

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

POWAY UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2012051032

ORDER DENYING NOTICE OF
INSUFFICIENCY

On May 24, 2012 Student filed a Due Process Hearing Request¹ (complaint) naming District. On June 8, 2012, District filed a Notice of Insufficiency (NOI) as to Student's complaint. Concurrently, District filed a Motion to Dismiss Issues. This Order addresses only the NOI. The motion to dismiss will be addressed in a separate order.

APPLICABLE LAW

The named parties to a due process hearing request have the right to challenge the sufficiency of the complaint.² 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.³ These 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.⁴

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 20 U.S.C. § 1415(b) & (c).

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

⁴ See, H.R.Rep. No. 108-77, 1st Sess. (2003), p. 115; Sen. Rep. No. 108-185, 1st Sess. (2003), pp. 34-35.

The complaint provides enough information when it provides “an awareness and understanding of the issues forming the basis of the complaint.”⁵ 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.⁶ Whether the complaint is sufficient is a matter within the sound discretion of the Administrative Law Judge.⁷

DISCUSSION

Student’s complaint consists of seventeen pages of factual allegations, issues and proposed resolutions. Generally, Student’s complaint alleges that he is eight years old and lives within District’s boundaries. He attends second grade at a District public school. He is failing to learn to read and is performing two years below grade level. On September 14, 2010, Parent requested that District assess Student for special education eligibility based upon his reading delays. District did so. District representatives and Parent met on November 16, 2010, at which time District advised Parent that Student did not qualify for special education. Mother disagreed with the result of District’s evaluation but did not fully understand her rights to ask for an independent educational evaluation (IEE) when she left the meeting with District. Student alleges that from November 2010 to the time of filing, District did not conduct any further assessments to determine the basis for his difficulties in the area of reading. In September 2011, District placed Student in a 1:1 Reading Recovery program removing Student from his general education environment 30 minutes a day for 17 weeks. In April 2012, District’s Intervention Assistance Team met with Parent to discuss Student’s failing reading record, and offered to reassess Student in all areas of suspected disability for eligibility for special education. Parent declined and requested a comprehensive IEE in the area of neuropsychology, occupational therapy (OT), and developmental vision. District offered Parent an assessment plan for assessments to be conducted by District personnel on April 26, 2012. On May 7, 2012 District agreed to a neuropsychological IEE. Parent signed an assessment plan on May 2, 2012. District refused to conduct IEEs in OT or Developmental Vision. Student’s complaint includes proposed resolutions.

⁵ Sen. Rep. No. 108-185, *supra*, at p. 34.

⁶ *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.].

⁷ 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).

Student identifies the following issues in the complaint⁸:

1. Whether District procedurally and substantively denied Student a FAPE at the time of his initial assessment in the fall of 2010 and thereafter by:
 - a) failing to appropriately evaluate Student's for eligibility for special education services under the IDEA;
 - b) failing to disclose to Parents a profound discrepancy between Student's intellectual ability and academic achievement in reading;
 - c) failing to appropriately assess Student in all areas of suspected disability, including OT, developmental vision, visual processing, auditory processing, and psychoeducational;
 - d) failing to conduct a diagnostic reading assessment;
 - e) failing to consider Parent's concerns and Student's present levels of performance as reported by his teachers;
 - f) failing to provide related services and supports addressing Student's unique needs;
 - g) failing to provide Student with an adequate education program based upon his unique needs.

2. Whether District denied Student a FAPE in the fall of 2011 and thereafter by:
 - a) failing to evaluate Student for eligibility for special education services under the IDEA during the statutory time period;
 - b) failing to provide Student with an adequate educational program based upon his unique needs;
 - c) failing to refer Student for a special education evaluation in September 2011 after a District staff member expressed concerns.

3. Whether District denied Student a FAPE from and after April 2012 by:
 - a) failing to consider Parents' concerns about District's initial assessment of Student;
 - b) unreasonably delaying District's consent to Parent's request for an IEE at public expense in the areas of neuropsychology, OT and diagnostic reading;
 - c) failing to request a due process hearing after denying Parent's request for an IEE in OT and diagnostic reading;
 - d) failing to authorize an IEE in developmental reading at public expense;
 - e) failing to accurately inform Parent of her procedural right to IEEs for OT and developmental vision.

⁸ The issues have been reorganized and restated for clarity.

3. Whether District violated 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.) in Fall of 2010, Fall of 2011 and May of 2012 by failing to refer Student for a section 504 assessment, and by failing to provide Student with some supports until Student was found eligible for services under IDEA.

4. Whether District violated 20 U.S.C. section 6368(7)II (No Child Left Behind) by failing to conduct a Diagnostic Reading Assessment in general education to determine the potential causes of Student's reading difficulties.

5. Whether District committed ethics violations from and after the fall of 2011 relating to communications made by District staff to Parent.

The facts alleged in Student's complaint are sufficient to put the District on notice of the issues forming the basis of the complaint. However, Student should be aware that OAH has no jurisdiction to entertain claims arising under Section 504, No Child Left Behind, or ethics violations under the California Teachers Association Code of Ethics, and that any such claims, even if sufficiently alleged, may be subject to a motion to dismiss.

ORDER

1. The complaint is sufficient under Title 20 United States Code section 1415(b)(7)(A)(ii) as to the issues identified in this Order only. If Student believes that there are other issues not identified in this Order, Student will need to amend the complaint to add those issues.

2. All mediation, prehearing conference, and hearing dates in this matter are confirmed.

Dated: June 12, 2012

/s/

ADRIENNE L. KRIKORIAN
Administrative Law Judge
Office of Administrative Hearings