

HEARING OFFICER DECISION

PROCEDURAL HISTORY

The request for hearing in this matter was filed on December 14, 2010, and assigned to the undersigned hearing officer by memorandum dated same. On December 17, 2010, the hearing officer sent a letter to the parties, outlining the timelines and on December 23, 2010, the LEA filed a Motion to Dismiss with two exhibits and requested a hearing date. The Motion was supplemented by an additional exhibit on December 28, 2010. To properly decide the motion, the hearing officer requested the prior due process decision from D11-008 which was received on January 15, 2011. The telephone hearing was scheduled for January 17, 2011, and the parent was encouraged by the hearing officer to send a written response as well as participate in the motion hearing. On January 13, 2011, the LEA filed an Amended Motion to Dismiss, alleging additional grounds for dismissal. On January 17, 2011, the telephone hearing was held. The parent chose not to participate.

ISSUES PRESENTED IN MOTIONS

The LEA's Motion to Dismiss alleged lack of sufficiency in the Initiator's request for hearing. It was the LEA's contention that the parent was primarily reiterating the same complaints he had made in an earlier due process (D11-008) which at the time of the Motion had not yet been decided.¹

In addition, the LEA alleged that the only substantive issue not contained in the previous due process involved the December 9, 2010, IEP meeting. This meeting was admittedly noticed to the parents eight (8) days before the meeting rather than the ten (10) days required by Policy 2419. In addition, the parents attended but later left the IEP meeting on December 9, 2010, because the LEA had its attorney present for the IEP meeting; the parents alleged that his presence destroyed the confidentiality of the meeting and the LEA responded that it did not. The LEA's final ground for requesting dismissal was that the Parent had filed this due process for the improper purpose of harassing the LEA, needlessly increasing the cost of litigation and was an abuse of process.

The LEA's Amended Motion to Dismiss alleged in addition to the grounds in its original motion that, despite the LEA's multiple efforts to schedule and hold a resolution meeting, the parent has refused to participate and refused to directly respond to the LEA's efforts despite being mailed, emailed and faxed each attempt to schedule. Included with this motion were copies of the actual LEA documents dated December 15, 2010, December 29, 2010, and January 6, 2011, sent to the parent and the LEA Special Education Coordinator at the January 17, 2011, told the hearing officer about additional contacts by the LEA with the parent by telephone.

1. The written decision in D11-008 was issued on January 4, 2011, by Hearing Officer Patrick Lane. This decision held that at the time of the student's enrollment in the LEA, there was no evidence that the student had an IEP in place so therefore the LEA did not deny FAPE to the student by failing to implement a current IEP. The decision also held that the LEA determined eligibility on the fifty-third (53rd) day on October 22, 2010, well within the eighty (80) days from parental consent and had until November 21, 2010 to develop an IEP and therefore did not deny FAPE to the student by unlawfully delaying the eligibility determination and subsequent development of the student's IEP.

CREDIBILITY OF EXHIBITS

The hearing officer was and is satisfied that all records and documents entered as exhibits are complete, authentic and valid and that they were entered with proper evidentiary foundations. The hearing officer gives due deference to the due process hearing decision in D11-008, issued January 4, 2011, including the findings of fact and conclusions of law, as they concern the student, the parent, and the LEA.

CONCLUSIONS OF LAW

1. The Individuals with Disabilities Education Act (IDEA) 20 USC §1400 et seq. and the regulations found in 34 CFR §300.1 et seq. as well as West Virginia Code §18-20-1 et seq. and the regulations for the Education of Students with Exceptionalities (*Policy 2419*) are the relevant provisions of law applicable to this due process.
2. These provisions allow a parent or school district to request a due process hearing on any matter relating to a proposal or a refusal to initiate or change the identification, evaluation or educational placement of a student or the provision of a free appropriate public education (FAPE).
3. A Due Process hearing request must be in writing and contain six elements, including “a specific description of the student’s problem relating to the proposed or refused initiation or change, including the facts pertinent to the problem.” A due process hearing may not be held until the Initiator files a due process complaint that includes this information. *Policy 2419*
4. A due process hearing request by the parent/student will be considered sufficient unless the LEA notifies the due process hearing officer within fifteen calendar days of receiving the complaint that the complaint does not meet the content requirements. *Policy 2419*. The LEA timely filed its notification that the request was not sufficient.
5. In due process hearing decisions determining whether or not a student received FAPE and involving solely procedural violations, a hearing officer may find for the parent/student only if the procedural inadequacies interfered with the student’s right to FAPE, or significantly interfered with the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE to the student or caused a deprivation of an educational benefit. *Policy 2419*.
6. If the LEA, after making reasonable efforts and documenting same, is unable to get the parents to participate in the mandatory resolution session, the LEA may, at the conclusion of the resolution period, ask for dismissal of the parent’s due process complaint. 34 CFR §300.510(b)(4) and 34 CFR §300.322(d), The LEA appropriately documented its reasonable efforts to obtain parental participation and timely filed its request.

DISCUSSION

1. Sufficiency of the Due Process Complaint

As noted above, the LEA timely filed its notice to the hearing officer that the parent’s complaint does not meet the content requirements established in *Policy 2419*. The LEA’s main argument was that these were the same issues raised in the prior due process request and the content of this due process request was not different enough from the

issues litigated in the prior due process request to be considered sufficient. Although *Policy 2419* states that the hearing officer is to determine the sufficiency of the complaint within five (5) calendar days of being notified of the issue, the hearing officer was unable to do so since the decision in the prior due process was not yet written and she was therefore unable to compare the immediate due process issues with the issues litigated in the prior due process. The prior due process hearing decision was received by the hearing officer on January 15, 2011, and this decision is issued within five (5) calendar days of that receipt.

Noting in the procedural safeguards sections in *Policy 2419* and IDEA prevents a parent from filing a separate due process complaint on an issue separate from the issue(s) in a due process complaint already filed. 34 CFR §300.500-536. A thorough review of the January 2011 decision in D11-008 finds that, with the exception of the December 9, 2010, IEP meeting allegations, all issues raised by the parent in D11-009 are identical to the issues litigated in D11-008 and the complaint is therefore insufficient as to those issues. 2

As to the issues raised by the parent in the complaint concerning the December 9, 2010, IEP meeting, the parent alleges that the LEA agrees that the meeting notice was received eight (8) days before the IEP meeting, two (2) days fewer that required by *Policy 2419* and IDEA regulations. The parent also alleges that the LEA's attorney should not have been present at the IEP meeting. These issues allege procedural violations and *Policy 2419* limits the ability of the hearing officer to find for the student/parent if the sole issue(s) is a procedural violation. The parent offered no evidence that the two-day non-compliance interfered with the student's right to FAPE, or significantly interfered with the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the student or caused a deprivation of an educational benefit as the parents attended the IEP meeting and signed the sign-in sheet. The second procedural allegation (that the LEA's attorney attended the IEP meeting) might have been a sufficiently significant violation if this had been a resolution meeting but there was no evidence that this was anything but an IEP meeting. The LEA is free to bring whomever it wishes to an IEP meeting if it reasonably believes the person can assist the process and the LEA's lawyer, as well as any other individual at the IEP meeting, would be bound by the same confidentiality rules as any other member of the IEP Team. Therefore, the alleged December 2010 IEP meeting procedural violations, without more, are insufficient.

2 The appropriate remedy for the parent who might disagree with the decision in D11-008 is to file an appeal in state court within ninety (90) days of receiving the decision or federal court; it is not appropriate to relitigate those same issues with a new due process request and a different hearing officer.

2. Parental Participation in Mandatory Resolution Session

Except where the parent and the LEA have both agreed to waive the resolution process or to use mediation, the parent's failure to participate in the resolution meeting will delay the due process hearing until the resolution meeting is held. The parent and the LEA did not agree to waive the resolution process in this due process nor was there a request for mediation filed with the WV Department of Education, Office of Special Programs. The LEA provided copies of its correspondence with the parent attempting to arrange a mutually agreed upon time and place for the mandatory resolution meeting. They demonstrate that the LEA made reasonable efforts to obtain parental participation in a resolution meeting.

Order

Based on the foregoing, the LEA's Amended Motion to Dismiss is granted on the basis that the LEA was unable to obtain parental participation in the mandatory resolution meeting despite reasonable and documented efforts. The LEA's original Motion to Dismiss is granted on the basis that the due process request reiterates the allegations in D11-008, decided January 4, 2011; the appropriate remedy for the parent who disagrees with the decision in D11-008 is to appeal that decision in state or federal court. The only allegations in this due process not litigated in D11-008 are procedural violation allegations that, taken in the light of most favorable to the parent, do not meet the *Policy 2419* significance test. Therefore, the parent's due process hearing request in this matter is DISMISSED.

APPEAL RIGHTS

Any party who does not agree with this decision has the right to bring a civil action with respect to the matter that was the subject of this due process. The action may be brought in a West Virginia state court of competent jurisdiction within ninety (90) calendar days from the date of this decision or in a federal court without regard to the amount in dispute.