

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

GUARDIAN ON BEHALF OF STUDENT,

v.

NEWPORT-MESA UNIFIED SCHOOL
DISTRICT.

OAH CASE NOS. 2010040608 and
2010120902

ORDER GRANTING MOTION TO
DISMISS FATHER'S COMPLAINT

There are several motions pending in these consolidated matters. Father, on behalf of himself and Student, has filed with the Office of Administrative Hearings (OAH), a Motion to Dismiss Mother's Complaint or, in the alternative, a Motion to Bifurcate his complaint with Mother's Complaint. Father has also filed with OAH a Motion to Continue the proceedings in these matters to July 2012, based upon his incarceration. The Newport-Mesa Unified School District (District), through counsel, has filed with OAH a Motion to Dismiss Father's Complaint. Because this Order grants the District's Motion to Dismiss, the other pending motions are moot and need not be decided.

BACKGROUND

On April 6, 2010, Mother, who is now deceased, through counsel, filed with OAH a Request for Due Process Hearing (Mother's Complaint) that named the District. OAH assigned this matter Case No. 2010040608. On November 3, 2010, the District, through counsel, filed with OAH a Request for Due Process Hearing (District's Complaint) that named Student. OAH assigned this matter Case No. 2010110309. The District has subsequently dismissed this action. On December 27, 2010, Father, through counsel, filed with OAH a Due Process Filing (Father's Complaint) that named the District. OAH assigned this matter Case No. 2010120902.

On December 28, 2010, OAH granted a stipulation by the parties, and issued an Order of Consolidation that joined the three cases.

On May 3, 2011, Father murdered Mother and Mother's father while they were attempting to pick-up Student at Father's home. Father is now incarcerated awaiting trial in an Orange County jail.

Previously, on September 10, 2010, the Orange County Superior Court issued an Order which stated, in pertinent part: "On a temporary basis and until further order from this court, (Father) shall have the sole and exclusive responsibility and authority to give consent

or withhold consent to (Student's) Individualized Education Program." On September 21, 2011, the same court issued an Order which appointed Student's Maternal Grandmother as Guardian of Student. This Order provided, in pertinent part: the "Court orders that there will be no discussions regarding criminal proceedings and no visits with Father whatsoever and no contact with the Father." On September 27, 2011, the court issued Letters of Guardianship in favor of Student's Maternal Grandmother. The appointment of the Maternal Grandmother operated to vest all educational decision-making authority for Student in the Maternal Grandmother.

On February 3, 2012, Father filed with OAH a Motion to Dismiss Mother's Complaint, or, in the alternative, a Motion to Bifurcate Case No. 2010120902 (Father's Complaint) from Case No. 2010040608 (Mother's Complaint), and a Motion to Continue the proceedings in his case. The District and Student, through the attorney for her Maternal Grandmother, have filed with OAH responses to these motions.

On February 17, 2012, counsel for the District filed with OAH a Motion to Dismiss which is directed at Case No. 2010120902, Father's Complaint. Counsel for Student's Maternal Grandmother has joined in the motion. Father has not filed with OAH a response to the Motion to Dismiss.

DISCUSSION

California law provides that the right to bring a special education administrative action extends, inter alia, "to the parent or guardian, as defined in Section 56028. . ." (Ed. Code, § 56501, subd. (a).) State law, in turn, provides that "parent" can include a biological parent of the disabled child, or a guardian authorized to act as the child's parent. (Ed. Code, § 56028, subd. (a)(1), (3).) More definitively, state law provides that "If a judicial decree or order identifies a specific person. . . to act as the 'parent' of a child or to make educational decisions on behalf of the child, then that person or persons shall be determined to be the 'parent' for purposes of this part." (Ed. Code, § 56028, subd. (b)(2).)

Father's Due Process Filing, Case No. 2010120902, charged that, during the period from December 27, 2008 to December 27, 2010, the District denied Student a free appropriate public education for numerous alleged failures in her special education program. At the time that his complaint was filed, Father was a "parent" who could bring such an administrative action. (Ed. Code, §§ 56028, subd. (a)(1), 56501, subd. (a).) However, the Orange County Superior Court has removed Father's parental rights through a judicial decree, and her Maternal Grandmother is now Student's "parent" within the meaning of special education law. (Ed. Code, § 56028, subd. (b)(2).)

The commentary to federal regulations supports the determination that Father has no authority to pursue a special education administrative action on behalf of Student. Education Code section 56028, which defines "parent" for special education matters, is largely analogous to the federal definition of the term. (20 U.S.C. § 1401(23); 34 C.F.R. § 300.30 (2006).) In the commentary to regulation 300.30, the United States Department of Education

provided the following advice as concerns the authority that a biological parent might have over a court appointed guardian:

Comment: One commenter stated that § 300.300(a)(2) withdraws the rights of biological parents under the Act without due process of law.

Discussion: We do not agree with the commenter. If more than one person is attempting to act as a parent, § 300.30(b)(1) provides that the biological or adoptive parent is presumed to be the parent if that person is attempting to act as the parent under § 300.30, unless the biological or adoptive parent does not have legal authority to make educational decisions for the child, or there is a judicial order or decree specifying some other person to act as a parent under Part B of the Act. We do not believe that provisions regarding lack of legal authority or judicial orders or decrees would apply unless there has already been a determination, through appropriate legal processes, that the biological parent should not make educational decisions for the child or that another person has been ordered to serve as the parent.

(71 Fed.Reg. 46565 (Aug. 14, 2006).)

Here, the Orange County Superior Court has determined that her Maternal Grandmother shall act as Student's parent. Accordingly, Father has no right to maintain his administrative action against the District, and his Due Process Filing must be dismissed.

ORDER

The motion by Newport-Mesa Unified School District to dismiss OAH Case No. 2010120902 is granted.

IT IS SO ORDERED.

Dated: February 22, 2012

/s/

TIMOTHY L. NEWLOVE
Presiding Administrative Law Judge
Office of Administrative Hearings