dist.*, 138 F.3d 379, 382 (8th Cir. 1998) (parents' failure to seek an IEP before placing their child in private school precludes reimbursement under IDEA). ■