

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CHULA VISTA ELEMENTARY SCHOOL
DISTRICT,

v.

PARENT on behalf of STUDENT.

OAH CASE NO. 2009090806

ORDER DENYING STUDENT'S
MOTION TO DISMISS

On September 16, 2009, the Chula Vista Elementary School District (District) filed a Request for Due Process Hearing (complaint), naming Student as the respondent.

On October 21, 2009, Student, through his mother (Mother), filed a motion to dismiss the complaint. Student alleges that the complaint should be dismissed because the District did not serve Mother with a copy of the complaint and did not provide her with a copy of procedural safeguards at the time the complaint was filed.

On October 26, 2009, the District timely filed an opposition to Student's motion. The District asserts that it properly served Mother as well Student's father, and Student's then attorney of record. The District further asserts that it has properly provided Mother a copy of her procedural safeguards at various times and that it was not legally required to provide her with a copy at the time it filed the instant complaint.

DISCUSSION

Alleged Failure to Serve Complaint

In its opposition to Student's motion to dismiss, the District includes declarations signed under penalty of perjury from attorney Robin Champlin, who prepared the District's complaint, and from paralegal Leslie Pettey, who served the complaint on behalf of the District. Both declarations indicate that Ms. Pettey served the complaint on Mother and Student's father. Mother and Father apparently reside at different residences. Ms. Petty also served attorney Ellen Dowd, who had represented Student in a previous due process matter and who the District believed still represented Student at the time the complaint was filed. The District's complaint itself indicates that its request for due process was copied to Mother, Father, and Ms. Dowd. The Office of Administrative Hearings (OAH) issued a scheduling order with regard to this matter on September 22, 2009. OAH served Mother, Father, and Ms. Dowd with the order.

On September 29, 2009, Ms. Dowd, on behalf of Student filed a letter requesting that this matter be continued since she was not certain if she would be able to represent Student. Her letter also appeared to be a motion to dismiss the District's complaint. The District filed a response to the letter on October 1, 2009. Ms. Dowd filed a reply to the District's response on October 5. On October 6, Mother filed her own reply to the District's response. On October 8, Ms. Dowd clarified with Ms. Champlin that she was no longer representing Student or his either of his parents. On October 14, Mother filed a letter with OAH clarifying that she was representing Student and requesting that the hearing be continued. On October 19, OAH held a trial setting conference at which time OAH set new mediation, prehearing conference, and hearing dates, based upon discussion with all parties.

It is clear from the record that the District served all possible parties and all possible representatives in this case. It has served both Mother and Father with all pleadings it has filed, as has OAH, and served Ms. Dowd, Student's former attorney, until it was informed that Ms. Dowd no longer represented Student or his parents. Furthermore, it is clear that Mother has had notice of and has participated in the proceedings, as evidenced by OAH's service on her of the initial scheduling order as well as by Mother's filing of a reply to the District's response to Ms. Dowd's request for a continuance. Mother's motion to dismiss based upon lack of proper service of the complaint is therefore denied.

Failure to Provide Copy of Procedural Safeguards

Mother contends that the District should have provided her with a copy of the procedural safeguards for due process at the time it served her with the complaint in this matter. The District acknowledges that it did not provide a copy of the safeguards when it served the complaint on Mother, but contends that it was not required to do so. The District further points out that it has given Mother many copies of the safeguards and did so in correspondence as recently as July 14, 2009.

The 2004 reauthorization of the Individuals with Disabilities Education Act states that "[A] copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only 1 time a year, except that a copy also shall be provided (ii) upon the first occurrence of the filing of a complaint under subsection (b)(6)." (20 U.S.C. § 1415 (d)(1)(A).) The District takes the position that "first occurrence" means the first time a due process complaint is ever filed with regard to a particular student. Since Student previously filed his own due process complaint which the parties settled in April 2009, the District takes the position that it would have only been required to provide Mother with a copy of the procedural safeguards with regard to due process filings in that previous case, and is not required to do so in the instant matter, or in any future due process matters involving Student.

The District's position is not supported by citation to statute or to case law. Moreover, it conflicts with the interpretation of the section of the IDEA at issue by the United States Department of Education in the Code of Federal Regulations. The Regulations specifically state that "[a] copy of the procedural safeguards available to the parents of a

child with a disability must be given to the parents only one time a school year, except that a copy also must be given to the parents . . . (2) [u]pon receipt of the first state compliance complaint under §§ 300.151 through 300.153 and upon receipt of the first due process complaint under § 300.507 *in a school year*. (34 C.F.R. § 300.504 (a)(2) (2006) (emphasis added).) Therefore, contrary to the District's contention, a copy of the procedural safeguards must be given to a student's parents the first time a due process complaint is filed in any given school year, even if due process filings occurred in previous school years. It appears that the instant case is the first due process filing concerning the parties during the present school year.

However, Mother cites no case law or statute that provides or suggests that the failure to provide a copy of the procedural safeguards is grounds for the dismissal of a due process complaint. Certainly, the failure to provide a parent with a copy of the safeguards according to statute is a proper basis for an allegation that a school district has procedurally violated the IDEA. Nevertheless, in order to show that such a procedural violation is more than harmless error, a student alleging the procedural violation must also demonstrate that it resulted in substantive harm either to him or to his parent. The student must show that it impeded his right to a FAPE, significantly impeded his parents' opportunity to participate in the decision making process regarding the provision of a FAPE to him, or caused the student a deprivation of educational benefits.

Applying that harmless error analysis to the District's failure to provide Mother a copy of the procedural safeguards when it filed the complaint herein, the evidence supports a finding that the failure amounted to harmless error. First, the District has shown through its declarations that it has consistently provided Mother with copies of her procedural safeguards, and did so on July 14, 2009, just before the school year began and only two months prior to filing the due process complaint. Additionally, at the time of the filing, Mother was represented by counsel who, at the very least, made a special appearance to request a continuance of the scheduling dates as well as suggesting that the case be dismissed. Finally, Mother has failed to allege any impediment to her participation in the due process proceedings or to allege any harm that Student has suffered by the District's failure to provide Mother with another copy of the safeguards. Mother has been actively participating in the proceedings either through former counsel or by her own participation. Based upon her request, OAH has continued the proceedings so that she can either obtain counsel or adequately prepare for hearing herself. There is no evidence that Mother has been impeded in her ability to participate in the hearing process because she did not receive a copy of the procedural safeguards with the complaint. The District's failure to include a copy of the procedural safeguards when it served Mother with the complaint was therefore harmless error that does not warrant dismissal of this case. ((20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484. Recent Ninth Circuit Court of Appeals cases have confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, n.3; *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.)

ORDER

Based upon the above discussion, Student's motion to dismiss the complaint is denied. The matter shall proceed as scheduled.

It is so ordered.

Dated: October 28, 2009

/s/

DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings