

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case No. 11-2029E
)
MIAMI-DADE COUNTY SCHOOL BOARD,)
)
)
Respondent.)
_____)

FINAL ORDER

Administrative Law Judge, John D. C. Newton, II, of the Division of Administrative Hearings (Division), heard this case, as noticed, on June 14, 2011, by teleconference at sites in Miami, and Tallahassee, Florida.

APPEARANCES

For Petitioner: ██████████, parent, on behalf of ██████████
(Address of record)

For Respondent: Teddra Joy Gadson, Esquire
The School Board of Miami-Dade County
1450 N.E. 2nd Avenue, Suite 430
Miami, Florida 33132

STATEMENT OF THE ISSUES

A.) Whether the parental rights of the Petitioner's ██████████, (██████████), have been terminated.¹

B.) If so, what is the legal effect, if any, of the termination under Title 20 United States Code Section 1400

(2004), and corresponding Florida Statutes and Florida Administrative Code provisions?

C.) Whether the Respondent, School Board of Miami-Dade County (Board), denied [REDACTED] notice of and an opportunity to participate in developing the Individual Education Plan (IEP) for [REDACTED].

PRELIMINARY STATEMENT

On April 19, 2011, [REDACTED] filed a Request for a Due Process hearing with the Board. On April 21, 2011, the Board referred the Request to the Division of Administrative Hearings to conduct the hearing. On April 26, 2001, the case was set for hearing to be held June 14, 2011.

The Board filed a Motion to Dismiss or in the Alternative Notice of Insufficiency. By Order dated April 29, 2011, the Motion was denied, and the Due Process Hearing Request was determined sufficient.

On June 3, 2011, the case status and pre-hearing conference were held. Part way through the conference, [REDACTED] announced that [REDACTED] was not going to participate any further and hung up.

[REDACTED] filed a Motion for Summary Judgment. It was denied by Order of June 7, 2011. The Board filed a Motion for Summary Order on June 10, 2011. The hearing convened as scheduled on June 14, 2011, by telephone conference call. The undersigned

denied the Board's Motion for Summary Order at the start of the hearing.

At the outset of the hearing on June 14, 2011, the undersigned reminded the parties that ██████ had terminated ██████ participation in the case status and pre-hearing conference. The undersigned advised ██████ that if ██████ chose to terminate ██████ participation in the hearing, that choice could be treated as abandonment of ██████ Request.

██████ was the only witness to testify on ██████ behalf. No exhibits were accepted into evidence on behalf of ██████

The Board called the following witnesses: ██████ (the maternal Grandfather of ██████²) and Beatriz Pontigo, Special Education Program Specialist, ████████████████████ Senior High School. Board Exhibits 1 and 4 (in part) (██████'s Individual Education Plans dated 09/06/2006, 02/05/2007, 01/29/2008, 11/23/2009, and 10/26/2010) were admitted into evidence.

Shortly after the Board began presenting its case, ██████ announced that ██████ was not going to participate any further in the hearing and terminated ██████ connection in the telephonic hearing. The Board presented the rest of its evidence. The hearing was adjourned after the Board rested. An Order of Post-Hearing Instructions advised the parties of their right to submit proposed orders and the deadline for submitting them.

Both parties submitted Proposed Orders which have been considered in preparation of this Final Order.

FINDINGS OF FACT

Based on the evidence and the entire record of this proceeding, the following findings of fact are made:

1. [REDACTED] is the biological mother of [REDACTED]

2. [REDACTED] was born [REDACTED]. As stipulated by the parties, [REDACTED] was over the age of [REDACTED] at the time of the hearing.

3. [REDACTED] lives with [REDACTED] maternal Grandfather, [REDACTED]'s father (referred to as Grandfather in this order).

4. On March 29, 2007 the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida rendered its Order Placing Children in a Permanent Guardianship and Terminating Protective Supervision in In Re [REDACTED], Case Number 05-015104. That Order placed [REDACTED] and [REDACTED]'s sibling in the permanent guardianship of [REDACTED]'s Grandfather and the Grandfather's now deceased, wife. It also terminated supervision of the children by the Department of Children and Families.

5. The Order provides that [REDACTED]'s Grandfather, as permanent legal guardian:

shall have all rights and duties of a parent, including, but not limited to, the right, duty, and authority to protect, train, and discipline the child(ren), to provide the child(ren) with food, shelter,

and education, to provide and consent to necessary medical, dental, psychiatric, and psychological examinations and treatment, and to obtain all records regarding the child(ren) including medical, mental health, and educational records.

6. It also prohibited the Grandfather from returning the children to the physical care and custody of the parents, including for short visitation periods without court order. The order made clear that the Grandfather and not the biological parents had full custody of both children.

7. Since entry of that Order, [REDACTED] has resided with the Grandfather. [REDACTED]'s Grandfather has actively participated in [REDACTED]'s education including Individual Education Plan (IEP) meetings. The Board provided [REDACTED]'s Grandfather all required notices of activities and educational decisions for [REDACTED], including IEP development meetings and provided him an opportunity to participate in the process and meetings.

8. The Board has provided [REDACTED] services under the IDEA and Florida's implementing laws and rules. [REDACTED]'s legal guardian, the Grandfather, is satisfied with the education and support that the Board has provided [REDACTED]. The Grandfather is satisfied with the information and opportunities that the Board provided him to participate in [REDACTED]'s education. Also [REDACTED]'s Grandfather did not authorize filing the Due Process Hearing Request in this matter and does not support it.

9. █████, until this proceeding, has never asked to be involved in █████'s education or otherwise contacted the Board or school representatives about █████.

CONCLUSIONS OF LAW

10. This case arises under the Individuals with Disabilities Education Improvement Act ("IDEA"), Title 20 United States Code Section 1400 (2004), and corresponding Florida Statutes and Florida Administrative Code provisions.

11. The Division has jurisdiction over the parties and the claims under IDEA in this proceeding. § 1003.57(1)(b), Fla. Stat. (2010)³; Fla. Admin. Code R. 6A-6.03311(9).

12. In this proceeding █████, █████'s biological mother, seeks to enforce the parental rights created by the IDEA. There is no question that the Board did not provide █████ those rights. So the determinative issue is whether, under the facts found here, █████ was entitled to the benefit of those rights.

13. █████ bears the burden of proof. █████ must prove █████ claims by a preponderance of the evidence. See Schaffer v. Weast, 546 U.S. 49, 62 (2005); Loren F. v. Atlanta Indep. Sch. Sys., 349 F.3d 1309, 1313 (11th Cir. 2003).

14. █████ maintains that the Board was required to provide █████ notice about and an opportunity to participate in █████'s IEP planning and other educational activities, despite the fact that a Florida circuit court order made █████'s Grandfather the

permanent legal guardian with all the rights and duties of a parent. The Board disagrees.

15. Title 34, Code of Federal Regulations, Section 300.30 defines parent and provides in pertinent part:

(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 . . . 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;

* * *

(b) (1) Except as provided in paragraph (b) (2) of this section, the biological . . . 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 . . . 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.

Florida Administrative Code Rule 6A-6.03411(1) (bb) is similar.

16. When a court order vests a child's legal guardian with exclusive control over a child's education, a parent does not possess authority or standing to bring a due process hearing on behalf of the child. St. Francis School District No. 15, Min. Educ. Agency, OAH 44-1300-20719-9, MDE No. 10-002H, 110 LRP 22056. Under Florida law, a non-custodial parent, such as [REDACTED], does not have the requisite standing to bring an action against the wishes of a court ordered guardian with complete custodial rights. Gordon v. Colin, 997 So. 2d 1136, 1137 (Fla. 4th DCA 2009) (When parents had shared parental responsibility, parent with primary custody is the only parent with authority to take legal actions on behalf of the child).

17. The Circuit Court order made [REDACTED]'s Grandfather permanent legal guardian. It gave complete custody to the Grandfather. It gave him all rights and duties of a parent, including the right, duty, and authority to provide [REDACTED] with an education and to obtain all education records regarding [REDACTED]. This makes [REDACTED]'s Grandfather the "parent" as defined by Title 34, Code of Federal Regulations, Section 300.30(a)(3)(4).

18. Title 34, Code of Federal Regulation, Section 501(b)(1)-(2) states:

(b) Parent participation in meetings.

(1) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to—
(i) The identification, evaluation, and educational placement of the child; and
(ii) The provision of FAPE to the child.

(2) Each public agency must provide notice consistent with §300.322(a)(1) and (b)(1) to ensure that parents of children with disabilities have the opportunity to participate in meetings described in paragraph (b)(1) of this section.

19. The Code of Federal Regulations at Title 34, Code of Federal Regulations, Section 322(a)(1) and (b)(1) provides that:

(a) Public agency responsibility—general. Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including—(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and . . .

* * *

(b) Information provided to parents. (1) The notice required under paragraph (a)(1) of this section must—
(i) Indicate the purpose, time, and location of the meeting and who will be in attendance; and
(ii) Inform the parents of the provisions in §300.321(a)(6) and (c) (relating to the participation of other individuals on the IEP Team who have knowledge or special expertise about the child), and §300.321(f) (relating to the participation of the Part C service coordinator or other representatives of the Part C system at the initial IEP Team meeting for a child previously served under Part C of the Act).

20. The IDEA requires that the School Board take steps to notify one or both parents of a child with a disability of specified actions and to provide an opportunity to participate in planning the child's education. The Board complied with the notice and participation requirements of IDEA as amplified by the regulations. [REDACTED]'s Grandfather is the "parent" as defined by Title 34 Code of Federal Regulations section 300.30(a)(3)(4).

21. [REDACTED] also seeks access to [REDACTED]'s school records. Since [REDACTED] does not have the rights of a parent, [REDACTED] does not have the access rights of a parent. In addition the Family Educational Rights and Privacy Act (FERPA) allows parents access to their children's education records. But the statute provides that the term "education records" does not apply to "records on a student who is eighteen years of age or older." 20 U.S.C. § 1232g(a)(4)(B)(iv).

22. Once a student reaches the age of 18 all of the rights under FERPA transfer from the parent to the student. See 34 C.F.R. §§ 99.4 and 99.5. Accordingly, no individual may access those records without the prior written consent of the 18-year-old student.

23. Furthermore, Florida law provides that the rights of students, with respect to education records, that are "created, maintained, or used by public educational institutions and

agencies shall be protected in accordance with the FERPA. § 1002.22(2), Fla. Stat.

24. Under state and federal law, █████ may not review █████'s education records without █████'s written consent since █████ is now █████ years old.

25. █████ has not met the burden of proof in this case. █████ has not demonstrated that █████ was denied any rights or privileges provided by the IDEA or implementing Florida law.

26. In addition █████ abandoned █████ Request for Due Process and the opportunity to seek relief by terminating █████ participation in the hearing.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law it is,

ORDERED that:

1. █████'s request for notice of and the opportunity to participate in educational planning for █████, including development of █████'s IEP, is denied.

2. █████'s request for access to the Board's records for █████ is denied.

DONE AND ORDERED this 1st day of July, 2011, in
Tallahassee, Leon County, Florida.

S

JOHN D. C. NEWTON, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of July, 2011.

ENDNOTES

^{1/} This is an issue as gleaned from the pleadings and conferences in this case and stated in the June 3, 2011, Case Management Order. The evidence and argument at hearing clarified that the issue was the limited question of whether [REDACTED], mother of [REDACTED], had parental rights under IDEA.

^{2/} [REDACTED]'s Grandfather and Mother have the same initials.

^{3/} All references to the Florida Statutes are to the 2010 edition.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless, within 90 days after the date of this decision, an adversely affected party:

- a) brings a civil action in the appropriate state circuit court pursuant to Section 1003.57(1)(b), Florida Statutes (2009), and Florida Administrative Code Rule 6A-6.03311(9)(w); or
- b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), and Florida Administrative Code Rule 6A-6.03311(9)(w).