

STATE OF OHIO
DEPARTMENT OF EDUCATION

In the Matter of the:

Due Process Request of:

Petitioners,

And

Toledo Public Schools,

Respondent.

IMPARTIAL
HEARING OFFICER
CARLA B. DAVIS

Case No.: SE 2102-2007

DECISION

On January 5, 2009, this Hearing Officer issued a decision on the Petitioner's Motion for Clarification of Order and/or for Reconsideration of the decision issued on September 16, 2008 which denied all but issues five (5) and in part, issue nine (9) of the amended complaint filed by the Petitioners. Pursuant to that decision, this IHO determined that the Petitioners' Second Amended Complaint was to be allowed on the issue of whether the student was denied FAPE as a result of the procedural violation of not being provided with the updated "Whose IDEA is This?" and whether TPS failed to have the required persons present at the resolution session in May of 2008. Briefs were to be filed on those issues by January 15, 2009; an extension was granted until January 30, 2009.

ISSUES PRESENTED:

1. Whether the student was denied FAPE as a result of the District's procedural violation of failing to provide the parents with the updated version of 'Whose IDEA is This?'
2. Whether the District failed to have the required persons present at the May 2008 Resolution Session and if so, whether that resulted in a denial of FAPE to the student?

FINDINGS OF FACT:

ISSUE I

The parents filed a due process request on April 7, 2008 on the issue of the failure of the District to provide breakfast to their child in accordance with the Federally-funded nutrition program available to all of the students of the district. The District sent the parents a copy of the March 1, 2007 version of 'Whose Idea Is This' rather than the updated version issued April 3, 2007. The updated version indicates on the cover that there were corrections to the March 1, 2007 version on pages 43 and 44.

A review of the April 3, 2007 version demonstrates that the corrections defined the two types of non-public schools and provided that children attending those schools may receive services from the public school district. The parents herein have not suggested that this section is relevant to the educational issues of their student. Petitioners have also not provided any evidence demonstrating substantive harm to them or to the student from the procedural violation. An affidavit attached to Petitioners' Brief, styled Exhibit E, states, "I was unaware of whether there were any changes in the provisions

that would affect my ability to fully participate in decisions regarding my daughter's education." See, Exhibit E of Petitioners' Brief.

ISSUE 2

The District received a copy of the Petitioners' due process request on April 8, 2008. In response, the District sent a letter dated April 16, 2008 suggesting a resolution session on April 25, 2008. Petitioners requested that the resolution session be held on May 12, 2008. In attendance at that session were Thom Billau, the Director of Student Services for the District and Mr. [REDACTED], the student's father. No resolution was reached.

According to Mr. Billau's affidavit, attached to Respondent's Brief, he was one of the school district's representatives at several IEP meetings convened for the student. With respect to the issue raised in the due process complaint, Mr. Billau averred that he had specific knowledge of the issue, he had discussed the District's position with his superior and that he had decision-making authority.

The Petitioners specifically objected to Mr. Billau's participation in the resolution process on the basis that he had no involvement in "breakfast" in 2006. See. Petitioners' Exhibit C. Petitioners requested that the District have "all appropriate personnel" available, but did not request any particular member of the IEP team.

CONCLUSIONS OF LAW AND DECISION ON ISSUES PRESENTED:

ISSUE 1

It is undisputed that there was a procedural violation in the provision of an outdated version of "Whose Idea Is This." A finding of a procedural violation does not automatically entitle a petitioner to relief without a showing that the procedural violation

caused substantive harm to the student or to the parents' ability to meaningfully participate in their child's education. Knable v. Bexley City Sch. Dist. (6th Cir. 2001), 238 F. 3d 755. Further, the burden is on the Petitioners to demonstrate that substantive harm occurred or significantly impeded their participation in their child's education. Schaffer ex rel. Schaffer v. Weast (2005), 546 U.S. 49.

Applying the law to the facts of this case requires the finding that the procedural violation did not result in substantive harm or impede the parents' ability to participate in their child's education. The sections of "Whose Idea Is This" that were corrected by the later version had no relevance for the student herein. Moreover, the only suggestion of harm by the parents is that they did not know whether the changes would affect their participation. This, without more, does not meet the burden required.

ISSUE 2

A school district must convene a resolution session after receiving a due process complaint notice. 20 U.S.C. 1415(f)(1)(B). The resolution session must include a "representative of the agency who has decision-making authority on behalf of the agency." 20 U.S.C. 1415(f)(1)(B)(i). Further, Section 300.510(a)(4) of the Code of Federal Regulations states that the "parent and the LEA determine the relevant members" to attend the meeting.

It is clear that the District did convene a resolution session upon receipt of the due process complaint notice and that it was scheduled at the time requested by the Petitioners. Mr. Billau's affidavit supports the District's contention that he was a representative of the agency, he had decision-making authority, he had participated in several IEP meetings held on behalf of the child and that he had specific knowledge of

the issue regarding the breakfast program in dispute. The Petitioners objected to his participation on the basis that Mr. Billau had no involvement in "breakfast" in 2006. There was no representation that he had no knowledge of the facts regarding the breakfast program. In addition, although the Petitioners objected to his participation, they made no specific request for any particular member or members of the IEP team.

It is the decision of this IHO that Mr. Billau met the requirements to participate in the resolution session as defined by law and its implementing regulations. Hence, it is not necessary to decide whether FAPE was denied to the child on the basis of this issue.

IT IS SO ORDERED.

2-5-2009
DATE

Carla B. Davis
Carla B. Davis
Impartial Hearing Officer

**SEE ATTACHED NOTICE OF OPPORTUNITY TO APPEAL DECISION
OF IMPARTIAL HEARING OFFICER.**

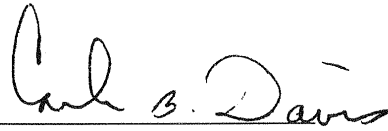
CERTIFICATION

This is to certify that a copy of the foregoing was sent by Certified Mail and by Ordinary U.S. Mail this 5th day of February, 2009 to the following:

Jena Smith
2612 Bensmore
Toledo, Ohio 43606

Randy L. Meyer
Lisa Pizza
Counsel for Toledo Public Schools
Spengler Nathanson
Four Seagate, Suite 400
Toledo, Ohio 43604-2622

Chrissy Cline, Ohio Department of Education
Office for Exceptional Children
25 South Front Street
Mail Stop #202
Columbus, Ohio 43125-4183.

A handwritten signature in cursive script that reads "Carla B. Davis". The signature is written in black ink and is positioned above a horizontal line.

Carla B. Davis
Impartial Hearing Officer

NOTICE OF OPPORTUNITY TO APPEAL DECISION OF IMPARTIAL HEARING OFFICER OR BRING CIVIL ACTION TO APPEAL STATE LEVEL DECISION

1. **Appeal Right After Hearing Decision:** If you are not satisfied with the findings and decision of the impartial hearing officer, you may appeal the decision, in writing, to the Ohio Department of Education within forty-five (45) days of receipt of the hearing decision, under Revised Code Section 3323.05(H) and Rule 3301-51-05(K)(14)(b) of the Administrative Code (*Operating Standards for Ohio Educational Agencies Serving Children with Disabilities*).

Notice of appeal: If you appeal, you must file a Notice of Appeal that sets forth the order appealed and the grounds of your appeal. You must file:

- (a) The **original** Notice of Appeal with the Ohio Department of Education:

Ohio Department of Education
Office for Exceptional Children
Procedural Safeguards Section
25 South Front Street, Mail Stop #202
Columbus, Ohio 43215-4183

- (b) A copy of your Notice of Appeal with the other party to the due process whom your appeal is brought against.

Upon receipt of your appeal, the Ohio Department of Education will appoint a state level review officer to review the decision you are appealing from and issue a final decision in the review.

2. **Appeal Right after State Level Review Decision:** If you are not satisfied with the findings and decision of the state level review officer, you have the right to bring a civil action to appeal the decision, in writing, under Revised Code Section 3323.05(H) and Rule 3301-51-05(K)(17). You may file your civil action:
 - a. In the court of common pleas of the county in which the child's school district of residence is located within 45 days of notification of the order of the state level review officer, under Chapter 119. of the Revised Code, as specified in Revised Code Section 3323.05(H).
 - OR
 - b. In a district court of the United States within 90 days from the date of the decision of the state level review officer regardless of the amount in controversy, as specified in 20 U.S.C. 1415(i)(2) and 34 C.F.R. 300.516.

Notice of Appeal: If you appeal, you must file a Notice of Appeal that sets forth the order appealed from and the grounds of the appeal.

Filing in common pleas court: If you bring your civil action in Ohio common pleas court, within the 45 days referenced in #2.a. above, you must file:

1. The **original** Notice of Appeal with the Ohio Department of Education. (Send the original to the address provided for ODE in #1(a) above).
2. A copy of the Notice of Appeal with each of the following:
 - The appropriate court; and
 - The other party to the due process whom your appeal is brought against.

Filing in federal district court: If you are bringing your civil action in the United States district court, within the 90 days referenced in #2.b. above, you must file your Notice of Appeal in accordance with the court's requirements. Check with the district court to determine the district court's specific filing requirements.