

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

BRENTWOOD UNION SCHOOL  
DISTRICT.

OAH CASE NO. 2009120689

DETERMINATION OF SUFFICIENCY  
OF DUE PROCESS COMPLAINT

On December 14, 2009, Natashe Washington, attorney for Student, filed a Due Process Hearing Request<sup>1</sup> (complaint) against the Brentwood Union School District (District). On December 17, 2009, Elizabeth Rho-Ng, attorney for District, filed a Notice of Insufficiency (NOI) concerning Student's complaint.

APPLICABLE LAW

A complaint is sufficient if it contains: (1) a description of the nature of the problem of the child relating to the proposed initiation or change concerning the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education (FAPE) to the child; (2) facts relating to the problem; and (3) a proposed resolution of the problem to the extent known and available to the party at the time. (20 U.S.C. §§ 1415(b)(7)(A)(ii)(III), 1415(b)(7)(A)(ii)(IV);<sup>2</sup> Ed. Code, § 56502, subd. (c)(1).)

The complaint is deemed sufficient unless the party against whom the complaint has been filed notifies the Office of Administrative Hearings (OAH) and the other party, in writing, within 15 days of receiving the complaint, that the complaint has not met the notice requirements. (§ 1415(c)(2)(C); Ed. Code, § 56502, subd. (d)(1).) Section 1415(c)(2)(D) requires that the sufficiency of the complaint be evaluated based on the face of the complaint.

The party against whom the complaint has been filed is entitled to know the nature of the specific allegations being made against it, such that the party may be able to prepare a

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<sup>1</sup> A request for a due process hearing under Education Code section 56502 is the due process complaint notice required under Title 20 United States Code section 1415(b)(7)(A).

<sup>2</sup> All statutory citations are to Title 20 United States Code unless otherwise noted.

defense. (*Tadano v. Manney* (9th Cir. 1947) 160 F.2d 665, 667; *Hornsby v. Allen* (5th Cir. 1964) 326 F.2d 605, 608.)

## DISCUSSION

Student's complaint contains four issues, as follows:

### *Issue No. 1*

Student alleges that District denied her a FAPE because District failed to assess her in all areas of suspected disabilities. Student alleges District should have conducted an auditory processing evaluation, an assistive technology evaluation, and an assessment for emotional disturbance, under Assembly Bill 3632. Student cites to assessments by District in April 2007 and August 2009, which noted that she demonstrated processing deficits; appeared withdrawn; and was experiencing social and emotional difficulties. She further alleges that District was on notice of her emotional issues, and of her diagnosis of Attention Deficit Hyperactivity Disorder based upon a letter from her private psychologist, dated May 11, 2009.

Student alleges that District also failed to conduct an assessment for assistive technology. However, with respect to this assessment, the complaint fails to provide facts relating to the identified problem. Student does not set forth facts as to when and why District's obligation to conduct an assistive technology assessment was triggered.

While Student provided facts relating to the problem of a denial of FAPE due to District's failure to assess in the areas of auditory processing and emotional disturbance, the complaint fails to identify the time period for the denial of FAPE. For example, it is unclear at what point between April 2007 and the present the District's obligation to assess in the identified areas was triggered. Accordingly, Issue No. 1 is insufficient.<sup>3</sup>

### *Issue No. 2*

Student alleges the District denied her a FAPE because it failed to design an educational program to meet her unique needs. In the "Brief Summary of Facts" section of the complaint, Student states that her educational program from May 14, 2007, through February 5, 2009, consisted of 30 minutes per week of group speech therapy and four times

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<sup>3</sup> District also asserts that any claims for failure to assess in all areas of suspected disability, based upon the April 2007 assessment, are barred by the statute of limitations. An NOI is not the proper means by which to seek determination of District's contentions, as the only determination to be made upon the filing of an NOI is the sufficiency of the complaint on its face. District's contentions may be litigated at hearing as an affirmative defense, or may be addressed in a Motion to Dismiss supported by sufficient facts.

per week of group support in math. On February 5, 2009, the educational program was changed to 30 minutes per week of group speech therapy, and five times per week of Resource Specialist Program (RSP). On May 27, 2009, the District's offer of FAPE was changed to 30 minutes per week of group speech therapy, five times per week of RSP, and 30 minutes per week of group counseling. Student alleges the group counseling was inappropriate.

Within Issue No. 2, Student alleges a denial of FAPE due to the District's failure to offer her counseling services until May 2009; failure to pay for drama and karate, based upon an IEP in 2008; and failure to address a lack of academic progress in Grade 4. The complaint fails to provide a factual basis. For example, the issue references school years from 2007 to the present, but does not clearly identify the specific denials of FAPE for a particular school year.<sup>4</sup> The complaint should identify, specific to each school year being raised, the areas in which Student failed to make progress, whether the services provided in the IEP were inadequate, whether there was a failure to implement the IEP, whether the goals and objectives were inadequate, or what additional or alternate services Student required to receive a FAPE. Accordingly, Issue No. 2 is insufficient.

#### *Issue No. 3*

Student alleges that District denied her a FAPE from September 2008 onwards because it failed to adequately address bullying by other students. Student's alleges that the bullying caused her to have increased anxiety, low self esteem and increased emotional problems. Student alleges that she cried and "spoke about suicide." In the body of the complaint, Student asserts her parents pulled her out of school and home schooled her from September 2009 onwards.

Student has identified a specific time period covered by this issue, a problem, District's failure to address bullying by fellow students, and set forth a factual basis for the identified problem. Issue No. 3 provides District with the requisite notice so that it may prepare a response, prepare for resolution, participate in mediation or prepare a defense. Issue No. 3 is sufficiently pled.

#### *Issue No. 4*

Student alleges that District denied her a FAPE when it failed to allow a discussion in the IEP meetings of 2008 and 2009 regarding whether Student qualified for extended school

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<sup>4</sup> For example, the complaint alleges Student is currently in the fifth grade. It states Student was in the second grade at the time of the May 14, 2007 IEP and was in the fourth grade at the time of the May 12, 2008 IEP. If this is correct, then Student should be in the sixth grade for the 2009-2010 school year because she would have been in fifth grade for the 2008-2009 school year. The complaint does not state whether Student was accelerated a grade level during any school year. Therefore, it is unclear from the complaint which school year is identified as the Grade 4 denial of FAPE under Issue No. 2.

year (ESY) services. Student asserts District unilaterally determined Student did not qualify for ESY.

Student has identified a specific time period, a specific problem and a factual basis for the problem. District argues that Student fails to allege whether District was required to discuss ESY eligibility at all IEP meetings during the years of 2008 and 2009. While the requirement of what must be discussed at each IEP meeting may be a defense available to District, it is not grounds for an NOI. Accordingly, Issue No. 4 is sufficiently pled.

A complaint is required to include proposed resolutions to the problem, to the extent known and available to the party at the time. Student's proposed resolutions request assessments, placement, various prospective services and compensatory education. Student has met the statutorily required standard of stating a resolution to the extent known and available to her at the time.

### ORDER

1. Pursuant to section 1415(b)(7)(A)(ii), Issues No. 3 and 4 of Student's complaint are sufficiently pled.
2. Pursuant to section 1415(c)(2)(D), Issues No. 1 and 2 of Student's complaint are insufficiently pled.
3. Pursuant to section 1415(c)(2)(E)(i)(II), Student shall be permitted to file an amended complaint.<sup>5</sup>
4. The amended complaint shall comply with the requirements of section 1415(b)(7)(A)(ii), and shall be filed not later than 14 days from the date of this order.
5. If Student fails to file a timely amended complaint, the hearing shall proceed only on Student's Issues No. 3 and 4.

Dated: December 21, 2009

/s/

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BOB VARMA  
Administrative Law Judge  
Office of Administrative Hearings

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<sup>5</sup> The filing of an amended complaint will restart the applicable timelines for a due process hearing.