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# Legal Insights

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for School Districts

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**Special education parents given green light to sue school without attorney representation**

**by Maureen Anichini Lemon**

In the first of several school-related decisions this term, the United States Supreme Court approved a parent's right to bring a lawsuit against a school district for alleged violations of the Individuals with Disabilities Education Act ("IDEA") without being represented by an attorney in *Winkelman v. Parma City School District*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1994 (2007).

Jacob Winkelman was a six-year-old child with autism spectrum disorder when his parents commenced lengthy administrative proceedings against Parma City School District. The Winkelmans participated in the development of an IEP for Jacob, but filed a due process complaint against the school district alleging that it had failed to provide Jacob with a free appropriate public education. The parents were not represented by an attorney during the initial due process hearing or at the state-level appeal.

Having lost at both of those levels, the parents brought a complaint in the United States District Court for the Northern District of Ohio. That court affirmed the administrative finding that the school district had provided Jacob with a free appropriate public education. The parents appealed that ruling with the Court of Appeals for the Sixth Circuit. That court entered an order dismissing the appeal unless the parents obtained counsel to represent Jacob. This ruling was consistent with the position then held in several circuits, including our own Seventh Circuit, that a parent needed to retain an attorney to litigate IDEA claims on behalf of his or her child. The opposite position -- that a parent can litigate IDEA claims on behalf of his or her child without an attorney ("pro se") -- had been accepted by the First Circuit Court of Appeals.

The Winkelmans challenged the Sixth Circuit's order, and the United States Supreme

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**Schools can suppress student speech that encourages illegal drug use**

**by Graham Liccardi**

It has been thirty-eight years since the U.S. Supreme Court ruled in *Tinker* that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." (*Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969)). In that decision, the Court established that student speech may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." In June 2007, the Supreme Court in *Morse v. Frederick*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 2618 (2007) (commonly referred to as the "BONG HiTS 4 JESUS" case) created another exception to the *Tinker* rule and confirmed that "substantial disruption" is not the only basis on which school student speech can be regulated by school officials. Now, schools may regulate student speech without violating the student's First Amendment rights in order to protect the students entrusted in their care from speech that can reasonably be regarded as encouraging illegal drug use.

In January 2002, the Olympic Torch Relay passed through Juneau, Alaska, proceeding along a street in front of Juneau-Douglas High School. The school principal, Deborah Morse, allowed students and staff to observe the torch relay as an approved school social event or class trip. The relay occurred during school hours, and the teachers and administrators monitored the students' conduct. As the torchbearers and television camera crews were passing by the school, Joseph Frederick and other students unfurled a fourteen-foot banner displaying the phrase, "BONG HiTS 4 JESUS." Morse immediately asked the students to take down the banner. Every student complied except Frederick. Morse confiscated the banner and suspended Frederick. Morse explained that she removed the banner because it violated Juneau School Board policy, which prohibits expression advocating the use of illegal substances during regular school programs or approved social events and class trips.

Frederick administratively appealed his suspension, and the superintendent upheld the suspension. The superintendent stated that the event was clearly a school sponsored activity and that Frederick was disciplined not because the principal disagreed with his message, but because his message appeared to advocate the use of illegal drugs. The superintendent concluded that Morse's actions were permissible because the banner was "speech or action that intrudes upon the work of the schools." Frederick filed suit in federal court under 42 U.S.C. §1983, alleging that the school board and Morse violated his First Amendment rights. The United States Supreme Court was asked to address whether Frederick had a First Amendment right to display his banner.

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## Special education parents

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Court resolved the dispute by ruling that a parent may file a lawsuit alleging violations of IDEA without the assistance of an attorney. The majority opinion held that a parent can assert any and all IDEA claims without an attorney. The court based this conclusion on the statutory scheme and structure of the IDEA, rather than explicit language in the statute. Because a parent may enforce rights at the administrative stage without an attorney, it would be inconsistent to bar him or her from continuing to assert those rights in federal court.

Further, the IDEA allows parents to (1) participate on their child's IEP team; (2) bring challenges on "any matter" relating to their child's education; and (3) bring a civil action disputing the findings and decisions of a hearing officer. According to the court, these statutory provisions create in parents an independent stake in the substantive decisions to be made in addition to the procedures and costs implicated by the decision-making process. The court concluded that the IDEA does not differentiate between the rights accorded to children and the rights accorded to parents. If it did, families that could afford an attorney could proceed with their challenge, while those families that could not afford an attorney would be barred from further appeal. The court refused to rule in a way that could lead to such an apparent potential for injustice.

By contrast, the dissenting opinion would hold that parents may proceed *pro se only* when they seek reimbursement for private school expenses or redress for violations of their own procedural rights. The dissent would hold that parents may not proceed *pro se* when they challenge the substantive adequacy of their child's educational placement. The rationale for this distinction is the dissent's view that a parent's rights (i.e., procedural rights to written notice and participation in IEP team meetings) differ from the child's substantive right to a free appropriate public education.

The Parma City School District argued that a ruling in favor of the Winkelmans will increase costs borne by school districts forced to defend against *pro se* lawsuits unconstrained by attorneys trained in the law and the rules of ethics. The court dismissed this concern, noting that the IDEA empowers courts to award attorney's fees to a prevailing school district whenever a parent has presented a "complaint or subsequent cause of action . . . for any im-

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## Supreme Court's latest step to end race discrimination in schools

by Vicki Johnson

On June 28, 2007, the United States Supreme Court ruled that a public school district that had not operated legally segregated schools -- or has been found to be unitary -- may not classify students by race and rely upon that classification in deciding school assignments in *Parents Involved in Community Schools v. Seattle School District 1*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 2738 (2007).

The case involved school districts in both Seattle and Kentucky. The Seattle school district had never operated legally segregated schools. The Kentucky school district had previously operated legally segregated schools and had been subject to a desegregation decree until 2000. A federal court dissolved the desegregation decree at that time, because the district had eliminated the vestiges of prior segregation to the greatest extent practicable. Both school districts voluntarily adopted student assignment plans that relied upon race to determine which public schools a student may attend. In a 5-4 decision, the United States Supreme Court held that the school boards did not present any "compelling state interest" that would justify the use of race for school seat assignments.

The Seattle school district allowed students to apply to any high school in the district by ranking their preferences. Some schools were more popular than others. Since certain schools often became oversubscribed when too many students selected them as their first choice, the school district used a system of tiebreakers to decide which students would be admitted to the popular schools. The first tiebreaker gave preference to students who had a sibling currently at the school. The third tiebreaker looked at the geographic proximity of the school to the student's residence. These two tiebreakers were not the problem. The problem was the second tiebreaker that depended upon the racial composition of the particular school and the race of the individual student. This factor was intended to maintain racial diversity in the schools. If the racial make-up of any school's student body were not within ten percentage points of the district's overall white/non-white racial balance, the racial tiebreaker went into effect. Therefore, at any particular school either whites or non-whites could be favored for admission depending upon which race would bring the racial balance closer to the goal. As a result of the racial composition factor, a group of parents whose children have been or may be denied assignment to their chosen high school because of their race sued the school district. Their lawsuit included alleged violations of the Equal Protection Clause of the 14<sup>th</sup> Amendment, Title VI of the Civil Rights Act of 1964, and the state civil rights act.

The Jefferson County Public School system in Louisville, Kentucky had adopted a similar voluntary student assignment plan. This assignment plan required all non-magnet schools to maintain a minimum black enrollment of fifteen percent and a maximum black enrollment of fifty percent. At the elementary school level schools were grouped into clusters in order to facilitate integration, and each student was assigned a "resides" school within a specific geographic area. New students were assigned to schools within each cluster based on available space in the school and the racial guidelines of the district's student assignment plan. If a student's race contributed to a school's racial imbalance, he or she would not be assigned to that school.

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## Student speech

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Frederick's first argument was that this was not a school speech case. The Court disagreed. It discerned that this was clearly a school speech case based on the facts that school officials were supervising the students, the high school band was performing, the event was sponsored by the school and held during school hours, and the banner was directly visible to the school's students. Frederick's second argument was that the banner's message was ambiguous or nonsense and only a ploy to get on television. While the Court found the message on the banner to be cryptic, the pervasive meaning of the banner's words demonstrated that the sign advocated the use of illegal drugs. The Court stated that the banner could be interpreted to mean "to smoke marijuana" or to celebrate the idea of doing drugs. Further, the Court acknowledged the scarcity of other potential meanings for the phrase "bong hits." The Court did make it perfectly clear that the banner could in no way be interpreted as having any political or religious meaning.

After determining that this was a school speech case and that the banner was advocating the use of illegal drugs, the Court addressed the issue at the heart of the case: whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when the speech is reasonably viewed as promoting illegal drug use. The Court determined that a principal may regulate this form of speech because of the special characteristics of the school environment and because the school has a compelling interest in preventing student drug use.

In 1969, the Court made it clear that school officials can regulate student speech that they reasonably believe will "materially and substantially" disrupt the work and discipline of the school in *Tinker*. However, teachers' and students' First Amendment rights apply in light of the special characteristics of the school environment. In recognizing that the school is a special environment, the Court noted in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), "the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings." In *Fraser*, a student was suspended for giving a speech at a school assembly that included a graphic and explicit sexual metaphor. The Court noted that even though the speech did not substantially disrupt the work of the school -- which was the only standard for regulating student speech at the time -- the school officials acted within their authority by regulating the lewd and indecent speech at a school sponsored event. If this speech was made in a public forum, outside of a school sponsored event or trip, it would have been protected. The *Fraser* decision was significant because it opened the door for exceptions to the *Tinker* "substantial disruption" standard. In *Morse*, the Court carved out another exception to the *Tinker* standard in order to prohibit student speech that encourages illegal drug use.

The *Morse* Court illuminated the fact that the prevention of illegal drug use is a serious governmental concern. Congress has declared that part of a school's purpose is to educate students about the dangers of drug use and has provided billions of dollars to support drug-prevention programs. The Court noted that the deterrence of

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## Race discrimination

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Crystal Meredith and her son, Joshua, moved into the district. However, there was no space for Joshua at his "resides" school, and he was assigned to a school in his cluster ten miles from his home. His mother petitioned the district to transfer Joshua to a school closer to his home, but not in his cluster. When the district denied the transfer request because his race would have contributed to the school's racial imbalance, his mother sued the district, alleging violations of the Equal Protection Clause of the 14<sup>th</sup> Amendment.

Both of these cases were heard together by the Supreme Court. It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny. (*Johnson v. California*, 543 U.S. 499 (2005)). In order to survive a strict scrutiny analysis, a narrowly tailored plan must be presented in order to achieve a "compelling state interest." The Supreme Court recognizes two compelling interests for the use of race in school assignments. The first interest that the Court recognizes is the compelling interest of remedying the effects of past intentional discrimination. (*Freeman v. Pitts*, 503 U.S. 467 (1992)). Since the Seattle public schools were never segregated by law, and the Jefferson County Public Schools had achieved a unitary status, thereby remedying the effects of past intentional discrimination, neither school could raise this interest.

The second government interest that the Supreme Court has recognized as compelling is the interest in diversity in higher education upheld in *Grutter v. Bollinger*, 539 U.S. 306 (2003). The majority refused to apply the *Grutter* holding to elementary and secondary school districts. In *Grutter*, the diversity interest was not focused on race alone but encompassed "all factors that may contribute to student body diversity." This interest is uniquely applicable in a higher education institution that desires to achieve "exposure to widely diverse people, cultures, ideas, and viewpoints." Moreover, the Seattle and Kentucky plans at issue do not use race as one of many assessments for broader diversity, but as a lone factor for assigning students to different schools.

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Each school district argued that its racial diversity plans met goals of achieving educational and social benefits. The Court's majority rejected this argument because the plans were directed only to racial balances and were not narrowly tailored to achieve their stated goal. The school districts' failure to identify a level of diversity that would provide purported educational and social benefits was deemed a fatal flaw. The Supreme Court reaffirmed that "racial balance is not to be achieved for its own sake." In a lengthy dissent, Justice Breyer and three colleagues criticized the majority opinion. The dissent applauds the school districts' effort to integrate their schools and to overcome the problems of cities divided by race and poverty. The majority and the dissent each cite to the seminal *Brown v. Board of Education*, 347 U.S. 483 (1954), ruling to support their respective decisions.

For now, it is clear that public schools may not use race as the sole-determining factor for assigning students to schools. According to the majority opinion, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." ■

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proper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." (20 U.S.C. 1415(i)(3)(B)(i)(III)) Whether courts will, in fact, order a parent of a disabled child to pay attorney's fees to a school district in appropriate situations -- and the circumstances under which that might occur -- remains to be seen. ■

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drug use by schoolchildren is an "important - indeed, perhaps compelling" interest. (*Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995)). Further, students are more likely to use drugs when the norms of the school appear to tolerate such behavior. (*Board of Education of Indiana School District No. 92 of Pottawatomie City v. Earls*, 536 U.S. 822 (2002)). Frederick's banner could be interpreted to mean only one thing and had Morse not acted quickly, and left the banner visible, it would have sent the wrong message about the school's position on drug use.

The First Amendment does not provide students with an unfettered right to display any form of speech or expression they desire, and it does not tie the hands of school officials from protecting other students from expression that promotes the use of illegal drugs. The situation required Principal Morse to act quickly, and nothing in the facts indicated that Morse was unreasonable in concluding that a fourteen-foot banner displaying the nonsense phrase, "BONG HiTS 4 JESUS" advocated the use of illegal drugs. The special characteristics of the school environment and the unwavering commitment of the school to prevent drug use by students supported the Court's decision that schools may regulate student speech that can reasonably be regarded as encouraging illegal drug use without violating the student's First Amendment rights. ■

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