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980357

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Ward County Juvenile Court Case Number 97-R-0148
North Dakota Supreme Court Case Number 980357

IN THE INTEREST OF R.E., A MINOR CHILD

GLORIA MARAGOS.)
)
Petitioner/Appellee,)
)
vs.)
)
R.E., Child: and B.E., Mother;)
)
Respondents/Appellants.)

FILED IN THE OFFICE OF THE CLERK OF SUPREME COURT
APR 27 1999
STATE OF NORTH DAKOTA

ON APPEAL FROM THE WARD COUNTY JUVENILE COURT

NORTHWEST JUDICIAL DISTRICT

THE HONORABLE GERALD RUSTAD, PRESIDING

APPELLANT'S REPLY BRIEF

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ISSUE PRESENTED

Whether R.E. is prohibited from seeking justice and asking the North Dakota Supreme Court to decide a nationally recognized and extremely important issue concerning the treatment of children with disabilities.

The appellants admitted that R.E. spray-painted a bus stop shelter. (See Appellee's Br. at 9.) This was a misdemeanor criminal mischief offense and for that R.E. was adjudicated to be a delinquent. The appellants admitted that R.E. had behavioral problems and for that R.E. was adjudicated to be an unruly child. R.E. had court-appointed counsel in the original proceeding who undoubtedly slammed his fist down on the counsel table and proclaimed that we do not incarcerate juveniles for spray-painting bus stop shelters. Unfortunately for R.E., children with disabilities do not have access to skilled advocates who have the vast knowledge required of the situation to educate our Juvenile Courts as to why we should not be stripping parents of custody and incarcerating our children with disabilities in youth correctional centers. The State incarcerated R.E., a child with disabilities, for a year and a half and determined that was not long enough. In granting the State's request to extend the original order for another year, the Juvenile Court stated:

"I do not view this as a educational deprivation case at all. The mere fact that when a referral for delinquent conduct comes to the court and it's supplemented by background information which preferrly [sic] touches a school or other bad behavior that occurred during school does not make it an educational case

“The delinquent conduct was not school related. *Some of the reasons for the disposition may have been school related*, but the delinquent conduct was not school related”

(Tr. at 155-156; emphasis added.) The reasons for R.E.’s disposition and the discriminatory motives became clear during the course of the review hearing and in the Juvenile Court’s comments and ruling from the bench. But for R.E.’s emotional and behavioral disabilities and his need for an education, the State would not have sought to remove him from his home in the first place. But for R.E.’s emotional and behavioral disabilities, the State would not have sought to extend the original order for another twelve months. When it becomes clear that R.E. is being subjected to differential treatment due to his disabilities – then the issue of discriminatory practices is properly before the Supreme Court despite the Appellee’s assertions to the contrary. (See Appellee’s Br. at 9.) When counsel sees juveniles that admit several counts of felony burglary walk away from the Juvenile Court with 6 months probation – and when counsel sees the juvenile court supervisor recommend 6 months probation for juveniles accused of assault and felony firearm offenses – counsel knows that R.E. is being discriminated against in his disposition due to his disabilities when he ends up being incarcerated for over 2 years for spray-painting a bus stop shelter. Counsel was not born yesterday. This child sees the fundamental unfairness of his situation as do others.

The Office of Special Education Programs (OSEP) is extremely alarmed over the disproportionate number of children with disabilities represented in the juvenile justice system and in our youth correctional centers. This alarm is significant enough for

OSEP to make it an absolute priority to fund a research center for students with disabilities involved with and at risk of involvement with the juvenile justice system:

“Absolute Priority 2--Center for Students With Disabilities Involved With and at Risk of Involvement With the Juvenile Justice System (84.324J)

“Background:

“In general, special education services for students with disabilities have improved since the passage of Public Law 94-142 in 1975. However, progress has been limited for children with disabilities in the justice system. Although the estimates vary, most researchers agree that *students with [Page 10354] disabilities are over-represented in the juvenile justice system.* OSEP data for 1996 indicate that 15,930 students with disabilities were being served in correctional facilities. This count only includes those in correctional facilities, not the total number involved in the justice system. Of these 15,930 students, 45 percent are classified as having a learning disability and 42 percent are classified as emotionally disturbed. Theories regarding the disproportionate number of students in the juvenile justice system vary but their common characteristic is *school failure.* Over the past several years, the number of students with disabilities in correctional facilities has risen at over twice the rate of the increase of the overall special education population. From 1992-1993 to 1996-1997 the number of students ages 6-21 with disabilities increased 13 percent; the number in correctional facilities increased 28 percent. *This increase is*

most apparent with juveniles with learning disabilities and emotional disturbance.

“In order to meet the challenges of serving this population of students with disabilities, States need to make significant improvements addressing the following areas: prevention, educational programming, and reintegration or transition. Research indicates that students with significant antisocial behaviors can be identified fairly accurately by age 9, with some research indicating even earlier. *However, students do not typically receive effective interventions until they have first been unsuccessful in their current educational setting.* Research-based prevention strategies need to be implemented with at risk children to assist in preventing later involvement with the juvenile justice system. *Once students are in the justice system, coordination and delivery of special education services have traditionally been inappropriate and ineffective.* Even though promising and preferred strategies exist regarding the effective provision of educational services to students with disabilities, these strategies and practices have not been consistently or effectively applied to children with disabilities at risk of involvement in or in the juvenile justice system.

“Interagency coordination between education and justice agencies, at a minimum, is needed to enhance the knowledge and use of research-based strategies and practices in the justice system, *consistent with the provisions of IDEA.* Finally, interagency efforts involving families and

communities are needed to facilitate the successful reintegration of students with disabilities back into their home school and community when appropriate. Research has shown that few students, once they are involved with the justice system are able to return to their home school and later exit school appropriately with the skills needed to be successful within their community.

“This priority represents a collaborative effort between the Department of Education, Office of Special Education and Rehabilitative Services, Office of Special Education Programs, Office of Vocational and Adult Education, and the Department of Justice, Office of Juvenile Justice and Delinquency Prevention. The Office of Special Education Programs and the Office of Juvenile Justice and Delinquency Prevention held a focus group on students with disabilities in the Justice system. Copies of these proceedings can be obtained by contacting Project FORUM at the National Association of State Directors of Special Education (703) 519-3800.

“This priority is expected to have a significant impact on the improvement of services for students with disabilities in the justice system. Improvements in the areas of prevention, educational services, and reintegration based on a combination of research, training, and technical assistance will lead to improved results for children with disabilities.”

(Federal Register: March 3, 1999 (Volume 64, Number 41)) [Notices] [Page 10351-10363] From the Federal Register Online via GPO Access [wais.access.gpo.gov] <http://www.ed.gov/legislation/FedRegister/announcements/1999-1/030399a.html>.)

OSEP clearly recognizes school failure as the common characteristic explaining the disproportionate number of students with disabilities represented in the juvenile justice system. In an compelling article widely disseminated on the internet, the author writes that the blame for school failure is most often placed on the children themselves. Pamela Darr Wright, M.A., M.S.W., Educational Problems: It's the Kids' Fault, http://www.ldonline.org/ld_indepth/assessment/ed_problems.html. Shouldering the blame is a tremendous burden for a confused child with emotional disabilities (and low self-esteem) to bear. The article cited research demonstrating that school psychologists are significant contributors to the blame game. Id. The school that pays the school psychologist's bill does not want to be informed that it has failed the child in any way -- and if the school psychologist reports school failure as a factor, it is doubtful that the school will continue to use the school psychologist's services. Id. The article quotes Dr. Galen Alessi, Professor of Psychology at Western Michigan University, when it questions. "Is the role of the school psychologist to label children [as the problem] to help schools avoid improving faulty educational practices, or [is it the role of the school psychologist] to help schools improve faulty educational practices to avoid labeling children?" And the question on this appeal becomes: Is it the role of the juvenile courts to label children with disabilities as delinquent and unruly and remove these children from their homes and communities as a means to relieve schools of their statutory duties to comply with special education laws?

In its February 11, 1999, edition, the Minot Daily News ran an article entitled, *Schools and jails: Floor leaders clash over spending on education, corrections*. The article stated, "North Dakota's House floor leaders squared off about state spending on schools and prisons, with Republican Jon Dorso declaring, the GOP doesn't 'take a back seat to anybody' in its support of education." *Schools and jails: Floor leaders clash over spending on education, corrections*, Minot Daily News, February 11, 1999. In support of more money for education, the House Minority leader, Merle Boucher, used a large cartoon prop depicting a massive prison facility consisting of many buildings. Each building was labeled "Jale." *Id.* The cartoon depicted two prison guards in the foreground viewing the misspelled "jale" designations and the caption read, "In hindsight, maybe they should have spent more of the state budget on education." *Id.*

Mental health experts recognize that children with oppositional defiant disorder (ODD) "are not noncompliant and belligerent because they want to be – they have a biologically driven disorder." Nancy Hall, Jon Williams, Philip S. Hall, CHILDREN WITH ODD: Serving Children with Oppositional Defiant Disorder in the Classroom, 18 (Unpublished Article, Psychology Department, ODD Clinic, Minot State College.) However, the juvenile court supervisor made it absolutely clear that R.E.'s disabilities were irrelevant. The juvenile court approaches children with biologically driven disorders as simply children with behavior problems – to be labeled as unruly, taken from their homes, and incarcerated with felony offenders. Our legislature's Criminal Justice Committee has acknowledged the following:

"The committee discussed the need for the juvenile justice system and schools to work together. The committee also discussed the need for

linkage of entities that are providing services. Multiple providers may confuse the client with different treatment programs and *philosophical differences* in treatment."

North Dakota Fifty-sixth Legislative Assembly, Final Report, Criminal Justice Committee, <http://www.state.nd.us/lr/minutes/cjfinal.html>.

The Appellee proclaims, "The Court's decision represents a pragmatic common sense approach to the evidence that was adduced at the hearing." (Appellee's Br. at 14.) If it makes pragmatic common sense to unfairly label children with disabilities as misfits of society that need to be incarcerated, then counsel has wasted a year and a half of her time trying to understand the dilemma and formulate a solution. This is an overwhelming state and national issue which cannot be swept under the carpet simply by placing the blame on our children with disabilities, labeling them to be delinquent or unruly, and proclaiming that res judicata prevents this particular child from seeking justice. When a child with emotional disabilities, low self esteem, depression, and oppositional defiant disorder spray paints a bus stop shelter, we need to make a decision: are we dealing with a criminal who needs to be incarcerated for two and a half years -- or are we dealing an individual who requires understanding, support, and proper services that they are entitled to under the law? Until we can unify the perspectives of the various professions that provide services to children with disabilities, our "jales" will continue to overflow and the cries of our disabled children and their parents shall fall upon deaf ears. The appellants pray that the North Dakota Supreme Court will issue a decision in their favor and fling open the doors of justice for children with disabilities.

Respectfully submitted this 22nd day of April, 1999.

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CERTIFICATE OF SERVICE

I, Debra K. Edwardson, do hereby certify that a true and correct copy of the foregoing APPELLANT'S BRIEF was served by mail on the 22ND day of April, 1999, to the Appellee's attorney of record at his last known mailing address: Timothy Wilhelm, Assistant State's Attorney, Ward County Courthouse, Minot, North Dakota.

Debra K. Edwardson

Debra K. Edwardson