

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

BEFORE THE PENNSYLVANIA OFFICE OF DISPUTE RESOLUTION

K.O.,  
Student by [redacted] Mother,  
Petitioner,

v

File No. 02502/11-12AS

James Gerl,  
Hearing Officer

Shikellamy School District,

Respondent.

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**ORDER**

This matter is before me upon respondent's Motion to Dismiss. Respondent requests dismissal because it contends that the student's mother who filed the due process complaint lacks the legal capacity to bring a due process complaint.

The student's mother filed a response to the motion. The student's father filed a response to the mother's response, joining the Respondent's request for dismissal. Respondent also filed a response to the mother's

pleading. The student's mother subsequently filed a reply. The school district filed its third brief, a response to the mother's reply. The father filed an additional response. The mother filed a response to the school district's third brief. All filings and all attached papers and supporting documents have been considered.

### Procedural History

The student's mother filed a handwritten note as a due process complaint with the school district dated November 7, 2011. The due process complaint was provided to respondent by the Office of Dispute Resolution on November 11, 2011. Respondent filed a challenge to the sufficiency of the complaint on November 23, 2011. IDEA §615(c)(2)(C). The sufficiency challenge was granted on November 28, 2011 and the student's mother was given until January 6, 2012 to file an amended complaint. IDEA §§615(b)(7)(A); 615(c)(2)(D). Petitioner was advised that if an amended complaint was received by the deadline, the timelines for this case would begin again with the filing of the amended complaint. 34 C.F.R. §300.508(d)(4). The student's mother filed an amended complaint on January 3, 2012 along with a stay put motion.

## Discussion

Respondent contends that the student's mother lacks standing to pursue a due process complaint because her educational decision making rights have been terminated by a court. The student's father also asks that the instant due process complaint be dismissed because he has sole custody of the student and [the student's] educational decision making rights and because the student is now residing with him and attending school in Illinois.

Under the federal regulations implementing the Individuals with Disabilities Education Act, 20 U.S.C. §1400, et seq, (hereafter sometimes referred to as "IDEA") only a "parent" or a public agency may file and pursue a due process hearing. 34 C.F.R. §300.507(a). Parent is defined as follows:

(a) *Parent* means—

- (1) A biological or adoptive parent of a child;
- (2) A foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;
- (3) A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State);
- (4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or
- (5) A surrogate parent who has been appointed in accordance with § 300.519 or section 639(a)(5) of the Act.

(b) (1) Except as provided in paragraph (b)(2) of this section, the biological or adoptive parent, when attempting to act as the parent under this part and when more than one party is qualified under

paragraph (a) of this section to act as a parent, must be presumed to be the parent for purposes of this section unless the biological or adoptive parent does not have legal authority to make educational decisions for the child.

(2) If a judicial decree or order identifies a specific person or persons under paragraphs (a)(1) through (4) of this section to act as the "parent" of a child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the "parent" for purposes of this section.

34 C.F.R. §300.30

In order to be a "parent" for purposes of pursuing a due process complaint under IDEA, the key question is whether the parent has the authority to make educational decisions for the child. See, Fuentes v. Board of Education of the City of New York 589 F.3d 46, 52 IDELR 152 (2d Cir. 6/15/2009)

The participants to this case have submitted a number of Court Orders that are relevant to the resolution of this issue. On September 12, 2011, the Court of Common Pleas of [redacted] County, Pennsylvania in No. [redacted], issued an Order finding that while the student had been in the custody of [the student's] mother, [the student] had not received proper parental care with regard to [the student's] educational and medical needs. The court then awarded custody to the student's father. On page 6 of the Order the Court orders as follows: "Commencing on December 15, 2011, Father shall be permitted to solely make all decisions regarding major events

in the child's life including, but not limited to *education*, medical, therapeutic, religious, legal and extracurricular decisions..." (emphasis added).

On October 26, 2011, the Juvenile Division of the Court of Common Pleas of [redacted] County, Pennsylvania, in Docket NO: [redacted], entered an Order removing the student from the home of [the student's] mother based upon findings of abuse, neglect and/or dependency. The Court made a specific finding that it was evident the student's mother was not meeting the educational needs of the student. The Court specifically ordered that the mother's educational rights be severed. The student was placed in the custody of a public agency, the [redacted] County Children and Youth Services.

On December 8, 2011, the Juvenile Division of the Court of Common Pleas of [redacted] County, Pennsylvania, in Docket NO: [redacted] entered an Order. In said order, the Court finds that the student's father had returned from a civilian assignment with the Department of Defense in [redacted] and presented himself as a ready, willing and able to be a parent. Accordingly, the Court vacated and dismissed the previous order in the juvenile matter and noted that the father now had sole legal and primary physical custody of the student. The court specifically notes in

footnote 2 and the accompanying text that the September 12, 2011 Order in No. [redacted], which is referenced above, is now controlling.

Thus since December 15, 2011, the student's mother's educational decision making rights for the student have been terminated (by the controlling September 12, 2011 Court Order in No. [redacted].)

The mother argues herein that the controlling date for standing is the date that the due process complaint was filed. This argument misses the point. The question is whether the mother has standing to pursue this due process complaint and to obtain relief if she prevails. The issue is not limited to the filing of the complaint.

It is clear from the court order of September 12, 2011 that is quoted above that the student's mother has had no educational decision making rights for the student since December 15, 2011. Because the mother does not now have legal authority to make educational decisions for the child, the preference cited by the mother for the biological or adoptive parent in 34 C.F.R. §300.30(b)(1) does not apply. Rather because a judicial decree designates the father as the sole person to make educational decisions for the student, he is the only "parent" under IDEA. 34 C.F.R. §300.30(b)(2).

Accordingly, the mother is not the “parent” for purposes of IDEA, and she cannot pursue a due process hearing or obtain relief under IDEA on behalf of the student. The motion to dismiss must be granted.

The mother’s argument that she had educational decision making authority at the time that the complaint was filed, and therefore, she may pursue the due process complaint is rejected. It is clear that the mother is not now a “parent” for purposes of IDEA and, therefore, she lacks standing to pursue this action.

In her filings on this issue, the mother states that the September 12, 2011 court order is being appealed. If a reviewing court reverses or modifies the court order to provide future educational decision making rights for the mother, she will at that time become a “parent” as defined under IDEA and she will then be able to access the due process system. Until then, she is not a “parent” as defined under IDEA, and she cannot pursue a due process complaint.

Much of the discussion submitted by both the mother and the father focused upon whom had custody of the student. For purposes of IDEA, however, it the right to make educational decisions for the student, and not custody, that governs. In this case the mother does not have

educational decision making authority for the student, and accordingly may not pursue a due process complaint on her behalf.

The mother also cites J.C. v Slippery Rock Area School District 54 IDELR 127 (PA. Commonwealth Ct 3/25/2010) in support of her position. The case is inapposite. In that case, the Court ruled that the incarceration of the parent and temporary loss of custody did not terminate her educational decision making authority. The Court noted that there had been no ruling revoking the parent's educational decision making rights. Here, a court has entered an order (that is not a temporary order) terminating the mother's educational decision making rights and providing the father with the sole authority to make such decisions.

From the documents submitted by the parties, it is clear that the mother is not a parent for purposes of IDEA. Accordingly, the mother does not have standing to pursue the instant due process complaint on behalf of the student.



The motion to dismiss is hereby granted. This matter is dismissed with prejudice.

**IT IS SO ORDERED.**

Dated: January 28, 2012

/s/ James Gerl  
James Gerl, CHO  
Hearing Officer