

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO EASTERN DIVISION

JEFFREY WINKELMAN AND SANDEE WINKEL-
MAN, individually and on behalf of J.W., a child
with a disability,

Plaintiffs,

COMPLAINT

-against-

Case No.

PARMA CITY SCHOOL DISTRICT
BOARD OF EDUCATION, OHIO
DEPARTMENT OF EDUCATION and SUSAN
ZELMAN, as Superintendent of the Ohio Depart-
ment of Education,

Defendants.

Jeffrey Winkelman and Sandee Winkelman, individually and on behalf of J.W., a child with a disability, by and through their attorneys, LAW OFFICE OF ANDREW K. CUDDY, for their complaint hereby alleges:

1. This is an action brought pursuant to the pendency provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(j).
2. Plaintiffs reside in the City of Parma, County of Cuyahoga, State of Ohio.
3. Plaintiff J.W. is a child with a disability as defined by IDEA, 20 U.S.C. § 1401(3)(A).
4. Plaintiffs Jeffrey and Sandee Winkelman are the parents of J.W. as defined by IDEA, 20 U.S.C. § 1401(23).
5. Defendant PARMA CITY SCHOOL DISTRICT is a local educational agency

as defined by IDEA, 20 U.S.C. § 1401(19), and, as such, is obligated to provide educational and related programs and services to its students in compliance with the applicable federal and state statutes, regulations, and the U.S. Constitution, and is subject to the requirements of 20 U.S.C. § 1400 *et seq.*, and the regulations promulgated thereunder.

6. Defendant Ohio Department of Education (hereinafter “ODE”) is governed by the laws of the State of Ohio, the laws of the United States, and the Constitution of the United States in carrying out its duties and responsibilities. The ODE is the state education agency as defined by IDEA, 20 U.S.C. § 1401(32), responsible for implementing and enforcing education policies and procedures in the State of Ohio, and is the recipient of federal financial assistance for purposes of the IDEA.

7. Pursuant to 20 U.S.C. § 1401(32), defendant ODE is “primarily responsible for the State supervision of public elementary schools and secondary schools[.]”

8. Defendant Susan Zelman is Superintendent of public instruction at the ODE and is responsible for the day-to-day supervision of the ODE.

JURISDICTION AND VENUE

9. Jurisdiction is predicated upon 28 U.S.C. § 1331, which provides the district courts with original jurisdiction over all civil actions arising under the laws of the United States, and upon the jurisdictional provisions of IDEA, 20 U.S.C. § 1415(i)(3), which provides that the district courts of the United States shall have jurisdiction of actions brought under section 1415(i)(3) without regard to the amount in controversy.

10. Venue is predicated upon 28 U.S.C. § 1391(b)(1) based upon the residence

of the defendant, and upon 28 U.S.C. § 1391(b)(2) based upon the location of the subject matter of this action.

FACTUAL BACKGROUND

11. J.W. was born in 1997 and suffers from an autism spectrum disorder.

12. J.W. has been diagnosed with moderate to severe autism and is classified as a student with autism pursuant to the Individuals with Disabilities Education Act (IDEA). His classification is not in dispute.

13. J.W. presently attends the Monarch School in Shaker Heights, Ohio, and has attended Monarch since 2003.

14. On or about August 13, 2007, J.W., by and through his parents and legal guardians, Jeffrey and Sandee Winkelman (the Winkelmans), initiated an due process proceeding by filing a formal request for an Impartial Due Process Hearing as provided in the IDEA.

15. In their complaint, the Winkelmans alleged that the Parma City School District, an agent of the state (ODE), denied J.W. his right to a free and appropriate public education (“FAPE”) as mandated by 20 U.S.C. § 1400 *et seq.*; 34 C.F.R. § 300 *et seq.*, O.A.C. § 3301-51 *et seq.*

16. The Winkelmans sought reimbursement for J.W.’s tuition for the 2007–08 school year at the Monarch School pursuant to 20 U.S.C. § 1412(a)(10)(C)(ii).

17. Impartial Hearing Officer (IHO) Ronald Alexander was appointed by the ODE to preside over the due process matter and render a decision.

18. On March 7, 2008, IHO Alexander issued a decision, finding that 2007–08 individual educational plan (IEP) created by defendant PARMA CITY SCHOOL

DISTRICT was inappropriate, did not provide J.W. with meaningful educational benefit, and that it denied a free appropriate public education (FAPE) to J.W. for the 2007–08 school year.

19. IHO Alexander also found that J.W.’s current educational placement at Monarch School provided him a meaningful education and awarded \$68,500.00 in tuition reimbursement to the Winkelmans.

20. The Winkelmans and the PARMA CITY SCHOOL DISTRICT both appealed portions of IHO Alexander’s decision to a state level review officer (SLRO) of the ODE.

21. Defendant ODE appointed Robert Mues as SLRO.

22. By decision dated August 21, 2008, SLRO Mues affirmed IHO Alexander’s decision “in its entirety, except that the reference to attorneys’ fees being denied on [page] 207 [of the IHO decision] is stricken. As previously stated, an IHO has no authority to grant or deny a request for attorneys’ fees, which rests within the jurisdiction of the district courts.”

23. In particular, the SLRO upheld the award of \$68,500.00 in tuition reimbursement, upheld the finding that defendant Parma’s IEP denied J.W. a FAPE, and upheld the finding that the Monarch School provided J.W. with an appropriate program during the 2007–08 school year.

FIRST CAUSE OF ACTION

24. Plaintiffs repeat and reallege paragraphs 1 through 23 as if more fully set forth herein.

25. Pursuant to 34 C.F.R. § 300.518(a), “during the pendency of any adminis-

trative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under Sec. 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.” This is called a child’s “pendency” or “stay-put” placement.

26. If “a State review official in an administrative appeal agrees with the child’s parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents for purposes of paragraph (a) of this section.” 34 C.F.R. § 300.518(d).

27. SLRO Mues is “a State review official in an administrative appeal” in this matter.

28. SLRO Mues, in his August 21, 2008 decision, “agree[d] with the child’s parents that a change of placement is appropriate” in that he found the Parma IEP to be inappropriate and found the Monarch placement to be appropriate. See, e.g., *Mackey v. Arlington Central School District*, 386 F.3d 158 (2nd Cir. 2004); *Murphy v. Arlington Central School District*, 297 F.3d 195 (2nd Cir. 2002); *Bd. of Ed. v. Schutz*, 290 F.3d 476 (2nd Cir. 2002).

29. Due to SLRO Mues’ decision, defendant ODE is deemed to have agreed, as a matter of law, with the parents to change J.W.’s current educational placement to Monarch School.

30. Plaintiffs seek a declaratory order providing that Monarch is J.W.’s current educational placement as of August 21, 2008.

SECOND CAUSE OF ACTION

31. Plaintiffs repeat and reallege paragraphs 1 through 30 as if more fully set forth herein.

32. On September 19, 2008, PARMA CITY SCHOOL DISTRICT informed the Monarch School (and the Winkelmanns) by letter that would pay for J.W.'s tuition at Monarch from August 25, 2008 to September 19, 2008, apparently as J.W.'s pendency placement.

33. This letter informed the parents and Monarch that "[b]ecause Case No. SE/SLR 1995-2007 is concluded, the District hereby places Monarch School on notice that it will not be paying any further tuition to Monarch for [J.W.'s] education during the 2008–09 school year."

34. On September 19, 2008, the Winkelmanns initiated a due process complaint against PARMA CITY SCHOOL DISTRICT for the 2008–09 school year (SE 2175-2008), again alleging a denial of FAPE.

35. This due process complaint also sought reimbursement for tuition at Monarch for the 2008–09 school year pursuant to 20 U.S.C. § 1412(a)(10)(C)(ii).

36. As a matter of law, the initiation of the impartial hearing requires PARMA CITY SCHOOL DISTRICT to maintain J.W. in his current educational placement, which, as a result of SLRO Mues' August 21, 2008 decision, is and continues to be Monarch School.

37. By letters to ODE (defendant Zelman) and to Parma (Michelle Nolan) both dated and sent on September 22, 2008, plaintiff Sandee Winkelmann requested that defendants implement pendency by maintaining J.W.'s tuition and related transportation expenses at Monarch.

38. Defendants have failed to pay any tuition or related transportation expenses for J.W. at Monarch after September 19, 2008, putting his placement at the school in jeopardy.

39. Plaintiffs seek an order directing the defendants to pay J.W.'s tuition and related transportation expenses at Monarch from September 20, 2008 through the pendency of the administrative proceedings set in motion by the September 19, 2008 due process hearing request.

WHEREFORE, plaintiffs respectfully request that this Court:

- (1) Assume jurisdiction over this action;
- (2) Issue an order declaring that J.W.'s pendency placement became Monarch School on August 21, 2008 and remains Monarch School through the pendency of the impartial hearing requested on September 19, 2008;
- (3) Issue an order directing the defendants to maintain current payments on J.W.'s tuition at Monarch School, including related transportation costs at the current IRS mileage rate, through the pendency of the impartial hearing and any appeals relating to the hearing request served on September 19, 2008;
- (4) Award to the plaintiffs the costs, expenses and attorneys' fees of this action pursuant to 20 U.S.C. § 1415; and
- (5) Grant such other and further relief as the Court deems just and proper.

Dated: Auburn, New York
October 9, 2008

Yours etc.,

s/ Andrew K. Cuddy

LAW OFFICE OF ANDREW K. CUDDY

Andrew K. Cuddy, Esq.

Jason H. Sterne, Esq.

Attorney for Plaintiff

145 E. Genessee Street

Auburn, New York 13021

(716) 868-9103

akcuddy132@aim.com