

**STATE OF MAINE**

**SPECIAL EDUCATION DUE PROCESS HEARING**

January 23, 2004

**Case # 03.172H, *Parents v. Sanford School Department***

REPRESENTING THE FAMILY : Richard O'Meara, Esq.

REPRESENTING THE SCHOOL: Eric Herlan, Esq.

HEARING OFFICER: Lynne A. Williams, J.D., Ph.D.

**DECISION ON ISSUES FOR HEARING**

The family's request for a due process hearing was essentially a challenge to a Complaint Investigator's Report and the Corrective Action Plan contained therein. The family challenged the report as follows:

What is the appropriate compensatory education remedy for the Sanford School Department's failure to provide Student with a free appropriate public education (FAPE) during the 2000-2001, 2001-2002 and 2002-2003 school years?

The Sanford School Department, however, sought to challenge the Commissioner's underlying finding that the department did not provide a free appropriate public education during the years in questions [sic], and sought to offer testimony as to the following issue:

Did the Sanford School Department provide Student with educational programming that was reasonably calculated to provide him with educational benefit during the years in question?

The family contended that the school department's failure to request a due process hearing within the thirty day period following receipt of the complaint investigator's report bars them from challenging her findings.

A conference call was held on Wednesday, January 21, 2004 to consider whether the Sanford School Department has a legal basis for challenging the complaint investigator's findings regarding the provision of FAPE to Student during the periods in question.

## **Statement of Facts.**

1. The Complaint Investigation Report in question was issued on November 21, 2003 and was received by the Sanford School Department on November 25, 2003 and most likely received by the family on or about that date.
2. The family subsequently faxed a due process hearing request to the Due Process Office on December 23, 2003, and a paper copy of the this request was received by the Due Process Office on December 29, 2003.
3. In a letter to Pauline Lamontagne, dated December 29, 2003, the Sanford School Department stated that they would be “asking that the hearing officer fully review *de novo* that portion of the Investigator’s ruling that relates to the student’s earlier school years.” In this letter, Sanford also reserves “the right to contest the underlying portion of the Investigator’s ruling that is currently being challenged by the family.” (Letter from Eric Herlan, Esq. to Pauline Lamontagne, Due Process Coordinator, dated December 29, 2003)

## **Discussion.**

There are no federal or state laws or regulations that specifically address the filing timelines for cross appeals of the findings of a complaint investigation. The family argues that this failure to either statutorily or regulatorily address this issue requires that the question be strictly governed by 20-A M.R.S.A. §7206(4), which provides:

A parent or a school administrative unit may challenge a complaint investigation report by requesting a due process hearing within 30 days of the receipt of the complaint investigation report.

Therefore, they argue, any appeal, even a cross appeal, brought outside of this time frame would be barred and the investigator’s findings would become the final word on the issue.

The absence of direct guidance regarding the timeliness of a cross appeal does not mandate the application of §7206(4) to cross appeals. Rather, the void created by Congress’ and the state legislature’s failure to specifically address this issue could more appropriately be filled by looking to timelines in similar legal situation. For example, under Rule 13(a) of the Federal Rules of Civil Procedure, a compulsory counterclaim must be asserted in the pending case or else it is barred in any subsequent action. A compulsory counterclaim is one, which “arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim....” F.R.Civ.P. 13(a). Therefore, when a

compulsory counterclaim is filed within the period for filing an answer, the counterclaim would be considered timely.<sup>1</sup>

In Maine, there is a similar statute applicable to counterclaims. Under 14 M.R.S.A. §865, a defendant may file a counterclaim, arising out of the same action or occurrence, even beyond the applicable statute of limitations. When such counterclaim is filed, it relates back to the time that the plaintiff's action was commenced for the purpose of the statute of limitations.<sup>2</sup>

The purpose of these provisions is to prevent a appellant from filing an appeal at the very end of the permissible filing period, thereby precluding the appellee from filing a cross appeal. While nothing mandates application of this reasoning to the situation at hand, nothing prohibits it either. And the strict application of a statute that could significantly disadvantage either party, in this case the appellee school department, is unjustifiable.

It is not unknown for a Maine hearing officer to apply relevant civil statutes to procedural questions not addressed by federal or state law or regulations. In *Mr. and Mrs. F. v. Caribou*, the school department requested that the hearing officer impose a strict statute of limitations on student's claim for compensatory education. However, after consideration of what statute of limitations might be most relevant, that request was denied and a more reasonable time period, Maine's general, six-year statute of limitations for many civil actions, was applied. *Mr. and Mrs. F. v. Caribou* (01.135, August 3, 2001).

Just as there was a consideration of what statute of limitations might be most relevant in *Caribou*, so should there be such a consideration in this case. And part of that consideration must be what policies underlie the various statutes. As noted previously, the purpose of the federal and civil counterclaim rules was to avoid disadvantaging a appellee by permitting an appellant to essentially preclude the filing of a counterclaim. The purpose of §7206(4) is to assure timely appeals; it is silent, however, on the question of cross appeals. In the absence of any clear guidance on this issue, the most appropriate, and fairest, way to decide this issue would be to apply the principles underlying the rules governing federal and state cross claims.

The family argues that the hearing officer does not have broad equitable powers to address this issue. However, much of the power that the hearing officer has is equitable, and many of the decisions made by hearing officers reflect the application of equitable principles. For example, tuition reimbursement is an equitable remedy. 20 U.S.C. §1414(c); *Burlington School Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985); *Florence County School Dist. Four v. Carter*, 114 S.Ct. 361 (1993).

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<sup>1</sup> Rule 13(a) would generally limit the time available for filing such a compulsory counterclaim to the time permitted to file an answer, usually 20 days.

<sup>2</sup> Again, the time period for filing would generally be 20 days.

Lastly, the issue of remedy raised by the family is significantly intertwined with the question of FAPE. Therefore, a determination of remedy without a consideration of the facts surrounding the delivery, or non-delivery, of FAPE would be inappropriate.

**Decision.**

The Sanford School Department shall be permitted to challenge the findings of the complaint investigator with reference to whether a free appropriate public education was provided to Student during the years in question. It shall be assumed that the school department's cross appeal on this issue was submitted in a timely manner.

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Lynne A. Williams, J.D., Ph.D.

Dated: \_\_\_\_\_