

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

December 2, 2002

Case # 02.302, Parent v. Brunswick School Department

REPRESENTING THE FAMILY: Roxanne Doyer, Advocate

REPRESENTING THE SCHOOL: Donald A. Kopp, Esq.

HEARING OFFICER: Peter H. Stewart, Esq.

This hearing was held, and the decision was written, pursuant to 20-A MRSA 7202 *et seq.*, 20 USC 1415 *et seq.*, and accompanying regulations.

On October 7, 2002, Parent requested this hearing on behalf of Student (DOB:x/xx/xxxx). At the time the hearing request was filed, Student was living with her mother in Lewiston, Maine, and was enrolled in school there for the 2002-2003 academic year. The family named the Brunswick School Department because Student had attended school in Brunswick, for part of kindergarten and all of Student's first, second and third grade years, when the family lived in Brunswick. A pre-hearing conference was held on November 5 and a pre-hearing order was issued on November 12. The hearing was held on November 18. The family offered one witness, the student's mother, and introduced documents identified as P-1 through P-73 into evidence. The school did not offer any witnesses and introduced documents identified as S-1 through S-70 into evidence.

I. Preliminary Statement

This dispute arises out of events that occurred during the student's enrollment in he [sic] Brunswick school system which Student attended for part of kindergarten and then all of first, second and third grades. During this time, the student was found to be not eligible for special education services. The family did not agree with the eligibility determinations made by the Brunswick PET meetings. However, the family did not request a due process hearing until October 2002, after they had moved from Brunswick to Lewiston and enrolled the student in school there for the 2002-2003 academic year. The family then made the due process request which has led to the current hearing.

At the pre-hearing conference, the family advanced several arguments. First, the family asserted that under the provisions of the McKinney-Vento Homeless Assistance Act,¹ a

federal statute granting certain rights to persons who are “homeless” as defined therein, the student was entitled to return to school in the Brunswick school system. They further asserted that the hearing officer, appointed to hear this matter pursuant to federal and state special education law, had jurisdiction to resolve that claim. The family also claimed that the student had not received a free and [sic] appropriate [sic] public education while at the Brunswick schools, claiming that Brunswick PETs improperly determined her to be not eligible for special education services.

In a pre-hearing order, the hearing officer advised the parties that the question of the jurisdiction of a special education due process hearing officer to determine claims brought under the McKinney-Vento Act would be addressed as a preliminary matter. Additionally, the hearing officer raised the question of whether a non-resident family was entitled to a due process hearing against a former school system under the facts presented here. Again, the parties were advised that this issue would be addressed at the hearing as a preliminary matter.

II. Issues

- A. Whether the hearing officer has jurisdiction to rule upon a claim brought by the family pursuant to provisions of 42 USC 11432 *et seq.* (the McKinney-Vento Act);
- B. Whether a non-resident family is entitled, under the IDEA or Maine special education law, to a due process hearing seeking redress against a former school district;
- C. Whether the student received a free and [sic] appropriate education, as required by federal and state law, while in grades K-3 in the Brunswick school system;
- D. If a violation is found, what should the remedy be?

III. Findings of Fact

Based upon the testimony of the witness presented at the hearing and the documentary evidence admitted into the record, I make the following factual findings:

1. The student (DOB:x/xx/xxxx) attended school within the Brunswick school system for part of her kindergarten year and all of first, second and third grades. During this time, she lived with her mother in Brunswick. While PET meetings were held by the Brunswick school throughout the time the student attended school there, the student was never found to be eligible for special education services. (Mother, S- 12, 52, 66, 76).
2. With each announcement of a PET meeting, the student’s mother either received or was offered copies of “procedural safeguards” from the Brunswick School Department.

She received at least one copy of the “Parent’s Handbook” which also contained a description of the procedural rights of parents, including the availability of a due process hearing. Some of this information was difficult for the student’s mother to process easily. She also received information about public agencies available to provide assistance to parents in need of help with special education matters; names, addresses and telephone numbers of these agencies were included. (Mother, S-112, 52, 66, 76, 162-165)

3. The student’s mother was, and remains, highly involved in the education of her daughter. She attended as many PET meetings as she could given the sometimes difficult conditions present in her own life, volunteered at the school over the years and sought help in dealing with her child’s needs as she perceived them. She obtained the services of a case manager to help her navigate through the special education process. The case manager attended PET meetings about the student on 1/18/00, 2/14/02, and 5/23/02. The mother also engaged a parent advocate early in 2002. The advocate accompanied the student’s mother to PET meetings held on 2/14/02 and also on 5/23/02. (Mother, S-12, 52, 66)

4. The family moved from Brunswick to Lewiston during the summer of 2002. The student was enrolled in school and began attending fourth grade in Lewiston in September of 2002, at the beginning of the 2002-2003 school year. (Mother)

5. The family did not request a due process hearing until October 7, 2002. (Mother, S 1-4)

IV. Discussion

Initially, the family claims that it has certain rights under the McKinney-Vento Homeless Assistance Act, asserting that the family meets the definition of “homeless” contained in the Act, and that the student is entitled thereby to return to the Brunswick school system. The family urges the hearing officer to take jurisdiction of this claim, review it and issue a ruling ordering the Brunswick School Department to admit the student. Without commenting in any way about the merits of the family’s claim, I am compelled to decline this invitation. The jurisdiction of a special education due process hearing officer, appointed pursuant to state and federal special education laws, is limited to adjudicating disputes which arise out of those laws. A hearing officer’s jurisdiction - that is, the power to decide an issue - is both created and limited by special education law and cannot be expanded at the discretion of any particular hearing officer. I conclude that I do not have the jurisdiction to hear or rule upon any claim purportedly arising from the provisions of the McKinney Vento Act.²

The next issue is whether a family is entitled to a due process hearing seeking redress against a former school district, when no request for a due process hearing had been made when the student lived in or attended school in the former district While it is clear that the family did not request a due process hearing involving the Brunswick school system until

after the student was living and attending school in Lewiston, they argue that the McKinney-Vento Act grants the student *de facto* residency, that is, the right to attend school in Brunswick, and puts the family in a status equivalent to any other resident of the town.

The school disagrees, and asserts that the family is not entitled to a due process hearing under these circumstances when (1) the family knew of its right to request a hearing while the student was attending school in Brunswick but (2) did not make such a request until after it had moved out of town and enrolled the student in another school system. In support of its position, the school relies upon *Thompson et al. v. Board of the Special School District No. 1 et al.*, 144 F. 3rd 574, (8th Cir., 1998).³ *Thompson* involves facts similar to those here: the student had several years of problems at school during which family and school attempted [sic] design a program agreeable to all. While the parent and school did not always agree about the program the student was receiving, the parent did not request a due process hearing until after the student had left the original school and was attending another school. After enrolling the student in the other school, the parent requested a due process hearing, naming the former school. The hearing officer in that case concluded that the parent was not entitled to a due process hearing because (1) the student was no longer enrolled in the former school and (2) the parent was aware of her right to request a due process hearing while the student was attending the original school. Because the parent knew of her right to request a due process hearing, but did not exercise that right until after the student had left the school, the *Thompson* court upheld the hearing officer and affirmed the ruling that the parent was not entitled to a due process hearing involving the former school.

In this case it is undisputed that the mother did not request a due process hearing until after the student had moved from Brunswick to Lewiston and had enrolled in school there. Thus, the first part of the test applied in *Thompson* is met. The second question is whether the mother knew of her right to request a due process hearing while the student was enrolled in the Brunswick school. While I credit the mother's testimony that she had some difficulty processing some of the information about "procedural rights" that was given to her, there are other factors bearing on the question of whether the mother knew that she had a right to request a due process hearing while her daughter was attending school in Brunswick. At every PET meeting she was given, or offered, a copy of her procedural rights, including the right to request a hearing. On one occasion, the PET meeting of 2//14/02, she declined a copy, saying that she already had several copies. It is clear that she had been given appropriate information. If she was confused or uncertain about the information, she had ample opportunity to ask whatever questions she had. She was in the school frequently, both to meet with school staff about her daughter and as a volunteer; she could have inquired about her rights in either of those contexts. Also, it is important to note that the mother had the help of a case manager, employed by a regional service agency and assigned to her daughter, to help co-ordinate the services her daughter was receiving. While the person serving as case manager changed over the years, a case manager attended at least three PET meetings about the student over a period of more than two years. Finally, months before moving out of the Brunswick school system, the mother obtained the services of a parent's advocate to help and advise her about her

daughter's school problems. This advocate was involved in the process with the mother, and even attended two PET meetings with her, on 2/14/02 and then again on 5/23/02. In light of all this - the amount of information provided to the student's mother, the level of assistance and advice available to her through the school, her case manager, and particularly the advocate she engaged specifically to help her deal with her relationship with the school - I conclude that the mother was aware of her right to request a due process hearing while her daughter was in school in Brunswick. Thus, the second part of the *Thompson* test is also met. I conclude that the family is not entitled to a due process hearing under the circumstances presented in this case.

V. Order

For the reasons set forth above, this matter is dismissed with prejudice.

Peter H. Stewart Date
Hearing Officer

¹ *See*, 42 USC 11432 *et seq.*

² It is my understanding that the McKinney Vento Act contains an appeal process to resolve disputes about its meaning or application. The family may find relief there.

³ Also found at 28 IDELR 173 and 28 LRP 4875.