

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 28, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1255

Cir. Ct. No. 2006CV210

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

OCONOMOWOC AREA SCHOOL DISTRICT,

PLAINTIFF-APPELLANT,

V.

**ELIZABETH BURMASTER, WINNECONNE COMMUNITY SCHOOL DISTRICT,
WINNEBAGO COUNTY, OCONOMOWOC DEVELOPMENTAL TRAINING CENTER
OF WISCONSIN, LLC, JAMES WACHTER AND B. W.,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
DAVID T. FLANAGAN, III, Judge. *Affirmed.*

Before Dykman, Lundsten and Bridge, JJ.

¶1 PER CURIAM. The Oconomowoc Area School District (OSD) appeals from an order dismissing its complaint against several defendants,

including the State Superintendent of Public Instruction. The dispute is over who must pay the education expenses of B.W., a disabled individual who lived in a community based residential facility in Oconomowoc and attended school there, but whose family home was in another school district in a different county. The trial court concluded that under applicable law, OSD is responsible for B.W.'s education costs. We agree and therefore affirm.

¶2 The trial court decided the case on the pleadings. On review, we therefore accept all facts alleged in the complaint as true. See *Beloit Liquidating Trust v. Grade (Beloit II)*, 2004 WI 39, ¶17, 270 Wis. 2d 356, 677 N.W.2d 298. Those facts include the following. B.W. lived in Winneconne, Wisconsin, with his father, and attended public school there until 2002, when a Winnebago County CHIPS proceeding resulted in his placement at a children's residential care center operated by the Oconomowoc Development Training Center (ODTC) in Oconomowoc. While at the center, B.W. attended the ODTC private school. WISCONSIN STAT. § 115.81 (2005-06)¹ required Winnebago County to pay B.W.'s educational costs while living in the residential care center, and Winnebago County did pay those costs.

¶3 In October 2004, two days before B.W.'s eighteenth birthday, the Winnebago Circuit Court appointed his father as his guardian. When B.W. turned eighteen, his placement at the residential care center ended, and his guardian/father allowed him to transfer to a community based residential facility in Oconomowoc. He continued to attend the ODTC school. However,

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Winnebago County discontinued its payments for B.W.'s schooling, taking the position that the OSD was now responsible as the school district in which B.W. resided. OSD denied responsibility, and the matter eventually came before the Department of Public Instruction as a dispute between the Winneconne School District and OSD. The latter commenced this lawsuit after the DPI concluded that OSD was responsible for B.W.'s education costs at ODTTC incurred after his eighteenth birthday.

¶4 There is no dispute that, pursuant to WIS. STAT. §§ 115.758-115.90, B.W. was a child with disabilities entitled to an education at public expense consistent with his or her needs, including placement in a private school. There is also no dispute that the ODTTC school was an appropriate educational facility for B.W. The only dispute is over who must pay for the schooling he received there after his eighteenth birthday.

¶5 Under WIS. STAT. §§ 115.76(10) and 115.77(1m)(b), the “local education agency,” is responsible for providing the disabled child with a free, appropriate public education as required by state and federal law. In this case, because B.W. was not in a State-operated facility, the local education agency was the school district within which he “resided.” § 115.76(10). Under Wisconsin’s long-standing rule, a child resides in a district if the child actually lives there and the child’s primary reason for living there is other than obtaining an education in that district. *State ex rel. School District No. 1 of Waukesha v. Thayer*, 74 Wis. 48, 59, 41 N.W. 1014 (1889).

¶6 OSD agrees that B.W. resided at the community based residential facility for reasons other than attending school in Oconomowoc. However, OSD contends that *Thayer* does not apply to B.W. because: (1) he is beyond the age of

compulsory school attendance; (2) he is a person with disabilities; (3) he lived in a residential care facility; (4) he had the option of attending a public school while in Oconomowoc; and (5) his father did not enroll him in ODTC in order to obtain a free public education. We have considered these distinctions and conclude they make no difference. *Thayer* remains the bright line rule for determining school cost responsibility in Wisconsin for those, like B.W., entitled to a publicly paid education. OSD cites WIS. STAT. § 115.81(1)(b) as an exception, but this applies to children under eighteen living in a residential care center, so once B.W. turned eighteen, this exception no longer applied.

¶7 OSD also cites *Calumet County Dep't of Human Servs. v. Randall H.*, 2002 WI 126, 257 Wis. 2d 57, 653 N.W.2d 503, for the proposition that if a disabled child's residential placement is for reasons other than education, then the local education agency need not pay for the child's education. However, OSD misreads *Randall H.*, which holds only that a disabled child's entitlement to a free appropriate public education excludes the non-educational costs of a residential or institutional placement, if the placement is for reasons other than education. *Id.*, ¶¶23-24, 29. Those non-education costs are not at issue in this case. *Randall H.* does not, therefore, support OSD's position nor create an exception to the local education agency's obligation to pay the child's direct educational expenses.

¶8 We conclude, as did the trial court, that under the applicable law OSD is the district within which B.W. resided and must therefore bear the cost of his education at ODTC after his eighteenth birthday.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

