BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

NEWARK UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2022120182

CORRECTED ORDER DETERMINING DUE PROCESS COMPLAINT PARTIALLY SUFFICIENT AND DENYING STUDENT'S MOTION TO DISMISS NOTICE OF INSUFFICIENCY

MARCH 8, 2023

On February 21, 2023, the Office of Administrative Hearings, referred to as OAH, issued an Order Determining Due Process Complaint Partially Sufficient and Denying Student's Motion to Dismiss Notice of Insufficiency. There was a typographical error in Order number 2. This Corrected Order has been changed only to correct the number of the issue Student insufficiently pleaded.

On December 6, 2022, Parent on behalf of Student filed a Due Process Hearing Request, called a complaint, with the Office of Administrative Hearings, referred to as OAH, naming Newark Unified School District. OAH issued an Order dated December 20, 2022, determining Student's complaint to be insufficient. OAH served the parties a copy of the December 20, 2022 Order Determining Due Process Complaint Insufficient on December 21, 2022. The December 20, 2022 Order permitted Student to file an amended complaint pursuant to title 20 United States Code section 1415(c)(2)(E)(i)(II) no later than 14 days from the date of the Order.

On January 3, 2023, at 4:59 PM, Parent on behalf of Student timely filed with OAH a first amended complaint naming Newark Unified. On January 17, 2023, Newark Unified timely filed a Notice of Insufficiency to the first amended complaint. OAH issued an Order dated January 20, 2023, determining Student's first amended complaint to be partially sufficient, and mostly insufficient. OAH served the parties a copy of the January 20, 2023 Order Determining Due Process Complaint Insufficient on January 20, 2023.

The January 20, 2023 Order permitted Student to file an amended complaint pursuant to title 20 United States Code section 1415(c)(2)(E)(i)(II) no later than 14 days from the date of the Order, and specified if Student did not amend the complaint, the case would proceed to hearing on the parts of the January 3, 2023 first amended complaint OAH determined were sufficiently pleaded, which were only Issues 1 and 6 as to claims involving implementation of the April 19, 2019 IEP from December 6, 2020, the inadequacies of the goals offered in the March 29, 2021 IEP, and implementation of accommodations, supports, and services from October 1, 2021, through June 1, 2022., further defined as follows:

- In Issue 1 of the January 3, 2023 first amended complaint, Student contended Newark Unified failed to implement from December 6, 2020, aspects of Student's April 23, 2019 individualized education program, called an IEP. The amended complaint sufficiently identified the components of the April 23, 2019 IEP that Newark Unified allegedly failed to implement, which included program accommodations, consultations for occupational therapy, physical therapy, speech and language therapy, as well as services for physical therapy, occupational therapy, and speech and language therapy, a one-to-one aide, transportation, and extended school year services;
- In addition, Issue 1 of the January 3, 2023 first amended complaint's contention as to the goals offered in the March 29, 2021 IEP was sufficiently pleaded. Student argued that the IEP offered goals that Student had already met, did not contain baselines, and were not measurable. The January 3, 2023 first amended complaint provided sufficient information regarding Student's contention over the March 29, 2021 IEP's offered goals;
- Student contended in Issue 1 of the January 3, 2023 first amended complaint that from October 1, 2021, through June 1, 2022, Newark Unified failed to implement accommodations, supports, consultations, and other services apart from speech and language therapy, occupational therapy, and physical therapy. This contention was sufficiently pleaded to provide Newark Unified with an awareness and understanding of the problem; and
- Issue 6 of the January 3, 2023 first amended complaint raised the same claims in Issue 1 involving the goals, accommodations and services offered

in the March 29, 2021 IEP. Issue 6 of the January 3, 2023 first amended complaint was sufficient and insufficient for the same reasons those claims were found sufficient and insufficient in Issue 1.

On February 3, 2023, Parent on behalf of Student timely filed with OAH a second amended complaint naming Newark Unified, titled "DUE PROCESS HEARING REQUEST AMENDMENT 2 DATED 02/02/2023 -REVISION LIMITED TO ITEMS REFERENCED AS 'ISSUES' REFERNCED [sic] PER ORIGINAL DUE PROCESS HEARING REQUESTED DATED 12/06/2022 AND AMEDMENT 1 DATED 01/03/2023."

On February 16, 2023, Newark Unified timely filed a Notice of Insufficiency as to the second amended complaint.

On February 16, 2023, Student filed a motion to dismiss Newark Unified's February 16, 2023 Notice of Insufficiency, titled "REQUEST TO DISMISS DISTRICT 'NOTICE OF INSUFFICIENCY PER AMEND 2 DUE PROCESS HEARING REQUEST FILED ON 02/03/2022.'"

The named parties have the right to challenge the complaint's sufficiency. (20 U.S.C. § 1415(b) & (c).) The Individuals with Disabilities Education Act and California Education Code do not contemplate any procedure for dismissing a notice of insufficiency that is timely filed. Any notice of insufficiency that is timely filed must be considered.

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:

1. describes the problem relating to the proposed change regarding the Student's identification, evaluation, or educational placement, or providing the Student a free appropriate public education;
2. includes facts about the problem; and
3. includes a proposed resolution 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 IDEA 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 Board* (M.D.Fla., Oct. 28, 2005, 8:04CV2657T24EAJ) 2005 WL 2850076 [nonpub. opn.]; but cf. *M.S.-G v. Lenape Regional High School Dist. Board 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.)

An amended complaint supersedes the original and furnishes the sole basis for a cause of action, and the original complaint is thereafter dropped out of the case and ceases to have any effect as a pleading, or as a basis for judgment. (*Hayes v. Risk* (1967) 255 Cal.App.2d 613; Code Civ. Proc., § 471.5; see also Fed. R. Civ. Pro., rules 10 and 15, and U.S. Dist. Ct., Local Civ. Rules, Northern Dist. Cal., rule 10-1 ["Any party filing or moving to file an amended pleading must reproduce the entire proposed pleading and may not incorporate any part of a prior pleading by reference."]; *Ferdik v. Bonzelet* (9th Cir. 1992) 963 F.2d 1258, 1262 [an amended complaint supersedes the prior complaint, and after amendment, the Court will treat the prior complaint as nonexistent]; *Hal Roach Studios v. Richard Feiner & Co.* (9th Cir. 1990) 896 F.2d 1542, 1546.)

Student's second amended complaint alleges nine claims in the complaint, some of which are sufficient and some of which are insufficient. The issues are discussed below.

In Issue 1, Student has sufficiently pleaded facts to support a claim of denial of a free appropriate public education, called FAPE. Student's second amended complaint puts Newark Unified on notice as to the basis of Student's claims regarding failing to implement Student's April 23, 2019 IEP from December 6, 2020, through the end of the 2020-2021 regular school year. Student alleges Newark Unified denied him a FAPE by failing to implement the following components of the April 23, 2019 IEP Student asserts was in effect at the time:

- transportation;
- 1:1 aide;
- assistive technology services/supports; and
- "program accommodation, adaptations, or services."

Student's second amended complaint provides Newark Unified an awareness and understanding of the problems described above to allow Newark Unified to prepare for hearing and to participate in a resolution session and mediation. However, any other claim, or claims, Student attempted to assert in Issue 1 is, or are, insufficiently pleaded.

In Issue 2, Student has sufficiently pleaded facts to support a claim of denial of a FAPE. Student's second amended complaint puts Newark Unified on notice as to the basis of Student's claims regarding deficiencies in the development and content of the March 29, 2021 IEP. Student alleges Newark Unified denied him a FAPE with respect to the development and content of the March 29, 2021 IEP in the following ways:

- Significantly impeding Parent's opportunity to participate in the decisionmaking process regarding the provision of FAPE to Student by:
    - Failing to consider Parent's input about Student's behavioral changes, life function skills, academic abilities, and current levels academically;
    - Changing Student's "program services, adaptations, modifications, special education and related services, accommodations, intensive individual services, and goals" without meeting with Parent;
    - Failing to provide Parent a copy of the annual IEP dated March 29, 2021 until November 1, 2021; and
    - Implementing the March 29, 2021 IEP after March 29, 2021 without Parent's consent;
- Failing to assess Student on the terms and conditions Parent wanted, including allowing Parent to be present during the assessment and with accommodations and "alternative testing protocols;"

- Failing to accurately identify Student's present levels of performance in academic areas;
- Failing to develop appropriate goals by "mirror[ing]" goals from the April 23, 2019 IEP by offering goals Student had already achieved, "with the exception of additional goals included for speech and language, adapt[ed] physical education, and occupational therapy";
- Failing to develop measurable goals; and
- Failing to offer appropriate placement and related services, by writing the IEP to have on-campus services but maintaining Student on "independent study" with asynchronous instruction by distance education.

Student's second amended complaint provides Newark Unified an awareness and understanding of the problems described above to allow Newark Unified to prepare for hearing and to participate in a resolution session and mediation. However, any other claim, or claims, Student attempted to assert in Issue 2 is, or are, insufficiently pleaded.

In Issue 3, Student has sufficiently pleaded facts to support a claim of denial of a FAPE. Student's second amended complaint puts Newark Unified on notice as to the basis of Student's claims regarding Newark Unified's failure to assess Student on the terms and conditions Parent wanted, including allowing Parent to be present during the assessment and with accommodations and "alternative testing protocols." Student complained about this same factual circumstance in Issue 2 as it related to Newark Unified's alleged procedural defects in developing the March 29, 2021 IEP.

Issue 3 repeats Student's allegations related to the assessment topic in Issue 2, and adds information regarding Student's additional dissatisfaction, specifically that Newark Unified would not allow Parent "input in the actual assessment administration or collaboration with assessors to arrive at accurate results." Student's second amended

complaint provides Newark Unified an awareness and understanding of the problems described above to allow Newark Unified to prepare for hearing and to participate in a resolution session and mediation. However, any other claim, or claims, Student attempted to assert in Issue 3 is, or are, insufficiently pleaded.

Issue 4 is insufficiently pleaded. The heading of Issue 4 contends Newark Unified failed to accommodate Student's "underlying medical concerns." The facts Student alleges are related to this claim list multiple and inconsistently stated IEP dates and focus on Parent's requests for recordings of IEP team meetings and IEP documents, as well as dissatisfaction with distance education in April and May 2020, and ambiguously the 2020-2021 school year. Thus, Issue 4 is confusing and insufficient to provide Newark Unified an awareness and understanding of the problems Student alleges to allow Newark Unified to prepare for hearing and to participate in a resolution session and mediation.

In Issue 5, Student has sufficiently pleaded facts to support a claim of denial of a FAPE. Student's second amended complaint puts Newark Unified on notice as to the basis of Student's claims regarding Newark Unified's failure to develop satisfactory goals for Student in the March 29, 2021 IEP. What is stated in Issue 5 is connected to the parts of Issue 2 that complained about the goals developed at the March 29, 2021 IEP team meeting. Issue 2 attacks the goals of the March 29, 2021 IEP that were repeated, or "mirrored," goals of the April 23, 2019 IEP. Issue 5 adds more particularity about Student's disputes with the specific goals Student alleged in Issue 2 were added goals regarding "speech and language, adapt[ed] physical education, and occupational therapy." In Issue 5, Student alleges he was denied a FAPE because, with respect to those additional goal areas in the March 29, 2021 IEP, Newark Unified failed to:

- Develop a measurable goal for adapted physical education because the goal was not based on an accurate present level of performance, also called a baseline, and did not contain a way the goal's progress would be measured;
- Develop a measurable goal for speech and language regarding fluency because the goal was not based on an accurate present level of performance, also called a baseline, and did not contain a way the goal's progress would be measured;
- Develop a measurable goal for speech and language regarding expressive and receptive language because the goal was not based on an accurate present level of performance, also called a baseline, and did not contain a way the goal's progress would be measured; and
- Develop a measurable goal for visual motor skills and fine motor control, to be worked on in occupational therapy, because the goal was not based on an accurate present level of performance, also called a baseline, and did not contain a way the goal's progress would be measured; and
- Develop a measurable goal for fine motor skills, to be worked on in occupational therapy, regarding Student's written output in class because the goal was not based on an accurate present level of performance, also called a baseline, and did not contain a way the goal's progress would be measured.

In Issue 5, Student also alleges Newark Unified failed in the March 29, 2021 IEP to develop a measurable academic goal regarding adding items with a sum up to 30 because the goal was not based on an accurate present level of performance, also called a baseline, and did not contain a way the goal's progress would be measured. Student's second amended complaint provides Newark Unified an awareness and understanding

of the problems described above to allow Newark Unified to prepare for hearing and to participate in a resolution session and mediation. However, any other claim, or claims, Student attempted to assert in Issue 5 is, or are, insufficiently pleaded.

In Issue 6, Student has sufficiently pleaded facts to support a claim of denial of a FAPE. Student's second amended complaint puts Newark Unified on notice as to the basis of Student's claims regarding Newark Unified's failure to implement either Student's April 23, 2019 or March 29, 2021 IEP's by failing to provide Student special education and related services during the extended school year after the 2020-2021 regular school year. Student's second amended complaint provides Newark Unified an awareness and understanding of the problem described above to allow Newark Unified to prepare for hearing and to participate in a resolution session and mediation. However, any other claim, or claims, Student attempted to assert in Issue 6 is, or are, insufficiently pleaded.

In Issue 7, Student has sufficiently pleaded facts to support a claim of denial of a FAPE. Student's second amended complaint puts Newark Unified on notice as to the basis of Student's claims regarding Newark Unified's failure from December 6, 2020, through the end of the 2020-2021 regular school year to conduct academic assessments by a qualified assessor, because a classroom aide administered the academic assessments instead of a credentialed teacher. Student's second amended complaint provides Newark Unified an awareness and understanding of the problem described above to allow Newark Unified to prepare for hearing and to participate in a resolution session and mediation. However, any other claim, or claims, Student attempted to assert in Issue 7 is, or are, insufficiently pleaded.

In Issue 8, Student has sufficiently pleaded facts to support a claim of denial of a FAPE. Student's second amended complaint puts Newark Unified on notice as to the

basis of Student's claims regarding Newark Unified's failure to implement Student's April 23, 2019 IEP by failing to provide Student special education and related services during the extended school year after the 2021-2022 regular school year. Student's second amended complaint provides Newark Unified an awareness and understanding of the problem described above to allow Newark Unified to prepare for hearing and to participate in a resolution session and mediation. However, any other claim, or claims, Student attempted to assert in Issue 8 is, or are, insufficiently pleaded.

In Issue 9, Student has sufficiently pleaded facts to support a claim of denial of a FAPE. Student's second amended complaint puts Newark Unified on notice as to the basis of Student's claims regarding Newark Unified's failure to offer Student IEP placement in home/hospital instruction with appropriate related services, all delivered by virtual instruction but with a one-to-one aide in Student's home, for the 2022-2023 school year based on Parent's requests and Student's doctor's recommendations in June and July 2022. Student's second amended complaint provides Newark Unified an awareness and understanding of the problem described above to allow Newark Unified to prepare for hearing and to participate in a resolution session and mediation. However, any other claim, or claims, Student attempted to assert in Issue 9 is, or are, insufficiently pleaded.

Newark Unified contends Student's second amended complaint is insufficient because it does not include any proposed resolutions. A complaint is required to include proposed resolutions to the problem, to the extent known and available to the party at the time. (20 U.S.C. §1415(b)(7)(A)(ii)(IV).) Student's second amended complaint failed to state any proposed resolutions. However, Student's first amended complaint stated many requested services, and stated others had been requested in the original complaint and directed a reader to that original complaint for additional remedies

because Parent "[had] not had the appropriate time to draft all request [sic] services in this due process case" and the "services and remedies" in the first amended complaint were "additions to the original submission of remedies submitted on filing dated 12/06/2022." While amended complaints replace and supersede any prior complaints, Student's failure to include in the second amended complaint any proposed resolutions does not deprive Newark Unified of information to allow Newark Unified to prepare for hearing and to participate in a resolution session and mediation. Newark Unified has been informed of Student's proposed remedies and the absence of proposed remedies in the second amended complaint does not render it totally insufficient.

MEDIATOR ASSISTANCE FOR NON-REPRESENTED PARENTS: A parent without an attorney may request that OAH provide a mediator to assist the parent in identifying the issues and proposed resolutions that must be included in a complaint. (Ed. Code, § 56505.) Parent has previously been advised of the availability of this assistance and are again encouraged to contact OAH for assistance if Parent intends to amend the due process hearing request.

ORDER

1. Issues 1, 2, 3, 5, 6, 7, 8, and 9 of Student's second amended complaint are sufficient under title 20 United States Code section 1415(b)(7)(A)(ii), as defined and limited above.
2. Issue 4 of Student's second amended complaint is insufficiently pleaded under title 20 United States Code section 1415(c)(2)(D), as are any parts of Issues 1, 2, 3, 5, 6, 7, 8, and 9 Student attempted to plead that are not described by this Order.
3. If Student seeks to state any claims beyond those identified as sufficiently pleaded in this Order, Student is permitted to file another amended complaint

under title 20 United States Code section 1415(c)(2)(E)(i)(II). The third amended complaint shall comply with the requirements of title 20 United States Code section 1415(b)(7)(A)(ii), and shall be filed not later than 14 days from the date of this Order. The third amended complaint must be retyped or rewritten in its entirety and may not incorporate any part of the original complaint, the first amended complaint, or the second amended complaint by reference.

4. The filing of an amended complaint will restart the applicable timelines for a due process hearing.
5. If Student fails to file a timely amended complaint, the hearing shall proceed only on Issues 1, 2, 3, 5, 6, 7, 8, and 9 of Student's second amended complaint, as defined and limited above.
6. Student's motion to dismiss Newark Unified School District's Notice of Insufficiency is denied.

IT IS SO ORDERED.

Kara Hatfield

Kara Hatfield

Administrative Law Judge

Office of Administrative Hearings