

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2009 Term

No. 34617

FILED

May 4, 2009

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
BOARD OF EDUCATION OF THE COUNTY OF PUTNAM,
Petitioner,

v.

THE HONORABLE J.D. BEANE,
C.E.M., a minor,
the HONORABLE LESLIE L. MAZE, in her capacity
as Special Prosecuting Attorney of Wood County, West Virginia
SUSAN D. SIMMONS, in her capacity as guardian *ad litem*, and
WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Respondents.

PETITION FOR WRIT OF PROHIBITION

WRIT GRANTED

Submitted: March 11, 2009

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The Opinion of the Court was delivered PER CURIAM.

JUSTICE WORKMAN concurs, in part, and dissents, in part, and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. “A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W. Va. Code, 53-1-1.*” Syllabus Point 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977).

2. “The due process of law guaranteed by the State and Federal Constitutions, when applied to procedure in the courts of the land, requires both notice and the right to be heard.” Syllabus Point 2, *Simpson v. Stanton*, 119 W.Va. 235, 193 S.E. 64 (1937).

Per Curiam:

The Petitioner, the Putnam County Board of Education (“the School Board”), asks that the Court enter a Writ of Prohibition against the Respondent, the Honorable J.D. Beane of the Circuit Court of Wood County, to halt the enforcement of two orders directing the School Board to provide and pay for a full-time nurse for a special-needs student. The School Board argues that the orders exceeded the circuit court’s legitimate powers because the School Board was not a party to the action before the circuit court, was not served with notice of the hearing that led to the circuit court’s orders, and was not given an opportunity to be heard at a hearing.

After carefully reviewing the briefs, the legal authority cited and the record presented for consideration, we grant the requested writ of prohibition.

I.
Facts & Background

Respondent C.E.M.¹ is a thirteen-year-old sixth grade student who is currently enrolled at Winfield Middle School in Putnam County. C.E.M. has attended schools under the control of the School Board, for eleven years, beginning in the 1998-99 school year.

¹As is our practice in cases involving sensitive matters, we use the child’s initials rather than his full name to identify him. *See Marilyn H. V. Roger Lee H.*, 193 W.Va. 201, 202 n. 1, 455 S.E.2d 570, 571 n.1 (1995).

C.E.M. suffers from a number of medical problems and is wheelchair bound.² He was born prematurely on May 29, 1995, and remained in the hospital for the first eight months of his life. Shortly after his hospital discharge, an abuse and neglect petition was filed against both of his parents in the Circuit Court of Wood County, C.E.M.'s then-home county, on February 15, 1996. As a result, the Respondent West Virginia Department of Health and Human Resources ("DHHR") was given the legal and physical custody of C.E.M. DHHR placed C.E.M. in permanent foster care in Putnam County, and he has continuously resided in the same foster care home for thirteen years.

On June 11, 2008, the Circuit Judge conducted a review hearing in Wood County on the still-pending abuse and neglect petition. At that review hearing, evidence was presented by the guardian *ad litem* for C.E.M., by a special prosecutor, and by the DHHR, all of whom are Respondents in the instant matter. Following that hearing, on July 25, 2008, the circuit court entered an order requiring the School Board to provide and pay for a full-time nurse for C.E.M. while he was at school – despite the fact that the School Board was neither a party to the action nor afforded notice of the hearing and an opportunity to appear to present evidence.

It was alleged in the review hearing before the circuit court that C.E.M. had been provided with a full-time nurse by the School Board until the 2008-09 school year when he was promoted from Winfield Elementary to Winfield Middle School. Winfield Middle

²C.E.M.'s medical conditions are set forth by his physician in an April 22, 2008 letter attached to Respondents' "Response To Petition For Writ of Prohibition."

School does not have an on-site nurse. The nurse assigned to Winfield Middle School divides her time between two schools and is approximately ten minutes away from C.E.M.'s school when she is not on-site at his school. It was alleged that a ten-minute response time for the nurse poses a significant danger to C.E.M. because he experiences frequent seizures which require the administration of rectal Valium and oxygen. There was also proffered to the circuit court a letter from C.E.M.'s physician, who stated that treatment of his seizures should not be left to lay personnel, and stated that it would be optimal to have nursing personnel present to handle these situations.

The School Board was not a party to the abuse and neglect action before the circuit court, and never received notice of or an opportunity to appear at the hearing. Accordingly, in its petition to this Court, the School Board vigorously disputes the claim that C.E.M. needs or has always been provided with a full-time nurse. The School Board has attached an affidavit to its petition from its director of exceptional education, Patricia Homberg, to support this position. Ms. Homberg states that C.E.M., in accordance with his Individualized Education Plans ("IEP") prepared each year, has *never* needed or been provided with a full-time nurse. Furthermore, Ms. Homberg states that in four of C.E.M.'s eleven years in the school system, the school nurse available to attend to C.E.M. was assigned to multiple schools.³

³Ms. Homberg's affidavit explains (with emphasis added):
During 7 years of his enrollment an RN was located at the school that he attended, and a school health nurse assigned to various schools provided supervision for the RN. For the other

The circuit court did not have this input from Ms. Homberg at the review hearing because the School Board was not given notice of the hearing. Without having the benefit of the School Board's information, the circuit court's July 25, 2008 order made a general finding that, "Due to the medical needs of the minor child, the minor child requires the assistance of a full-time nurse when in school."⁴ The order did not specifically require any action by the School Board.

Following entry of the July 25, 2008 order, the DHHR sent a copy of the order to the School Board. After receiving this order, counsel for the School Board informed

4 years of his enrollment (including this year), a school health nurse for C.E.M.'s school was assigned to serve various schools. . . *C.E.M.'s Individualized Education Plan (IEP) has never required that a full-time nurse be assigned to him. Only one IEP developed for C.E.M. has even indicated that school health services, while in school, needed to be provided in any intensity other than indirectly between '10 minutes per week' and 'as needed.'*

⁴Another finding by the Circuit Judge states:

The minor child has frequent break-through seizures with status epilepticus requiring administration of rectal Valium . . . During said seizures, the minor child may become cyanotic, requiring the administration of oxygen.

This finding as to the frequency of C.E.M.'s seizures appears to be somewhat contradicted by statements made by the foster mother to the School Board. The affidavit from the School Board's director of exceptional education explains:

C.E.M.'s foster mother completed Putnam County Schools Health Services Seizure Questionnaire for 2008-2009 and indicated that C.E.M. rarely has a seizure. The IEP developed on April 30, 2008, *documents that he has not had a seizure at school in 2 ½ years.*

(Emphasis added).

the DHHR that it would take the Circuit Judge's order under advisement, but noted that the School Board was not a party to this action, and had not been provided notice or an opportunity to be heard. The School Board also noted to the DHHR that the order did not require it to take any action.

On November 10, 2008, the Circuit Judge entered another order, this time specifically requiring the School Board to take action. This second order stated that the circuit court

does hereby **ORDER** Putnam County Schools to provide a full-time nurse for the minor child, C.E.M., while the minor child is in the physical care of Putnam County Schools, as has historically been provided for said minor child. The Court does further **ORDER** that Putnam County Schools shall pay for the expense of said nurse.

Several days later, the School Board filed a petition with this Court seeking a writ of prohibition to halt enforcement of the circuit court's November 10, 2008 order.

II. *Standard of Review*

“A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W. Va. Code*, 53-1-1.” Syllabus Point 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977). *In accord*, Syllabus Point 1, *State ex rel. Shepard v. Holland*, 219 W.Va. 310, 633 S.E.2d 255 (2006).

III. *Discussion*

It is undisputed that the School Board had – at a minimum – a financial interest directly affected by the Circuit Judge’s orders, and was charged with formulating and carrying out C.E.M.’s IEP. It is also undisputed that the School Board was not provided with either a notice of the hearing or an opportunity to be heard in the circuit court. The School Board therefore asserts that its fundamental right to due process has been violated by the Circuit Judge’s orders and that the best interests of C.E.M. were not served.⁵

⁵The School Board also states that even if the circuit court had the jurisdiction in this case to enter an order granting relief against the School Board, exhaustion of administrative remedies is generally required as a prerequisite to judicial intervention into matters arising from disputes over a special education student’s Individualized Education Plan (“IEP”).

There are both federal and state procedures in place to resolve disputes over a special education student’s IEP. Under the Individuals with Disabilities Education Act (“IDEA”), the state is required to “ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services[.]” 20 U.S.C. 1400(d)(1)(A). The IDEA does not confer upon parents or custodians a right to immediately seek redress in federal court for the alleged denial of a free appropriate public education under the Act. Rather, the IDEA contains a detailed administrative scheme that must be exhausted prior to filing a federal claim. *See* 20 U.S.C. 1415(1).

The West Virginia counterpart to the IDEA is found in *W.Va. Code*, 18-20-1, *et. seq.*, titled “Education of Exceptional Children.” Pursuant to *W.Va. Code*, 18-20-1 [1990], the State Board of Education is authorized to adopt rules to develop a program to assure that all exceptional children in the state receive an education in accordance with the mandates of state and federal laws. Pursuant to this authorization, the State Board developed Policy 2419 which is found in the *Code of State Regulations* at 126 C.S.R. § 16.

Like the IDEA, Policy 2419 provides a comprehensive administrative scheme for addressing the complaints of parents, legal custodians and students. This scheme includes providing notice of procedural rights and the right to mediation. It also includes dispute resolution mechanisms consisting of the right to file a complaint with the appropriate state agency; the right to file a due process complaint with the district superintendent or the State Department of Education; and the right to have one’s complaint heard and decided by an impartial hearing officer. Any party aggrieved by the decision of the hearing officer may

The Respondents counter by arguing that the circuit court did not exceed its jurisdiction because the “primary goal in cases involving abuse and neglect, as in all family matters, must be the health and welfare of the children.” Syllabus Point 3, in *part*, *re: Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996).

While doing what is in the best interests of the child is the primary goal of abuse and neglect proceedings, this goal does not relieve a court from complying with fundamental due process requirements. The most fundamental due process protections are notice and an opportunity to be heard. As we held in Syllabus Point 2 of *Simpson v. Stanton*, 119 W.Va. 235, 193 S.E. 64 (1937): “The due process of law guaranteed by the State and Federal Constitutions, when applied to procedure in the courts of the land, requires both notice and the right to be heard.”

A circuit court cannot adequately protect an abused child when the individuals who can supply pertinent facts are not given notice and the opportunity to present evidence. It was clearly a significant oversight of the lower court and the parties to make no effort to

then bring a civil action.

In our recent decision of *Sturm v. Board of Educ. of Kanawha County*, ___ W.Va. ___, 672 S.E.2d 606 (2008), we concluded that a party, prior to bringing a civil action under West Virginia Board of Education Policy 2419, 126 C.S.R. § 16, is required to exhaust their administrative remedies. We stated, in Syllabus Point 5 of *Sturm*:

Prior to bringing a civil suit alleging failure to provide a free appropriate public education under the Regulations for the Education of Students with Exceptionalities, Policy 2419, 126 C.S.R. § 16, a complainant must first exhaust his or her administrative remedies provided under the regulations or meet the burden of proving an exception to the exhaustion requirement.

include the School Board in the relevant hearings, not only for the preservation of due process but also for determining an outcome that would be in C.E.M.'s best interests. The School Board's documents reflecting C.E.M.'s educational and school medical records as well as testimony of school employees as to relevant information on the progress and needs of C.E.M. would surely shed light on the question of the best interests of this young man.

The Respondents state in their reply brief that "There is absolutely no medical evidence to justify the determination of the Putnam County Board of Education that a full-time nurse is not required at this time." We again note that the School Board was not given an opportunity to present evidence in the circuit court. The School Board has presented the director's affidavit which contains evidence suggesting that C.E.M. has not had a seizure at school in two and a half years, that he has never been provided with a full-time nurse, and that for four of his eleven years in the school system, there was not a nurse present on-site.

We note that some of the director's statements may be in opposition to C.E.M.'s treating physician's opinion that treatment of his seizures should not be left to lay personnel, and that it would be optimal to have nursing personnel present to handle these situations. It is not our function at this stage to weigh the evidence or make conclusions about the care C.E.M. requires while attending school. We note these conflicting viewpoints simply to point out that the Circuit Judge lacked relevant, necessary information when issuing the orders in this case by failing to provide the School Board with notice.

The circuit court clearly denied the School Board its fundamental due process rights to notice and an opportunity to be heard. In so doing, the circuit court did not have

before it important evidence concerning the child's medical and educational history. We find it troubling that neither the special prosecuting attorney, the guardian *ad litem*, DHHR, nor the circuit court recognized the need to include the School Board in these hearings wherein the School Board's interests were considered and decided *ex parte*.

For these reasons, we hold that the circuit court deprived the School Board of fundamental due process and clearly exceeded its legitimate powers.

IV. *Conclusion*

For the reasons set forth above, we grant the writ of prohibition. We decline to address the Petitioner's request for attorney fees. The circuit court's orders requiring the School Board to provide and pay for a full-time nurse for C.E.M. are hereby vacated.

Writ Granted.