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Student, 6514/05-06 AS

Name/File Number

Xx/xx/xx

Date of Birth

06/20/06

Date of Hearing

Closed

Type of Hearing

Parties to the Hearing:

Mr. Parent

Ms. Parent

Parent(s) Name(s)

06/23/06

Date Transcript Received

Philadelphia City

School District

07/08/06

Date of Decision

Office of General Counsel

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Philadelphia, PA 19130

School District Address

Anne L. Carroll, Esq.

Hearing Officer Name

Kenneth Cooper, Esq.

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School District Counsel & Address

Signature of Hearing Officer

I. **BACKGROUND**

On April 24, 2006, the Mother of Student filed a request for a due process hearing to seek a private school placement by the Philadelphia City School District. A hearing on that request was scheduled for June 8, 2006.

On May 19, 2006 the hearing officer received a letter from counsel for the School District, Kenneth Cooper, Esq., requesting dismissal of the due process hearing request or a continuance of the hearing date for two reasons: 1) The School District expected that Student's Mother would lose legal custody of the student at a hearing scheduled for June 9, 2006 in the Court of Common Pleas; 2) the report of an educational evaluation ordered as a result of a prior hearing was being completed, after which an IEP meeting would be held to develop a program for the 2006/2007 school year.

A decision on the School District's motions was issued on May 25, 2006, canceling the June 8 hearing and concluding that it was impossible to entirely grant or deny the School District's motion without a record. A new due process hearing session, therefore, was scheduled subsequent to the custody hearing and was limited to three issues: 1) Whether the Mother retained the right to proceed with the due process hearing in light of the outcome of the custody hearing in the Court of Common Pleas; 2) whether the Father intended to proceed with the hearing if he were granted sole legal custody of the student; 3) whether the due process hearing request should be dismissed as premature, in that an IEP meeting had not yet been held to discuss the new evaluation results and develop a program/placement for the Student based upon the evaluation.

II. FINDINGS OF FACT

1. Student is [a pre-teenaged] child, born xx/xx/xx. He is a resident of the School District and is eligible for special education services. (N.T. p.17, S-3, S-4, S-6).
2. Student has a current diagnosis of learning disability in accordance with Federal and State Standards. 34 C.F.R. §300.7(a)(1), (c)(10); 22 Pa. Code §14.102 (2)(ii); (S-3, S-4, S-6).
3. Student's Mother requested a due process hearing to seek a private school placement for him. (HO-2).
4. By letter dated May 19, 2006, the School District moved to dismiss the due process hearing requested by Student's Mother, based in part upon an upcoming family court hearing in which legal custody of the Student was expected to be vested entirely in the Father. (HO-1)
5. As additional grounds for dismissal, the School District cited an ongoing evaluation of the Student which was undertaken in accordance with a due process hearing decision dated February 20, 2006 whereby the School District was ordered to conduct a comprehensive evaluation of Student, including psycho-educational testing and a behavioral assessment. (N.T. pp.25, 26; S-3).
6. On May 25, 2006 a decision on the School District's motion was issued, continuing the due process hearing then scheduled for June 8, 2006 to a date subsequent to the Court of Common Pleas custody hearing. (N.T. p 6; HO-2)
7. On June 9, 2006 the Court of Common Pleas, Family Court Division, entered an order granting Student's Father full legal custody and appointing him "the sole decision maker regarding special education issues." (N.T. p. 17; S-1)
8. In light of the introduction of the court order into the record of the June 20 due process hearing, the Parents were informed on the record that Mother no longer had the authority to proceed with the due process hearing she had requested. (N.T. pp.20– 22)
9. The Mother stated that Student's Father had delegated to her the authority to proceed with the hearing and continues to deal with the special education issues. (N.T. p. 23)
10. The Parents were informed on the record that only a Parent with legal custody, or an attorney is permitted to represent the interests of a child in IDEA due process proceedings. (N.T. pp. 23, 24)
11. Evaluations of Student as ordered by the previous hearing officer were completed in March and May 2006. (N.T. p. 31, 33; S-4, S-6).

12. The School District sent Student's Father an invitation to participate in an IEP meeting on June 19, 2006, but the IEP meeting was not held because Student's Father did not attend. (N.T. pp. 34; S-9).
13. Although the Father ultimately agreed to participate in an IEP meeting for Student, he opposed the School District's request to dismiss the due process hearing request filed by Student's Mother because he is concerned about Student's lack of educational progress, believes that Student needs more intensive services than the School District has provided so far, and believes that a private school placement will allow Student to make progress. (N.T. pp. 23, 41, 62, 63, 67, 79, 84, 85, 87)
14. During the discussion of the need for Father to participate in an IEP meeting and whether the pending due process hearing request should be dismissed or postponed until the completion of the IEP process, the Mother became disruptive, interrupting both the Father and the Hearing Officer repeatedly, attempting to give the Father legal advice concerning the rights and obligations of the parties under the IDEA statute and insisting that a due process hearing concerning her request for a private school placement be scheduled immediately. (N.T. pp. 29, 30, 31, 38, 41– 44, 46, 47, 52)
15. Since Mother refused to refrain from speaking when requested to do so and continued to interrupt the remarks or testimony of other participants whenever she disagreed with them, she was ultimately escorted from the hearing room by School District security officers at the direction of the hearing officer. (N.T. pp. 47, 48, 52, 53)

III. ISSUES

1. Who has the right to pursue a due process hearing and otherwise make special education decisions on behalf of Student?
2. Should the pending due process hearing request be dismissed due to the incomplete IEP process?

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Effect of the Custody Decision

In 20 U.S.C. §1415(b)(1), the IDEA statute provides that the parents of a child with a disability have the following rights: 1) to examine the child's records; 2) to participate in meetings with respect to the identification, evaluation, and educational program and placement of the child ; 3) to obtain an independent evaluation of the child. In addition, under §1415(b)(6),

the parents also have the right to initiate a due process hearing relating to the identification, evaluation, and educational program and placement of a child with a disability.

The IDEA statute also specifies who is considered a “parent” by defining the term as:

- A) a natural, adoptive or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent);
- (B) a guardian (but not the State if the child is a ward of the State);
- C) an individual acting in the place of a natural 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
- (D) except as used in subsections 615(b)(2) and 639(a)(5) an individual assigned under either of those sections to be a surrogate parent.

20 U.S.C. §1401(23). In interpreting the IDEA definition of “parent,” the Appeals Panel has made it quite clear that both natural parents ordinarily have an equal right to participate in all aspects of educational planning and dispute resolution for IDEA eligible students, and to begin such participation at any time, even if one natural parent was not previously involved in those matters. In addition, it is clear that physical custody alone does not impact a parent’s right to request, pursue, and/or participate in a due process hearing. *See, e.g., In Re: The Educational Assignment of T.C.*, Special Education Opinion No. 1231(Apr. 18, 2002); *In Re: The Educational Assignment of T.L.*, Special Education Opinion No.1167 (Aug. 23 2001); *In Re: The Educational Assignment of K.O.*, Special Education Opinion No.1094 (Feb. 2, 2001).

On the other hand, however, the same Appeals Panel decisions hold that a state court order which broadly divests a natural parent of legal custody, or more narrowly gives one parent the right to make educational decisions for a child to the exclusion of the other, terminates the right of the parent who loses legal custody or educational decision-making authority to request and pursue a due process hearing. Notwithstanding the continuing natural relationship between parent and child, therefore, a mother or father who loses legal custody and/or the right to make

special education decisions under a valid court order no longer has the rights given to parents under the IDEA statute. *In Re: The Educational Assignment of T.C.*, Special Education Opinion No. 1231(Apr. 18, 2002).

The June 9, 2006 order of the Court of Common Pleas terminated Student's Mother's right to legal custody, in general, and specifically divested her of the right to make special education decisions on his behalf. (F.F. #7). Pursuant to the same order, such rights are now vested entirely in Student's Father. (*Id.*). In this case, therefore, the rights that both Parents ordinarily have under the IDEA statute to initiate and pursue a due process hearing on Student's behalf have been altered by the Court of Common Pleas order. Lacking legal custody and quite explicitly, the right to make special education decisions for Student, the Mother no longer has the authority to pursue the due process hearing she initiated in April 2006. Until and unless the June 9 custody order is either rescinded by the Court of Common Pleas or reversed on appeal, only Student's Father has the right to initiate and/or pursue a due process hearing. In addition, only Student's Father has the right to make binding educational decisions on his behalf, *e.g.*, to accept or reject the recently completed evaluation of Student and to accept or reject a NOREP offered by the School District. *In Re: The Educational Assignment of T.C.*

It must be noted that Student's Mother attempted to nullify the court order via her participation in the June 20, 2006 due process hearing. Once the June 9, 2006 order of the Court of Common Pleas was received into evidence, the conclusion that the Mother is no longer a decision-maker under IDEA was announced on the record. In order to proceed with the second issue to be determined at the hearing, *i.e.*, whether the Father intended to proceed with the same due process hearing that Mother had requested in April. (F.F. #8) The Mother, however,

immediately announced that Student's Father wanted her to continue with the hearing and with making decisions concerning Student's special education. As explained on the record, however, permitting that would be a violation of law. (N.T. pp. 23, 24). As noted above, the Pennsylvania Special Education Appeals Panel has consistently held that the authority of a parent to pursue a due process hearing for an eligible student is governed by the custody orders of the Pennsylvania courts. Parents do not have the right to disregard the explicit terms of the custody order governing legal custody of Student and the right to make special education decisions for him, and neither does the hearing officer. Allowing the Mother to make the decision to continue with the due process hearing and represent Student would violate the custody order presently in effect, even though she originally requested it, and even if the Father agrees to that procedure. Neither the IDEA statute nor Pennsylvania special education regulations allow a parent to designate another person, other than legal counsel, to represent an eligible student at a due process hearing. *See*, 22 Pa. Code §14.162(i): "Parents may be represented by legal counsel and accompanied and advised by individuals with special knowledge or training with respect to the problems of children with disabilities."

After learning that she would not be permitted to proceed with educational decision-making as the Father's designee, Mother then declared herself a witness at the hearing. (F.F. #9). It is certainly within the Father's rights to call whatever witnesses he chooses, but it is not the prerogative of any witness to attempt to take over and/or disrupt the proceedings. Mother spoke to Father constantly while the School District's case was still being presented and would not refrain interrupting the proceedings to speak at length whenever she disagreed with something that was said, despite several warnings to cease her disruptive conduct. (F.F. ##14,

15). She also told Father that he had the right to demand an immediate due process hearing to determine whether the School District should provide a private school placement for Student and that he should refuse to participate in an IEP meeting. (F.F. #14)

Although the Mother has a natural and understandable interest in the education of her son, and legitimate concerns about his lack of educational progress, it is quite clear from her conduct at the June 20 due process hearing that she does not intend to abide by the Court of Common Pleas order with respect to making special education decisions and will try every possible means to circumvent the order and continue to insert herself into the special education decision-making process. If the Mother is permitted to attend IEP meetings or future due process hearings, she will continue her efforts to control both the proceedings and the decisions that the Father now has the sole authority to make. Unless the Mother regains legal custody and/or the right to make special education decisions, therefore, the School District shall have the right to preclude her attendance at IEP meetings. At the School District's request and subject to the discretion of the hearing officer at the time, the Mother may also be prohibited from general participation in any future due process hearings. If her testimony is required, she shall be permitted to be in the hearing room only to answer questions, not to insert unsolicited comments and argument into the record.

B. Further Proceedings

The Father likewise expressed his concerns about Student's lack of educational progress and his misgivings about the School District's ability to provide an effective program to teach the student basic reading and math skills. Nevertheless, a hearing on the substantive issue in the

existing due process hearing request, whether the School District should place Student in a private school, is premature at this stage. The parties have not yet met to review the recent evaluation report and discuss a program for Student for the next school year, and may be unable to schedule a meeting until August.

Although I expressed an intention to continue the due process hearing until such time as the parties meet to discuss Student's educational needs and program, upon reflection, I have determined that such procedure would be contrary to the ideal of collaboration and cooperation between Parent and School District contemplated by the IDEA statute. Assuming that the need for a due process hearing will remain after the parties meet signals an expectation that the IEP process will fail. In addition, it could give the Parent the impression that the meeting(s) to be scheduled for the purpose of discussing Student's needs and proposed program and placement are simply a formality to be followed in order to get to a due process hearing. To the contrary, however, the IEP process is the centerpiece of the IDEA statutory scheme and is the preferred method for assuring that eligible students have an appropriate special education program and placement to meet their unique needs and allow them to make reasonable progress.

Consequently, the due process hearing request for Student will be dismissed.

If the IEP process does not result in a proposed program and/or placement which the Father believes is appropriate and will meet Student's needs as identified in the recent evaluation report, the Father can certainly initiate a due process hearing request or a request for mediation. On the other hand, however, because Student's needs are extensive and he has made virtually no progress in the past, it is essential that he receive services as soon as the next school year begins. The School District, therefore will be ordered to assure that the Father knows where Student will

report to school on the first day of the 2006/2007 school year. In addition, in order to assure that the Father is fully informed of Student's school history, the School District will be ordered to provide Father with a complete copy of Student's educational records.

V. SUMMARY

An order entered on June 9, 2006 by the Court of Common Pleas gave Student's Father complete legal custody and explicitly granted him the sole right to make special education decisions for Student. The Mother, therefore, no longer has the authority to proceed with the due process hearing she requested in April 2006, or to make any decisions concerning Student's special education program and placement. Although the Father expressed his interest in proceeding with the hearing as requested by the Mother before she was divested of decision-making authority by Court of Common Pleas, it would be counterproductive to schedule a due process hearing to determine whether the School District should provide a private school placement for Student, before the School District has had the opportunity to review the recent evaluation report with the Father and discuss a program and placement for Student. The existing due process hearing request, therefore, will be dismissed without prejudice to the Father's right to initiate a new due process hearing if the parties, meaning the Father and the School District, only, are unable to agree upon a program/placement for Student for the 2006/2007 school year.

VI. ORDER

In accordance with the foregoing findings of fact and conclusions of law and discussion, it is hereby **ORDERED** that:

1. Father, father of Student, has the sole authority to make all special education decisions for Student, including initiating due process hearings, agreeing or

disagreeing with evaluations and approving or disapproving NOREPs;

2. The School District is not required to invite Mother, mother of Student, to IEP or other meetings concerning Student and may preclude her attendance at such meetings since she has no authority to make special education decisions for Student and demonstrated her unwillingness to abide by the undeniable terms of the custody by her disruptive conduct at the June 20 due process hearing;
3. Should there be any subsequent due process hearings for Student, the School District may exclude the Mother from the due process hearing session, subject to the discretion of the hearing officer, based upon the same reasons stated in subparagraph 2 of this order.
4. The due process hearing request filed by Mother, mother of Student in April 2006 is **DISMISSED**.

It is **FURTHER ORDERED** that the School District shall take the following actions:

5. Provide Father with a complete copy of the educational records of Student by no later than **MONDAY JULY 24, 2006**.
6. Schedule a meeting with the Father to review the results of the evaluations of Student conducted on March 21, and May 19, 2006.
7. At the same or a subsequent time, convene an IEP team meeting to determine an appropriate program and placement for Student for the 2006/2007 school year. The IEP team members shall include teachers and other professionals who worked with him at the school he attended during the 2005/2006 school year, as well as teachers and other professionals from the school the School District proposes he attend during the 2006/2007 school year.
8. In the event the IEP process is not completed by the first day of the 2006/2007 school year, notify the Father of the school to which Student should report and implement his current IEP there until such time as a new IEP is finalized.

Dated: 07/10/06

Anne L. Carroll, Esq., Hearing Officer