SWAN Legal Services Initiative

March Legal Report

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PENNSYLVANIA SUPREME COURT

In re: Adoption of L.B.M., a Minor[1] Date of Decision: March 28, 2017
Cite: 84 MAP 2016

Holding:
§2313(a) of the Adoption Act mandates the appointment of counsel to represent the child in contested involuntary termination of parental rights proceedings; the appointment of a guardian ad litem (GAL), even when the GAL is an attorney, does not satisfy this requirement.

Facts and Procedural Posture:
L.B.M. and A.D.M. were adjudicated dependent and placed in the legal and physical custody of Franklin County Children and Youth Services (CYS) as a result of Mother's unstable living conditions and Father's incarceration. During the life of the dependency case, Mother was repeatedly incarcerated as a result of numerous probation violations; consequently, CYS filed a petition seeking termination of Mother's parental rights. Following a hearing, the trial court declined to terminate Mother's parental rights, finding that despite Mother's repeated periods of incarceration and her recent release from prison, Mother had obtained both housing and employment, had attended almost all of her available visits with the children, and had engaged and bonded with them. Additionally, the trial court expressed "grave concerns" about the effect that severance of the relationship would have on A.D.M., who was "extremely close" with and "desperately want[ed] to be with his Mother". Following the hearing, Mother made significant progress, and the children were scheduled to be reunited with her; however, while reunification was pending, CYS opened an investigation as to allegations of possible physical abuse following discovery of bruises on L.B.M. after they returned from a weekend visit with Mother. The investigation was unable to reveal the cause of the bruising. Reunification was subsequently delayed in order to permit A.D.M. to finish the school year. During this period, Mother was reincarcerated as a result of a housing-related probation violation; during her reincarceration, Mother participated in visitation with the children until her visiting privileges were suspended due to a drug test yielding positive results for suboxone. The GAL then filed a second petition seeking involuntary termination of Mother's parental rights, citing both Mother's reincarceration and the revocation of Mother's visiting privileges. In response, Mother filed a Motion citing §2313(a) of the Adoption Act, requesting appointment of counsel for the children, noting that the GAL's position "may be adverse to the [children's] position" and averring the necessity of independent counsel. The trial court denied Mother's motion, citing the second sentence of §2313(a)—which gives the court the discretion to appoint counsel or a GAL to represent any child who has not reached 18 years of age and is subject to any other proceeding under this part whenever it is in the best interest of the child—and noting that because the GAL had an established relationship with the children, the GAL's representation would best suit the children's interests.

[1] A "corrected" opinion in this case was subsequently issued by the PA Supreme Court on May 23, 2017. This opinion will be discussed in the upcoming May Legal Report.

(**In re: Adoption of L.B.M., a Minor**, cont.)

Following a hearing on the GAL's petition, the trial court terminated Mother's parental rights. Mother appealed the order to the Superior Court, arguing that the trial court erred in denying Mother's motion for the appointment of counsel and abused its discretion in terminating her parental rights. The Superior Court affirmed the trial court's refusal to appoint counsel in addition to the dependency GAL. Mother sought review to the Pennsylvania Supreme Court; the Supreme Court reversed.

Issues:

1. Whether continued representation of a child by a dependency GAL through a contested involuntary termination of parental rights proceeding satisfies §2313(a) of the Adoption Act and allows the trial court to dispense with the appointment of counsel to represent the child; and
2. Whether the dependency GAL can continue to serve as counsel for the child in termination of parental rights proceedings.

Rationale:

In cases involving children, the law acknowledges two separate and distinct categories of interest: a child's legal interest, which is synonymous with the child's preferred outcome, and a child's best interest, which the trial court must determine. *See* In re: Adoption of S.P., 47 A.3d 817, 820 (Pa. 2012). "Legal interest" denotes that an attorney is to express the child's wishes to the court regardless of whether the attorney agrees with the child's recommendation; "[b]est interest denotes that a guardian ad litem is to express what the guardian ad litem believes is best for the child's care, protection, safety, and wholesome physical and mental development regardless of whether the child agrees." Pa.R.J.P. 1154 (comment). While the best-interest determination belongs to the court, statutes and rules guide the court and channel its discretion. In dependency cases, where the trial court is required to appoint a guardian ad litem (GAL), the Juvenile Act mandates that the GAL must be an attorney and, as such, is authorized by statute to represent both the child's legal interest and the child's best interest by making recommendations to the court regarding the child's placement and needs, as well as advising the court of the child's wishes (if ascertainable). 42 Pa.C.S.A. §6311(a), §6311(b). §6311(b)(9) also explicitly provides that any difference between the child's wishes and the GAL's recommendations "shall not be considered a conflict of interest". 42 Pa.C.S.A. §6311(b)(9). The Adoption Act, however, prescribes a different scheme for the representation of children in termination of parental rights and adoption cases and demonstrates the General Assembly's recognition of the difference between counsel and a GAL. §2313(a) states, in pertinent part,

> The court shall appoint counsel to represent the child in an involuntary termination proceeding when the proceeding is being contested by one or both of the parents. The court may appoint counsel or a guardian ad litem to represent any child who has not reached the age of 18 years and is subject to any other proceeding under this part whenever it is in the best interests of the child. 23 Pa.C.S.A. §2313(a).

The Supreme Court noted the General Assembly's use of the word "shall" in §2313(a), in relation to the appointment of counsel to represent the child in involuntary termination proceedings, and contrasted that with the use of the term "may" in the second sentence of §2313(a), in connection with the appointment of counsel or a guardian ad litem subject to "any other proceeding".

Having determined that the trial court must appoint counsel to represent the child's legal interest in a contested involuntary termination of parental rights proceeding, the Supreme Court then turned to the determination as to whether or not the dependency GAL could serve in that role.

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(**In re: Adoption of L.B.M., a Minor**, cont.)

Four members of the Court held that where a conflict of interest does not exist, the GAL attorney is sufficient to protect the child's interests and serve as counsel (concurring -Saylor and Todd; dissenting opinions -Baer and Mundy). Three members of the Court disagreed and noted that while there were strong arguments in favor of allowing the GAL into service as the child's counsel for the termination proceedings (including, but not limited to the GAL's familiarity with the case, and avoiding additional financial costs and delays for new counsel's preparation for representation), they were outweighed by the potential to breed confusion for the child as well as other parties and the increased risk of confusion posed by dual representation with conflicting obligations. They concluded that the dependency GAL should not be employed as the child's counsel in termination of parental rights proceedings.

PENNSYLVANIA SUPERIOR COURT

K.W. v. S.L & M.L. v. G.G.

Date of Decision: March 6, 2017
Cite: 1372 MDA 2016

Holding:

1. A parent has a fundamental constitutional right to parent their child which includes the right to be free from custody litigation involving third parties; deprivation of this right by a private adoption agency without the benefit of a hearing or other due process protections satisfies the collateral order doctrine enabling immediate appellate review.
2. Biological Parent's actions of informing a private adoption agency that he did not consent to adoption of his child (less than one month after being notified that the child was residing with prospective adoptive parents) and filing a custody complaint shortly thereafter demonstrate actions inconsistent with consent. As *in loco parentis* standing cannot be achieved without the consent and knowledge of and in disregard of the wishes of a parent, the trial court's conclusion of implied consent was improper and inconsistent with the law.

Facts and Procedural Posture:

In March 2015, Mother contacted Bethany Christian Services ("BCS") in order to place her unborn child for adoption; Mother did not inform Father of the pregnancy. In August 2015, two days after Mother gave birth to her daughter, BCS placed the child with S.L. and M.L. Mother had provided BCS with Father's name and Facebook profile, and they attempted to contact Father less than one month before the child's birth via Facebook messages and friend requests; Father did not respond to the messages, nor did he accept the friend requests. BCS's attempt to contact Father by calling the employer listed on his Facebook profile also failed. In September 2015, BCS located several of Father's last known addresses and sent letters to him; upon receipt of said letters, Father contacted BCS and requested a meeting. In October 2015, Father informed BCS that he did not want his child to be adopted and filed a complaint for custody, naming only Mother as the Defendant, in Centre County (where BCS's place of business is located), as well as an emergency petition requesting that BCS be ordered to provide him with the current whereabouts of his child. The Centre County trial court issued an order granting Father's emergency petition the same day it was filed, then later entered an order transferring the case to Lycoming County (the county in which Father resides) and an interim custody order awarding primary physical custody to S.L. and M.L., with partial physical custody with Father as agreed upon by the parties. S.L. and M.L. then filed a complaint for custody in York County (the county in which S.L., M.L., and the child reside), as well as a Notice of Appeal for the Centre County trial court's order transferring Father's custody case to Lycoming County—arguing that the trial court erred by failing to join them as a necessary party to the custody action and by failing to transfer the case to York County (as the home county of the child who was the subject of the custody action). Following numerous filings by both Father and S.L. and M.L., the York County trial court issued an order denying Father's preliminary objections, concluding that S.L. and M.L. stand *in loco parentis* with respect to the child because they assumed parental status and discharged parental duties for almost a year since shortly after her birth.

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(**K.W. v. S.L & M.L. v. G.G.**, cont.)

The trial court additionally concluded that Father gave implied consent to S.L. and M.L.'s *in loco parentis* standing because he did not express an interest in parenting the child until almost a month after being informed that she had been residing with a prospective adoptive family. Father appealed, arguing the trial court erred, as implied consent is not permissible under Pennsylvania law and he never expressly consented to S.L. and M.L.'s *in loco parentis* standing.

Issue:

1. Whether a biological parent's deprivation of parenting his child by a private adoption agency without the benefit of a hearing or other due process protections satisfies the collateral order doctrine enabling immediate appellate review; and
2. Whether consent to *in loco parentis* standing can be implied.

Rationale:

The Superior Court began by reviewing the law on whether the York County trial court's order granting S.L. and M.L. *in loco parentis* standing was appealable. "An appeal lies only from a final order, unless permitted by rule or statute." Stewart v. Foxworth, 65 A.3d 468, 471 (Pa. Super. 2013). Generally, a final order is one that disposes of all claims and parties. *See* Pa.R.A.P. 341(b). Pa.R.A.P. 313(a) provides that an appeal may be taken as of right from a collateral order of a lower court and that "a collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment of the case, the claim will be irreparably lost". Pa.R.A.P. 313(b). The Superior Court concluded that Father's claim would be irreparably lost if review were postponed until the entry of the final order. The court emphasized that standing in child custody cases is a matter of constitutional significance, as "the right to make decisions concerning the care, custody, and control of one's children is one of the oldest fundamental rights protected by the Due Process Clause of the Fourteenth Amendment", and that allowing third parties to seek custody of a child burdens the constitutional rights of parents. Hiller v. Fausey, 904 A.2d 875, 885 (Pa. 2006) (*citing* Troxel v. Granville, 530 U.S. 57 (2000); D.P. v. G.J.P., 146 A.3d 204, 210, 213-214 (Pa. 2016). The Superior Court stated that the fundamental constitutional right to parent a child embodied "a right too important to be denied review", and noted that if Father's appeal was quashed, Father would be subject to extensive litigation involving S.L. and M.L., which would not only result in a substantial financial burden to Father, but, more importantly, the loss of time caring for and bonding with his child; therefore, the collateral order doctrine was satisfied, enabling immediate appellate review.

The Superior Court then addressed the issue as to whether the York County trial court's granting of *in loco parentis* standing to S.L. and M.L. was legally permissible, and concluded it was not. Generally, the Child Custody Act does not permit third parties to seek custody of a child contrary to the wishes of that child's parents, and unless the person seeking custody is a parent, grandparent, or great-grandparent of the child, allows for standing only if the person is *in loco parentis*. 23. Pa.C.S.A. §5324(2). "The term *in loco parentis* literally means 'in the place of a parent'" Peters v. Costello, 891 A.2d 705, 710 (Pa. 2005) (*citing* Black's Law Dictionary, 791 (7th Ed. 1991)). "*In loco parentis* status cannot be achieved without the consent and knowledge of, and in disregard of the wishes of, a parent." E.W. v. T.S., 916 A.2d 1197, 1205 (Pa. 2007) (*citing* T.B. v. L.R.M., 786 A.2d 913, 916-917 (Pa. 2001). The Superior Court noted that the trial court's finding that Father gave his implied consent to S.L. and M.L.'s *in loco parentis* standing was in error, as neither the Pennsylvania Superior Court nor the Pennsylvania Supreme Court have held that consent to *in loco parentis* standing can be implied.

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(**K.W. v. S.L & M.L. v. G.G.**, cont.)

The Superior Court noted that Father did not expressly consent to said standing, and Father acted in a manner inconsistent with consent by promptly informing BCS that he did not want his child to be adopted less than a month after being notified that she was residing with prospective adoptive parents, as well as by filing a custody complain shortly thereafter. In reaching this conclusion, the Superior Court stressed that,

> Father has a fundamental constitutional right to care for Child, and that he is presumed to be a fit parent…If a parent is unfit, this Commonwealth has a well-established system for adjudicating children dependent, terminating parental rights, and placing children in pre-adoptive homes. However, these remedies are available only if a parent is provided essential due process protections, including notice, a hearing, and proof by clear and convincing evidence. Here, we note with disapproval, Father has been deprived of Child without any evidence in the record that he is an unfit parent, and without the benefit of due process protections.

The court noted that BCS' decision to place the child for adoption without Father's consent was particularly troubling; BCS made no effort at all to contact Father for a period of four months, and by the time they finally contacted Father, the child was already residing with S.L. and M.L. The Court remarked that as a result of BCS' inaction, Father had spent more than a year-and-a-half fighting for custody of his child, and that S.L. and M.L. had spent more than a year-and-a-half hoping to adopt the child. While the Superior Court was sympathetic to S.L. and M.L., who they noted have expended immense time and effort caring for the child and ensuring her well-being, their sympathies must give way to Father's constitutional rights. The order issued by the York County trial court was vacated, and the matter was remanded to the court to enter an order granting Father's preliminary objections to the custody complaint filed by S.L. and M.L. due to lack of standing.

In the Interest of Z.V., a Minor

Date of Decision: March 23, 2017
Cite: 1211 EDA 2016

Holding:
Trial Court's order changing the permanency goal from reunification to adoption without a hearing denied Mother the opportunity to present evidence; additionally, trial court could not properly consider whether the permanency plan developed for the child was appropriate or feasible, whether Mother was in compliance with the plan, and whether any progress had been made toward alleviating the circumstances necessitating the placement.

Facts and Procedural Posture:
Philadelphia County Department of Human Services ("DHS") received a referral and obtained an order of protective custody on the basis that Mother repeatedly hit Child with different implements. Following a shelter-care hearing, legal and physical custody of the child was granted to DHS, and Child was placed with maternal Grandmother. DHS then filed a dependency petition asserting aggravated circumstances, based on Mother's involuntary termination of parental rights as to Child's sibling. The trial court adjudicated Child as dependent, set a permanency plan of "return to guardian," and deferred ruling on the aggravated circumstances. At a permanency review hearing approximately seven months later, counsel for DHS indicated that the ruling on DHS's allegations of the existence of aggravated circumstances had previously been deferred, entered evidence of Mother's involuntary termination of parental rights as to Child's sibling, and requested that DHS be relieved of reunification efforts as to Mother. Following arguments from Mother's counsel, the trial court directed that no reasonable efforts were necessary, and upon testimony from the Community Umbrella Agency ("CUA") case manager, issued an order permanently suspending visitation between Mother and Child on the basis that visitation with Mother constituted a grave threat to child. A permanency review order was then issued memorializing the suspension of visitation; however, the court did not change the permanency goal of reunification, and said order directed the CUA to refer Mother for a parenting capacity evaluation and instructed Mother to continue with therapy.

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(**In the Interest of Z.V., a Minor**, cont.)

The court also issued a separate aggravated circumstances order finding the existence of aggravated circumstances and directing the cessation of efforts to preserve the family and reunify the child with Mother; the order further directed that a hearing be held within thirty days. A hearing was not held within thirty days. Approximately three months later at the next scheduled permanency review hearing, held before a different presiding judge, DHS recited the procedural history and called the CUA case manager to testify. During this testimony, the trial court judge and Mother's counsel engaged in an on-the-record discussion regarding Mother's right to make her own efforts despite court-ordered relief of DHS' affirmative obligation to make efforts toward reunification. As a result of this discussion, the trial court *sua sponte* changed the goal from reunification to adoption, over Mother's counsel's objection that a hearing had not been held on the issue of a goal change. Mother appealed.

Issue:
Whether the trial court erred in denying Mother the opportunity to present evidence and denying her right to a hearing under §6351(e) of the Juvenile Act when it changed the child's permanency goal from reunification to adoption without a hearing.

Rationale:
The Superior Court began by reviewing the relevant and applicable law related to hearings following a finding of aggravated circumstances. §6351(e)(2) indicates that:

> If the court finds from clear and convincing evidence that aggravated circumstances exist, the court shall determine whether or not reasonable efforts to prevent or eliminate the need for removing the child from the child's parent, guardian or custodian or to preserve and reunify the family shall be made or continue to be made and schedule a hearing as provided in paragraph (3). 42 Pa.C.S.A. §6351(e)(1)-(2).

Paragraph (3) of §6351(e) directs that,

> The court shall conduct permanency review hearings…[W]ithin 30 days of…a permanency hearing at which the court determined that aggravated circumstances exist and that reasonable efforts to prevent or eliminate the need to remove the child…or to preserve and reunify the family need not be made or continue to be made and the permanency plan for the child is incomplete or inconsistent with the court's determination[.] 42 Pa.C.S.A. §6351(e)(3)(ii)(B).

The Superior Court then reviewed the purposes of the hearing as found in §6351(f), including:

> (2) The appropriateness, feasibility, and extent of compliance with the permanency plan developed for the child;
> (3) The extent of progress made toward alleviating the circumstances which necessitate the original placement [, and]
> (4) The appropriateness and feasibility of the current placement goal for the child.
> 42 Pa.C.S.A. §6351(f)(2)-(4).

The court also noted the additional determinations to be made at this hearing under §6351 (f.1), which sets forth the "hierarchy of goals," and reviewed the concept and legal requirements of concurrent planning. The Superior Court concluded that the trial court's reliance upon the aggravated circumstances order in issuing a goal change to adoption was in error, as the court could not have properly considered the information required in §6351(f)(2)-(4). The trial court's failure to conduct an adequate hearing to address the goal change or to rule out Mother as a viable resource necessitated remand to the trial court for a new hearing.

In the Interest of K.S., a Minor

Date of Decision: March 29, 2017
Cite: 1491 MDA 2016

Holding:
Agency's failure to follow strict adherence to notice and service requirements and the trial court's subsequent adjudication of dependency and granting of legal and physical custody to the Agency constituted a violation of due process and abuse of discretion necessitating reversal.

Facts and Procedural Posture:
Northumberland County Children and Youth Services ("the Agency") became involved with K.S. and the family in 2009. Since then, the Agency had received eight additional referrals related to concerns about housing, lack of supervision, and the parents' drug and alcohol abuse. In July 2016, the current kinship care custodian of K.S. contacted the Agency and indicated that as a result of a physical confrontation, K.S. could no longer reside in his home. K.S. then shuffled placement with multiple relatives and kin. On August 9, 2016, the Agency filed a shelter-care application requesting temporary placement of K.S. in Agency custody. The day of and immediately prior to the shelter-care hearing, the Agency filed a Petition seeking a finding of Dependency. At the time of the hearing, Father, who was incarcerated in a state correctional institution, waived his right to counsel and participated via telephone. Mother (who was represented by Counsel), was serving time in Snyder County Prison as a Northumberland County Prisoner and, pursuant to Snyder County housing policy, was not permitted to attend nor participate in the hearing via other means. Mother's counsel requested a continuance due to Snyder County's refusal to allow Mother to participate, to which the Agency objected, arguing that Mother and Father's incarceration prevented them from being resource/placement options for the child. The request for a continuance was denied. Following testimony from an agency caseworker regarding history with the family, the Agency requested that the trial court proceed with the adjudicatory hearing. Over Mother's counsel's objection, the trial court complied with the Agency request and subsequently issued a Shelter Care Order granting legal and physical custody of K.S. to the Agency, as well as an Order adjudicating K.S. as dependent. Counsel for Mother appealed.

Issue:
Whether the trial court abused its discretion and violated Mother's right to due process in permitting the Agency to proceed on a Petition seeking Dependency despite the Agency's failure to follow the notice and service requirements proscribed by the Rules of Juvenile Court Procedure and the Juvenile Act.

Rationale:
Rule 1331 of the Pennsylvania Rules of Juvenile Court Procedure provides that upon the filing of a [dependency] petition, a copy of the petition shall be served promptly upon the child, the child's guardian, the child's attorney, the guardian's attorney, the attorney for the county agency, and the county agency; if the parent is not the child's guardian, the parent must also receive service of the dependency petition. Pa.R.J.C.P. 1331 (and comment). Notice of the adjudicatory hearing is governed by Rule 1361, which requires the trial court to provide notice of the hearing on a Petition for Dependency to the parents of the child. Pa.R.J.C.P. 1361. Additionally, Rule 1360 directs that the court "shall issue a summons compelling all parties to appear for the adjudicatory hearing", and that said summons set forth, in writing, the date, time and place of the adjudicatory hearing and include a copy of the petition unless the petition has already been served. Pa.R.J.C.P. 1360; *see also* 42 Pa.C.S.A. §6335. Said summons "shall be served in person or by certified mail, return receipt and first class mail, "and the serving party must file an affidavit of service". If the serving party does not file an affidavit of service, then "the serving party shall advise the court of what efforts were made to notify a person", and the court "may proceed to a hearing upon a showing of reasonable efforts to locate and notify all persons pursuant to Rule 1360". Pa.R.J.C.P. 1363(D). Prior to commencing the adjudicatory hearing, the trial court is required to ascertain whether the notice requirements of Rules 1360 and 1361 were met. Pa.R.J.C.P. 1406(A)(1)(a).

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(**In the Interest of K.S., a Minor**, cont.)

Additionally, the trial court's order scheduling the adjudicatory hearing for the same date and time as the shelter care hearing and the related notice were all entered in the record on the same date as the shelter care hearing, and therefore, could not have been provided to Mother prior to the commencement of a hearing on the petition pursuant to the requirements of Pa.R.J.P. 1361. Furthermore, while the record contained a written summons as is required by R. 1360, the summons was not accompanied by the requisite affidavit of service, nor was there any information in the record suggesting that Mother had been served either in person or by certified mail, and there was no information regarding whether reasonable efforts had been made to notify Mother of the proceeding. Finally, the trial court did not ascertain whether the requirements of Rules 1360 and 1361 had been met prior to commencing the adjudicatory hearing, as is required by Rule 1406(A)(1)(a). The trial court's argument—that the history of the family with the Agency, the confinement of both parents, and the acting-out behaviors of the child constituted exigent circumstances supporting its decision to proceed with the adjudicatory hearing despite Mother's inability to participate—was without merit, as such circumstances were not so dire as to warrant dispensing with the procedural rules and failing to afford Mother proper notice. For these reasons, the Superior Court concluded that the trial court abused its discretion in holding the adjudicatory hearing despite the Agency's failure to strictly adhere to the notice and service requirements and provisions, vacated the Dependency Order, and remanded the case for a new adjudicatory hearing in which Mother be afforded the right to participate.

SPOTLIGHT: SUPREME COURT OF THE UNITED STATES: YOUTH AND EDUCATON: IDEA

The Supreme Court of the United States recently reviewed the Individuals with Disabilities Education Act (IDEA) in the case of Endrew F. v. Douglas County School District, where, by unanimous opinion, the court declined to issue a bright-line rule for determining "when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act". Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. V. Rowley, 458 U.S. 176 (1982). Instead, the Supreme Court reiterated that the adequacy of a given Individualized Education Plan (IEP) turns on the unique circumstances of the child for whom it was created, with deference based on the application of expertise and the exercise of judgment by school authorities, whom the Act vests with responsibilities of critical importance to the life of a disabled child.

SPOTLIGHT: THIRD CIRCUIT: YOUTH AND EDUCATION: IDEA

The Third Circuit continues to hear cases under the Individuals with Disabilities Education Act (IDEA):

Brandywine Heights Area School District v. B.M.: 2017 WL 1173836

A.C. v. Scranton School District: 2017 WL 1162839

G.L. v. Saucon Valley School District: 2017 WL 1177175

E.D. v. Colonial School District: 2017 WL 1207919