



DISCHELL | BARTLE | YANOFF | DOOLEY
R E S U L T S M A T T E R

THE DBYD DIFFERENCE – EDUCATION LAW
OCTOBER 22, 2009

When SCOTUS Says No

- A look at one of the cases that the Supreme Court will not hear this term -

Can you just give me the short-short version? I'm not going to read all of this.

On October 5, 2009, the U.S. Supreme Court declined to review a special education law case that was decided by the Ohio Court of Appeals. This means the case will gain significant prominence and therefore people involved in special education should know about it. It does not mean that the case establishes a national precedent.

The Ohio Court's decision was about pendency (a.k.a. the "stay put" provision in the IDEA). The court said that some IEP changes do not trigger pendency. This means that, in some cases, a school district may implement a change in a student's IEP over parental objection because pendency does not apply. This is different from the usual analysis in which courts try to figure out what placement is pendent. Schools must proceed with great caution before acting on this precedent – especially because it is not applicable in all jurisdictions.

A secondary issue in the case was about the extent of parental consent to evaluation. In this case, the parents gave consent for an evaluator to conduct an evaluation and to participate in IEP development. The court concluded that these facts allowed the evaluator to testify. The case, however, raises major questions about what an evaluator can and cannot do after an evaluation report is written – but does imply that an evaluator can continue to make observations as long as the parents are informed and do not object. This has serious implications for "ongoing" evaluations and the increasingly popular RTI model in regular education.

I'm interested. Tell me the whole story.

As a few special education law luminaries have noted, the Supreme Court declined to hear appeals of special education cases in the 2009-2010 term. See Hearing Officer Gerl's blog at <http://specialeducationlawblog.blogspot.com/2009/10/u-s-supreme-court-declines-review-of.html>. In legalese, this is called a denial of *certiorari* or *cert* for short.

It is worthwhile to take a close look at one of the cases that the Court declined in order to get a sense of where special education law may be going.

It is very important to note that precedents are not established when the Supreme Court does nothing. It is incorrect to think of a case as the law of the land (on a national level) simply because the Court declined to review it. Nevertheless, when *cert* is denied attention is drawn to the case and the likelihood that other courts will reference it, or rely on it, goes up.

The case in question is *Stancourt ex rel. Stancourt v. Worthington City Sch. Dist.*, 51 IDELR 19 (Ohio Ct. App., 2008). There are two particularly interesting issues in this case that are starting to cause a bit of an uproar in the parent advocacy community. The first issue concerns what triggers the so-called “stay put” provision in the IDEA. The second issue (which has received less coverage) is about how long parental consent to evaluate is good for.

What are the facts of the case?

The basic facts of the case are as follows: Gregory Stancourt had an IEP with a Behavior Support Plan (BSP). After an evaluation and an IEP team meeting, the Worthington City School District (District) proposed an addendum to the BSP that would titrate the behavioral interventions as Gregory’s behavior improved. Under the addendum, Gregory’s behavioral supports would be removed once they were no longer needed. The Stancourts did not approve the addendum, but they did not reject it either, and the District implemented the change. Six weeks later, the Stancourts requested a Due Process Hearing and claimed that pre-addendum BSP was “pendent” under the stay put rule – meaning that the District had to implement the pre-addendum BSP during the hearing and any subsequent appeals.

What did the court say about the stay put rule?

As the Ohio Court of Appeals noted, the stay put rule requires students to remain in their current program and placement while dispute resolution is pending. Generally, there is not much dispute regarding what program and placement are pendent. When there is a dispute, judges and hearing officers tend to examine both the last IEP and/or NOREP that was approved by the parents and the student’s actual current program and placement. In other words, the fact finder looks at the last document that everybody actually agreed to *and* what is actually happening in the real world. Arguably, the law strictly requires implementation of the last approved NOREP, but few judges and hearing officers will dramatically alter a student’s actual program and placement for this reason alone (especially given the jurisprudence on the purpose of the stay put rule).

In this case, however, the fight was not about what services Gregory actually received *or* about what documents were most recently signed. Instead, the case hinged on whether the addendum actually triggered the stay put provision at all. In this case, the court determined that the District could implement the addendum while the parties fought it out

because the addendum did not trigger the stay put provision. It reached this conclusion because the addendum did not create a “fundamental change in, or elimination of, a basic element of the student’s educational program.”

The court considered several factors in reaching this conclusion. It held that the addendum:

1. Did not change Gregory’s placement (i.e. his physical location),
2. Did not alter Gregory’s opportunities to participate in academic, non-academic or extra-curricular activities, and
3. Did not affect the extent of Gregory’s education with non-disabled students (i.e. the change did not make the placement more restrictive).

Interestingly, the court also carefully considered whether the addendum constituted a “detrimental change” to Gregory’s IEP. The fact that the changes were, in the court’s opinion, helpful to Gregory contributed to the court’s conclusion that the pendency rules did not apply. The court also noted that the District complied with the IDEA’s procedural requirements by making sure that Gregory’s parents had an opportunity to meaningfully participate in the development of their son’s IEP. As a result, the District could implement the addendum not because the addendum was pendent – but because pendency did not apply to it.

What does this mean for School Districts?

It is important to stress that this case does not create a national precedent. That said, put yourself in the shoes of a special education administrator in Ohio. Assume that you have just proposed a minor change to a student’s IEP and, after an IEP meeting, the parents reject the change and request a hearing. Most school district solicitors would advise you that you may not implement the change. This case changes that advice. Now, if after meaningful parental participation the proposed change meets the factors described in *Stancourt* you may implement the change despite parental objection. The usual question of “what is pendent?” becomes “does pendency apply?”

Yet that same administrator must proceed with extreme caution. First, the parents and their attorney will challenge your assessment of the factors and argue that pendency does apply. Moreover, the parents (and the court) will examine whether the change is “detrimental.” In my opinion, this examination encourages the sort of Monday morning quarterbacking that school districts have fought hard to prevent. As long as school districts insist that IEPs cannot be judged in hindsight, they must also argue that a change can only be detrimental based on the information available at the time the change was proposed. Unfortunately for school districts, the Ohio Court of Appeals did not directly address this issue explicitly. To whatever extent this theory of the non-applicability of pendency opens the door to judging IEPs in hindsight, wise school district solicitors will stick to arguing about what is pendent, not whether pendency applies.

What did the court say about parental consent to evaluate?

To be sure, this case focused on pendency. Yet the court relied on evidence from two expert witnesses to figure out how the District's addendum squared with the test it established to determine whether pendency applies. One witness testified for Gregory's parents, the other for the District. It seems that the District's expert, a Dr. Arnold, was a District-employed psychologist who had evaluated Gregory and participated in the development of his IEP. Gregory's parents argued that the court should exclude Dr. Arnold's testimony because he relied on observations and assessments that occurred without their consent.

To clarify, Gregory's parents did give consent for Dr. Arnold to "assist in the development and implementation of Gregory's IEP by conducting a consultative psychological evaluation..." Gregory's parents, however, argued that their consent ended when the evaluation was complete and that any "future action was without their consent and in violation of the [IDEA's parental consent rules]."

For a number of technical reasons, the Ohio Court of Appeals determined that they could consider Dr. Arnold's testimony whether or not the Stancourts' consent extended past the evaluation. More importantly, in the broader sense, the court paid attention to the fact that the Stancourts had "knowledge of Dr. Arnold's continuing involvement regarding Gregory's IEP, the Stancourts did not object to Dr. Arnold's participation... [and they] did not object to Dr. Arnold's continued involvement in the IEP process..."

The court did not say these facts extended the Stancourts' consent beyond the initial evaluation (the focus was on whether Dr. Arnold's testimony was admissible), but the court strongly implies that, as a general matter, parents can consent to an evaluator's participation in IEP development simply by not objecting.

What does this mean for School Districts?

The IDEA is frustratingly silent about evaluations that, by their nature, do not have a definite stopping point. The functional behavioral assessment (FBA) is a prime example. FBAs are "ongoing" evaluations in which evaluators constantly test hypotheses as they drill down on what triggers a student's behavior. Of course, there comes a time when the evaluator must memorialize her or his impressions into an evaluation report that will yield a BSP but, in theory, the generation of a report does not mean that the evaluator's job is finished. If the evaluator continues to be a member of the student's IEP team, he or she should continue to review data and, preferably, observe the student to make sure that the BSP is working. Arguably, these actions are the way in which the evaluator participates in the IEP process. It would be very frustrating to school districts if parents could consent to an evaluator's membership – for lack of a better word – on an IEP team, but object to the evaluator's participation.

All of this forces school districts to carefully consider where the line that divides "observation" and "participation" from "evaluation" is drawn. This effort will not be

easy in a world where the laws were drafted in contemplation of discrete tests (e.g. IQ testing, reading evaluations, etc.). This is, in many ways, analogous to persistent questions about the RTI model which, for all of its benefits, blurs the line between regular and special education.

As the law in this area develops, the most consistent thread is that courts will examine these questions on a case-by-case basis. Every court, including the Ohio Court of Appeals, explicitly notes that these cases are fact-specific. As a result, school districts do themselves a great service by establishing clear lines of communication with parents. When parents have a clear understanding of what is happening with their children and what actions the school district are taking, the risk of dispute goes down, cooperation is increased and children are better served. Even from the most cynical perspective, both the consent and pendency issues presented in this case illustrate the point that school districts are more likely to win in court when they let parents know what is happening.

The DBYD Difference is published by Dischell Bartle Yanoff & Dooley, P.C. It does not, and is not intended to, constitute legal advice. Your receipt of this publication does not create or constitute an attorney-client relationship. You should not consider this publication to be an invitation for an attorney-client relationship, you should not rely on the information provided in this publication without first obtaining separate legal advice, and you should always seek the advice of competent legal counsel in your own state. This publication should not be viewed as an offer to perform legal services in any jurisdiction other than those in which DBYD's attorneys are licensed to practice. DO NOT send DBYD any information concerning a potential legal representation until you have spoken with one of DBYD's attorneys and obtained authorization to send that information.