IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| KILLIAN J. HYNES, etc. | ) | DOCKET NO. 07 C 3483 |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| SUPERINTENDENT ALAN LEIS, et al., | ) | Chicago, Illinois |
| | ) | June 27, 2007 |
| Defendants. | ) | 9:00 o'clock a.m. |

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE
MILTON I. SHADUR, Judge

APPEARANCES:

For the Plaintiff:
MR. KEVIN J. HYNES
PRO SE

For the Defendants:
MS. LAURA A. SINARS

JESSE ANDREWS
Official Court Reporter - U. S. District Court
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1 THE CLERK: 07 C 3483, Hynes vs. Leis.

THE COURT: Counsel, do you want to reflect your appearances, please, for the record?

MS. SINARS: Laura Sinars on behalf of Alan Leis, Kitty Murphy and Naperville School District 203:

MR. HYNES: Kevin Hynes, H-y-n-e-s, appearing pro se. Good morning, your Honor.

THE CLERK: Good morning.

We are going to be interrupted, but not for over a minute, because the other thing is a citation to discover assets. And as you probably know, that simply involves swearing the defendant, and then they retire to counsel's office for purposes of dealing with that.

And both of you ought to be seated, because I am going to talk about this one before I hear from you, since I have read everything that you have submitted. You don't have to be standing around cooling your heels for that purpose. So you can be seated.

MR. HYNES: Thank you, your Honor.

MS. SINARS: Thank you.

THE COURT: As I read the Complaint and also the removal papers even before I got Mr. Hyne's response that was filed yesterday afternoon, I must confess that I was immediately put in mind of someone whom I regard as one of the great figures in American law, somebody who changed the course



of affairs here in the United States with two simple sentences. This was not a Judge, but a lawyer, who exemplified both legal and human fundamentals so perfectly that later on when he was cast in a motion picture as a judge, it was really perfect type casting. The movie -- of course for those of a different

generation, I am not sure whether either of you has seen it, although it's one of the great legal movies, was Anatomy of a Murder, and the lawyer was Joseph Welch. And his two sentences, which he spoke in his real-life persona to the then seemingly all-powerful Joseph McCarthy were, "Have you no shame senator? Have you no shame."

Just so, I must say that the undisputed picture here is regrettably one of the defendants holding I guess a six-year old (I think he's six years old) autistic boy hostage, depriving him of what is without dispute really a promised Tango communication device, something that everyone agree -- even the professionals agrees -- is essential to his effective functioning. And to hold that back as what has to be viewed, I regret to say, as blackmail for his parents, seeking to compel them to accept a program that the defendants' own professionals have found not to be in his best interest! And I regret that the delay, the nondelivery, appears to be as inflicting serious damage on the boy's progress in dealing with his extremely serious developmental difficulties. My personal view, which is not going to affect my decision for reasons that you are going



to hear in a moment or two, is that's nothing short of appalling.

Let me tell you where I suspect this dispute might be more effectually resolved consistently with Justice Brandeis' famous aphorism that "Sunlight is the best disinfectant." Instead of the anonymous judicial system, I believe that defendant's conduct ought to be aired in the court of public opinion, maybe by being made the subject of what I suspect would be a sort of scathing article -- for example, in the

Chicago Tribune. It is only respect for what I would guess is the parent's possible aversion to having what is really an intensely personal problem become public property that such treatment, although perhaps most likely to be successful, is not somehow brought into play. So much I guess, has to be viewed as dictum because, having said that, I turn to my own area of expertise.

Defendants have brought this action from its place of origin in the state court system on the premise that the parents are suing under the federal Individuals with Disability Education Act. More accurately, I think the premise should be stated in terms that the parents should have sued under IDEA but didn't. And then having erected that as a kind of strawman, defendants proceed to argue that such an action ought to be dismissed because the parents haven't pursued the administrative due process hearing that is a statutory



precondition to invoking judicial involvement under IDEA.

But in this response that I just got, and this confirms my reading of the Complaint, the plaintiffs correctly respond they are not suing under IDEA. Instead, with the boy's need for the Tango device having been undisputed by the defendant's own professionals, and with those professionals having promised to provide one for the boy's use, what the plaintiffs are essentially seeking to do is to compel specific performance of that promise.

Now in removal jurisprudence it's black letter law that the existence or possible existence of a federal question defense to an action does not support removal. As sheer chance would have it, I just wrote an article that got published in

the last issue of the American Bar Association's Litigation Magazine, entitled "Traps for the Unwary in Removal and Remand. It's in 33 Litigation, it begins at page 43. And here is how I have briefly stated that universal rule over here at page 45:

> "And so such cases as Metropolitan Life Insurance Company against Taylor, 481 U.S. 59 at page 63, have regularly reconfirmed the principle that a plaintiff, having drafted a 'well-pleaded complaint' in a fashion that poses only state law issues, cannot normally be forced into the federal courts by a defendant's contention that such a state law claim is preempted by a federal defense to such claim."



Now the reason that I -- well, let me say in this instance the separate question -- well, no. Before I deal with that, let me go on.

You know you heard that I said "cannot normally be forced." The reason for that "normally" qualifier deals only with what has been called in the law "field preemption." That is something that is not involved here.

Let me just read a little further in the article without citing cases. I say:

> "One major exception to the plaintiff-in-control principle has developed: the 'artful pleader doctrine,' under which fields of law are viewed as having been so pervasively occupied by federal law that any plaintiff's complaint in that field (even though it may carefully eschew any reference to federal law) is considered as 'arising under' (which is the Article III language) federal law and is hence

removable to a federal court. To date that concept has been sharply limited by the Supreme Court, applying in principal part to claims preempted by actions under (1) the Labor Management Relations Act Section 301 and (2) ERISA. [And then I refer to Seventh Circuit case that sets that out more extensively, and also to Moore's.]

But the point is that in this instance the separate question under IDEA, for example whether the School Board can or cannot be required to pay for any alternative choice of educational plan that the parents may prefer to what the School Board wants, is one thing that can -- carrying with it, by the way, that concomitant due process hearing requirement, can be fought ought as and when it arise. But it has not arisen here.

Now because subject matter jurisdiction is of course the first matter that I am required to look at, like any other federal court, that controls my action here. And that is pursuant to 28 U.S.C. Section 1447(c), if it appears that the court lacks subject matter jurisdiction, it's required to for remand. That same section, as I say, mandates remand in this case. And accordingly that is the order that I am entering here.

And because that order states that it is under 1447(c), it is not appealable, something that the Supreme Court reconfirmed, again coincidentally, something under ten days ago in a case called Powerex Corporation against Reliant Energy Services, which is 75 U.S. Law Week 4437. My further order is that the certified copy of the remand order should be mailed forthwith so that the state court judge can consider and rule

on the merits.

Having said all of that, I am constrained to return to what I said at the beginning, not in my capacity as the judge, for saying that I lack jurisdiction that's the end of my



ruling, but really as a human being. That is, I really cannot understand why the defendants here can't rise above what appears to be petty bureaucracy and behave like human beings as well.

So my order is one of remand for lack of subject matter jurisdiction. The rest is for the defendant's consideration. And I hope that you might carry back this message from somebody who I can assure you is really an objective observer looking at this one from the outside. I really must tell you I seldom have been as troubled by a move as I have by looking at this Complaint and the reaction that it has somehow instilled on the part of the defendants.

So the order is one that I have just indicated. The case is remanded, and it's going back forthwith. And that means that you can get back to where you were before the removal. Thank you.

MS. SINARS: Thank you.

MR. HYNES: Thank you.

(WHICH WERE ALL OF THE PROCEEDINGS HAD AT THE HEARING OF THE ABOVE-ENTITLED CAUSE ON THE DAY AND DATE AFORESAID.)

C E R T I F I C A T E

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the report of proceedings in the above-entitled cause.

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JESSE ANDREWS, CSR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
DATED: June 27, 2007