

**STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING**

November 22, 2004

Case #04.132H, *Parent & Parent v. South Portland School Department*

REPRESENTING [sic] THE FAMILY: Peter Clifford, Esq.

REPRESENTING THE SCHOOL: Amy K. Tchao, Esq.

HEARING OFFICER: Peter H. Stewart, Esq.

This special education due process hearing has been conducted, and this decision written, pursuant to the terms of state and federal special education law, 20-A MRSA 7202 *et seq.* and 20 USC 1415 *et seq.*, and the regulations accompanying each.

The mother and the father, the parents of the student, requested this hearing on September 24, 2004, when the mother filed a Dispute Resolution Request Form with the Due Process Office of the State of Maine Department of Education. The student was born on xx/xx/xxxx. He lived with his mother in South Portland and attended South Portland High School at the time this hearing request was filed. The student has been diagnosed as having multiple disabilities and is thereby eligible to receive special education services.

The student's parents initially asked for an expedited hearing, but shortly thereafter requested a standard due process hearing. Accordingly, the pre-hearing conference was held on October 19, 2004, at which time the school presented a motion to dismiss the case. The hearing officer partially granted the school's motion and dismissed many of the issues identified by the family. The hearing on the remaining issues was held on November 4, 2004. At the hearing, the family presented one witness and the school presented one witness. The parties jointly submitted documentary evidence identified as Joint Exhibits 1-148 and A-1 to A-5, and agreed to certain factual stipulations identified in the record as A-6.

The decision in this matter follows.

PRELIMINARY STATEMENT

This case involves a xx year-old student who is eligible for special education services under the category of “multiple disabilities.” His IEP provides, in part, that he receive special education transportation services. (JE 64, 65) He was transported to and from school in [sic] school bus that carried both regular and special education students, along with special education support staff. On December 12, 2003, after getting off the school bus, the student slipped and fell while walking toward the school building. The student was seriously injured, received medical treatment and did not attend school from the time of his accident until January 5, 2004, when he returned to school in a wheelchair. On January 5, the student’s transportation services changed: he was transported to and from school on a different school bus, one that carried only special education students and support staff, and was transported on a “door to door” basis. That is, he was escorted or accompanied by special education staff from the pickup point by his home to bus [sic] and from the bus to the school, and assisted as needed [sic] special education support staff throughout the entire trip. This level of service was provided to the student by the school from January 5, 2004 to the end of the 2003-2004 school year. The student continues to receive special education transportation service on a “door to door” basis in the 2004-2005 school year. The student no longer requires a wheelchair; he now uses a “side-walker” to assist him while walking. Currently, at the request of his mother, a special education support staff member always accompanies the student as he move [sic] from place to place within the school.

Prior to the pre-hearing conference, the family’s attorney set forth a list of issues he wished resolved in this special education due process hearing. The issues included allegations that the school, in its treatment of the student, had: violated the Americans with Disabilities Act, the Maine Human Rights Act, the Constitutions of the United States and the State of Maine, Section 504 of the Rehabilitation Act and the IDEA; acted in a negligent manner, causing harm to the student and his family; and acted in a discriminatory manner, causing harm both to him and his family. Neither in the written

submissions prior to the pre-hearing conference nor at the pre-hearing conference itself did the family articulate a remedy that arose from the IDEA.

At the pre-hearing conference on October 19, the school made a motion to dismiss the family's claims. After giving the parties an opportunity to submit written arguments on this motion, the hearing officer on October 28 dismissed issues 1, 2, 3, 4, 8, and 9, as contained in the family's October 7 "Statement of Issues", on the grounds that the issues were beyond the jurisdiction of a special education due process hearing officer. The hearing officer also dismissed issue 7 in the same document, except to the extent that it could relate to rights the student may have that arise out of the IDEA or Maine special education law. Further, the hearing officer denied the school's motion to dismiss as to issues 5 and 6, on the grounds they allege the school failed to comply with the IDEA regarding the design and/or provision of appropriate special education transportation to the student. Finally, the hearing officer noted that the family's continued failure to ask for a remedy within the jurisdiction of a special education hearing officer would be the threshold issue at the hearing. The hearing officer stated that "...unless the family can show that they seek a remedy that 1) is within the jurisdiction of the hearing officer but 2) has not already been provided by the school, there is no reason to proceed with a hearing on the merits of this case."

At the hearing, both parties presented both testimonial and documentary evidence on this issue. At the end of the day, the parties agreed to submit the case, both the threshold issue of a remedy and all remaining IDEA issues, to the hearing officer for decision on the basis of the record as it then existed, without taking any further evidence.

ISSUES

The issues to be resolved at this hearing are:

- I. Is the family seeking a valid remedy that is a) within the jurisdiction of the hearing officer and b) has not already been provided by the school; and, if so,

- II. Does the student's Individualized Education Program (IEP) as it concerns special education transportation services provide a free and appropriate education (FAPE); and, if so,
- III. Was the student's IEP as it concerns special education transportation services properly implemented by the school?

FINDINGS OF FACT

1. The student (DOB: xx/xx/xxxx) and [sic] lived with his family in the school district during high school and at the time this hearing was requested. He has been diagnosed as having multiple disabilities and is thereby eligible for special education services. The family plans to move out of the school district to another school district in Maine on November 13, 2004. A PET meeting involving the current school, the family and the school the student will be attending beginning November 15 is scheduled for the week of November 8. That PET will meet to develop a new IEP to be provided to the student by the new school. (Dispute Resolution Request Form, Testimony of K. Fries, JE A-3)
2. The IEP for school year 2003-2004 provided, in part, that the student receive special education transportation. From the beginning of the year until December 12, 2003, the student was transported to and from school on a school bus that carried regular education students as well as special education students. Special education support staff were on the bus to assist the special education students as needed. (JE 64-65, Testimony of K. Fries)
3. On December 12, 2004, the student slipped and fell while walking from the school bus into the school building. He was injured and required a "left hip pinning" as part of his treatment. He was out of school until January 5, 2004. When he returned, he was using a wheelchair. In his recovery, he has moved out of the wheelchair and is currently using a "side-walker", a device to improve his stability when walking. (JE 53, Testimony of K. Fries)

4. Upon the student's return to school on January 5, 2004, the school changed the special education transportation services he received. The student is transported to and from school on a smaller bus that carries only special education students, in addition to special education support staff. The transportation service was provided on a "door to door" basis: the student was escorted by special education staff from a pickup point near his home to the school bus, was accompanied by special education support staff during the bus ride, was met by special education support staff when the bus got to school, and was assisted as needed by special education support staff into the school and to his classroom. This level of transportation has been, and was being at the time of the hearing, provided to the student. During this time, the family has never asked that any change be made to the student's transportation services. The school offered to convene a PET meeting to discuss any issues the family may have had about the student's transportation, but the family did not accept that offer. (Testimony of K. Fries)

5. The student needed assistance getting on and getting off the school bus and also required assistance in getting from the bus into the school. He also required assistance while on the school bus. The special education support staff that provide such assistance need to be properly trained to deal with the student's needs. The support staff should be especially alert to his safety needs during inclement weather or when the footing is difficult to walk on [sic]. The student has both cognitive and physical limitations that need to be considered during transitions from home to bus, bus to school and within the school itself. While safety concerns are important, the student should be helped to learn how to take care of himself, and not only protected from harm. (Testimony of S. Fitzgerald)

DISCUSSION

The first issue to be resolved in this matter is whether the hearing officer has the ability, under the IDEA, to order remedial action that will be effective to address the family's concerns. For the reasons set forth below, this hearing officer concludes that he does not have jurisdiction to issue such a remedy and, therefore, that this case should be dismissed.

A.

From the beginning of this proceeding, the family, speaking through its attorney, has alleged that the school has engaged in behavior vis-à-vis the student that violates certain constitutional, statutory and common-law rights of the student and the family. The family has argued that, because of the school's alleged violation of these rights, it is entitled to a variety of remedies including money damages, re-imbusement for medical expenses, injunctive relief involving changes to the school's methods of training school staff and attorney's fees. These allegations and demands for remedy were made in the family's initial request for a special education due process hearing¹ and in a document entitled "Statement of Facts", dated 10/7/04. Just prior to the pre-hearing conference, the school made a motion to dismiss the family's case. The hearing officer granted the school's motion in large part, dismissing all allegations and claims that did not arise from federal or state special education law and regulations. What remained of the family's case was the claim in issue 7 regarding the allegation that the student had been denied "handicap accessible transportation" in violation of the IDEA, as well as the claims in issues 5 and 6 to the extent they relate to the provision of appropriate transportation required by the IDEA.

After the completion of the hearing, the hearing officer has reviewed the record as it exists at this point and has considered the arguments advanced by the parties' representatives at the hearing. The hearing officer reaffirms his 10/28/04 decision regarding the school's motion to dismiss. A special education due process officer does

¹ The Maine Department of Education requires that parties seeking a special education due process hearing initiate that process by filing a form with the Department. The family filed this form, called a Dispute Resolution Request Form, on 9/24/04. See, Case File.

not have jurisdiction to decide issues arising from the federal or state Constitution, the Americans with Disabilities Act, the Maine Human Rights Act or federal discrimination law, Section 504 of the Rehabilitation Act or upon a claim for attorney's fees for work done during this proceeding. Neither does a due process hearing officer have jurisdiction to rule on a "slip and fall" negligence claim. While the family may have valid claims to make under these sources and may be entitled to the remedies they describe here, the special education due process system is not the proper forum in which to pursue them².

B.

The due process hearing officer does have jurisdiction to order remedies that arise out of the IDEA or state special education law. Here, the IDEA issues involve the provision of special education transportation services to the student. At the conclusion of the hearing, it became clear that the family was not arguing that the "door to door" bus service that the student had been receiving since he returned to school on January 5, 2004 was inadequate under IDEA standards. Indeed, the family's expert witness essentially approved both the kind and level of service the school was providing. Rather, the family's argument amounted to a claim that the IEP was inadequate because it did not sufficiently describe the "door to door" transportation services the school was in fact providing. The family finally articulated the remedy it was seeking: an order from the hearing officer that the student's IEP, under which he was receiving special education services from the school, be amended to more completely describe the transportation services which the school was providing.

There are several reasons why this remedial request does not justify a hearing under the circumstances present in this case. First, the student had been receiving "door to door" transportation services, with special education support staff with him throughout the entire trip, since January 5, 2004. The family has known since that date exactly what

² Throughout this process, there was much debate about two recent decisions of the United States District Court, District of Maine, as each discussed the application of the exhaustion of administrative remedies doctrine to claims that were, or could have been, brought under the due process provisions of the IDEA. This hearing officer did not make any attempt to apply those decisions to this due process proceeding. *See*, 321 F. Supp. 2d 119 (USDC ME, 4/30/04) and 324 F. Supp. 95 (USDC ME, 5/7/04).

kind of transportation service the student was receiving. The school convened a PET meeting in July of 2004 to amend the IEP to reflect the fact that “door to door” services were being, and would continue to be, provided to the student. The student’s mother attended this PET and participated in the discussion about the student’s transportation services. The family cannot claim to be without precise knowledge of the details of the student’s transportation services. Second, the family made no complaint to the school about the “door to door” transportation service the student was receiving. During this period, the school asked the student’s mother if she wanted to convene another PET meeting to discuss transportation issues. She declined to do so. The family has never asked the school for the remedy it now says it wants. This remedy was never mentioned in the family’s request for a due process hearing, at the pre-hearing conference, or in any of its written submissions at any point in this process. The request that the IEP be modified to contain a more specific statement about transportation services was first articulated toward the end of the hearing on November 4, 2004. The school, while it has proved by its actions over the past year that it is willing to provide transportation services acceptable to the family, was never given the opportunity to do voluntarily what the family now asks the hearing officer to order it to do.

Finally, there is another fact present in this case which conclusively demonstrates the futility of the remedy the family now seeks. At the hearing, the school presented uncontradicted evidence that the family is moving out of the school district and is enrolling the student in another school. Sometime prior to October 27, the mother told the school she was moving to another town in Maine. The school offered to set up a joint PET meeting involving the family, the “old” school and the “new” school. The mother accepted the school’s offer. The purpose of the meeting is to develop the IEP that describes the special education services the student will receive at the “new” school. The joint PET was scheduled for the week beginning November 8. The family was moving out of the school district on November 13 and the student begins attending the “new” school on November 15. This decision will not issue until November 22, more than a week after the student has left the school the family is suing in this proceeding. Even assuming *arguendo* that the family is entitled to the order it seeks, it would be futile for this hearing officer to issue such an order a week after the student has begun attending

another school, in another school district, and is currently receiving his education under a different IEP. Even if there once was a controversy between these parties that did arise out of the IDEA, there is no longer any such controversy here. Under these circumstances, there is no reason to continue any further with this proceeding.

ORDER

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

Peter H. Stewart Date
Hearing Officer

WITNESS LIST

FOR THE FAMILY:

Susan Fitzgerald, B.S., M.S.

FOR THE SCHOOL:

Kathleen Fries, Director of Special Services, South Portland School Department

DOCUMENTS

JOINT EXHIBITS 1 to 148 and A-1 to A-6