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ILLINOIS STATE BOARD OF EDUCATION
IMPARTIAL DUE PROCESS HEARING

SPECIAL EDUCATION
SERVICES

[REDACTED]
Student,

v.

Case No. 2014-0263

[REDACTED]
School District.

Philip C. Milsik,
Impartial Hearing Officer

DECISION AND ORDER

INTRODUCTION

This special education due process hearing was initially requested by D.H.'s paternal grandmother, [REDACTED] H., on December 12, 2013. [REDACTED] H. stated that she was acting as D.H.'s guardian. On March 18, 2014, [REDACTED] ("District [REDACTED]") filed a request for a due process hearing and complaint contesting [REDACTED] H.'s request for an independent educational evaluation ("IEE") for D.H. (District 211's request for hearing and complaint regarding the IEE were subsequently withdrawn in conjunction with an offer to settle the issues raised in the Amended Due Process Complaint that was made part of the case record as an attachment in support of a Motion to Dismiss filed by District [REDACTED] on September 25, 2014.)

On April 7, 2014, [REDACTED] attorneys [REDACTED] and [REDACTED] were granted leave to appear on behalf of D.H. and [REDACTED] H. On April 29, 2014, an Amended Due Process Complaint was filed and the timelines were recommenced because new hearing issues were raised in the Amended Complaint. See, 105 ILCS 5/14-8.02a(g-15). [REDACTED] attorney [REDACTED] was granted leave to appear as additional counsel for D.H. and [REDACTED] H. on July 22, 2014.

After the offer of settlement was made on September 25, 2014, the hearing officer took District [REDACTED]'s Motion to Dismiss on mootness grounds under advisement and asked counsel to negotiate a settlement agreement. Negotiations resulted in a settlement agreement that was eventually signed by [REDACTED] H. and her son, [REDACTED] H. However, during the course of negotiations D.H.'s living arrangements changed. District [REDACTED] has not signed the settlement agreement due to the changes in D.H.'s circumstances and questions as to who has the authority to act on behalf of D.H. Both sides then requested a hearing to determine who D.H.'s "parent" is for purposes of making educational decisions on behalf of D.H.

The hearing was held on January 8, 2015, at the District [REDACTED] Administrative Offices in Palatine, IL.

JURISDICTION

This hearing officer has jurisdiction under 20 U.S.C. Sec. 1415, 34 C.F.R. Sec. 300.507, and 105 ILCS 5/14-8.02a.

PARTIES

The Plaintiffs in this matter are D.H., the Student, and Willa.H., her paternal grandmother. The Respondent is District [REDACTED].

D.H., date of birth March 25, 1999, is 15 years old and is a 10th grade student at [REDACTED] High School in [REDACTED], Illinois. [REDACTED] is part of District [REDACTED].

[REDACTED] H. is the paternal grandmother of D.H.

COUNSEL

[REDACTED] and [REDACTED] of [REDACTED] represented D.H. and [REDACTED] H. at the hearing.

[REDACTED] and [REDACTED] of [REDACTED] represented District [REDACTED].

ISSUES

Both sides presented as the sole question for the hearing: Who has authority to make educational decisions for D.H.?

FINDINGS OF FACT

1. D.H. is a 15 year-old student in the 10th grade at [REDACTED] High School in Palatine, Illinois.
2. It is undisputed that D.H. is a student with a disability who is eligible for special education and related services under the Individuals with Disabilities Education Act ("IDEA") and section 14-8.02 of the Illinois School Code, 105 ILCS 5/14-8.02.
3. D.H. currently resides with her maternal grandmother, [REDACTED] W., in Hoffman Estates, Illinois.

4. D.H. has a fixed nighttime abode and is not a homeless student.
5. D.H.'s biological mother is [REDACTED] W., who lives in [REDACTED], Illinois.
6. D.H. does not reside with [REDACTED] W.
7. D.H.'s biological father is [REDACTED] H., who currently does not have a fixed place of residence, but can be reached through [REDACTED] H.
8. [REDACTED] H., lost her place of residence in either the second or third week in September, 2014.
9. Until [REDACTED] H. lost her place of residence D.H. resided with [REDACTED] H.
10. [REDACTED] H. has assumed primary responsibility for making educational decisions for D.H. during all times pertinent to this hearing.
11. [REDACTED] W.'s participation in making educational decisions on behalf of D.H. has been insignificant.
12. [REDACTED] H.'s participation in making educational decisions on behalf of D.H. has been somewhat greater than that of [REDACTED] W., but his involvement has not been substantial.
13. There are no court orders, decrees, or adjudications of any kind regarding D.H.'s physical or legal custody, guardianship or authority to make educational decisions. No surrogate parent has been appointed for D.H.
14. [REDACTED] W. and [REDACTED] H. state that they want to become more involved in making educational decisions on behalf of D.H.
15. District [REDACTED]'s decision to discontinue treating [REDACTED] H. as the "parent" of D.H. during the 2014-15 school year was not based on [REDACTED] H.'s homelessness, but on a discovery that D.H. was taking a bus to which she was not assigned because she was no longer residing with [REDACTED] H. and was living with [REDACTED] W.

APPLICABLE LAW

The definition of "parent" is found in 34 C.F.R. §300.30. Illinois State Board of Education rules adopt this definition by reference. 23 Ill. Adm. Code 226.75.

Section 300.30 (a) states that "parent" means (1) a biological parent or adoptive parent of a child. 34 C.F.R. 300.30(a)(1). It also says that "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" can be a "parent". (Emphasis added)

Section 300.30(b)(1) says that, except as provided in paragraph (b)(2), "**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.**" (Emphasis added.)

(Paragraph (b)(2) applies to cases in which there is a judicial decree or order that identifies a specific person or persons under 300.30(a) to act as the "parent". Paragraph (b)(2) is not applicable to this case because there are no judicial orders or decrees in place.)

U.S. Department of Education responses to public comments regarding the 2006 regulations implementing the 2004 amendments to IDEA clearly show that the Department purposely decided not to establish a definition or a minimum threshold for "attempting to act as a parent". Further, the Department's comments make it clear that the intent of paragraph 300.30.(b)(1) is to presume that the biological or adoptive parent is the parent for purposes of IDEA unless a question is raised about their legal authority. See, 71 Fed. Reg. No. 156, pp. 46565-46568 (8/14/2006).

CONCLUSIONS OF LAW

- I. ████████ W. and ████████ H. are the parents of D.H. under IDEA. The language of 34 C.F.R. 300.30(b)(1) is clear that the biological parents are presumed to be the parents in the absence of legal authority to the contrary. As of the date of the hearing no court orders have been entered to limit or remove the authority of either of these individuals to make educational decisions for D.H. Granted, their participation to date has demonstrated either a lack of interest or an inability to fully understand or participate in the process. However, the regulations do not establish a best interests test, set a threshold level of participation or even define what "attempting to act as the parent" means. Both parents attended the hearing, provided testimony, and said they wanted to be more involved in the process. Whether that actually occurs remains to be seen.

The issue raised by District 211 as to whether ████████ H. is the biological father of D.H. is beyond the scope of the hearing officer's authority and jurisdiction. For purposes of the due process hearing, the testimony of ████████ W. and ████████ H. that ████████ H. is the father of D.H. is sufficient. In addition, other than District 211's Exhibit 6, the short form birth certificate of D.H. which does not include the father's name, there was no testimony from any witness questioning whether ████████ H. is the father of D.H. Moreover, it should be

noted that D.H. has two sisters who, according to the testimony, are also children of ██████ H. and ██████ W.

2. ██████ H., and ██████ W. are not "parents" of D.H. under IDEA. As stated above, the presumption in 34 C.F.R. 300.30(b)(1) favors the biological parents. Also, since D.H. does not currently live with ██████ H., ██████ H. does not meet the definition of "parent" as an "individual acting in place of a parent" under 34 C.F.R. 300.(a)(1). ██████ W. is not the "parent" because of the presumption favoring the biological parents.

3. The validity of the short-term guardianship appointment by ██████ H. to ██████ two days prior to the hearing will not be considered as a factor in determining who the "parent" is for purposes of IDEA. District ██████ questions the validity of the appointment. My authority does not extend to making a determination of the validity of such instruments. My responsibility is to determine who the parents are under IDEA. A determination on the short-term guardianship is best left to a court of competent jurisdiction if the appointment remains in place and a challenge is made.

4. ██████ H.'s last minute Motion to Intervene was denied on the hearing record. The denial of the Motion was based on two grounds. First, the Motion was not made in a timely manner. This case was initially filed on December 12, 2013. ██████ H. could have intervened at any time during the pendency of the case and only chose to seek to become a party on the day of the hearing, only two days after he appointed his mother to be the short-term guardian of D.H.. Second, the very issue in the case is whether ██████ H., or someone else, is the parent of D.H. Allowing ██████ H. an opportunity to intervene would essentially have allowed him to prevail on the very issue under consideration before any testimony was heard. Given the decision in this case, ██████ H. has certain procedural safeguards including the right to initiate his own due process complaint if he has a dispute with District 211 concerning D.H.

5. The District's Motion in Limine with respect to ██████ H.'s exhibits is denied. The Exhibits are allowed into the record and given the weight they are due. They mainly show the level of ██████ H.'s participation in the educational process on behalf of D.H. over the years. I understand District ██████'s relevancy objections, but I choose to err on the side of caution and allow the exhibits into evidence.

ORDER

Authority

The District shall consider the biological parents, ██████ W. and ██████ H. to be the parents of D.H. for purposes of making educational decisions on behalf of D.H. District

FAX:

