STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of NICHOLAS PAPADELIS.

ROCHESTER COMMUNITY SCHOOLS,

Petitioner-Appellee,

v

NICHOLAS PAPADELIS,

Respondent-Appellant.

UNPUBLISHED
September 2, 2010

No. 291536
Oakland Circuit Court
LC No. 08-742003-DL

Before: WILDER, P.J., AND CAVANAGH AND SAAD, JJ.

PER CURIAM.

Respondent appeals as of right a trial court's order of disposition following a referee's recommendation for an adjudication of guilt for school incorrigibility, MCL 712A.2(a)(4).[1] We affirm.

[1] MCL 712A.2 provides in relevant part:

> The court has the following authority and jurisdiction:
>
> (a) Exclusive original jurisdiction superior to and regardless of the jurisdiction of another court in proceedings concerning a juvenile under 17 years of age who is found within the county if 1 or more of the following applies:
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> * * *
>
> (4) The juvenile willfully and repeatedly absents himself or herself from school or other learning program intended to meet the juvenile's educational needs, or repeatedly violates rules and regulations of the school or other learning program, and the court finds on the record that the juvenile, the juvenile's parent, guardian, or custodian, and school officials or learning program personnel have met on the juvenile's educational problems and educational counseling and alternative agency help have been sought. As used in this sub-subdivision only, "learning program" means an organized educational program that is appropriate, given the

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I. 34 CFR 300.535(a)

On appeal, respondent lists a series of unpreserved[2] complaints that he passingly suggests exceed the scope of a regulation accompanying the Individuals with Disabilities Education Act ("IDEA"), 34 CFR 300.535(a), which provides:

> Rule of construction. Nothing in this part prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or prevents State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability. [See also 20 USC 1415(k)(6)(A).]

Respondent fails to explain how these complaints allegedly resulted in unfairness or violations of his due process rights.

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. [*LME v ARS*, 261 Mich App 273, 286-287; 680 NW2d 902 (2004), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).]

Therefore, we conclude that respondent has abandoned these complaints on appeal.

Furthermore, even if respondent had not abandoned the complaints, he has not established plain error affecting his substantial rights. First, respondent relies on MCR 3.914(B)(1) in opposing petitioner's filing of the petition and the absence of a prosecutor as a neutral party. However, MCR 3.914(B)(1) provides, "Only the prosecuting attorney may request the court to take jurisdiction of a juvenile under MCL 712A.2(a)(1)." Because the school district requested the court take jurisdiction of respondent under MCL 712A.2(a)(4), MCL 3.914(B)(1) does not apply, and therefore, it was not error for petitioner to request the court take jurisdiction

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(…continued)

> age, intelligence, ability, and psychological limitations of a juvenile, in the subject areas of reading, spelling, mathematics, science, history, civics, writing, and English grammar.

[2] This Court reviews unpreserved arguments for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999); *People v Bauder*, 269 Mich App 174, 180; 712 NW2d 506 (2005).

> "We will reverse only if we determine that, although defendant was actually innocent, the plain error caused him to be convicted, or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, regardless of his innocence." [*People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).]

in this case. Second, respondent challenges petitioner's witnesses' credibility, but respondent's substantial rights were not violated because respondent was able to cross-examine these witnesses and introduce conflicting evidence at trial. Furthermore, "[q]uestions of credibility are left to the trier of fact and will not be resolved anew by this Court." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Third, respondent objects to the discovery procedures requiring him to obtain records necessary for his defense from petitioner. Respondent waived this argument by agreeing to reciprocal discovery before trial. See *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000) (waiver is an intentional relinquishment or abandonment of a known right).

II. MCR 3.914(A)

Respondent next argues that the trial court's order of disposition must be overturned because it failed to invoke MCR 3.914(A). This subrule provides: "On request of the court, the prosecuting attorney shall review the petition for legal sufficiency and shall appear at any child protective proceeding or any delinquency proceeding." Respondent does not demonstrate that the trial's court's failure to request review and appearance by the prosecuting attorney constitutes an error of discretion and there is no evidence that the failure affected respondent's substantial rights. As we conclude, *infra*, there was sufficient evidence to support an adjudication of guilt for school incorrigibility.

III. PETITION

Respondent challenges the referee's authorization of the petition. Respondent's unpreserved challenge is reviewed for plain error affecting his substantial rights. *Green*, 282 Mich App at 300-301. Pursuant to MCR 3.932(D), "The court may authorize a petition to be filed and docketed on the formal calendar if it appears to the court that formal court action is in the best interest of the juvenile and the public." Petitioner alleged that respondent, who had been receiving behavioral plan services for his disabilities (including Tourette's Disorder, Attention Deficit Hyperactivity Disorder, and Adjustment Disorder), nevertheless had repeated and escalating violations of school conduct. Furthermore, according to the petition, respondent's violations caused disturbances in other students' learning environments. Therefore, it was not plain error to conclude that it was in the best interest of respondent and the public to take jurisdiction of respondent.

Respondent further relies on 34 CFR 300.535(b), which provides:

> Transmittal of records. (1) An agency reporting a crime committed by a child with a disability must ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

Respondent claims that petitioner did not transmit the records to the court prior to authorizing the petition, adjudication and disposition. Again, respondent's reliance on 34 CFR 300.535 is unpreserved. *Green*, 282 Mich App at 300-301. The plain language of 34 CFR 300.535 does not require an authority to whom a crime is reported to obtain special education and disciplinary records prior to authorizing the petition. Furthermore, the record shows that the parties engaged

in reciprocal discovery of respondent's records and the referee admitted relevant records at trial. Therefore, respondent has not established error under 34 CFR 300.535.

Respondent next argues that petitioner failed to provide written notice of the filing of the petition before it was authorized. The referee conducted a preliminary inquiry, which is an "informal review . . . to determine appropriate action on a petition," MCR 3.903(A)(23), without a hearing and off the record pursuant to MCR 3.932(A). The trial court correctly concluded that because there was no hearing, respondent was not entitled to notice. See MCR 3.920(D)(1) ("Notice of a hearing must be given in writing or on the record at least 7 days before the hearing except as provided in subrules (C)(2) and (C)(3), or as otherwise provided in the rules."). Furthermore, unless the court directs the juvenile to appear for formal inquiry on the petition pursuant to MCR 3.932(A)(3), the juvenile is not required to be present. For these reasons, respondent's notice argument fails.

Respondent next challenges the format of the petition and maintains that it should have been dismissed. We disagree. Contrary to respondent's claim, the original petition was not defective. See MCL 712A.11 and MCR 3.931. Furthermore, respondent fails to support her claim for dismissal with authority. This Court has previously concluded, "summary disposition [of juvenile proceedings] is not permitted by our court rules and does not comport with due process." *In re PAP*, 247 Mich App 148, 155; 640 NW2d 880 (2001).

Respondent also claims that it was improper to allow petitioner to amend the petition. We disagree. MCL 712A.11(6) provides, "A petition or other court record may be amended at any stage of the proceedings as the ends of justice require." The amended petition clarified petitioner's allegations. At the time of the referee's order allowing amendment, respondent did not raise, and there was no record of, any particularized reasons to deny the motion to amend, such as undue delay, bad faith, or a dilatory motive. *PT Today, Inc v Comm'r of the Office of Financial & Ins Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006). Therefore, we conclude that the referee did not abuse its discretion by allowing the amendment. *Hamed v Wayne Co*, 284 Mich App 681, 699; 775 NW2d 1 (2009).

Respondent's final argument with respect to the petition is that he was not served with the amended petition until March 20, 2008, and the proceedings should have been dismissed for lack of service beforehand. Respondent fails to rationalize or cite authority explaining why an amended petition must be served before a certain date. Therefore, respondent has abandoned this argument on appeal. *LME*, 261 Mich App at 286-287.

IV. PRELIMINARY HEARING

Respondent argues that the trial court erred by denying his request for a preliminary hearing. Respondent was not detained and was therefore not entitled to such a hearing under MCR 3.934(A)(1) and MCR 3.935(A). Consequently, respondent has not demonstrated that the trial court's denial of his request for a preliminary hearing constituted an abuse of discretion. See *People v Mischley*, 164 Mich App 478, 482; 417 NW2d 537 (1987).

V. IDEA CLAIMS

Respondent argues that the filing of the petition constituted a change in educational placement and a manifestation determination should have been made within ten days of the filing according to the IDEA. Respondent's unpreserved argument is reviewed for plain error affecting his substantial rights. *Carines*, 460 Mich at 764; *Bauder*, 269 Mich App at 180.

20 USC 1415(k)(1) provides in relevant part:

> (E) Manifestation determination.
>
> (i) In general. Except as provided in subparagraph (B), within 10 school days of any decision to *change the placement of a child* with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine--
>
> (I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
>
> (II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.
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> (ii) Manifestation. If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability. [See 34 CFR 300.530(b)(5)(E) (emphasis added).]

We agree with petitioner's counterargument that collateral estoppel precludes respondent's argument regarding the manifestation determination. See *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001).[3] In any event, the filing of the petition was not a change in educational placement. Respondent was not removed from school for more than ten consecutive days, he had not been subjected to a series of removals totaling more than ten school days in one school year, and he was not expelled. See 34 CFR 300.356. Consequently, respondent was not entitled to a manifestation determination within ten days of the filing of the petition, and his related argument that petitioner violated notice requirements for changes in educational placements under 20 USC 1415(b)(3) also fails.

[3] An administrative law judge determined, in a separate administrative action filed by respondent's parents, that the juvenile petition did not constitute a change in educational placement. This determination was final, involved the same parties, or their privities, as the parties in the instant proceedings, and mutuality of estoppel exists.

VI. STAY

Respondent argues that the trial court's order of disposition must be overturned because the juvenile proceeding should have been stayed pending respondents' parents' administrative action. We disagree. As we noted earlier in this opinion, 20 USC 1415 (k)(6)(a) provides, "Nothing in this subchapter shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities." Consequently, the referee did not abuse its discretion when it refused to stay the proceedings.

VII. COMPETENCY EVALUATION/HEARING

Respondent raises several objections surrounding his competency evaluation. He alleges that he was not notified of the competency hearing, the referee failed to hold a hearing, and the referee based the competency ruling solely on an evaluator's report despite his request to cross-examine the evaluator. Respondent waived these challenges regarding competency. On the first day of trial, prior to the referee's competency determination, the referee questioned respondent's attorney regarding the competency matter.

> *Respondent's Attorney*. We disagree with the [competency] assessment. However, we are prepared to proceed today. My clients have a desire to have this matter resolved as soon as possible at this point.
>
> *Referee*. All Right. So you are [not] contesting competency any longer?
>
> *Respondent's Attorney*. We believe that we will be able to do that through the trial.

Although respondent's attorney subsequently requested an opportunity to cross-examine the evaluator regarding whether he utilized an adult or juvenile competency standard, *In re Carey*, 241 Mich App 222, 234; 615 NW2d 742 (2000), respondent had already abandoned that right and the referee proceeded accordingly. *Carter*, 462 Mich at 215, 219; see also See *People v Newton* (*After Remand*), 179 Mich App 484, 488; 446 NW2d 487 (1989) ("The determination of competency may rest solely on the report . . . if neither the state nor the defendant chooses to offer testimony."). However, even if we were to consider respondent's claims, we would conclude that the inability to cross-examine the evaluator was not outcome determinative. The evaluator considered respondent's disabilities, intellectual functioning, and learning comprehension when making the competency determination.

Respondent also argues that the referee erred by denying his request to "seal the records in regard to the competency hearing." By failing to cite any authority to support this argument, respondent has abandoned it on appeal. *LME*, 261 Mich App at 286-287.

VIII. TEACHER-STUDENT PRIVILEGE

Respondent argues that petitioner failed to obtain his parents' consent to disclose the log of incidents attached to the petition according to MCL 600.2165. Respondent's claim is unpreserved because he did not assert the teacher-student privilege under MCL 600.2165 below and the trial court did not address it. *Green*, 282 Mich App at 300-301.

[P]rivileges should be narrowly defined and the exceptions to them broadly construed." *People v Fisher*, 442 Mich 560, 574; 503 NW2d 50 (1992). The teacher-student privilege prevents a witness from disclosing any records or confidential communications unless the "testimony" is given with the consent of the person, or parents of the person, who confided or to whom the records relate. MCL 600.2165. Testimonial privileges, such as the teacher-student privilege, only restrict testimony regarding privileged communications by a sworn witness and the introduction of privileged communications by other means is not precluded. See *id.* at 575. Because the teacher-student privilege restricts testimony and does not apply to the pleadings stage of these proceedings, respondent has not demonstrated plain error with respect to the incident log attached to the petition.

IX. ADMISSIBILITY OF EVIDENCE

Respondent filed a motion in limine to exclude evidence of events occurring after December 18, 2007, the date of the original petition. Respondent claims that the referee abused its discretion by instead excluding evidence of events occurring after February 25, 2008, the date of the amended petition. Because the amendment formally altered the petition, see *Citizens Protecting Michigan's Constitution v Sec'y of State*, 280 Mich App 273; 761 NW2d 210 (2008) ('"amend' means "to alter (as a motion, bill, or law) formally by modification, deletion, or addition"), respondent's reliance on the original petition was misguided, and it was within the referee's discretion to exclude evidence considering undue delay, waste of time, or needless presentation of cumulative evidence, MRE 403.[4]

Respondent argues that the trial court erred by entering an order of disposition following the referee's recommendation because the referee failed to qualify a special education teacher, Jennifer Devine, as an expert witness.

MRE 702 governs the admissibility of expert testimony. That rule provides:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

[4] In a related argument, respondent argues that the trial court's reliance on the date of the amended petition did not comply with the relation-back doctrine under MCR 2.118(D). However, "[t]he doctrine of relation back was invented by the courts to associate the amended matter with the original pleading so that it would not be barred by the statute of limitation." *Smith v Henry Ford Hosp*, 219 Mich App 555, 558; 557 NW2d 154 (1996). Because respondent does not argue that a statute of limitations question arose as a result of the amendment, MCR 2.118(D) is inapposite.

The proponent of expert testimony bears the burden of proving that a witness's testimony satisfies these criteria.

Respondent offered Devine as an expert to testify that respondent can behave in a school setting if given the proper accommodations and modifications. The referee abused its discretion in failing to qualify Devine as an expert to testify for this purpose in light of her education, experience, and implementation of a plan with respondent. MRE 702. Regardless, the referee's abuse of discretion was harmless. MCL 769.26. Evidence that respondent can behave in a school setting if given the proper accommodations and modifications would not have assisted the referee to determine facts in issue, MRE 702, namely whether respondent repeatedly violated school rules and regulations and whether the necessary parties met and sought alternative help. See MCL 712A.2(a)(4).

Respondent also offered Devine as an expert to testify regarding whether the allegations in the petition related to respondent's disabilities or incorrigibility. Based on voir dire, it was not outside the range of principled outcomes for the referee to conclude that it could not determine whether Devine could reliably testify for the stated purpose. *Gilbert*, 470 Mich at 779. Furthermore, this testimony would not have assisted the referee to determine facts in issue because the plain language of the MCL 712A.2(a)(4) does not distinguish between willful violations of rules and regulations and violations related to a juvenile's disability.

Respondent also argues that the trial court erred by entering an order of disposition following the referee's recommendation because the referee failed to adjourn the proceedings for Dr. Jon Markey or Dr. John McCaskill to testify regarding the relationship between the allegations in the petition and respondent's disabilities. Even assuming the referee abused its discretion by denying the motion, the error was harmless. Petitioner stipulated to the admission of a letter from Dr. Markey, which included information regarding the relationship between the allegations and the disabilities, MCR 2.503(C)(3),[5] and, as we concluded above, MCL 712A.2(a)(4) does not exempt violations resulting from a juvenile's disability so the doctors' testimony would not have assisted the referee to determine facts in issue.

Respondent's final evidentiary issue on appeal is that the referee erred by admitting petitioner's "records" into evidence. Respondent generally argues that the "records" constituted hearsay, and were created by petitioner, kept by petitioner, and relied on by petitioner for the trial, thereby indicating a lack of trustworthiness. At least 15 of petitioner's exhibits were admitted at trial. Because respondent fails to specifically identify the exhibits at issue here and analyze whether any of them constituted hearsay, respondent's argument is abandoned. *LME*, 261 Mich App at 286-287.

[5] MCR 2.503(C)(3) provides, "If the testimony or the evidence would be admissible in the proceeding, and the adverse party stipulates in writing or on the record that it is to be considered as actually given in the proceeding, there may be no adjournment unless the court deems an adjournment necessary."

X. REQUEST FOR DIRECTED VERDICT OF ACQUITTAL

Respondent argues that the referee erred by failing to grant his motion for directed verdict at the close of petitioner's case in chief. This Court reviews de novo a court's decision on a motion for directed verdict. *Roberts v Saffell*, 280 Mich App 397, 401; 760 NW2d 715 (2008). This Court views the evidence presented up to the point of the motion and all legitimate inferences from the evidence in the light most favorable to the nonmoving party. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ. *Roberts*, 280 Mich App at 401.

Respondent maintains that, at the close of petitioner's case in chief, there was no medical testimony to establish that respondent's violations of rules and regulations were not related to or prompted by his disabilities. Again, MCL 712A.2(a)(4) does not require the violations to be willful, nor does it exempt violations resulting from a juvenile's disability, and IDEA does not preclude a school from reporting a crime committed by a child with a disability, 34 CFR 300.535(a). Regardless, school officials repeatedly testified regarding a disconnect between respondent's disabilities and his behaviors. Thus, the referee did not err by denying respondent's motion for directed verdict. *Roberts*, 280 Mich App at 401.

Respondent also argues the referee should have directed a verdict of acquittal, at the end of respondent's case in chief, because Dr. Markey's letter and his parents' testimony presented that the violations were related to his disabilities. Even if petitioner had been required to prove a disconnect between respondent's disabilities and his behaviors under MCL 712A.2(a)(4), petitioner did so and conflicting evidence from school officials, Dr. Markey, and respondent's parents must be resolved in favor of petitioner on appeal.[6] See *People v Fletcher*, 260 Mich App 531, 561-562; 679 NW2d 127 (2004).

XI. Sufficiency

Respondent argues that there was insufficient evidence to support the referee's adjudication of guilt under MCL 712A.2(a)(4), and that the trial court erred by affirming the referee's recommendations. We disagree. This Court reviews sufficiency of the evidence claims de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). Therefore, this Court "must view the evidence in a light most favorable to the [petitioner] and determine whether any rational trier of fact could have found that the essential elements of the [offense] were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

[6] In this same regard, respondent argues that the referee erred by substituting his personal opinion regarding respondent's ability to control his behavior for the evidence presented. Noting his observation was not evidence, the referee stated that respondent behaved well during the entire trial indicating that respondent could concentrate for periods of times without misbehaving. The record does not conflict with the referee's observation. Notably, respondent's parents and teacher each testified regarding respondent's ability to control his behavior.

Again, an adjudication of guilt under MCL 712A.2(a)(4) requires a petitioner to prove:

> The juvenile . . . *repeatedly violates rules and regulations of the school or other learning program*, and *the court finds on the record that the juvenile, the juvenile's parent, guardian, or custodian, and school officials or learning program personnel have met on the juvenile's educational problems and educational counseling and alternative agency help have been sought*. [Emphasis added.]

Respondent argues that petitioner failed to meet its burden of proof regarding whether he "willfully and repeatedly absent[ed] himself . . . from school." However, willful and repeated absenteeism was not at issue at trial and did not serve as a basis for the referee's adjudication of guilt. Therefore, respondent's arguments with respect to absenteeism are inapposite.

Next, respondent argues that petitioner failed to meet its burden of proof regarding whether he "repeatedly violate[d] rules and regulations of the school" and "the juvenile, the juvenile's parent, guardian, or custodian, and school officials or learning program personnel have met on the juvenile's educational problems and educational counseling and alternative agency help have been sought." The record is replete with violations of the school's rules and regulations, which resulted in various repercussions including ten days of suspension in each of his seventh and eighth grade school years.[7] Educational counseling and alternative agency help was sought. Respondent attended the Learning Center for additional assistance during downtimes at school, his behavior intervention plans were amended regularly, and petitioner developed a 504 plan. Furthermore, May and other school staff, including a teacher and learning consultant, frequently met informally with respondent and his parents to address respondent's behavior and strategies for the future. School officials even discussed behavioral recommendations with Dr. Markey, who had independently evaluated respondent upon his parents' request.[8] Viewing the evidence in the light most favorable to petitioner, there was sufficient evidence to support the adjudication of guilt under MCL 712A.2(a)(4).

XI. Bias, Standard of Review, and Impairment of Right to Defend an Action

Respondent argues that the referee demonstrated bias against him, adopted inconsistent standards of review, and allotted inequitable time to respondent for his defense. However, respondent has abandoned these arguments on appeal because they are not included in the

[7] Respondent attempts to undercut the violations presented by petitioner by arguing that May only personally witnessed three of the incidents. However, May personally investigated all violations resulting in suspension, the suspension notices summarizing the incidents were admitted into evidence at trial, and respondent's teacher, learning consultant, and counselor each testified regarding their personal observations of respondent's misbehavior.

[8] Respondent disregards these efforts and focuses on petitioner's failure to schedule an IEP meeting, in response to his parents' October request for special education, until January 2008, after filing the original petition. The plain language of the incorrigibility statute, however, does not limit "alternative agency help" to IEPs. Also, an administrative law judge concluded that any delay with respect to the IEP process resulted from the conduct of respondent's parents.

statement of questions presented. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Henry William Saad