

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

RESCUE UNION ELEMENTARY  
SCHOOL DISTRICT.

OAH CASE NO. 2010090516

ORDER PARTIALLY GRANTING  
MOTION TO DISMISS AND ORDER  
DENYING SUFFICIENCY MOTION

On September 14, 2010, Student filed a request for an expedited due process hearing (complaint) naming the District. On September 15, 2010, the Office of Administrative Hearings (OAH) issued a scheduling order setting this matter for a prehearing conference on September 29, and a hearing on October 5 through 7, 2010. On September 20, 2010, the District filed a Motion to Dismiss Student’s complaint on the ground that Student did not serve the District with his complaint.<sup>1</sup>

On September 23, 2010, Student filed an opposition to the motion along with proof of service of the complaint on the District and the attorney for the District by fax transmission on the same date.

On September 24, 2010, the District filed a Notice of Insufficiency (NOI) challenging the sufficiency of Student’s complaint.

APPLICABLE LAW AND DISCUSSION

*Motion to Dismiss*

The purpose of the Individuals with Disabilities Education Improvement Act (IDEA 2004) (20 U.S.C. 1400 et. seq.) is to “ensure that all children with disabilities have available to them a free appropriate public education” (FAPE). (20 U.S.C. § 1400(d)(1)(A), (B), and (C); Ed. Code, § 56000.) A party has the right to present a complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the

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<sup>1</sup> District’s motion also contained a notice of representation and an opposition response to the complaint.

provision of a free appropriate public education to such child.” (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).)

The party requesting a special education due process hearing must provide the opposing party with notice of the complaint by delivering a copy of the complaint to them at the same time that it is filed with OAH. (20 U.S.C. § 1415(b)(7)(A); Ed. Code, § 56501.5, subd. (c).) OAH has an optional complaint form that is available on the Internet.<sup>2</sup> The form contains a section entitled “Statement of Service” for the party requesting a hearing to indicate by checking boxes whether he or she provided a copy of the complaint to the other named party and OAH by first class mail, facsimile transmission, messenger service, or personal delivery, and to sign the statement.

District’s motion to dismiss is not accompanied by any evidence, such as a declaration under penalty of perjury. Student’s complaint was in letter format and did not utilize the OAH complaint form. Parents represented in the complaint that they “provided” the complaint to the District on September 11, 2010, but there was no proof of service or other indication of how they delivered it. Overall, the evidence did not establish that Student served the District on September 11, 2010, and the complaint originally filed with OAH was therefore defective. District’s motion to dismiss the complaint filed on September 14, 2010 is granted and all previously scheduled dates are vacated.

However, Student’s opposition contains a declaration under penalty of perjury establishing that District was served with his complaint by fax transmission on September 23, 2010.<sup>3</sup> The evidence establishes that Student cured his defective filing, and the District has now been duly served with the complaint. Accordingly, OAH shall forthwith issue a new scheduling order based on the filing of Student’s complaint as of September 23, 2010.

#### *Notice of Insufficiency*

An unexpedited complaint is deemed sufficient unless the party against whom the complaint has been filed notifies OAH and the other party, in writing, within 15 days of receiving the complaint, that the complaint has not met the notice requirements. (20 U.S.C. § 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.

However, there is no comparable sufficiency provision with respect to expedited complaints regarding disciplinary or manifestation determination issues. Section 1415(k)(3) permits a party to request an expedited hearing to appeal a decision regarding a disciplinary

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<sup>2</sup> [www.dgs.ca.gov/oah](http://www.dgs.ca.gov/oah)

<sup>3</sup> In addition, Student’s opposition contained correspondence with the District regarding his complaint dated September 11, 2010.

change of placement, such as placement in an alternative education setting or a manifestation determination regarding student conduct. This section requires an expedited hearing to occur within 20 school days of the date the hearing is requested. There is no provision similar to that in section 1415(c)(2)(A) for testing the sufficiency of a request for an expedited hearing pursuant to section 1415(k). Indeed, there is insufficient time to complete the NOI process in expedited hearing matters. Thus, an NOI cannot be granted regarding a due process complaint in an expedited hearing, and the District's NOI is denied.

#### ORDER

1. District's Motion to Dismiss is partially granted, and all previously scheduled dates in this case are vacated.
2. Student's complaint is deemed filed as of September 23, 2010.
3. OAH shall forthwith issue a new scheduling order.
4. District's NOI is denied.

Dated: September 27, 2010

/s/

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DEIDRE L. JOHNSON  
Administrative Law Judge  
Office of Administrative Hearings