BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: BRENTWOOD UNION SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2017120966 ORDER DETERMINING DUE PROCESS COMPLAINT SUFFICIENT AND DENYING REQUESTS TO DISMISS COMPLAINT AND TO VACATE EXPEDITED HEARING DATES

On December 27, 2017, Brentwood Union School District filed a Due Process Hearing Request[1] (complaint) with the Office of Administrative Hearings naming Student. OAH calendared this matter for both expedited and non-expedited hearing dates based on the issues raised. On January 3, 2018, Student filed a Notice of Insufficiency as to Brentwood's complaint and, in the same pleading, an alternative Motion to Dismiss and a Request for an Order to Vacate the Expedited Hearing Dates. Student's pleading is supported by the sworn declaration of her counsel and a copy of an October 26, 2017 individualized education program and Brentwood's November 2, 2017 prior written notice.

APPLICABLE LAW

Notice of Insufficiency

The named parties to a due process hearing request have the right to challenge the sufficiency of the complaint. (20 U.S.C. § 1415(b) & (c).) 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).

The complaint is deemed sufficient unless a party notifies the Office of Administrative Hearings and the other party in writing within 15 days of receiving the complaint that the party believes the complaint has not met the notice requirements. (20 U.S.C. § 1415(c)(2)(C); Ed. Code, § 56502, subd. (d)(1).)

[1] A request for a due process hearing under Education Code section 56502 is the due process complaint notice required under title 20 U.S.C. section 1415(b)(7)(A).

Title 20 of the United States Code, section 1415(k)(3) permits a parent to request an expedited hearing to appeal a decision regarding a disciplinary change of placement, such as placement in an alternative education setting or a manifestation determination regarding student conduct, and also allows a local educational agency, that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, to request an expedited hearing. 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 title 20 United States Code, section 1415(c)(2)(A) for testing the sufficiency of a request for an expedited hearing pursuant to section 1415(k). Generally, there is insufficient time to complete the NOI process in expedited hearings.

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 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. (20 U.S.C. § 1415(b)(7)(A)(ii)(III) & (IV).) 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. (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." (Sen. Rep. No. 108-185, *supra*, at p. 34.) The pleading requirements should be liberally construed in light of the broad remedial purposes of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.) and the relative informality of the due process hearings it authorizes. (*Alexandra R. ex rel. Burke v. Brookline School Dist.* (D.N.H., Sept. 10, 2009, CIV. 06-CV-0215-JL) 2009 WL 2957991[nonpub. opn.]; *Escambia County Bd. 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, 8:04CV2657T24EAJ) 2005 WL 2850076 [nonpub. opn.]; but cf. *M.S.-G v. Lenape Regional High School Dist. Bd. of Educ.* (3d Cir. 2009) 306 Fed.Appx. 772, 775 [nonpub. opn.].) Whether the complaint is sufficient is a matter within the sound discretion of the Administrative Law Judge. (*Assistance to States for the Educ. of Children with Disabilities & Preschool Grants for Children with Disabilities* (Aug. 14, 2006) 71 FR 46,540-46541, 46699.)

Motion to Dismiss

The purpose of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education," and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also 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 provision of a free appropriate public education to such child."

(20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

A school district that believes that maintaining a child in her current placement is substantially likely to result in injury to the child or others, has the right to request and receive an expedited due process hearing. (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a).) The procedural right to an expedited due process hearing is mandatory and does not authorize OAH to make exceptions or grant continuances of expedited matters which must be heard within 20 school days of the date the complaint requesting the hearing is filed. (20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c)(2) .) A matter can only be unexpedited or continued if no issue is alleged that is subject to an expedited hearing. If it is determined that maintaining the current placement of the student is substantially likely to result in injury to the student or to others, the administrative law judge may order a change in placement to an appropriate interim alternative educational setting for not more than 45 school days. (20 U.S.C. § 1415(k)(3)(B)(ii)(II); 34 C.F.R. § 300.532(b)(2)(ii).)

Although OAH will grant motions to dismiss allegations that are facially outside of OAH jurisdiction (e.g., civil rights claims, section 504 claims, enforcement of settlement agreements, incorrect parties, etc.), special education law does not provide for a summary judgment procedure.

DISCUSSION

Brentwood alleges that Student has exhibited increasingly dangerous behaviors in her current educational placement in a special day class at Marsh Creek Elementary School and that these behaviors are substantially likely to result in injury. Following an August 2017 incident of Student kicking her teacher, Brentwood held a manifestation determination review team meeting on September 1, 2017, and concluded that Student's conduct was a manifestation of her disability and vacated a proposed disciplinary change of placement. Based on the pleadings filed in this matter, Brentwood and Parents agreed for Student to receive temporary in-home instruction. However, a disagreement ensued as to what educational placement would meet Student's needs.

Brentwood offered placement at Turner East County Special Education Program, located at Turner Elementary School in the city of Antioch. Parents disagreed with this placement, and Student returned to Marsh Creek in November 2017. Brentwood identifies two issues for hearing. Issue Number 1 is framed as follows: whether maintaining Student in her current placement is substantially likely to result in injury to the Student or to others,

such that Student should be placed in an interim alternative educational setting for a period of not less than 45 school days. Brentwood seeks an order in the affirmative and further seeks an order that its proposed interim placement at Turner constitutes an appropriate interim setting. This constitutes an expedited issue under title 20 U.S.C. section 1415 (k). As such, it is not the proper subject of a sufficiency challenge.

Brentwood's Issue Number 2 is a non-expedited issue, seeking a determination that for the 2017-2018 school year and extended school year, it offered Student a FAPE in the least restrictive environment that is reasonably calculated to provide her with educational benefit in light of her circumstances.

The facts alleged in Brentwood's complaint are sufficient to put Student on notice of the issues forming the basis of the complaint and its proposed resolutions. Brentwood's complaint identifies the issues with specificity and provides adequate related facts about the problems to permit Student to respond to the complaint, participate in mediation, and prepare for hearing. Even if the expedited issue was subject to a sufficiency challenge, Brentwood provides sufficient facts regarding Student, her placement, and her behaviors in support of its expedited issue and request for an interim alternative educational setting at Turner. Brentwood additionally provides sufficient facts regarding the IEP team meetings during the relevant time frame, its offer of services and placement, and amended offers for the 2017-2018 school year in support of its non-expedited issue.

Student's arguments that Brentwood's complaint should be found insufficient are not persuasive and are at odds with the general notice pleading requirements under the IDEA. Brentwood was required to plead facts sufficient to place Student on notice of the issues, the underlying facts, and the proposed resolutions. Brentwood has met the required pleading standards. Therefore, Brentwood's complaint is legally sufficient.

Student's motion to find the complaint insufficient and/or to dismiss the complaint and vacate the expedited hearing evinces a fundamental misunderstanding of the law in several regards. Student fails to acknowledge Brentwood's right to file for an expedited hearing seeking an order authorizing it to remove Student to an appropriate interim alternative educational setting, separate and apart from removing Student for disciplinary conduct. Student provides no persuasive legal support for challenging the sufficiency of Brentwood's expedited issue; or for her contentions that OAH lacks jurisdiction to schedule Issue 1 for an expedited hearing, to hear this expedited issue, and to grant the requested remedy. Student's specific contentions are addressed in detail below.

Student's Arguments that Issue 1is Insufficiently Pled and/or Subject to Dismissal

LACK OF JURISDICTION

Student argues that OAH lacks jurisdiction to order an interim alternative educational setting because Brentwood failed to conduct a manifestation determination review meeting based on Student's conduct after September 1, 2017. It is Student's position that

Brentwood's failure to allege that it conducted a manifestation determination review meeting after September 1, 2017, divests OAH of authority to adjudicate Issue 1. This contention is not legally supported and disregards the fact that Brentwood is not seeking a disciplinary change in placement. Rather, Brentwood is asking OAH to find that Student requires an interim alternative educational setting because maintaining her current placement is substantially likely to result in injury to herself or others. The law specifically allows for Brentwood to raise this issue and for OAH to adjudicate this claim.

FAILURE TO SUFFICIENTLY PLEAD ISSUE 1

In this section of her motion, Student acknowledges that Brentwood may file a request for due process asking OAH to change Student's placement if it believes that maintaining the current placement is substantially likely to result in injury. However, Student argues that Issue 1 should be deemed insufficient and/or dismissed because Brentwood referenced only one injury which resulted from Student's conduct, namely the August 2017 kicking incident.

Student provides no supporting authority that Brentwood's expedited issue is the proper subject of a notice of insufficiency. Even so, as determined above, Brentwood has pleaded sufficient facts regarding Student, her placement, and her behaviors in support of Issue 1 and the proposed resolution. Student appears to argue that Brentwood's claim must be found insufficient or be dismissed outright because it fails to allege that Student's conduct resulted in any injury to herself or a sufficient injury to another. However, a finding that Student inflicted injury is not a prerequisite for finding a substantial risk of injury. (See *Light v. Parkway C-2 School District* (8th Cir. 1995) 41 F.3d 1223 wherein the Eighth Circuit Court of Appeals rejected the contention that "injury is inflicted only when blood is drawn or the emergency room visited," and "[m]ore broadly … reject[ed] the proposition that a child must first inflict serious harm before that child can be deemed substantially likely to cause injury." (*Id*. at 1230.) That Student disagrees with Brentwood's claim, that her conduct supports an emergency removal to prevent a substantial risk of injury, is not grounds for dismissing Issue 1 or otherwise finding it insufficient.

FAILURE TO SUFFICIENTLY ALLEGE PROPOSED INTERIM SETTING WILL PROVIDE FAPE

The interim alternative educational setting must enable the student to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the student's IEP. (20 U.S.C. § 1415(k)(1)(D)(i); 34 C.F.R. § 300.530(d)(1)(i).) There is no requirement that the interim setting offer Student a FAPE or the least restrictive environment. Additionally, the IDEA requires that a student with a disability who has been removed to an interim alternative educational setting receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications so that the behavior for which the student has been placed in the interim alternative educational setting does not recur. (20 U.S.C. § 1415(k)(1)(D)(ii); 34 C.F.R. § 300.530(d)(1)(ii).)

Even if Issue 1 was subject to a sufficiency challenge, Brentwood has pled sufficient supporting facts regarding its proposed interim alternative educational setting. Brentwood bears the burden at hearing of proving that its proposed interim setting will sufficiently address the behaviors which it alleges warrant Student's removal, and that Student will be able to participate in the general education curriculum and make progress on her goals.

Student further contends that Issue 1 should be dismissed because Brentwood failed to allege that it ever expressly discussed an interim alternative educational setting with Parents or as part of an IEP team meeting. OAH does not allow for a summary judgment procedure. Further, this contention is not supported by the law. The IEP team is responsible for determining a student's interim alternative educational setting only when a student's disciplinary conduct is determined to not be a manifestation of the student's disability or where there are special circumstances involving weapons, illegal drugs or the infliction of serious bodily injury. (20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.531.) Nether of these circumstances are applicable to the case at hand. If a school district proves that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, it is the responsibility of the ALJ to order a change in placement to an appropriate interim alternative educational setting for not more than 45 school days. (20 U.S.C. § 1415(k)(3)(B)(ii)(II); 34 C.F.R. § 300.532(b)(2)(ii).) Brentwood is entitled to a full evidentiary hearing as to the appropriateness of its proposed alternative setting.

FAILURE TO SUFFICIENTLY ALLEGE "SERIOUS BODILY INJURY"

Student accurately states the law regarding a special circumstance removal. A district may place a student in an interim alternative educational setting for not more than 45 school days, regardless of whether the student's behavior is determined to be a manifestation of the child's disability, under "special circumstances" defined as (a) carrying or possessing a weapon to or at school, on school premises, or at a school function; (b) knowingly possessing or using illegal drugs, or selling or soliciting the sale of a controlled substance, while at school, on school premises, or at a school function; or (c) inflicting serious bodily injury upon another person while at school, on school premises or at a school function. (20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. §300.530(g).) The term "serious bodily injury" for the purpose of these disciplinary measures is the same as that found in title 18 United States Code section 1365(h)(3). (20 U.S.C. § 1415(k)(7)(D); 34 C.F.R. § 300.530(i)(3).) The term is defined as: bodily injury that involves a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. (18 U.S.C. § 1365(h)(3).) However, a special circumstance removal is not at issue in this matter.

If Brentwood had determined that Student's conducted resulted in serious bodily injury, it would have been entitled to remove Student from her current placement to an appropriate interim setting for up to 45 school days. Here, Brentwood is seeking an order from OAH that maintaining Student's current placement is substantially likely to result in injury such that she requires an interim alternative setting. Brentwood is not alleging a special circumstance of "serious bodily injury." Therefore, Student's argument that

Brentwood's complaint must be dismissed or found insufficient for failing to sufficiently allege serious injury is inapposite.

Student's Argument that Issue 2 is Insufficiently Pled and/or Subject to Dismissal

Student contends that Brentwood fails to allege sufficient facts to support its claim that its proposed educational program and placement will provide a FAPE or are reasonably likely to curb her behaviors and allow her to access her education. As determined above, Brentwood sufficiently alleges facts regarding Student, her current placement, her behaviors, and its proposed IEP and amendments thereto in support of Issue 2. Student's contention that Brentwood does not plead that it can meet its burden of proof at hearing reflects a fundamental misunderstanding of the IDEA's notice pleading requirements. Student provides no support for her contention that Issue 2 should be dismissed as a matter of law. Whether Brentwood's proposed IEP provides Student a FAPE in the least restrictive environment is within OAH's jurisdiction. Brentwood is entitled to a full evidentiary hearing to pursue this issue.

Request to Vacate Expedited Hearing

A matter can only be unexpedited, or continued, if no issue is alleged that is subject to an expedited hearing. As delineated above, Brentwood believes that maintaining Student's current placement is substantially likely to result in injury to Student or others, and has exercised its right to request an expedited hearing. The expedited hearing must occur within 20 school days of the date the hearing is requested. OAH not only has the jurisdiction to schedule this matter for an expedited hearing in a timely manner, but is required to do so.

Student's argument that OAH lacks jurisdiction to schedule an expedited hearing with regards to Issue 1 is contrary to the law. Student is mistaken in her belief that only a disciplinary change of placement stemming from a student's alleged violation of a code of conduct is subject to the expedited hearing process. The mandatory provisions of title 20, section 1415, subdivision (k)(4)(B) for an expedited hearing apply to Issue 1. OAH has no authority to continue the expedited hearing dates or otherwise vacate these dates. Accordingly, Student's request to vacate the expedited hearing dates is denied.

Student's motion to dismiss Brentwood's complaint is not limited to matters that are facially outside of OAH jurisdiction, but instead seeks a ruling on the merits. Brentwood's issues are subject to proof at an evidentiary hearing, and Brentwood is entitled to proceed to hearing as to both of its issues.

Accordingly, this matter will proceed to hearing as scheduled.[2]

ORDER

1. The complaint is sufficient under title 20 of the United States Code, section 1415(b)(7)(A)(ii).

2. Student's motion to dismiss is denied.

3. Student's motion to vacate the expedited dates is denied.

4. All expedited and non-expedited dates in this matter are confirmed.

DATE: January 8, 2018

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Theresa Ravandi
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THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings

[2] Brentwood's request to continue the non-expedited hearing date will be addressed in a separate order.