



P.O. Box 185
Bowdoinham, Maine 04008

Fax 207 666-8241
e-mail: clenna@gwi.net

April 5, 1999

TO: Amy Tchao, Esq.
Richard O'Meara, Esq.

FROM: Carol B. Lenna
Hearing Officer

RE: Action on Request to Dismiss Hearing
Brunswick v. Parent Case 99.061

This memorandum serves to transmit my decision on the request made by Mr. O'Meara on behalf of the family to dismiss the special education due process hearing brought by the Brunswick School Department on behalf of the student.

The parties came together in hearing in the summer and fall of 1998 on the matter of an appropriate program for the student. The Hearing Officer¹, after many days of hearing on this and related issues, ruled that the program put forth by the school was reasonably calculated to provide the student educational benefit in the least restrictive educational environment. The parent appealed that decision to court. In November 1998, the student began attending the school program. In March 1999, after what was apparently a contentious period between the family and the school, the student was removed from school by the parents. On March 4, 1999, the parent requested the court hear additional evidence as part of their appeal. The student is currently in a homeschool program.

The request for hearing was filed by the Brunswick School Department on March 19, 1999. On March 24, 1999, the parent requested that the Hearing Officer dismiss the hearing. The school objected to this request. The Hearing Officer directed the parties to submit written arguments for consideration by April 2, 1999. The parties were convened by telephone conference call on Monday, April 5, to make oral presentations. This call lasted approximately one hour. A court reporter made a record of the proceeding.

¹ I was the hearing officer who conducted that hearing, as well as the related matters considered in conjunction with the hearing.

It is the position of the parent's attorney that the hearing should be dismissed. He argues that the school's request for hearing is not legitimate since the parent has not challenged any current action by the school. He asserts that in the absence of current controversy regarding the student's program, the school is requesting declaratory judgement from the hearing officer, not the resolution of an active dispute. He further asserts that there is no statutory provision within the Individuals with Disabilities Education Act (IDEA) which authorizes a school district to commence due process proceeding against parents of a student with a disability; only parents have that option. Finally, he argues that the school is using this request for hearing as a mechanism to bolster its argument to the court that it should not consider additional evidence which is the subject of a due process hearing.

It is the position of the school's attorney that the school has both the statutory and regulatory authority to bring forth a due process hearing. Additionally, she asserts that there is nothing in state or federal special education law or regulations which permits a due process hearing officer to dismiss a hearing on matters clearly within his or her jurisdiction. She argues that the hearing should go forward to determine the appropriateness of the program the school currently offers to the student; that the parent's removal of the student from the public school constitutes a rejection of the student's program, and therefore an active dispute exists around the program which should be resolved through the administrative process.

Matters to be determined:

- Does the school have the same right to request a due process hearing as that given parents?
- Does a due process hearing officer have the authority to dismiss a due process hearing on matters clearly within his or her jurisdiction?
- Should the hearing requested by the Brunswick School Department be dismissed?

School's Right to Request Hearing

Schools clearly have the right in both state and federal regulations to request a due process hearing on behalf of a student with a disability. "A parent or a public agency may initiate a hearing on *any* of the matters relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child." 34 CFR 300.507 ² (Emphasis added.) Maine Special Education Regulations at Section 11.1 state that "[a] parent or a school unit may initiate a hearing."³

² Parent's attorney argues that there is no statutory authority giving schools the right to request a due process hearing. 34 CFR 300.507 cites as its authority 20 USC 1415 (b)(5), (b)(6), (b)(7), (b)(8), (e)(1) and (f)(1).

Does a Due Process Hearing Officer have the Authority to Dismiss a Hearing

The school asserts that there is nothing in Maine's special education regulations or laws or in the federal IDEA or its regulations which permits a hearing officer to dismiss a hearing request. Conversely, there is nothing in law or regulations which bars a hearing officer from dismissing a hearing request. The hearing officer has the authority to decide on such matters presented to the hearing officer for review. When procedures are not set forth in law and regulations, those procedures are left to the discretion of the hearing officer. There are any number of reasons where it might be desirable for the hearing officer to dismiss a hearing. These matters should be left to the discretion of the hearing officer. If it is determined that that discretion has been abused, parties have the recourse to appeal any matter to civil court. See Moye by Moye v. Special Sch. Dist. No. 6, 23 IDELR 229 1995)

Should the Hearing Requested by the School be Dismissed?

The 1998-99 IEP for the student was the subject of a due process hearing in the summer and fall of 1998. The hearing officer, after several days of testimony and review of an extensive written record, issued a decision in October 1998 finding that the IEP proposed by the school was appropriate to meet the student's educational needs. The parents appealed that decision. In the interim, the student returned to the public school until March 3, 1999, when the student was withdrawn by the student's parents to begin a homeschool program. The parent wishes to present additional evidence to the court regarding events which occurred during the time the student returned to school until the student was removed by the student's parents.

In considering the request for a second hearing, the hearing officer must determine if there is a new dispute for hearing. In this case, it appears not. While the IEP may have been altered⁴ and new information generated as the events unfolded between November 1998 and March 1999, this is essentially the same dispute. The school offered an IEP for the 1998-99 school year. The parent rejected that IEP. While the dispute between the parties may have escalated, the disagreement is the same.

There seems no practical reason to move forward with this hearing. The hearing officer was presented with extensive evidence regarding the school's proposed program in the previous hearing. The hearing officer found the program design reasonably calculated to provide the student with educational benefit in the least restrictive educational

³ While new state regulations have not been promulgated since the new federal law was passed, language in the previous federal law and regulations was not substantially different on this issue

⁴ Statements by the school's attorney, not disputed by the parent's attorney, indicate that any changes in the IEP were relatively minor and either the result of the hearing order or attempts to accommodate the student's return to the public school.

99.061

Page 4

environment. The parents have exercised their right to appeal under 34 CFR 300.512. They have the right to request additional evidence be considered by the court as part of that appeal⁵. Until the court acts on the requirements set forth in §300.512, it serves no purpose to the parties in this dispute to pursue parallel dispute resolution. The special education due process hearing Case Number 99.061 is hereby dismissed.

cc: Parents
Polly Crowell
Michael Opuda

⁵ “In any [appeal]action brought under...this section, the court...shall hear additional evidence at the request of a party...” 34CFR§300.512 citing 20 USC 1415(i)(2)(B)