

Custody Issues in Special Education

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Parent Without Legal Custody – No IDEA Rights

A U.S. District Court recently addressed the rights of a non-custodial parent concerning the special education needs of his or her child. In *Carpenter v. Pennell School District Elementary Unit* [Penn Delco School District],¹ a non-custodial father sued a school district in federal court alleging that the district violated the Individuals With Disabilities Education Act ("IDEA") when it failed to evaluate his daughter as he had requested. The father requested money damages, compensatory education, a reevaluation and other services. The court dismissed the case stating that the father may not bring a suit under the IDEA.

The court provided several reasons for not allowing the father to proceed. Most relevant to school districts is that the father failed to satisfy the IDEA's definition of "parent." The IDEA definition includes a legal guardian or surrogate parent, and the regulations clarify the statutory definition to apply to the "natural or adoptive parent of a child."² Nonetheless, courts have held that the IDEA does not abrogate the state's allocation of parental authority in a custody determination. In this case, the custody order had extinguished **all** of the father's parental rights, stating that there should be "no contact of any kind" between the father and his children. Because the father had no rights as a parent, none of the rights granted to parents under the IDEA applied to him.³

Joint Custody – Shared IEP Decision-Making Authority

At the opposite end of the spectrum from the *Carpenter* decision is the situation when both parents share legal custody. Where custody is shared, either parent may pursue due process. "Legal custody" is defined as "the right to make major decisions affecting the best interest of a minor child, including but not limited to, medical, religious and educational decisions."⁴ Decisions addressing this issue emphasize that the custody order controls. In many of these cases, one parent lacks full legal custody and may have the right to participate but not the right to make binding decisions.

A 2001 Pennsylvania Special Education Appeals Panel decision, *Tiffani L.*, observed in a footnote that "[i]n a joint or shared custody arrangement, both parents would have decision making authority, absent an agreement to the contrary."⁵ One of the cases cited by the Pennsylvania panel was an Illinois special education appeals panel decision, *Sandwich Community Unified S.D.*⁶ There, the school district sought to evaluate a student. The father consented to the evaluation, but the mother did not and told her son not to participate. After the tug-of-war dragged on for some time, the father requested due process to order the evaluation. The appeals panel held that because the father had joint legal custody, he had the right to request an impartial due process hearing. The opinion also commended the district for acting in a "legal and responsible manner" as it tried to balance the conflicting requests of the parents and address the behavioral issues of the child.

Other Custody Arrangements – IEP Participation and Access to Education Records

The *Carpenter* decision presents the "easy" case – where a non-custodial parent has no rights at all as to his children.

In that situation, a school district need not be concerned about including the non-custodial parent in the decision-making concerning a special education student. More difficult to resolve are those situations in which the non-custodial parent retains some rights to be involved in a child's education. Under the IDEA, even if one parent has the controlling right to make educational decisions, absent specific language to the contrary in a custody order, both parents have the right to participate in meetings, including Individualized Education Program ("IEP") meetings. Moreover, under both the Family Education Rights and Privacy Act ("FERPA") and the IDEA, both parents have the right to access a child's education record.

This right to participate may itself grant the non-custodial parent certain rights to seek relief. For example, in a Massachusetts decision,⁷ the parents had joint legal custody, but the custody agreement stated that, with the advice and consultation of the mother, the father was the final decision-maker in decisions affecting education. There, the court allowed the mother to proceed with the due process hearing because the issue was whether

she was consulted and whether the district properly informed her of certain decisions.

In a U.S. Court of Appeals decision from Illinois,⁸ the mother was granted custody, including the right to make educational decisions. However, the custody decree stated that "[e]ach party has authority to inspect the children's school records and to communicate with teachers, school personnel and counselors to discuss the children's standing and progress and to participate in school activities. . ."⁹ The lower court had dismissed the father's objections to his son's IEP solely on the grounds that he was not the custodial parent. The appeals court reversed, holding that although the mother's wishes would prevail in the event of disagreement with the father, the court must consider whether the father's claim was incompatible with the mother's exercise of her right to make educational decisions and to consider those areas where he did have rights, such as access to educational records.

A recent federal appeals court decision, *Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768 (2d Cir. 2002), illustrates the range of claims that may be asserted (even if dismissed) by a non-custodial parent. Here, the father was granted "all legal and physical rights regarding the choice of schooling for the child . . ." The mother, however, had "a right to reasonable information regarding the child's progress in school and her health and safety." The mother appealed the denial of her requests for an Independent Educational Evaluation ("IEE") and to amend her daughter's educational records pursuant to FERPA. She also asserted that she was denied information about her child in violation of her rights under IDEA and FERPA.¹⁰

Regarding the IEE, the court held that because the mother lacked authority to make educational decisions for her child, she could not demand due process over the school district's evaluation of the child.¹¹ As to the request to amend her daughter's records, the court noted that FERPA regulations provide that the right to seek a hearing to amend a student's records is bestowed on all parents unless a legally binding document "specifically revokes" those rights.

The court determined that the custody order specifically revoked the mother's rights by granting the father the sole authority to make educational decisions.¹²

The court in *Taylor* did allow the mother to proceed with her IDEA claim of denial of access to her daughter's educational records. At the same time, the court noted that her right to "reasonable information" does not mean she must be provided with "every last cover letter, transmittal sheet or scrap of paper that happens to be [in the file]." Nor does it impose on the school district an obligation to create documents or provide additional explanation about the documents.¹³

Conclusion

As these cases make clear, the middle ground between unrestricted joint custody and sole custody requires a close reading of the custody order – and possibly consultation with your school district's solicitor – to determine the rights of the non-custodial parent. A copy of the custody order is "must-have" for the district to make informed decisions with regard to special education programming and discipline. In the absence of a court order, the presumption is that the parents share joint legal custody. As a matter of practice, administrators should treat the parent who has control and possession of the child on a day-to-day basis as the custodial parent.

In a situation where the district does not have the custody order and a parent who does not appear to have day-to-day control and possession of the child makes a request concerning the child's education or for the student's educational records, the district should respond by requesting a copy of the custody order. If the parent refuses, the district then should request the custody order from the other parent. If both parents refuse to produce a copy of the custody order, the district should presume that they share joint legal custody. If that presumption is incorrect, the custodial parent would have an incentive to come forward with the custody order or other evidence that the other parent should not be permitted to participate or make decisions concerning the child's education.

If the matter goes to due process and an existing custody order is so unclear that it fails to provide guidance, the hearing officer has the authority to order the parents to request a ruling from the family court about the parent's authority to make decisions.¹⁴

1 No. CIV. A. 01-6270, 2002 WL 1832854 (E.D. Pa. Aug. 9, 2002).

2 See 34 C.F.R. § 300.20.

3 The other grounds for dismissing the suit were that a parent cannot bring suit on his or her own behalf because the IDEA does not grant substantive rights to parents, only to children. Additionally, the father was proceeding *pro se*, that is, without representation by an attorney, and a parent cannot represent his or her child in federal court unless the parent is a lawyer. Non-lawyer parents cannot represent their children.

4 23 Pa. C.S. § 5302.

5 *Tiffani L.*, No. 1167, at 5 n.23 (Aug. 23, 2001).

6 33 IDELR 235 (Ill. SEA 2000).

7 *Derek M. v. Reynolds*, 1990 WL 29197 (D. Mass. 1990).

8 *Navin v. Park Ridge Sch. Dist.*, 270 F.3d 1147 (7th Cir. 2001).

9 *Id.* at 1149.

10 The court dismissed the FERPA claim in light of the U.S. Supreme Court decision, *Gonzaga University v. Doe*, holding that an individual cannot bring a Section 1983 claim for a FERPA violation.

11 313 F.3d at 782.

12 *Id.* at 792.

13 313 F.3d at 787.

14 See *Tiffani L.* at 8 n.33.