16-023

VIRGINIA: 1.

VIRGINIA DEPARTMENT OF EDUCATION
County Public Schools
Due Process Hearing

Tel:
Parent/Father

In Re:
Student/Child
i.d.

v.
COUNTY PUBLIC SCHOOLS

, Virginia
Attn: , Coordinator

ORDER OF DISMISSAL

A.

Administrative History

On December 15, 2015, Parent/Father ("Father") requested a Due Process Hearing, alleging various violations of the Individuals with Disabilities Education Act ("IDEA") and its governing Regulations, both procedural and substantive resulting in the wrongful determination of Student/Child as eligible for and receiving special educational (special ed) services pursuant to IDEA.

The undersigned accepted this case on December 22,2015. School filed its Answer denying any wrongdoing and, further, seeking dismissal of the case upon the ground that Father lacked standing to bring the suit. relying upon 34 C.F.R. 300.30(b)(2). By Order dated December 28,2015, the undersigned converted the Motion into a Motion for Summary Judgement since facts outside of the Request were involved. School's Motion was set for and held on January 20,2016 at School's hearing room.

Earlier on January 13, 2016, Father, acting through his /advocate (a lawyer) asked that Child, pursuant to IDEA'S "Stay-Put" regulation (34 C.F.R. 300.518), be returned to the status of a general education student with special education services being discontinued. School, by letter dated January 19,2016 opposed said motion.

B.

FACTS

The following facts are undisputed. (Child) was born, out of wedlock, on in 's County, Maryland. Now , then (Mother) and (Father) are the biological parents of the Child. At the time of Child's birth, Mother and Father were residents of 's County. (Tr. 12-18).

On February 2, 2002, by Consent Order issued by the 's County Circuit Court, Mother and Father were awarded joint legal custody of Child (then 2 years old). (See Father's Trial Ex. 1). Mother, however, was awarded physical custody of the Child and Father was granted reasonable rights including various specified dates. (See Father's Trial Ex. 1). Said Consent Order further provided in part:

"ORDERED that the parties shall attend custody mediation to resolve the manner in which educational decisions will be made in the event that the parties cannot reach a concensus; ....."

On September 27, 2002, nunc pro tunc to April 18, 2002 (the date of the original Hearing), the 's County Court modified its earlier Consent Order, ruling in pertinent part:

"ORDERED that parents shall communicate with one another and develop educational plans for the minor child and it is further

ORDERED that if after taking the aforementioned steps, the parties find that they cannot agree on the educational issue, Plaintiff shall make the final decision." (See School's Answer, Ex. 1).

In 2005 Mother and Child moved to County, Virginia (Tr 17), Child, now 15 years old has always been educated in the County School System (School) (Tr. 18). She currently attends High School where she is in the tenth grade (School's Answer, EX. 1).

At the close of School year 2015, namely June 2015, School's staff discovered a notebook of Child in which she had entered notes threatening to kill herself. (See School's Answer Ex. 6). Also sometime before August 3, 2015, Mother took Child to a psychiatrist for County because of the Child's struggles with visual processing and test anxiety (ADH). He recommended that Mother seek support from School.; Mother then began the Special Ed process by requesting that Child be evaluated by a Local Screening Committee (LSC) (See Ex. 6, supra,"Multipurpose Referral").

On August 6, 2015, School convened an LSC meeting. Mother, Father and School's requisite personnel (i.e. its Special Ed teacher, General Education teacher, Social Worker, Representative of the Principal, and its staff psychologist) attended. (See School's Answer, Ex. 6).

Among the information considered by the LSC was the following:

"According to her Mother, [Child] had tutors and showed no growth in her grades.. She works hard to please. She studies and works hard, but Mom reports that her hard work is not indicative of her grades. Mom also sees her emotionally going "down hill" and [Child] has spoken and written about killing herself. (underscoring supplied).

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Dad and Mom have joint legal custody. Dad shared that they work together well, but differ in their perspective of [Child's] emotional state. [Child] stays with Mom during the week and Dad on weekends.. Mom took her to a psychiatrist last summer (2014). She was diagnosed with ADHD (for which she is medicated) and is coupled with depression and anxiety." (Ex. 6, supra) (underscoring supplied).

The LSC, after full consideration of the facts presented, recommend convening a Determination Meeting, which, in turn. would decide whether Child had an educational disability which would qualify her for Special Ed services (See Ex. 6, supra) Both Mother and Father acknowledged receipt of the findings of the LSC (See Ex. 6 ,supra) and, by separate document. both gave their "...Consent for PS [School] to proceed with proposed assessments" (See School's Answer Ex. 7).

School on October 23, 2015 mailed by first class mail a written notice of the Determination Meeting to each Mother and Father.. (School's Answer, Ex. 8). Father contends that he never received this notice and would have attended it if he had received the notice. School responds by saying there is a presumption which should be followed here- that Father received the notice since it was properly addressed and mailed.

On October 28, 2016, the Determination Meeting was held, with Mother consenting to Child's determination as a child with a learning disability eligible for Special Ed. Services. (School's Answer, Ex. 10). The Individualized Education Plan (IEP) Meeting was then scheduled for November 20, 2015. (See Ex. 10 ,supra).

On November 19, 2015, Father by e-mail advised School that:

"Effective immediately I hereby revoke all consent to Special Education Eligibility and Special Education Services for my daughter." (Answer Ex. 10).

On that same date, School cancelled the then proposed IEP meeting for Child of November 20, 2015, cancelled Child's status as a student entitled to Special Ed services and returned her to the status of a general education student.. (See School's letter of November 19, 2015, appended to School's Answer as Ex. 10). In its letter to Father, School advised him of the adverse effects this change of status would create, pointing out the need for special educational services.

Shortly thereafter, Mother provided School with a copy of the Circuit Court's Order of September 27, 2002, requesting that Child's eligibility for special services be restored. School then restored Child's eligibility.

School than set IEP meetings for Child on December 9, 2015 and December 16, 2015 inviting Father and his wife/advocate to attend,-which they did. (See School's Reply dated January 11, p. 1).

No details as to the December 9th meeting are in this record other than the fact that it occurred, that Father and his /advocate attended, and that as a result of both meetings, Father's input was received resulting in changes being made as to the socio-cultural impact evaluation of Child. (See School's Response, supra).

With regard to the second IEP Meeting held on December 16, 2015, It is clear that all of School's required personnel attended including the School's psychologist, psychology intern,, Sp. Ed. Teacher, General Education Teacher, Social worker, Principal's Designee, and a Social Worker Procedural Support Liason. And, as before noted, Father and his /advocate attended.

At this meeting Father apparently renewed his objections and demanded that Child's right to Special Education services be revoked. As before noted, School advised Father that Mother's decision controlled, and accordingly it refused to change Child's status and placement.

On December 18, 2015, Father filed a Request for a Due Process Hearing. He alleged a myriad of procedural violations, which, in turn. nullified Child's determination as eligible for Special Ed. Services. Father urged that Child's eligibility be reversed, (based largely upon his construction of the relevant court order); or, at a minimum, that the entire process of entitlement be restarted. At that time, Father proposes to call various experts and lay persons who, he believes, will support his contention that Child does not need Special Ed services to address her emotional deficiencies- but merely needs love and support.

Immediately prior to the hearing upon School's Motion, Father, via his /advocate invoked IDEA'S "Stay-Put" regulation which she believed would return Child to her original status as a general education student.

At the instant hearing, the undersigned, with the reluctant consent of Father's /advocate, requested School to continue Child's Special Ed services until this decision was filed.

C.

GOVERNING LAW

It is conceded that Mother and Father are the natural (biological) parents of Child. Accordingly, each is a "parent" as defined by 34 C.F.R. 300.30 (a). It is settled law that each "parent" under IDEA has the same rights to the protection of IDEA'S Due Process provisions as the other even though they be divorced or living apart, unless this general result is otherwise limited by a specific provision of IDEA or its regulations. See e.g. 34 C.F.R. 300.30(a), 8 VAC 20-81-170,Taylor v. Vt. Dept. Of Educ, 313 F.3rd768 (2d Cir. 2002); In Re Student with Disability v. SEA, 15-010 (9/14/14); Navin v. Park Ridge School Dist. 270 F.3rd 1147 (7th Cir. 2001).

Here there is a specific provision of IDEA which limits the general rule, and which controls the instant case. namely 34 C.F.R. 300.30(a) and 300.30 (b)(2): It reads in part:

"... (a) Parent means...

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"(b)(2) If a judicial decree or order identifies a specific parent under paragraphs (a)(1) through (4) of this section [i.e. a natural parent] 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 the parent for purposes of this section." (underscoring supplied).

In other words, the parent identified in such order or decree (here Mother) becomes the sole "parent" entitled to the due process protections of IDEA with the other parent (here Father) losing standing to assert its protections. See e.g. 34 C.F.R. 300.30 (b)(2); Driessen v. Lockman et al 528 F. Appx 809 (11 Cir. 2013) unpublished; In Re Student with a Disability v SEA 115 LRP 5678 (Va, SEA 2014); Schares v.Katy Indep. Sch. Dist 252 F. Supp. 2d 364 (Tx. 2006); Taylor v. Vt. Dept. of Educ. 713 F. 3rd 762 (2d Cir. 2002); In Re Shikellamy School Dist, 142 LRP 9604 (Pa. SEA 2012).

D.

DISCUSSION

Despite Father's suggestion that he and Mother work well together regarding Child's welfare and education, the conduct of the parties at the instant hearing as well as other evidence suggests otherwise. Contentious and long standing differences are a more apt description. (See e.g. Tr. 16). Father, as early as August 2015, admitted that he and Mother

"disagreed when it came to Child's emotional health." Father's /advocate described the relationship as "acrimonious." (See Father's Letter in response to School's Motion to Dismiss). And this lack of agreement obviously existed for a period long before August 6 , 2015 when the process of obtaining Special Ed services for Child began.

Father's core position is that the Circuit Court's Order of September 27, 2002 must be construed in light of that Court's earlier custody order and a proposed order (obviously from his counsel) which was never signed or entered. (See Father's Trial Ex. 1 and 2) These, according to Father, establish that Mother must engage in a sustained process of negotiations with Father giving great weight to his position before she can assert her position as sole parent. (See e.g. Tr. 70-72). And even then, there must be a mediation process which failed. (See Father's Trial Ex. 1). This position ignores the reality. The Circuit Court rejected Father's position when it entered its Order of September 27, 2002 which modified, nunc pro tunc, its earlier Consent Order of February 2, 2002. In its Order of September 27, 2002, the Circuit Court stated that "... the parties shall communicate with one another and develop educational plans for the minor child... and if after taking the aforementioned steps they find that they cannot agree on the educational issue, Plaintiff shall make the final decision." (See Ex. A to School's Answer).

Here Mother and Father obviously communicated with Father in August 2015 agreeing to begin the process of obtaining Special Ed services for their child. He then in December simply changed his mind and began the instant proceedings. In short, if there ever was an agreement as to how to address Child's emotional disability it ceased. And, then Father, pursuant to Subection 30(b)(2), lost his standing to subsequently file the instant suit.

It would be pure folly to grant Father's alternative request to begin anew the entire process of obtaining Special Ed services for Child. Even if Father's request is granted, Mother will again disagree invoking Subsection 30(b)(2) and Father will lose his ability to maintain the due process complaint. In this regard, it should be noted that School's experts and its educational team concluded that Child was eligible for and should receive Special Ed services. Against this background it cannot be argued that Mother will suddenly change her mind and agree with Father.

Father's reliance upon the alleged absence of notice for the Determination Meeting also fails. He had no standing to invoke IDEA'S due process protection. See Schares v. Katy Indep. Sch. Dist., supra. And, if Father has no standing to object, how can it be said that the lack of notice to him was a procedural defect justifying a reversal of Child's determination as eligible for Special Ed services. If any error existed in this regard, it is harmless error.

Father fails to recognize that there are limitations to the impact of a due process procedural deficiency. A presumably correct identification of a child as educationally handicapped will not be overturned because some of IDEA'S procedural requirements are not exactly followed. See Di Buo v. Bd. of Educ. of Worcester Cy., 309 F.3rd 184 at 190 (4th Cir. 2002). There must be some loss of educational opportunity with regard to the Child. See MM ex rel D.M. v. School Dist. of Greenville County, 303 F.3rd 523 at 533 (4th Cir. 2002). A parent does not have the absolute power to veto an IEP Team's decision as to placement because of a procedural deficiency. See A.W. ex rel Wilson v. Fairfax County Sch. Bd., 372 F.3rd 674 at fn. 10, p. 683 (4th Cir. 2004); See B.B. ex rel J.B. v. Hawaii Dist. of Educ. 483 F. Supp. 2nd 1042, 1050-

1051 (D. Hawaii 2006). Nor can a parent "stack the deck" by filling an IEP conference with people supporting his view-as here Father intends to do. DOE by Gonzales Mother v. Maher 793 F.2d 1439 (9th Cir. 1986).

Here there is no allegation by Father that the averred procedural deficiencies caused any loss of Child's educational opportunities. To the contrary, Father asserts the here alleged procedural deficiencies in order to revoke the School's identification of Child as a student with educational disabilities, eligible for Special Ed services, thereby restricting Child's educational opportunities..

Father attempts to negate School's position by arguing that Subsection 30(b)(2) applies only when the court order transfers total authority, without regard to time or event, to the other parent. After studying Father's voluminous filings, the undersigned can find no authority therein to support this view. Nor could the undersigned find any authority.

The only constant is that there must be a disagreement between the parents as to the then present educational issue. And, when such exists, Subsection 30(b)(2) controls. See Fuentes v. Bd. Of Edu. Of City of New York, 589 F. 3rd 46 (2d Cir. 2008) (which points out that the key decision is which parent has the ultimate authority to make the educational decision involved). See also Schares v. Katy Indep. Sch. Dist, supra. (which held that the father there had no standing to bring a claim under IDEA where mother had the sole authority, pursuant to Subsection 30(b)(2) to make the educational decisions for their daughter).

Father's attempt to gain sympathy for his position by alleging that the School's decision left him as a "pure by-stander", unable to engage in his daughter's education, ignores the facts. As before noted, he can and did participate in the pertinent IEP meetings for Child; and School is willing to reconvene the IEP meetings if Father has additional input he wants to present.

Both Father and School rely upon School's internal regulations to support their views. Subsection 30(b)(2) controls- not School's internal regulations. To the extent they merely implement Subsection 30(b)(2)., they are relevant. In this regard regulation 2240.6 requires School to keep Father informed. to allow him to attend conferences and to participate in (not control) pertinent meetings. These internal regulations provide further proof that Father has not been nor will he be relegated to a pure by-stander when it comes to his daughter's education.

Father's effort to by-pass the impact of Subsection 30(b)(2) by invoking IDEA'S Stay-Put regulation,(See 34 C.F.R. 300.518 et seq) also fails. The applicable Stay-Put regulation is 34 C.F.R. 300.512(a). It provides that the child, during the pendency of a due process hearing "must remain in his or her current placement." Unless "... the School and parent(s) agree otherwise." Here the Mother and School have agreed to provide Child with Special Ed services. And, she is the sole "parent" who can make that decision. Moreover, even if stay-put is invoked, Child will return to Special Ed services -for that was her status when the stay-put request was made.

Father's instant Request for a Due Process Hearing is actually an invitation by him for School and the undersigned to modify the clear Order of the 's County Circuit Court of September 27, 2002. Neither School nor the undersigned has jurisdiction or authority to so, . And, IDEA confers no such jurisdiction or authority upon them. The proper forum for

Father's case is the 's County Circuit Court. In this regard, School is not a proper party to that proceeding; nor does that Court have any jurisdiction over School.

E.

FINDINGS OF FACT

1. (Child) was born on in 's County , Maryland.
2. w (Mother) is the biological (natural) mother of the Child and is a "parent" For purposes of IDEA.
3 (Father) is the biological (natural) father of Child, and is a "parent" for purposes of IDEA.
4. At the time of Child's birth (out of wedlock), both Mother and Father were adult residents of 's County, Maryland.
5. By Consent Decree of the 's County Circuit Court, dated February 21, 2002:
   (a) Both Father and Mother were granted legal custody of Child
   (b) Mother was granted physical custody of the Child.
   (c) Father was granted specific rights of visitation, not here relevant.
   (d) With regard to Child's education, both were required to cooperate and to try to agree upon the appropriate plans, followed by mediation –and if there was still no agreement, Mother's decision would control.
6. The Decree of February 21, 2002 was modified by said Circuit Court which on September 27, 2002 ruled that Mother and Father were to communicate with one another to develop an educational plan for Child but if Mother and Father could not agree, Mother's decision was to control.
7. In 2005, Mother and Child moved to County, Virginia where they still reside.
8. Child has been educated solely by School; and currently is a tenth grader at High School, County.
9. Child has been determined by School to be eligible for Special Education services because of emotional disorder and presence of ADHD.
10. Child's educational and emotional condition had been deteriorating since Child was in middle school.
    (a) Child's grades have deteriorated.
    (b) Child's emotional health is poor- Child having threatened to take her own life.
11. Mother and Father have long disagreed over the steps to be taken to address Child's emotional disability.
12. Beginning on August 6, 2015, Mother initiated the formal process to obtain Special Education services for Child.
13. While Father originally consented to this process, on November 19, 2015, he revoked his consent.
14. Immediately upon receipt of Father's revocation School cancelled the proposed IEP meeting set for November 20, and suspended the process of obtaining Special Education services for Child, returning her to the status of a general education student.

15. Shortly thereafter, Mother requested School to resume the Special Education process tendering to School a copy of the Order of the 's County Circuit Court of September 27, 2002.
16. School thereupon resumed the Special Ed process.
17. On December 3 and 16, 2015 IEP meetings were held with both Father and Mother attending, together with School's IEP designated members.
18. At the last IEP meeting on December 16, an appropriate IEP plan was developed for Child. with Mother's full agreement.
19. Father does not agree that Child was properly determined to be in need of Special Education services and objects to that determination and the provision of said ervices.

F.

CONCLUSIONS OF LAW.

1. The outcome of School's Motion to Dismiss (Summary Judgment) depends upon 34 C.F.R. 300.30(b)(2) which provides:

"(b)(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, than such person or persons shall be determined to be the parent for purposes of this section."

2. The Order of the 's Circuit Court of September 27, 2002 designates Mother as the sole parent when there is a disagreement between the parents as to an educational issue relating to Child.
   (a) Here there was a disagreement between Mother and Father (parents) as to whether Child should obtain and receive Special Ed services.
   (b) Mother, accordingly, is the sole parent entitled to the Due Process protections of IDEA.
   (c) Father, pursuant to Subsection 30(b)(2) supra lost standing to bring this suit.
3. The failure of Father to receive notice (if he actually did not receive the notice) of the Determination Meeting of October 28, 2015 resulting in his absence at that meeting is harmless error since there was no adverse effect upon Child's educational opportunity.
4. The IEP Meetings of December 3 and 16, 2015, which Father and his /advocate attended, were properly constituted and the provisions of Special Education services therein set forth are confirmed, and are controlling.

G.

FINAL DECISION

Father lacks standing to bring the instant Request for a Due Process Hearing; and, likewise. has no standing to challenge the provision of Special Education services to Child. Accordingly, it is this 4th day of February, 2016,

ORDERED: That Father's Request for a Due Process Hearing be and hereby is dismissed for lack of standing.

William E. Rollow, Hearing Officer

9.

H

RIGHT TO APPEAL

This decision is final and binding unless either party appeals in a federal district court within 90 calendar days of the date of this decision, or in a state court within 180 calendar days of the date of this decision.

cc: County Public Schools
Virginia Department of Education
. pro se
John F. Cafferky & Patricia A. Minson,
Counsel for School