

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
OREGON DEPARTMENT OF EDUCATION

IN THE MATTER OF:THE EDUCATION OF STUDENT AND LINCOLN COUNTY SCHOOL DISTRICT) RULING ON DISTRICT’S MOTION) FOR DETERMINATION OF) SUFFICIENCY OF DUE PROCESS) NOTICE AND FINAL ORDER)) OAH Case No. 2017-ABC-00260) Agency Case No. DP 17-102
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On January 17, 2017, William E. Smith, Attorney at Law, filed an Amended Request for Due Process Hearing (hearing request or request) on behalf of Parent and Student (Student) with the Oregon Department of Education (Department). The hearing request alleged, among other things, that Lincoln County School District (District) failed to provide a free and appropriate education (FAPE) for Student as required under the IDEA (Individuals with Disabilities Education Improvement Act of 2004), 20 USC §§ 1400 *et seq.*

On January 18, 2017, the Department referred the matter to the Office of Administrative Hearings (OAH) for a due process hearing. Senior Administrative Law Judge (ALJ) Bernadette H. Bignon was appointed to conduct the due process hearing and issue a Final Order therein.

On January 31, 2017, counsel for the District, Rich Cohn-Lee, timely filed District’s Motion for Determination of Sufficiency of Due Process Notice (sufficiency challenge). District asserted that Student’s hearing request should be dismissed for failing to meet the requirements of OAR 581-015-2345.

DISCUSSION

The IDEA provides for due process hearings to challenge a local educational agency’s identification, evaluation, educational placement or provision of a free and appropriate public education to children. 20 U.S.C. §1400 *et seq.* Pursuant to IDEA, state and federal legislatures have passed rules and regulations identifying the procedures a party, parent or school district, must adhere to when filing a request for a due process hearing in order to provide the adverse party sufficient notice to respond to the hearing request.

Pursuant to OAR 581-015-2350,¹ the District seeks an order dismissing Parent’s request for a due process hearing on the grounds that it fails to meet the requirements set forth in OAR

¹ OAR 581-015-2350 provides, in relevant part:

(1) A written request for hearing will be deemed sufficient unless the party receiving the request notifies the administrative law judge and the other party in writing, within 15

581-015-2345. OAR 581-015-2345(1) identifies the requirements for a valid hearing request and provides, in relevant part:

(a) Parent Requests for a Due Process Hearing

* * * * *

(B) The parent, or the attorney representing the child, must provide notice to the school district and to the Department when requesting a hearing. The notice (which remains confidential) must, include:

(i) The child's name and address * * *;

(ii) The name of the school the child is attending;

(iii) *A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and*

(iv) A proposed resolution of the problem to the extent known and available to the party at the time.

* * * * *

(c) A party may not have a hearing until the party, or the attorney representing the party, files a due process hearing request that meets the requirements of subsection (1)(a)(B) or (1)(b)(B).²

days of receipt of the hearing request, that the receiving party believes the notice does not meet the requirements of OAR 581-015-2345.

(2) Within five days of receiving notice that a party is objecting to the sufficiency of the other party's hearing notice, the administrative law judge must make a determination on the face of the hearing request of whether the hearing request meets the requirements of OAR 581-015-2345, and must immediately notify the parties in writing of that determination.

(3) A party may amend its hearing request only if:

(A) The other party consents in writing to the amendment and is given the opportunity to resolve the hearing request through a resolution meeting; or

(B) The administrative law judge grants permission, except that this permission may only be granted at any time not later than five days before a due process hearing occurs.

² The relevant language of OAR 581-015-2345 mirrors the text of 34 CFR § 300.508 which provides, in part:

(Emphasis added.)

A parent's request for due process hearing under the relevant statutes and rules is presumed to meet these notice requirements unless it is challenged by the school district. OAR 581-015-2350(1).

If met by the filing party, the requirements above provide notice to a school sufficient to identify the issues it will face at hearing. The determination of sufficiency is left in large part to the discretion of the hearing officer. The sufficiency determination is a strict notice issue, and the due process hearing request, on its face, must meet the requirements of the rule. OAR 581-015-2350(2). OAR 581-015-2350(2) provides:

Within five days of receiving notice that a party is objecting to the sufficiency of the other party's hearing notice, the administrative law judge must make a determination on the face of the hearing request of whether the hearing request meets the requirements of OAR 581-015-2345, and must immediately notify the parties in writing of that determination.

(Emphasis added.)

OAR 581-015-2345(1) does not explain the necessary level of specificity that a due process complaint notice must contain.³ However, the rule requires that the notice describe the

(b) *Content of complaint.* The due process complaint required in paragraph (a)(1) of this section must include—

* * * * *

(5) A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and

(6) A proposed resolution of the problem to the extent known and available to the party at the time.

(c) *Notice required before a hearing on a due process complaint.* A party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint that meets the requirements of paragraph (b) of this section.

(Emphasis original.) This language, in turn, mirrors the sufficiency requirements found in 20 U.S.C. § 1415(b)(7)(A).

³Although not binding, the Analysis of Comments and Changes to the Code of Federal Regulations, which addresses the filing requirements for a due process complaint and the process to amend the complaint, are instructive. See 34 CFR Parts 300 and 301, *Analysis of Comments and Changes*, 71 CFR 46698 (Monday August 14, 2006). As noted by Department of Education, Office of Special Education and Rehabilitation Services, the provisions for notice and for amending the complaint “ensures that the complaint accurately sets out their differences with the other party * * * [and] that parties involved understand and agree on the nature of the complaint before the hearing begins.” 304 CFR §508(d) (which

nature of the problem “relating to such proposed initiation or change, including facts relating to the problem.” To meet the rule’s requirements, the complaint must provide sufficient detail to the school district about the reason(s) parent is requesting a hearing such that it allows the District to respond and engage in the resolution session and/or mediation. In the event the parties are unable to resolve issues raised by the hearing request, the basic details required by the statute and rules will allow the responding party to prepare for the due process hearing. Without a description of the nature of the problem of the child relating to the proposed or refused initiation or change, neither District nor the ALJ can adequately assess the nature of the dispute. Accordingly, the resolution session, mediation proceedings, and the hearing itself would proceed rudderless and development of a remedy for perceived violations would be impracticable, if not impossible.

In this case, the hearing request includes the child’s name, address, and the name of the school the child is attending; meeting the requirements of OAR 581-015-2345(1)(a)(B)(i) and (ii). However, as discussed below, the hearing request fails, on the face of the document, to meet the requirements of OAR 581-015-2345(1)(a)(B)(iii).

The January 17, 2017 hearing request states, in relevant part, as follows:

4. Basis for Complaint

Provision of A Free and Appropriate Public Education

Through the course of the 2015-1016 (*sic*) school year, student was secluded in a seclusion room in violation of ORS 339.291,⁴ denying [Student] a free and appropriate public education as guaranteed her by the IDEA.

Civil Rights Violations

By secluding student in the seclusion room, in violation of ORS 339.291, student’s civil rights under the IDEA, the ADA, section 504, and the United States Constitution were violated.

(Hearing Request at 2.)

is implemented in Oregon under OAR 581-015-2350). “If the party receiving the due process complaint notice believes the complaint is insufficient, the hearing officer determines the sufficiency of the complaint.” *Id.*

⁴ ORS 339.291, entitled “School Attendance; Admission; Discipline; Safety, sets forth restraint and seclusion in Oregon public schools, including requirements governing when and how physical restraint may be used “on a student *in a public education program*.” ORS 339.291(1)(a) (emphasis added.)

ORS Chapter 343, and OAR chapter 541 section 051 implement Oregon’s obligations under 20 USC Chapter 33 - Education of Individuals with Disabilities, and the federal rules adopted thereunder , 34 UCS part 300.

Hearing request under IDEA

Student's request includes two bases for filing the due process request. First, the request alleges District failed in its obligation under the IDEA to provide a FAPE to Student by placing Student in a secluded room at some unstated time during the 2015-2016 school year. As discussed below, this allegation does not meet the requirements of OAR 581-015-2345(1)(a)(B)(iii). There are no other facts alleged. The request fails to state sufficient facts that would provide District sufficient notice in order to respond to the allegations.

Student's hearing request must set forth facts showing that Student is entitled to the protections of the IDEA and that District has engaged in conduct that violates its duty to provide a FAPE to Student under the IDEA. The hearing request cites to ORS 339.291, which governs school use of seclusion and restraint regarding all children receiving public education. ORS 339.291 does not provide additional protections for the rights of a student pursuant to the IDEA. Here, the complaint fails to make any showing that Student either qualifies for services under the IDEA, or, in the alternative, that District has failed to evaluate or identify Student for eligibility for services. The request fails to explain how the District's alleged conduct, the "[seclusion] of Student in the seclusion room," relates to specially designed instruction or accommodations to which Student is entitled under the IDEA, or how District's conduct impacts Student's access to education.

Student's request fails to provide a sufficient "description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem" as it relates to the provision of FAPE under the IDEA. Therefore, the request for due process hearing is insufficient on its face. The District's challenge to the sufficiency of the Amended Due Process Hearing Request is granted.

Student's request also included an allegation that District's conduct resulted in "Civil Rights Violations."⁵ To the extent the authority for the asserted rights could be ascertained, Student's asserted violations of rights accrued under laws other than the IDEA.

⁵The remainder of Student's request addresses rights violations and proposed remedies under other laws. The request cites to the "ADA, section 504, and the United States Constitution," as the source of Student's rights that District is alleged to violate. Assuming that Student was referring to the following federal laws, *i.e.* the "ADA" meant the "Americans with Disabilities Act of 1990" *as amended*, 42 USC chapter 126, or that Student's reference to "section 504" refers to the "Rehabilitation Act of 1973, Section 504" *as amended* (Section 504), 29 USC title 29 chapter 16 §§ 701 *et. seq.*, violations of rights asserted under those laws are outside the scope of a due process request under the IDEA.

Student's due process rights under Section 504 are independent of rights asserted under IDEA although a student may qualify for both Section 504 and IDEA protections. If so, Student may pursue due process remedies under both IDEA and Section 504. *see* OAR 581-015-2395(5). The Department has delegated authority to the administrative law judge to conduct hearings under both Section 504 and the IDEA. The challenge to the current hearing request asserted under Section 504 is analyzed above.

An assertion of rights pursuant to the United States Constitution fails as overly broad and outside the scope of a due process request under the IDEA.

Hearing request under Section 504.

Student's request alleges that District violated Student's civil rights under Section 504, and other laws. Student's authority is assumed to be Section 504 of the Rehabilitation Act of 1973, *as amended*, 29 USC title 29 chapter 16 §§ 701 *et. seq.* (Section 504). A parent or guardian of a *qualified student with a disability under Section 504* may file a written request for a hearing with regarding the identification, evaluation, provision of a free appropriate education, education placement. OAR 581-015-2390(1)(Emphasis added.) To be entitled to a Section 504 hearing, the request must involve a "qualified student with a disability;" a student who (1) has a "physical or mental impairment" that substantially limits one or more "major life activities", as defined by OAR-015-2390(2)(a) and (b),⁶ and (2) is "[of] an age during which persons without a disability are provided education services; [of] any age during which it is mandatory under state law to provide such services to students with disabilities; or [to] whom a state is required to provide a [FAPE] under the [IDEA]." OAR 581-015-2390(3)(a), (b), and (c).

If the hearing request involves a student qualified for due process protections under Section 504, the request is subject to the requirements for prehearing and hearing procedures for IDEA hearings as set out above. OAR 581-015-2395(3)⁷. Under the analysis above, Student's request for a hearing under Section 504 fails to meet the requirements of OAR 581-015-2345(1)(a)(B)(iii). The request fails to provide sufficient information to show Student is a qualified student with a disability under Section 504. Additionally, the request lacks the required specificity as previously discussed related to the IDEA claim. As such, Student's request for a hearing under Section 504 is also dismissed. OAR 581-015-2350(1) and (2).

Alleged violations of civil rights outside of those provided by Section 504

Where Student requested a due process hearing for alleged violations of civil rights under the ADA and the United States Constitution, such allegations are outside of the specific

⁶ OAR 581-015-2390(2) provides that:

As used in section (1) of this rule:

(a) "Physical or mental impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; endocrine; any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities;

(b) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working;

⁷OAR 581-015-2395(3) provides that:

The prehearing and hearing procedures in OAR 581-015-2340 through 581-015-2383 apply to hearings conducted under Section 504 of the Rehabilitation Act.

provisions of the IDEA and exceed the scope of authority for a due process hearing request. Student's requested remedies of compensatory remuneration (not based on a finding of a violation of the IDEA) and punitive damages are also outside the scope of a due process hearing under OAR 581-015-2340 through 581-015-2383. Therefore, the portion of the hearing request seeking monetary damages for the alleged violation(s) of Student's civil rights is also hereby dismissed.

ORDER

The District's Motion for Determination of Sufficiency of Due Process Notice, challenging the sufficiency of Student's Amended Request for Due Process Hearing and requesting dismissal, is **GRANTED**. Student's Amended Request for Due Process Hearing, filed January 17, 2017, is deemed insufficient and is, therefore, **DISMISSED**. The pre-hearing conference scheduled for February 17, 2017 is **CANCELLED**.

Bernadette H. Bignon
Administrative Law Judge
Office of Administrative Hearings

APPEAL PROCEDURE

NOTICE TO ALL PARTIES: If you are dissatisfied with this Order you may, within 90 days after the mailing date on this Order, commence a nonjury civil action in any state court of competent jurisdiction, ORS 343.175, or in the United States District Court, 20 U.S.C. § 1415(i)(2). Failure to request review within the time allowed will result in **LOSS OF YOUR RIGHT TO APPEAL FROM THIS ORDER**.

ENTERED at Salem, Oregon this 3rd day of February, 2017, with copies mailed to:

Jan Burgoyne, Oregon Department of Education, Public Services Building, 255 Capitol Street NE, Salem, OR 97310-0203.

CERTIFICATE OF MAILING

On February 3, 2017 I mailed the foregoing RULING ON DISTRICT'S MOTION FOR DETERMINATION OF SUFFICIENCY OF DUE PROCESS NOTICE AND FINAL ORDER in OAH Case No. 2017-ABC-00260 to the following parties.

By: First Class Mail

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