

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

IN THE MATTER OF:THE	)	<b>ORDER RE: DISTRICT’S</b>
EDUCATION OF	)	<b>SUFFICIENCY CHALLENGE TO DUE</b>
	)	<b>PROCESS COMPLAINT</b>
<b>J.B. AND SPRINGFIELD SCHOOL</b>	)	
<b>DISTRICT 19</b>	)	OAH Case No. 2017-ABC-00412
		Agency Case No. DP 17-106

**HISTORY OF THE CASE**

On March 20, 2017, Parent filed a Request for Due Process Complaint with the Oregon Department of Education (Department) under the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), 20 USC §§ 1400 et seq.. The Department referred the complaint to the Office of Administrative Hearings (OAH) on March 20, 2017. The OAH acknowledged receipt of the complaint and notified Parent and the School District that it has assigned the case to Administrative Law Judge Jill Marie Messecar.

On April 25, 2017 and April 26, 2017 ALJ Messecar held prehearing conferences with Parent and counsel for the school district (District), Richard Cohn-Lee. Upon agreement of the parties, the 45-day hearing timeline was waived, and the ALJ extended the time limits for issuance of the final order to a date certain, August 4, 2017.

In May of 2017, Attorney Melissa Wischerath undertook representation of Student and Parent. On May 8, 2017 a third pre-hearing conference was held with Ms. Wischerath and Mr. Cohn-Lee. The time limit for issuance of the final order was extended to December 8, 2017 upon request of the parties. On May 25, 2017, with the agreement of the District, Ms. Wischerath filed an amended complaint. On June 9, 2017, in response to issues Mr. Cohn-Lee raised regarding the sufficiency of the amended complaint, Ms. Wischerath filed a second amended complaint.

On June 23, 2017, the District, through attorney Mr. Cohn Lee, filed a Motion for Determination of Sufficiency of Due Process Notice (motion), requesting an order, under 34 CFR § 300.508(d) and OAR 581-015-2350, finding the second amended complaint insufficient in relation to several issues, specifically Issue 3, Issue 6, and Issue 7. The motion also requested that Student be directed to file a third amended complaint to correct the alleged insufficiencies.

**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. §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.

*See also* OAR 581-015-2345(1)(a)(B).

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). However, 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 it meets the notice requirements. 20 U.S.C. §1415(c)(2)(D); OAR 581-015-2350(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 District challenged the legal sufficiency of Issues 3, 6, and 7 set out in the complaint on the basis that the allegations failed to sufficiently describe the nature of the problem and/or that it fails to include any specific facts or information as to let the District know what programs or services or actions that Parent believes the District did not provide.

**Issue 3.** In the second amended complaint, Issue 3 states as follows:

ESY: The District Failed to Properly Determine the Need for Extended School Year Services.

For the 2015-2016 and 2016-2017 school years, in violation of 34 C.F.R. 300.106 and OAR 581-015-2065, the District failed to provide a free and appropriate public education (FAPE) when it did not properly determine the need for extended school year services (ESY) during IEP team meetings. Failure to properly determine the need for extended school year services (ESY) during IEP team meetings harmed the Student, because it is very likely that Student would have been found eligible for ESY and received additional services, accommodations, and Student would have been afforded an opportunity to make gains (and prevent regression) in critical areas of need, had the IEP team

considered the Student's need during any of the IEP team meetings held over the course of the school years subject to this complaint,

(Second Amended Complaint at 8-9.)

Some of the information identified in the objection as missing from the complaint is simply the type of detailed information that is developed during a hearing or upon further discussions with Parents counsel. For example, District asserts that the allegation that fails to make it clear whether Parent is alleging that the District failed to consider ESY or that the District considered ESY but Parent disagree with the conclusions or bases. I find that the nature of the problem in this issue is one related to the manner of determining the need for ESY and as such meets the requirement of providing a description of the "nature of the problem."

Although the nature of the problem is adequately stated, this allegation does not contain adequate facts to allow the District to effectively respond. The facts in this issue do not state what aspects of the determination of the need for ESY were improper or what was missing from the determination of ESY. Consequently, this allegation does not meet the requirements of 20 U.S.C. §1415(b)(7)(A)(ii).

**Issue 6.** Issue 6 reads as follows:

**Improper IEP Team Members: The District Failed to Ensure That All Required IEP Team Members Attended IEPs and the Team Included Qualified Members.**

In violation of 34 C.F.R. §§ 300.308 and 300.321, the District failed to ensure that all required IEP Team members were present at the Student's IEP team meetings held during the school years subject to this complaint, and failed to ensure that the IEP team included professionals specifically qualified to address the needs of a child determined to be a child with a specific learning disability as defined in 34 C.F.R. § 300.8(10) and a communication disorder as defined in 34 C.F.R. § 300.8(11).

(Second Amended Complaint at 10-11.)

The nature of the problem is sufficiently alleged here: whether the proper IEP team members were present and whether those team members were qualified. The IDEA requires that specific District employees be present at IEP member and that some of those IEP team members have the ability to perform certain actions. Although the nature of the problem is adequately stated, like issue 3 discussed above, this allegation does not contain adequate facts to allow the District to effectively respond. It implies that all of the IEP team meetings were deficient but does not state which team members were not present and which qualifications those team members were missing. This allegation does not meet the requirements of 20 U.S.C. §1415(b)(7)(A)(ii).

**Issue 7.** Issue 7 states as follows:

Parent Participation: The District Failed to Provide Parent with the Opportunity to Fully Participate in the Student's IEP Process.

In violation of 20 U.S.C. §§1414 (c) and (d), 20 U.S.C. § 1415 (b), and 34 C.F.R. §§ 300.320, 300.322, and 34 C.F.R. 300.613, the District did not provide the Parent the opportunity to fully participate in the IEP process during the school years subject to this complaint. Parents must be informed about and consent to evaluations of their child under the Act, which the District failed to do. Parents are included as members of "IEP teams." Parents have the right to examine any records relating to their child. Parents have a right to periodic progress reports indicating progress in their child's goals. Parents must be given written prior notice of any changes in an IEP, and be notified in writing of the procedural safeguards available to them under the IDEA, which the District failed to provide. The District failed to provide the Parent, with sufficient time to review, the records necessary to make fully informed decisions regarding the education and placement of the Student. These rights include, but are not limited to: reports, assessments, and data used in making IEP determinations, and periodic progress reports in a timely manner.

(Second Amended Complaint at 10-11.)

This allegation establishes the nature of the problem at issue. Parent has the right to meaningful participation in developing Student's IEP and Parent alleges a denial of such participation. Some of the information identified in the objection as missing from the complaint is simply the type of detailed information that is developed during a hearing or upon further discussions with Parents counsel. For example, District alleged that the issue contains conclusory language about the things that the District did not provide without including details about the alleged failures. On certain issues Parent failed to provide sufficient facts regarding the allegation. When a very broad allegation is made, such as Issue 7, it is crucial that Parent provide sufficient detail to the District so the dates, and events, and documents that are at issue can be determined. The claim that Parent was not informed about and did not consent to evaluations during the school years at issue appears to provide sufficient detail. However, the claim regarding providing of reports appears to be contradictory because Parent alleges that the District failed to provide reports and that Parent was given insufficient time to review the records. This lack of clarity regarding the District's provision of records to Parent renders the allegation insufficient and fails to meet the requirements of 20 U.S.C. §1415(b)(7)(A)(ii).

In conclusion, I find that the Second Amended Complaint is insufficient in that it fails, in part, to meet to the requirements of 20 U.S.C. §1415(b)(7)(A)(ii) because Issues 3, 6, and parts of 7 (pertaining to the provision of records) lack facts and specificity.

Accordingly, pursuant to Sec. 615(b)(7)(B), this matter may not proceed to a due process hearing on Issues 3, 6, and 7 (regarding records) as alleged, and these allegations must be dismissed. Parent may file an amended complaint to include additional facts and provide specificity on these three issues, which would in turn allow the District to effectively respond to the allegations.

Pursuant to OAR 581-015-2350(4), if a party 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.

### **ORDER**

The issues 3, 6, and 7 (regarding records) in Second Amended Complaint dated June 9, 2017 filed on behalf of Student are insufficient and therefore **DISMISSED**.

Parent may submit an amended due process complaint (Third Amended Complaint) to the Oregon Department of Education to address the insufficiencies noted herein.

In the event no amended complaint is filed by July 30, 2017, the matter will proceed to hearing as scheduled on the remaining issues in the Second Amended Complaint.

Dated this 30th day of June, 2017.

Jill Marie Messecar  
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 July, 2017, with copies mailed to:

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

**CERTIFICATE OF MAILING**

On July 3, 2017 I mailed the foregoing **ORDER RE: DISTRICT'S SUFFICIENCY CHALLENGE TO DUE PROCESS COMPLAINT** in OAH Case No. 2017-ABC-00412 to the following parties.

By: First Class Mail

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