

**THE STATE OF NEW HAMPSHIRE  
DEPARTMENT OF EDUCATION**

In Re: IDPH FY 06-05-065

**ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**

This matter was scheduled for due process hearing by School District request, received at the Department of Education on 5/23/06 . The matter was scheduled for prehearing conference on 6/22/06 , and hearing dates of 7/12/06 and 7/14/06 were scheduled. Both Parent and the District appeared for the prehearing on 6/22/06 . The parties discussed the status of the case on the record. The prehearing conference resulted in an agreement that the matter could be scheduled for written arguments only on law arguments related to the status of the case. The hearing officer would have the sole authority to schedule a hearing on factual issues that might appear important in the review of the individual Motions for Summary Judgment filed by each party. The hearing officer declines the offer of a factual hearing.

The District's MOTION FOR SUMMARY JUDGMENT is dated 7/18/06 . The first argument in that MOTION is, "The hearing officer has jurisdiction to determine (District's) obligations to (Student), insofar as those obligations arise from the state and federal special education laws." The second argument in that MOTION is, "(Parent/Teacher) may pursue the grievance/arbitration process described in the collective bargaining agreement to determine what rights (Student) has under the collective bargaining agreement." The third argument in that MOTION is, "Since (Student) does not reside in the (District), the special education laws (RSA 186-C and the Individuals with Disabilities Education Act) do not require that (District) provide a free appropriate public education (FAPE) to (Student)."

Parents' MOTION FOR SUMMARY JUDGMENT is dated 7/12/06 . Parents argue that "... Student is lawfully enrolled as a student in the (District) pursuant to a collective bargaining agreement negotiated and executed between the (District) and the (\*) Teacher's Guild. (Guild)." Parents' MOTION also argues that the collective bargaining agreement permits the enrollment of a Guild member's child "without regard to residence." The MOTION argues that RSA 193:12, I permits agreements of a "district or of the school board" to waive state school residency laws. The argument in Parents' MOTION also alleges, "That the collective bargaining agreement specifically provides that any question concerning benefits afforded union members pursuant to the collective bargaining agreement are subject to a grievance procedure and ultimately arbitration." Parents' MOTION also alleges, "That any dispute as to residency is not relevant to the status of (Student) as a lawfully enrolled student with the consent of (District) and, as such, ... must be accorded the full rights and benefits of a student enrolled in that district as determined by Order of the Commissioner dated May 8, 2006 regarding Ed. 1127, Complaint No. 06-54 (SD Doc 4015)."

Each party filed a Memorandum of applicable law and each party had an opportunity to provide citations to relevant caselaw. Parents' Memorandum focuses on the rights attendant with the collective bargaining agreement that confer status on Student as if he is a resident in the (District) towns. The argument alleges that because "residence" is granted by contract, costs associated with the contractually granted rights should be controlled by contract provisions. Parents' Memorandum argues the New Hampshire statutory language for determining district liability for special education costs for a child are based on residence. Where, as here, the child's actual residence is other than the typically residence-labile school district, any dispute over educational costs, or special educational costs, between the District attended and the Parent/Teacher should be covered by the Collective Bargaining Agreement.

The District's Memorandum specifically states: "The parties also agree that the hearing officer's jurisdiction is limited to interpreting and applying the special education laws, not the collective bargaining agreement." The Memorandum argues that Parents have acted inconsistently with their argument because Parents "initiated" a special education procedure in March 2006 by commencing a complaint under Ed 1127 and 34 C.F.R. Sec. 300.660-300.662. This argument is rejected because at the time of Parents' request for complaint resolution, there was no agreement on evaluation or IEP, and Student was without a determination of what district would act.

The good news of the case was that the parties were able to reach an agreement on the coding and IEP questions for this Student after the due process case was scheduled. Presumably the coding and IEP agreements will enable the educational interests of the Student to be appropriately met while this controversy is conducted on a separate track. Whether or not the parties reached agreement because of the ruling of the Commissioner, the result is that Student's current code and IEP are agreed to by the parties.

The District raises three arguments in its Memorandum. The first argument is relative to Parents' March 2006 complaint to the Department of Education and the fact that Parents first sought relief within the special education system, rather than within the process provided by the Collective Bargaining Agreement. The Memorandum presents the complaint process history in detail and argues that the process is intended to provide specific answers quickly. The Memorandum argues that the complaint process resulted in a decision that exceeded the scope of the request. The decision of the Commissioner is cited in the Memorandum and is in the exhibits. The District, in argument, objects to certain language in the final sentence of the Commissioner's order, "All special education and related services must be provided at no cost to the parents." The argument continues on to cover other aspects of the District's objection to the complaint process.

The District's second argument in the Memorandum relates to the District's "entitlement" to a due process hearing on its duties under the special education laws, regardless of the grievance procedure in the collective bargaining agreement. This argument discusses numerous cases across the country that deal with various contractually provided rights and contractually provided arbitration/grievance procedures.

The validity of the cited cases for specific disputes covered by that case is not in question.

The District's third argument in the Memorandum argues "The State and Federal Special Education laws do not require the (District) to provide a FAPE to nonresident students." The argument is that New Hampshire statutes provide that a child "... may seek special education from the district where he resided, just as nondisabled students who seek public funding for regular education must deal with their district of residence." District Memorandum at page 27, also citing RSA 193:12. The argument continues that the federal special education laws impose the obligation to provide that special education on the individual states. 20 U.S.C. sec. 1412(a)(1)(A). This provision is applied to the New Hampshire statutory arrangement in Manchester School District v. Crisman, 306 F.3d 1, 9-11 (1st Cir. 2002). Of note in the "Crisman" decision is the review of New Hampshire residence laws as applied to costs of special education. The First Circuit stated, "It (the District Court) determined that state law, and not the IDEA, dictated the financial liability on individual local school districts for the costs of a free and appropriate public education." Id. at 9. The First Circuit decision agreed with the District Court determination that the IDEA did not impose a special education cost allocation, but left that up to state law. Id. at 11. The Crisman case discussed New Hampshire's statutory arrangement for allocation of special education costs. The "Crisman" issue is not present in this case, as this case was to be about special education entitlement, i.e., evaluation and IEP for a qualified child, but the parties settled those issues. The Crisman case was decided solely on New Hampshire's residence laws and cost allocation arrangements. Here, the District's argument is that New Hampshire statutes impose liability for special education costs based on the residence of a child, with various citations. The District's Memorandum also argues Section 504 considerations and "policy considerations" which are not stated here because those discussions are not necessary to decide a motion for summary judgment.

## DISCUSSION

The prime directive for hearing officers under the IDEA is to resolve cases within the statutory timelines as amended. This directive has been issued in connection with a Federal District Court case on the length of due process hearings while the special educational interests of that child languished. The reason for the prime directive is that the special education interests of a coded child must receive immediate attention. The system of special education hearings is directed before hearing officers with some knowledge of special education concepts and practices. Again, on information and belief, this is justified because of the need for speedy resolution of questions/issues within the statutory timelines established by Congress in the special education law. Any inference that the special educational issues in the instant dispute must be controlled by an arbitration process, or a collective bargaining agreement is rejected as contrary to the IDEA. Citations omitted. No position is taken on whether or not the parties may waive the IDEA provisions and engage in an arbitration procedure to establish special education right and responsibilities.

The Order from the Commissioner is affirmed as directly in line with the prime directive. The Commissioner's order directed a resolution of the special education issues within 20 days and also stated, "All special education and related services must be provided at no cost to the parents." The IDEA mandates the "cost" of special education to be the initial responsibility of the State Educational Agency. The IDEA then permits the State to allocate to the local educational agency a method of allocating costs of special education within the State. New Hampshire's statutory arrangement is such that the financial responsibility is allocated by "sending" and "receiving" districts in a typical fact pattern considered by the Legislature. While parents and districts sometimes mediate cost sharing formulas for special education, nothing in the IDEA requires cost sharing and nothing in the IDEA prohibits cost sharing. The attendance of this Student at a (District) school is via a collective bargaining agreement (hereinafter "CBA"). The CBA, apparently, neither voids New Hampshire statutes on special education cost allocation nor adopts those statutes. The prime directive is to be followed and responsibility for special education costs, or a predetermination of cost sharing should never be a bar to the prime directive of speedy resolution of the evaluation and programming needs of an individual child. On information and belief, the prime directive has been in existence and in practice for many years. The process for determining allocation of costs for special education under the New Hampshire statutory arrangement has historically been handled by another process within the Department of Education.

The typical fact pattern for cost sharing involves a sending and a receiving district. The Legislature has mandated this arrangement based on a specific legislative history and the parties would typically use the established procedure to allocate costs of special education under the legislative arrangement. The history of sending and receiving districts has typically involved fact patterns where special education eligible children were moved from district to district. Sometimes this movement is caused by parental action (divorce/death/job considerations/a temporary medical emergency/etc.). Sometimes this movement was due to court action and removal of custody powers from parents. No valid argument is presented why the parties should be required to follow the typical statutory fact pattern when this contractually established arrangement under the CBA does not utilize a "sending" and "receiving" school district to allocate special education costs. The residence statute, RSA 193:12 permits the parties to alter the residence rules. Here, the facts indicate that the parties have created a school attendance right by contract. There is no contest over the right of this Student to attend the (District) schools. There is no contest that Student is entitled to special education services while attending (District) schools. The contest is over how to allocate (or if to allocate) the costs of special education via the current statutory arrangement, or within the CBA.

No position is taken in this decision on the Commissioner's order relative to the "allocation" (or non-allocation) of special education costs in this decision. This decision is based solely on special education law and the IDEA. Hearing officers are specifically limited in their jurisdiction. Hearing officers are without authority to rule on Section 504 complaints, "1983" (civil rights) claims, and any other issue except those under the IDEA. That authority will not be exceeded here. Hearing officers have, on information and belief, never ruled on cost allocations in a due process case.

(Parents') MOTION FOR SUMMARY JUDGMENT is granted as to the “residency” issue of this Student. The parties have stipulated that Student may attend the (District) school by the terms of the CBA. Summary judgment is granted as to the right of this Student to attend (District) schools under the terms of the CBA. That right is established by the agreement of (District) and Parent that RSA 193:12 does not govern the admission of Student to the (District) schools otherwise decided by that statute. It is perhaps evident from this dispute that the Guild and the local School Board did not review the allocation of special education costs in the CBA in light of 20 U.S.C. Sec. 1401(25) or 34 Section 300.26(a) (Special education is to be provided “... at no cost to the parents...”). No position is taken on Parents' argument that the CBA requires all other issues to be determined by the CBA. Summary judgment is granted that absent a “sending” district, this (District) is responsible for the special education evaluation and (District) must offer an appropriate IEP to this child while he is qualified for special education and attending (District) schools.

The District's MOTION FOR SUMMARY JUDGMENT is granted in part. The granted part is that the hearing officer has jurisdiction to hear the special education issues between Parents and (District). The Motion is denied in part relative to the request that the IDEA does not require the (District) to provide a FAPE to Student based on residence considerations. RSA 193:12 permits parties to “consent” to school attendance for children with a residence other than the District's boundaries. The parties here stipulate that Student is attending a school not in his residence district. Having contractually altered the typical arrangement for school attendance, (District) is responsible for the special education requirements of the IDEA. Those portions (paragraph 3, 4, & 5) of the District's MOTION FOR SUMMARY JUDGMENT are denied.

So Ordered,  
July 20, 2006 S. David Siff , Hearing Officer

July 20, 2006 \_\_\_\_\_  
S. David Siff , Hearing Officer