

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

<p>IN THE MATTER OF: THE EDUCATION OF N.B. AND EUGENE SCHOOL DISTRICT 4J</p>	<p>)))))))</p>	<p>RULING ON DISTRICT’S MOTION FOR DETERMINATION OF SUFFICIENCY OF DUE PROCESS COMPLAINT AND FINAL ORDER</p> <p>OAH Case No. 2019-ABC-03181 Agency Case No. DP 19-108</p>
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HISTORY OF THE CASE

On September 30, 2019, Parent of Student NB, through attorney Kim Sherman, filed a request for due process hearing (due process complaint) with the Oregon Department of Education (Department). In that complaint, Parent raised concerns involving the identification, evaluation, educational placement, and provision of a free appropriate education to Student. Parent alleged that the Eugene School District 4J (District) failed to evaluate Student, failed to provide education in the Least Restrictive Environment, failed to provide specially designed instruction and related services reasonably calculated to confer a meaningful educational benefit, and failed to comply with Section 504 of the Rehabilitation Act and Americans with Disabilities Act. The Department referred the complaint to the Office of Administrative Hearings (OAH).

On October 4, 2019, the District, through its attorney Joel Hungerford, submitted a Motion for Determination of Sufficiency of Request for Hearing challenging the sufficiency of the due process complaint. The District asserted that the due process complaint fails to satisfy the requirements of 20 U.S.C. §1415(b)(7)(A) and OAR 581-015-2345(1) as it fails to provide sufficient facts to support the allegations and fails to give the District fair notice of the issues for hearing.

DISCUSSION

The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. (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. §1415(b)(6). 20 U.S.C. §1415(b)(7)(A)(ii) requires that the due process complaint contain the following information:

- (I) the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;

* * * * *

(III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

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

OAR 581-015-2345(1)(a)(B) contains similar notice requirements for a parent request for a due process hearing.¹ When a parent files a request for hearing alleging a violation of Section 504 of the Rehabilitation Act of 1973 in addition to (or as opposed to) a violation of the IDEA, these same prehearing and hearing procedures apply. OAR 581-015-2395(3), (4).

Under 20 U.S.C. §1415(b)(7)(B), a party may not have a due process hearing until the party files a notice that meets the requirements of subparagraph (A)(ii). *See also* OAR 581-015-2345(1)(c). Nonetheless, a due process complaint is presumed to meet these notice requirements unless it is challenged by the school district. 20 U.S.C. §1415(c)(2)(A); OAR 581-015-2350(1).

When, as here, a school district challenges the complaint, the ALJ must determine from the face of the hearing request whether or not the complaint meets the notice requirements. 20 U.S.C. §1415(c)(2)(D); OAR 581-015-2350(2).² If so, the matter will proceed to hearing. If not, the ALJ must dismiss the complaint. The parent then may file an amended complaint only if the school district consents to the amended complaint or the ALJ grants permission for the amendment. 20 U.S.C. §1415(c)(2)(E); OAR 581-015-02350(3).

The purpose for the notice requirements set out in 20 U.S.C. §1415(b)(7)(A)(ii) and OAR 581-015-2345(1)(a)(B)(iii) is to give the other side the “who, what, when, where, and why” details about the reasons the party is requesting a hearing. The detailed information allows the parties to resolve the issues through mediation or to prepare for a due process hearing. Whereas a due process complaint that lacks sufficient factual detail about the nature of the dispute impedes both resolution and an effective due process hearing because it does not provide the other party with fair notice and makes it very difficult for the other party to respond to the complaint in any substantive way.

¹ For example, OAR 581-015-2345(1)(a)(B)(iii) requires that the notice include “[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[.]”

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.

Here, the due process complaint raises three claims under the IDEA (failure to evaluate, failure to provide education in the least restrictive environment, and failure to provide adequate specifically designed instruction and related services) and a discrimination claim under Section 504 of the Rehabilitation Act of 1973. In its Motion, the District contends the due process complaint fails to support these allegations with sufficient factual information to allow the District to meaningfully respond. For the reasons set out below, the District's challenge has merit. The due process complaint fails to comply with 20 U.S.C. §1415(b)(6)(A)(ii) and OAR 581-015-2345(1)(a)(B)(iii), because it does not provide sufficient information. The complaint does not adequately describe the nature of the problem and does not set out specific, detailed facts relating to the problem.

Claim 1A, Failure to Evaluate Student

The due process complaint alleges the District failed to evaluate Student in all areas of suspected disability. In this regard, the complaint states, in pertinent part, as follows:

50. Beginning with Student's kindergarten enrollment in September 2012, District knew or should have known that student was a Student with a disability. Student's behaviors were dysregulated, sometimes explosive, and outside the norm of the behaviors of [Student's] same-aged peers. Beginning in YEAR [sic], a district employee began working with student in a small setting with only a few other students in an attempt to assist Student in developing behavioral regulation skills. However despite these events and other indications that Student was likely a student with a disability, District failed to initiate procedures to evaluate Student for a disability or to determine if Student required specially designed instruction or a Section 504 Plan of Accommodation until the middle of Student's third grade year. District subsequently found Student eligible under the IDEA in May of [Student's] third grade year.

(Complaint at page 8.)

In the Background and Education Events Timeline section of the due process complaint, Parent references Student's kindergarten school year (2012-2013), Student's first and second grade school years (SY 2013-2014 and SY 2014-2015) at Camas Ridge Elementary School and Student's third and fourth grade years (SY 2015-2016 and SY 2016-2017) at Holt Elementary School. Parent asserts that Student left Holt Elementary in mid-October 2017 and enrolled at Bridgeway School where, in Student's fifth and six grade school years, Student made significant progress in academics and life skills. Parent also alleges that, in early childhood, Student had ongoing heart issues that resolved by heart surgery at age 5 and a half; that Student was evaluated at home by an occupational therapist in Student's kindergarten year; that Parent provided the therapist's evaluation report to Student's teachers; that Student's kindergarten teacher suggested Student be considered for special education; and that Student had behavioral issues in kindergarten that escalated by second grade, and continued until Student left the District in October 2017 to enroll at Bridgeway school in Student's fifth grade year (SY 2017-2018).

As the District notes, despite the background and timeline recitals, the due process complaint does not provide the District with the necessary “who, what, when, where, and why” details to support this “failure to evaluate” claim. For example, the complaint does not allege if, or when, Parent informed District personnel of Student’s heart issues and medication needs, and of the resolution of the problem during Student’s first grade year. The complaint does not identify the occupational therapist who evaluated Student. The complaint does not indicate when this evaluation occurred, or whether the occupational therapist was hired by Parent or provided by the District. The complaint also does not indicate when, how, and with whom (which teacher(s)) Parent shared the evaluation report. The complaint also does not specify to whom Student’s kindergarten teacher suggested that Student be considered for special education.

In addition, the complaint does not specify when, “a district employee began working with Student in a small setting,” nor does it describe the nature of the setting. The complaint does not indicate whether the setting was a specialized classroom, a lunch group, or pull-out instruction. The complaint does not describe how this event relates to the District’s claimed failure to evaluate Student. The lack of specificity makes it difficult for the District to respond in any substantive way to this IDEA claim and the complaint in general.

It is also worth noting that the complaint does not specify the point at which Parent believes the District’s obligation to evaluate Student arose (*i.e.*, the date of the act or omission giving rise to the complaint).³ Insofar as Parent contends that the District’s obligation to evaluate student in all areas of suspected disability began as early as Student’s kindergarten enrollment in September 2012, seven years before Parent filed the due process complaint (or any time prior to October 2017), the claim may be time barred.

Claim 1B, Failure to Provide Education in the Least Restrictive Environment

The due process complaint next alleges that from September 2012 through mid-October 2017, the District failed to provide a free and appropriate education to Student in the least restrictive environment. Specifically, Parent alleges that the district failed to develop an IEP that appropriately addressed Student’s needs, and “as a result, Student was excluded from District’s educational program each day that Student was sent into the hallway, or sent to the office, or sent home early from school.” (Complaint at 9.)

In the Background and Education Events Timeline, Parent alleges that in second grade (2014-2015), Student’s behavioral concerns dramatically escalated and the school frequently called Parent to remove Student early from school due to behavioral concerns. The complaint also alleges that Student spent a great deal of time in the hallway outside the classroom or in the office. (*Id.* at 3.)

The due process complaint does not, however, provide detailed factual information in support of this least restrictive environment claim. The complaint does not allege the point at

³ This information is necessary and significant in light of the time limitation for due process complaints set out in OAR 581-015-2345(3). In Oregon, with certain exceptions that are not alleged in this case, a special education due process hearing must be requested within two years after the date of the act or omission that gives rise to the right to request the hearing.

which Parent believes the District should have developed an IEP for Student.⁴ The complaint does not describe the manner in which Student's behavior escalated, what prompted the school to call Parent, or how often Student was removed early from school. The complaint alleges Student missed school, and/or spent time outside the classroom in second and third grade due to behavioral issues, but it does not provide any specifics. As explained previously, the lack of specific facts and details makes it very difficult for the District to meaningfully respond to Parent's claims.

Claim 1C, Failure to Provide Meaningful Specially Designed Instruction and Related Services

At paragraph 61, the due process complaint alleges:

District's failure to evaluate Student in all areas of suspected disability was a procedural inadequacy that substantially impacted Student and seriously infringed on Parent's ability to fully participate in designing an appropriate IEP. District's failure to properly evaluate Student's present levels of academic, developmental, and functional performance skills prevented the IEP team in designing appropriate specially designed instruction. As a result of the District's failure, Student's behavioral and emotional dysregulation escalated to the point that Student expressed suicidal ideation.

(Complaint at 9.) In the Background and Education Events Timeline, Parent alleges that Student was diagnosed with Autism; that in third grade, the District identified Student as eligible for Section 504 accommodations; and then proposed evaluating Student for disability under the IDEA. The complaint alleges that Student expressed to the school principal (Ms. Joyce Johnson) in mid-October 2017 that Student "planned to kill himself. Parent sought private counseling for Student and subsequently enrolled Student in Bridgeway School. Student attended the remainder of the 2017-2018 school year and the whole of the 2018-2019 school year on a scholarship at Bridgeway School." (*Id.* at 3-4.)

As noted above, as written, the due process complaint does not provide sufficient detailed factual information in support of this claim. The complaint does not specify the point at which Parent believes the District became obligated to evaluate Student and/or the eligibility categories for which Student should have been evaluated. The complaint does not specify the point at which Parent believes the District should have developed an IEP for Student, nor does the complaint describe the ways in which the District failed to act. The complaint does not allege the type of specially designed instruction and related services Parent believes the District should have provided to Student and/or the reasons why such services would have benefited Student. Further, the complaint fails to describe how, or in what ways, Student's behavior escalated over the course of five years, or how the District's alleged failure to act related to Student's expressed suicidal ideation to the school principal in mid-October 2017. As written, the complaint fails to give the District fair notice of the issue(s) for hearing.

⁴ Again, this information is important in terms of determining whether the claim is barred by the two year limitations period set out in OAR 581-015-2345(3)(a).

Claim 2, Section 504 Violation

In Claim 2, Parent raises a discrimination claim, alleging in pertinent part, as follows:

67. In violation of Section 504 * * *, during the school years 2012 through mid-October 2017, and with the potential of being repeated, Student was excluded from and denied the benefits of general education instruction with [Student's] non-disabled peers when District failed to provide a free appropriate education as required by 34 C.F.R. § 104.33.

68. District failed to provide regular or special education and related services designed to meet Student's individual educational needs as adequately as [Student's] non-disabled peers by (1) failing to identify Student as a student with a disability until third grade, and then (2) failing to evaluate Student appropriately in order to determine the regular or special education and related services that Student would require in order to meet [Student's] needs. * * *

69. The District acted with deliberate indifference to the educational, physical, mental health, and emotional harm to the Student and without regard to the emotional harm to Student's Parent.

70. As a result of District's discrimination, Student suffered emotional, mental and emotional harms.

(Id.)

As with the IDEA claims, the complaint does not provide any factual details to support the alleged Section 504 violation. The complaint does not describe who acted with deliberate indifference, whether it was a teacher, counselor, or school administrator. The complaint does not specify what discriminatory acts these unidentified individuals allegedly engaged in, and/or what aid, benefit, or service Student was denied that others were afforded. In addition, the complaint does not specify dates or contexts in which the alleged violation/discriminatory acts occurred. The lack of detailed factual allegations in the complaint makes it nearly impossible for the District to respond in any substantive way to Parent's Section 504 claim.

Because the due process complaint fails to meet the requirements of 20 U.S.C. §1415(b)(7)(A)(ii) and OAR 581-015-2345(1)(a)(B), the complaint must be dismissed.

As set out above, pursuant to OAR 581-015-2350(3), a party may amend a hearing request only if: (A) the other party consents or (B) the ALJ grants permission. Pursuant to OAR 581-015-2350(4), if a party obtains consent or permission and files an amended hearing request, the applicable timelines for the resolution session and resolution period begin again with the filing of the amended hearing request.

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RULING AND ORDER

The due process complaint filed by Parent on September 30, 2019, assigned DP 19-108, is insufficient and DISMISSED.

Pursuant to OAR 581-015-2350(3)(B), Parent may submit an amended due process complaint to the Department no later than October 25, 2019.



Alison G. Webster
Presiding 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 10th day of October, 2019, 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 October 10, 2019, I mailed the foregoing RULING ON DISTRICT'S MOTION FOR DETERMINATION OF SUFFICIENCY OF DUE PROCESS COMPLAINT AND FINAL ORDER in OAH Case No. 2019-ABC-03181 to the following parties.

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