

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

MORGAN HILL UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2011061168

ORDER OF DETERMINATION OF
PARTIAL SUFFICIENCY OF DUE
PROCESS COMPLAINT

On June 22, 2011 Student filed a Due Process Hearing Request¹ (complaint) naming District. On July 5, 2011², District timely filed a Notice of Insufficiency (NOI) as to Student’s complaint. For the reasons discussed below, the NOI is granted in part and denied in part.

APPLICABLE LAW

The named parties to a due process hearing request have the right to challenge the sufficiency of the complaint.³ The party filing the complaint is not entitled to a hearing unless the complaint meets the requirements of Title 20 United States Code section 1415(b)(7)(A).

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.⁴ These

¹ 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).

² Although the facsimile identifier at the top of District’s NOI states that it was faxed on “May 19, 2008” at “23:21”, the proof of service executed under penalty of perjury identifies the service date as July 5, 2011, which is the date on which OAH received the NOI.

³ 20 U.S.C. § 1415(b) & (c).

⁴ 20 U.S.C. § 1415(b)(7)(A)(ii)(III) & (IV).

requirements prevent vague and confusing complaints, and promote fairness by providing the named parties with sufficient information to know how to prepare for the hearing and how to participate in resolution sessions and mediation.⁵

The complaint provides enough information when it provides “an awareness and understanding of the issues forming the basis of the complaint.”⁶ The pleading requirements should be liberally construed in light of the broad remedial purposes of the IDEA and the relative informality of the due process hearings it authorizes.⁷ Whether the complaint is sufficient is a matter within the sound discretion of the Administrative Law Judge.⁸

DISCUSSION

Student’s complaint consists of 96 pages, including eighty pages of exhibits. Although the complaint lists 11 “violations” on the first page, those are followed on pages three through 16 of the complaint by detailed descriptions of 12 claims. The complaint also includes proposed resolutions, including compensatory damages for the 2009-10 and 2010-11 school years. This Order addresses each issue in the order as presented beginning on page three.

Issue 1 alleges that Student’s March 9, 2009 IEP identified that Student needed “an aide to keep him focused and on task”, and that District failed to provide, at District’s expense, a classroom aide, in addition to aide services provided by Student’s parents. District contends that this claim is ambiguous, and is outside of the two year statute of limitations. Issue 1 is sufficiently pleaded to put District on notice of the nature of the claim and to prepare for a resolution session, mediation and hearing. Whether or not some or this

⁵ See, H.R.Rep. No. 108-77, 1st Sess. (2003), p. 115; Sen. Rep. No. 108-185, 1st Sess. (2003), pp. 34-35.

⁶ Sen. Rep. No. 108-185, *supra*, at p. 34.

⁷ *Alexandra R. v. Brookline School Dist.* (D.N.H., Sept. 10, 2009, No. 06-cv-0215-JL) 2009 WL 2957991 at p.3 [nonpub. opn.]; *Escambia County Board of Educ. v. Benton* (S.D.Ala. 2005) 406 F. Supp.2d 1248, 1259-1260; *Sammons v. Polk County School Bd.* (M.D. Fla., Oct. 28, 2005, No. 8:04CV2657T24EAJ) 2005 WL 2850076 at p. 3[nonpub. opn.] ; but cf. *M.S.-G. v. Lenape Regional High School Dist.* (3d Cir. 2009) 306 Fed.Appx. 772, at p. 3 [nonpub. opn.].

⁸ Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540-46541, 46699 (Aug. 14, 2006).

entire claim is outside of the applicable statute of limitations requires evidentiary findings and is therefore not appropriately determined in an NOI.

Issue 2 alleges that on June 7, 2010, District unilaterally demanded a change to Student's March 9, 2009 IEP regarding ABA aide services from a non-public agency to a district service. District contends that the claim is outside of the statute of limitations because it relates to the March 9, 2009 IEP and that it is vague because it alleges no harm. Issue 2 is insufficiently pleaded because it does not allege facts that establish whether District acted upon its demand to change Student's aide to a District staff aide, and if or how District's demand harmed Student by denying him a FAPE. Student will be granted leave to amend this issue in order to plead additional facts including what District did, when it did so, and what harm took place as a result of District alleged conduct. Whether or not some or this entire claim is outside of the applicable statute of limitations requires evidentiary findings and is therefore not appropriately determined in an NOI.

Issue 3 alleges that in April 2010 and June 2010 District proposed a change in placement for Student but failed to provide Student with a transition plan or preparation for the change. Student also alleges that after June 2, 2010, District unilaterally decided to change ABA providers without a transition plan and without first discussing the change with Student's parents. Student also alleges that District did not create a behavior support plan (BSP) to help transition Student to a new placement. Issue 3 is sufficiently pleaded to put District on notice of the nature of the claim and to prepare for a resolution session, mediation and a hearing.

Issue 4 alleges that District proposed to change student's placement to a more restrictive environment without first conducting a functional behavior assessment (FBA) and without including a behavior support plan, as requested by Parents. As a result, Parents withdrew Student from the District in August 2010. Issue 3 is sufficiently pleaded to put District on notice of the nature of the claim and to prepare for a resolution session, mediation and a hearing.

Issue 5 alleges that District failed to provide Student with an independent educational evaluation (IEE) after Parents disagreed with District's assessment and requested an IEE. As a result, parents privately paid for an IEE, for which they seek reimbursement. District's NOI does not challenge this issue, which is sufficiently pleaded.

Issue 6 alleges that District failed to assess Student in all areas of need, including an audiological evaluation. As a result, Parents had Student privately assessed, for which they seek reimbursement. District's NOI does not challenge this issue, which is sufficiently pleaded.

Issue 7 alleges that Student attended a school other than his home school, and that District did not offer Student transportation in his March 9, 2009 IEP. District challenges this claim based upon the statute of limitations. Issue 7 is sufficiently pleaded for purposes of clarity of the issue. Whether or not some or this entire claim is outside of the applicable

statute of limitations requires evidentiary findings and is therefore not appropriately determined in an NOI.

Issue 8 alleges that, in his March 9, 2009 IEP, District failed to offer Student ESY for summer 2009 and summer 2010. District challenges this claim based upon the statute of limitations. Issue 7 is sufficiently pleaded for purposes of clarity of the issue. Whether or not some or this entire claim is outside of the applicable statute of limitations requires evidentiary findings and is therefore not appropriately determined in an NOI.

Issue 9 alleges that District retaliated against Student's father for his educational advocacy activities, thereby inhibiting Student's parents' ability to enroll him at private school for the 2010-11 school year. Issue 9 is insufficient because it does not state facts that are related to the "proposed initiation or change concerning the identification, evaluation or educational placement" of Student. Student alleges no facts relating to actions by District that resulted in Student being deprived of his access to an education, including how and when he was so deprived. The gravamen of this issue is a tort or discrimination claim by Student's father, which is not within the subject matter of an IDEA due process hearing. Student will be granted leave to amend this issue including stating facts that relate to claims that fall within IDEA.

Issue 10 alleges that District changed Student's disability classification from "non-severe" to "severe" without providing Parents prior written notice. This claim is insufficient because it does not identify which IEP is at issue, when the change took place, how it took place, and how the change harmed Student. Student will be granted leave to amend this issue.

Issue 11 alleges that District failed to implement Student's March 9, 2009 IEP for the 2009-10 school year by providing appropriate resource support services, including limiting group size to five students. Issue 11 is sufficiently pleaded to put District on notice of the nature of the claim and to prepare for a resolution session, mediation and hearing.

Issue 12 alleges that District failed to appropriately implement Student's March 9, 2009 IEP during the 2009-10 school year in the area of occupational therapy (OT), and that District failed to assess Student in OT. As a result Student did not make meaningful progress. Issue 12 is sufficiently pleaded to put District on notice of the claims and prepare for a resolution session, mediation and hearing. Whether or not some or this entire claim is outside of the applicable statute of limitations requires evidentiary findings and is therefore not appropriately determined in an NOI.

A parent who is not represented by an attorney may request that the Office of Administrative Hearings (OAH) provide a mediator to assist the parent in identifying the issues and proposed resolutions that must be included in a complaint ⁹ Parents are

⁹ Ed. Code, § 56505.

encouraged to contact OAH for assistance if they intend to amend their due process hearing request.

ORDER

1. Issues 1, 3-8, 11 and 12 of Student's complaint are sufficient under Title 20 United States Code section 1415(b)(7)(A)(ii).
2. Issues 2, 9, and 10 of the complaint are insufficiently pled under Title 20 United States Code section 1415(c)(2)(D).
3. Student shall be permitted to file an amended complaint under Title 20 United States Code section 1415(c)(2)(E)(i)(II).¹⁰
4. The amended complaint shall comply with the requirements of Title 20 United States Code 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 within 14 days of the date of this order, the hearing shall proceed only on Issues 1, 3-8, 11 and 12 in Student's complaint.

Dated: July 12, 2011

/s/

ADRIENNE L. KRIKORIAN
Administrative Law Judge
Office of Administrative Hearings

¹⁰ The filing of an amended complaint will restart the applicable timelines for a due process hearing.