

STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION

Parent/Conway School Board

(SB-FY-12-06-022)

HEARING OFFICER'S REPORT AND RECOMMENDATION

I. Undisputed Facts

The relevant underlying facts in this case are not in dispute. The Parent has a child who is a student at Kennett High School ("School") in the Conway School District ("School District"). School Board's Motion to Dismiss, at 1 (July 20, 2012). Since January 2012, the Parent has been the unwilling subject of a "Communication Protocol" (Exhibit 4) ordered and implemented by the Conway School District. See Exhibit B.

Prior to May 2012, the Communication Protocol prevented the Parent from having direct communication with her child's teachers. In May 2012, the School District, working with its legal counsel, developed a modified protocol that allows the Parent direct access to School faculty and staff as requested by the Parent but imposes a new requirement that all communication (presumably written only) between the Parent and School faculty and staff be "cc'ed" by the Parent to the School's Director of Guidance. Exhibit G; Exhibit 4 ("Communication Protocol"); see Motion to Dismiss, at 2. By emails dated May 12, 2012 (Exhibit F) and May 22, 2012 (Exhibit 5) the Parent objected to the revised protocol and requested a hearing before the Conway School Board ("School Board").

By letters dated May 18, 2012 (Exhibit G) and June 8, 2012 (Exhibit 6), School District Superintendent Dr. Carl J. Nelson notified the Parent that the Conway School

Board had denied her request. In the May 18, 2012 letter Dr. Nelson stated that on May 14, 2012 he had “reviewed” her request with the School Board and that the School Board “feels it is not necessary to meet at this time...[because] the new protocol needs to be implemented and monitored”. Exhibit G. The letter concludes with: “Should you wish to appeal this decision please contact Stephen Berwick, NH DOE Dispute Resolution and Constituent Complaints Coordinator”. *Id.*

In the June 8th letter, Dr. Nelson informed the Parent that he “took your request to the Conway School Board on May 30, 2012” and that the School Board had “determined that there is no reason to hold a hearing at this time”. Exhibit 6. Once again, Dr. Nelson noted that the School Board “feels the new protocol needs to be implemented and monitored” and closed with the same statement regarding contacting the Department of Education “should you wish to appeal this decision”. *Id.*

II. Procedural History

In an email dated June 20, 2012 (Exhibit 7), the Parent filed a *pro se* appeal of the School Board’s denial of her request for a hearing regarding the appropriateness of the Communication Protocol. That email included the following statement of relief sought by the Parent:

I am requesting a hearing with the state in regards to my restricted communication with all teachers and administrators as other parents do. I feel singled out and next year would like open communication untainted by the administration rules that I must cc all my communications to the head of guidance.

Exhibit 7.

A Prehearing Conference was held on July 16, 2012 at which the School District raised a jurisdictional issue regarding the State Board’s authority to review this matter in

addition to asserting that, as a matter of law, the School Board was not required to provide the Parent a hearing regarding the Communication Protocol. The Parent disagreed with the School District's legal position and it was agreed by the parties to resolve these two legal issues in an expedited fashion. As such, the School District filed a Motion to Dismiss with Exhibits 1-8 on July 20, 2012 to which the Parent objected and further responded by letters dated July 20, 2012 (Exhibit A) and July 21, 2012 (Exhibit O) with Exhibits A-Q. All of the Parents pleadings and exhibits were received for filing on July 26, 2012.

III. Legal Analysis

The School District's Motion to Dismiss raises two related legal issues: whether the Conway School Board was required to provide the Parent with an opportunity for a hearing on the appropriateness of the Communication Protocol and whether the State Board of Education has the jurisdictional authority to review the School District's decision to not provide a hearing.

Petitioner's view is that because there is no statute that expressly provides a Parent with the right to appeal a decision of this nature the School Board was free to exercise its discretion and deny the hearing request. From there the School Board's argument on the jurisdictional issue is that because there is no decision to "appeal" within the meaning of RSA 21-N the State Board has no jurisdiction to review the decision of the School Board.

The School Board's interpretation of both the right to a hearing under New Hampshire law and the State Board's authority under RSA 21-N is unduly narrow, however. It is also contrary to the clear language of RSA 21-N, to State Board precedent and to the hearing requirements of Ed 200.

RSA 21-N:11 grants the State Board broad authority to: “Hear appeals and issue decisions...of **any** dispute between individuals and school systems...except those disputes governed by the provisions of RSA 21-N:4, III.” RSA 21-N:11, III (*emphasis added*). The State Board’s appellate jurisdiction expressly applies to “any” dispute between parents and school districts. *Id.* As such, the Board’s authority is not contingent on the Parent being provided an express statutory right to appeal the particular subject matter of the dispute.

Secondly, the Board has a longstanding practice of taking jurisdiction of a wide variety of parent-school district “disputes” without requiring a separate express statutory right to appeal. *See e.g.* State Board Minutes, November 9, 2011 (State Board rejected hearing officer recommendation and ruled that pursuant to RSA 21-N:11, it had the authority to hear a student’s appeal regarding a bullying claim despite recent repeal of statutory provision expressly providing a right to appeal). Although a longstanding practice cannot confer the State Board with authority beyond that provided by RSA 21-N:11, a longstanding practice undisturbed by the legislature is evidence of a legislative intent consistent with that practice. *New Hampshire Retirement System v. Sununu*, 126 N.H. 104, 109 (N.H. 1985)

Moreover, the Parent’s right to a hearing regarding the disputed Communication Protocol is clearly established by the due process requirements of Ed 204. In particular, Ed 204.01 expressly requires that “a local school board shall...[p]rovide opportunity for a hearing when the legal rights, duties or privileges of a party are threatened”. Ed 204.01(a)(1). A Parent’s ability to communicate with her child’s teachers is a significant interest that qualifies as a “legal right, duty or privilege” within the meaning of Ed

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204.01(a). Though the impact on parent-teacher communication has been lessened under the modified Communication Protocol that fact relates to the appropriateness of the restriction not to the Parent's underlying right to a hearing.

Finally, the provisions of Ed 204.01(a)-(f) provide direction as to the required procedures and scope of such hearing.

IV. Recommendation

Accordingly, it is recommended that the State Board:

- 1) Deny the School District's Motion to Dismiss;
- 2) Grant the Parent's request for a hearing before the Conway School Board; and
- 3) Remand this matter back to the Conway School Board for action consistent with this decision.

V. Notice Pursuant To Ed 201.01

As the Parties have agreed to expedite this matter, a list of exceptions with supporting memoranda of law may be filed by either Party within 10 days of the date of this Proposed Order. Any Party who wishes to present oral argument to the Board shall file a separate request for oral argument within the same time frame.

Date: August 2, 20012

Peter T. Foley
Hearing Officer