

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

vs.

NEWPORT-MESA UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH No. 2006030741

**DETERMINATION OF
SUFFICIENCY OF DUE PROCESS
COMPLAINT AND ORDER**

On March 21, 2006, the Office of Administrative Hearings (OAH) received from Ellen L. Bacon, attorney, a request for a due process hearing (Complaint), on behalf of Student, which names as the Respondent the Newport-Mesa Unified School District (District). On April 3, 2006, OAH received from attorney Joyce E. Paul, on behalf of the District, a Notice of Insufficiency (NOI) as to Petitioner's Complaint for not meeting the requirements of Title 20 United States Code section 1415(b)(7)(A).¹

APPLICABLE LAW

The reauthorized Individuals with Disabilities Education Act (IDEA) became effective July 1, 2005, and Section 1415, subsections (b) and (c), underwent significant amendment. Under the amended subsections, either party now has the express right to challenge the sufficiency of any due process complaint notice (Complaint) and a party filing the Complaint is not entitled to the hearing if it does not comply with subsection (b)(7)(A). The specific subsections at issue are:

Section 1415(b)(7)(A)(ii)(I) provides that the due process complaint notice shall include the name and residence address of the child ...and name of the school the child is attending.

¹ All statutory citations are to Title 20 United States Code, unless otherwise noted.

Section 1415(b)(7)(A)(ii)(III), which provides that the Complaint shall include “a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem;...”

Section 1415(b)(7)(A)(ii)(IV), which provides that the Complaint shall include “a proposed resolution of the problem to the extent known and available to the party at the time;”

Section 1415(b)(7)(B), which provides that a party is not entitled to a due process hearing until its Complaint meets the requirements of subsection (b)(7)(A);

Section 1415(c)(2)(D), which provides that, within 5 days of receipt of a notice of insufficiency, the hearing officer shall make a determination on the face of the Complaint whether it meets the requirements of subsection (b)(7)(A); and

Section 1415(c)(2)(E), which provides that a party may amend the Complaint only if the hearing officer grants permission, or as otherwise specified.

DISCUSSION

Fundamental principles of fairness apply to this type of administrative proceeding. As such, a respondent is entitled to know the nature of the specific allegations being made against it so that respondent may be able to prepare a defense. (*Tadano v. Manney* (9th Cir. 1947) 160 F.2d 665, 667; *Hornsby v. Allen* (5th Cir. 1964) 326 F.2d 605, 608.) This notice pleading standard has been defined as requiring a petitioner to file a complaint that sets forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. (See, *Stearns v. Fair Employment Practice Com* (1971) 6 Cal.3d 205, 213; *Block v. Ambach* (N.Y. 1989) 537 N.E. 2d 181, 185; *Pergament United Sales, Inc. v. NLRB* (2d Cir. 1990) 920 F.2d 130, 134.)

When Congress re-authorized the IDEA, the House Committee on Education and the Workforce’s analysis of Section 1415(b)(7) stated that the requirement of a clear and specific notice is essential to make the complaint process work in a fair and equitable manner. (H.R.Rep. No. 108-77, 1st Sess., page citation unavailable (2003).)² The Senate Committee on Health, Education, Labor and Pensions, analysis of Section 1415(b)(7) stated, “The purpose of the sufficiency requirement is to ensure that the other party, which is generally the school district, will have an awareness and understanding of the issues forming the basis of the complaint.” (Sen.Rep. No. 108-185, 1st Sess., page citation unavailable (2003)(emphasis added)). This committee made clear that the purpose of Section 1415(b)(7) is to avoid leaving the school district with no idea as to what the “real issues” will be at the due process

² The House Report noted, “If a parent cannot identify a specific problem, then the parent should ask to reconvene the IEP [Individualized Education Program] Team and discuss what their [sic] concerns are rather than filing a complaint to see if a hearing officer can determine the problem.” (H.R.Rep. No. 108-77, 1st Sess., page citation unavailable (2003).)

hearing, and forcing the district to prepare for any and every issue that could be possibly raised against it. (Ibid.) In addition, the committee noted that the specificity requirements of Section 1415(b)(7) allow a school district to provide, if necessary, a specific response to the student under Section 1415(c)(2)(B) (emphasis added), and to participate fully in the informal resolution process under Section 1415(f)(a)(B), and mediation under Section 1415(e). (Ibid.) A notice that lacks adequate specificity frustrates, if not vitiates, a district's ability to meet these obligations.

The degree of sufficiency necessary for any request for due process hearing can best be determined by reviewing the requirements placed on the party who must respond to such a request. A respondent is required, within 10 days of receiving the complaint, to send a response "that specifically addresses the issues raised in the complaint." (§ 1415(c)(2)(B)(ii).) A "non-complaining" party would be unable to respond with the required specificity imposed by this statute if the complaint itself is vague. Section 1415(c)(2)(B)(i)(I) requires the respondent to file a detailed response that includes:

- (aa) an explanation of why the [district] proposed or refused to take the action raised in the complaint;
- (bb) a description of other options that the IEP Team considered and the reasons why those options were rejected;
- (cc) a description of each evaluation procedure, assessment, record, or report the [district] used as the basis for the proposed or refused action; and
- (dd) a description of the factors that are relevant to the agency's proposal or refusal.

Examining these requirements, it is evident that any request for due process must describe the acts or omissions of the respondent, and other complaints, with the same degree of specificity that is called for in the response to the notice. The Complaint must include (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 FAPE to the child (§ 1415(b)(3) and (b)(7)(A)(ii)(III)); (2) facts relating to the problem (§ 1415(b)(7)(A)(ii)(III)); and (3) a proposed resolution of the problem to the extent known and available to the party at the time (§ 1415(b)(7)(A)(ii)(III)). The Complaint needs to allege a clear nexus between the factual allegations and the alleged violations.

The Complaint contains two contentions, and involves an eight year old child who is eligible for special education services with a diagnosis of autism. Petitioner's first contention alleges that the District failed to provide Student with a Free Appropriate Public Education (FAPE) by failing to offer, or to provide, Student in the December 2005 Individualized Educational Program (IEP) designated instructional services. Petitioner alleges that Student requires speech and language therapy, Applied Behavioral Analysis, adaptive physical education and occupational therapy. According to the Complaint, the District in July 2005, approved an inter-district transfer for Student to attend the University of California, Irvine, Child Development Center (CDC), and that in September 2005 the District changed its mind and offered Student a placement in a district school. The Student is

presently attending the CDC. The Complaint further alleges that the District did not offer designated instructional services based on the District's erroneous position that Petitioners request for an inter-district transfer to attend the CDC constitutes a unilateral placement in a private school. Based on this incorrect position, the District only offered Student an Individualized Services Plan (ISP) and not an IEP.

To the extent that Petitioner alleges that the District in December 2005 should have offered Student an IEP with designated instructional services, Petitioner has alleged sufficient facts. The Complaint contains adequate allegations that the CDC is not a private school and Student's parents request to place Student at CDC through an inter-district transfer is not a unilateral placement. However, Petitioner has failed to allege a proposed resolution for this allegation. As discussed further below, Petitioner's Proposed Resolution Two does not contain sufficient allegations as to the services Student requires. As to the second part of the first contention that Student requires the designated instructional services specified in the Complaint, Petitioner has not alleged sufficient facts. The Complaint does not contain adequate allegations that Student requires any of the listed services.

Concerning the second contention, the Complaint alleges that the District's denied Student FAPE by not funding the parent training that the CDC requires, and Student's afternoon social skills program at CDC. Petitioner alleges sufficient facts concerning the Parent's need to attend the training program for Student to attend the CDC. However, Petitioner does not allege adequate facts concerning Student's attendance in the afternoon social skills program as the Complaint contains no allegations that Student requires this program.

Concerning Proposed Resolution One, Petitioner requests that the District continue to fund Student's placement at the CDC. However, the Complaint's two contentions do not involve the District failure to provide Student FAPE by not funding Student's placement at the CDC as the Complaint only involves the District's failure to fund the parent training, and Student's afternoon social skills program. Petitioner has not alleged sufficient facts concerning the Proposed Resolution Two as the Complaint does not contain the services that Student's parents consented, and when the parents provided this consent. As to Proposed Resolution Three, Parents have not allege sufficient facts concerning their entitlement to be reimbursed for Student's afternoon social skills programs as the Complaint does not contain adequate allegations concerning this request. Concerning Proposed Resolution Four, Petitioner requests compensatory education, but does not allege anything in particular that Student requires as compensatory education. The Complaint needs to at least contain general areas, such as occupational therapy or speech and language services, that Student requires as compensatory education.

ORDER

1. Pursuant to Section 1415(c)(2)(D), the District's challenge to the sufficiency of Petitioner's Complaint, Contention One, Contention Two concerning the afternoon social

skills program, and Proposed Resolutions One, Two, Three concerning the afternoon social skills program and Four is granted.

2. Pursuant to Section 1415(c)(2)(D), the District's challenge to the sufficiency of Petitioner's Complaint, Contention Two and Proposed Resolution Three concerning the funding of the parent training course is denied.

3. Pursuant to Section 1415(c)(2)(E)(i)(II), Petitioner shall be permitted to file an Amended Complaint no later than 14 days from the date of this order.³

4. If the Petitioner fails to file an amended Complaint within 14 days, this matter shall proceed solely as to Contention Two concerning the funding the parent training course, and Proposed Resolution Three concerning the funding of the parent training course.

Dated: April 7, 2006

PETER PAUL CASTILLO
Administrative Law Judge
Special Education Division
Office of Administrative Hearings

³ The filing of an amended complaint will restart the applicable timelines for a due process hearing. (Section 1415(c)(2)(E)(ii).)