No 34617 – *State of West Virginia ex rel. Board of Education of the County of Putnam 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*

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OF WEST VIRGINIA

Workman, J. concurring, in part and dissenting, in part:

While I concur with the majority opinion's conclusion that the Putnam County Board of Education ("Putnam County BOE") should have been made a party to the proceeding, I must dissent from the opinion because of its immense shortcomings in failing to clarify significant legal issues which should be resolved expeditiously.

The insurmountable problem with the majority opinion is the lack of responsiveness to a serious health and safety issue involving a severely disabled child. The thirteen-year-old child involved in this case is wheelchair bound and, according to his treating physician, was born extremely prematurely, at twenty-eight weeks, with Arnold Chiari Malformation and seizure disorder. The child is developmentally-delayed and has cortical blindness. He also has spastic diplegia. The child suffers from seizures, requiring not only administration of medication; but, also during the seizures, he may become cyanotic, requiring administration of oxygen. The evidence supplied by the letter from his physician suggests that his very life could depend on prompt medical attention if a seizure occurs.

Among significant issues left unaddressed, apparently because the majority found them inconsequential, is the issue of jurisdiction**.** Part and parcel of that issue is whether a

child's Individualized Educational Plan ("IEP") can be modified or enforced in the context of an abuse and neglect proceeding.[1] The majority's silence on this issue leaves the implication that annual foster care review in an abuse and neglect proceeding is the proper forum for this issue to be heard. However, there is in fact a fairly extensive body of law in both federal and state statutes, as well as state regulations and even in case law from this Court, on this issue, which makes clear there is a separate procedure for the enforcement or modification of an IEP; yet, the opinion fails to cite or discuss any of this law.

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 ("FAPE") that emphasizes special education and related services[.]" 20 U.S.C. § 1400(d)(1)(A). The West Virginia counterpart to the federal IDEA is found in West Virginia Code § 18-20-1 to -9 (2008), entitled "Education of Exceptional Children." Pursuant to West Virginia Code § 18-20-1, which authorizes the adoption of rules to develop a program to ensure that all exceptional children receive an education in accordance with state and federal law, the State Board developed Policy 2419. W. Va. C.S.R. § 16. Like the IDEA, Policy

[1]By way of background, this child has been in long-term permanent foster care in Putnam Count for thirteen years, but has remained in the legal custody of the DHHS as part of an abuse and neglect proceeding begun in Wood County. As the result of being in permanent foster care, the Wood County Circuit Court holds periodic reviews of his foster placement pursuant to West Virginia Code § 49-6-8 (2004 and Supp. 2008).

2419 provides a comprehensive administrative scheme for addressing the complaint involving an IEP.

Chapter 11 of 126 West Virginia Code of State Regulation §16 provides for the following means to resolve disputes relative to the IDEA and FAPE, which include the filing of a state complaint, including early resolution, mediation, and the filing of a due process complaint, including a resolution process. *See Sturm v. Board of Educ. of Kanawha County*, 223 W. Va. 277, ___, 672 S.E.2d 606, 610 (2008)(stating that [p]ursuant 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 at 126 C.S.R. § 16. Like the IDEA, Policy 2419 provides a comprehensive administrative scheme for addressing the complaints of parents and students. This scheme includes providing notice of procedural rights; the right to mediation; 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 then bring a civil action[]").

Additionally, in *Ronnie Lee S. v. Mingo County Board of Education*, 201 W. Va. 667, 500 S.E.2d 292 (1997), the Court held in syllabus point two as follows:

> A civil action filed in a West Virginia circuit court, seeking monetary damages and injunctive relief from a county board of education and its personnel for the frequent and injurious use of a device employed to strap an autistic child to a chair while attending school, and which action includes allegations that the device was used upon the child in an intentional or reckless manner, is not precluded by the federal Individuals with Disabilities Education Act, 20 U.S.C. 1400 [1991], et seq., or the Act's West Virginia counterpart found in W. Va. Code, 18-20-1 [1990], et seq., and in West Virginia State Board of Education policy no. 2419, 126 C.S.R. 16, **nor is the action subject to the exhaustion of administrative remedies requirement thereof**, **the Individuals with Disabilities Education Act and its West Virginia counterpart having been enacted to assure children with disabilities "a free appropriate public education" and the Act and its State counterpart having been enacted to generally expand the rights of such children, rather than to restrict them**.

Ronnie Lee S., 201 W. Va. at 668, 500 S.E.2d at 293, Syl. Pt. 2 (emphasis added). Further, in *Ronnie Lee S.*, the Court acknowledged, in relying on the decision reached by the United States District Court for the Southern District of West Virginia in *Doe v. Alfred*, 906 F. Supp. 1092 (S.D. W. Va. 1995), that

> There are, of course, exceptions to the exhaustion requirement. Parents need not avail themselves of the administrative process when (1) such process would be inadequate or futile; (2) the grievance challenges generally applicable policies that are contrary to law; or (3) exhaustion will work severe harm upon the litigant.... [T]he determination of whether one of these 'narrow' exceptions is applicable depends upon ' "whether the pursuit of administrative remedies under the facts of a given case will further the general purposes of exhaustion and the congressional intent behind the administrative scheme." '

Ronnie Lee S., 201 W. Va. at 673, 500 W. Va. at 298 (quoting *Alfred*, 906 F. Supp. at 1097)(citations omitted); *see Sturm*, 223 W. Va. at ___and ___, 672 S.E.2d at 608 and

611(holding that "[p]rior 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[,]" and stating that exception to exhaustion requirement includes, but is not limited to, situation where exhaustion would be an exercise in futility).

Given the lack of any clarification on the issue, it is probable that the Respondent DHHS will re-litigate this issue in Wood County (this time with notice to Putnam County BOE), again in the context of an abuse and neglect proceeding, which clearly is not the proper means of seeking such relief.

Because the underlying issue involves the health and safety of a child with extreme disabilities and serious medical problems, I do not believe it was proper for the majority to completely ignore this issue. It should be remembered that this Court has said on several occasions that any time a child is before the court, that child is a ward of the court. *In re Samantha M.*, 205 W. Va. 383, 392, 518 S.E.2d 387, 396 (1999) ("Our statutes are clear that whenever a child appears in court, that child is a ward of that court. That court has both a right and a responsibility to see to it that the child is protected. *See Julie G.*, 201 W. Va. at 776, 500 S.E.2d at 889 (Workman, J., dissenting)[.]"). If this Court is to adhere to its responsibility, a number of issues should have been clarified. Perhaps if this was a case not

directly impacting the life and health of a child, this "lick and a promise" treatment of this case might suffice.

As previously stated, the next logical step for the DHHS is to continue to pursue the same issue in Wood County in the abuse and neglect framework. If that happens, the case will in all likelihood wind up again in this Court. This could be death (literally) by due process for this child. The failure of the opinion to address the fact that existing law provides a method for the enforcement or modification of an IEP that is separate and distinct from an abuse and neglect proceeding leaves the parties (and our law) completely in the dark. It is important not only for this case, but for future cases to clarify the proper legal procedure.

By their failure to address these issues, the majority leaves the definite impression that the Wood County Circuit Court has subject matter jurisdiction in the context of an abuse and neglect proceeding to address the child's IEP. That is just not the case. Absent jurisdiction to hear the matter, the Circuit Court of Wood County exceeded its legitimate powers and the majority's grant of a writ of prohibition should have encompassed this determination.

I am also concerned that a Motion to Supplement the record was filed by the DHHS on April 1, 2009, upon which no action has ever been taken by this Court. A transcript of a hearing held before the lower court on March 31, 2009, was the item sought to be added to the record. If a party takes the time to file a motion, this Court should at least rule on it one

way or another. If the Court wanted to turn a blind eye to additional proceedings improperly continuing in the lower court, they could at least have denied the motion. Although the substance of the hearing is of some concern, it is of even greater concern that the lower court is continuing to hold hearings on a case that this Court has taken in and has under consideration. West Virginia Rule of Appellate Procedure 14(c) provides that "[u]nless otherwise provided, the issuance of a rule to show cause in prohibition stays all further proceedings in the underlying action for which an award of a writ of prohibition is sought."[2]

In conclusion, while the majority resolves one issue correctly, it fails to address other issues which must be resolved so that the issues critical to this child's health and safety can be addressed expeditiously. It is now May 4, 2009. The petition seeking resolution of these issues was filed on November 20, 2008. The fate of this boy should not have been left twisting in the wind, with all parties now guessing as to how to proceed, while his life may be in danger. This Court should have ordered that the matter be remanded to the proper court with proper notice to all parties and be resolved in an expeditious manner.

Based upon the foregoing, I concur, in part, and dissent, in part.

[2] While the circuit court retains jurisdiction over the child pursuant to West Virginia Code § 49-6-8, requiring foster care review by the state department, the hearing which is the issue of the Motion to Supplement clearly involved issues pending before this Court.