BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

LINCOLN UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2023090343

ORDER DETERMINING DUE PROCESS COMPLAINT SUFFICIENT AND DENYING MOTION FOR SANCTIONS

SEPTEMBER 19, 2023

On September 12, 2023, Student filed a Due Process Hearing Request, called a complaint, with the Office of Administrative Hearings, referred to as OAH, naming Lincoln Unified School District. On September 18, 2023, Lincoln filed a Notice of Insufficiency as to the complaint, and moved for sanctions for Student's bad faith actions filing a complaint that was not sufficient after repeated instructions from OAH in a prior case between the same parties.

DETERMINATION OF SUFFICIENCY

The named parties have the right to challenge the complaint's sufficiency. (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).

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 Board 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 46540-46541, 46699.)

The allegations in Student's complaint in this case, filed September 12, 2023, are almost identical to those in Student's prior complaint and amended complaint in OAH Case No. 2023060798. That case was originally filed on June 20, 2023, against two local educational agencies. Lincoln filed a notice of insufficiency regarding the original complaint. On July 5, 2023, OAH determined all but one of the claims against Lincoln were sufficient, and afforded Student 14 days to file an amended complaint if Student wished to do so.

On July 17, 2023, Student filed an amended complaint repeating the sufficient claims against Lincoln and amending the one insufficiently pleaded claim. Lincoln filed a notice of insufficiency regarding the amended complaint. On July 25, 2023, OAH again determined the unchanged claims against Lincoln were sufficiently pleaded but determined the amended claim was not sufficiently pleaded, and afforded Student 14 days to file an amended complaint if Student wished to do so.

Student did not further amend the complaint in OAH Case No. 2023060798. On September 5, 2023, Student withdrew the case without prejudice. On September 6, 2023, OAH vacated the hearing dates and dismissed the case.

Student filed a new complaint on September 12, 2023. On September 18, 2023, Lincoln filed a notice of insufficiency, challenging only what is identified in Student's

new complaint as Issue 6, which included a paragraph labeled (a) but no other paragraphs such as (b), etc.

Lincoln did not challenge the sufficiency of Student's complaint regarding what Student labeled Issues 1, 2, 3, 4, and 5. For all the reasons previously stated in the Orders in OAH Case No. 2023060798 regarding the sufficiency of Student's allegations on the first five issues, Student's complaint in this case is sufficient.

In Issue 1, Student asserts Lincoln denied him a free appropriate public education, referred to as a FAPE, during the 2021-2022 school year by failing in the September 10, 2021, individualized education program, called IEP, to offer appropriate speech and language services. The allegations that follow the issue statement explain Student contends he required more than the 1,250 annual minutes of speech and language offered in the September 10, 2021, IEP. Student's complaint alleges several factual contentions supporting the alleged need for an increase in speech and language services. Student's complaint identifies Issue 1 and adequate facts about the problem to permit Lincoln to respond and participate in a resolution session and mediation and prepare for hearing.

In Issue 2, Student asserts Lincoln denied him a FAPE by failing to offer appropriate accommodations. The allegations that follow the issue statement explain Student required accommodations in his September 10, 2021, IEP to address his limited intelligibility, which hinders his ability to communicate effectively with peers and staff in the classroom setting. Though Student does not identify specific accommodations requested, the complaint identifies adequate facts about the problem to permit Lincoln to respond and participate in a resolution session and mediation and prepare for hearing.

In Issue 3, Student asserts Lincoln denied him a FAPE by failing to offer appropriate annual goals in the September 10, 2021, IEP. Student then alleges that three specifically identified communication goals were inappropriate because Student did not meet all three of them, if achieved they would have only reflected de minimis progress, they did not change from prior goals, or at most changed only slightly, and they could not be achieved in the general education classroom. This issue, on its face, relates to three communication goals from the September 10, 2021, IEP, and therefore the complaint identifies the issue and adequate facts about the problem to permit Lincoln to respond and participate in a resolution session and mediation and prepare for hearing.

In Issue 4, Student asserts Lincoln failed to offer extended school year for the 2021-2022 school year in the September 10, 2021, IEP. The allegations that follow demonstrate Student contends he required extended school year services to address deficits in communication. The complaint identifies the issue and adequate facts about the problem to permit Lincoln to respond and participate in a resolution session and mediation and prepare for hearing.

In Issue 5, Student asserts Lincoln failed to offer parent training in speech and language in the September 10, 2021, IEP. The allegations that follow reiterate Student's speech and language difficulties and conclude Student did not meet his speech and language goals, had intelligibility problems at home and school, and that Lincoln should have considered Parent's problem with Student's speech and language at home. The complaint identifies the issue and adequate facts about the problem to permit Lincoln to respond and participate in a resolution session and mediation and prepare for hearing.

Student only slightly changed the wording of the issue that was insufficiently pleaded in OAH Case. No. 2023060798. However, in this case, as Issue 6, Student asserts Lincoln denied Parents meaningful participation and therefore predetermined the offers in the September 10, 2021, IEP because Lincoln did not give Parents the speech and language assessment report before, or at, the September 10, 2021, IEP team meeting. Specifically, Student alleges, "Here, the parent had asked for assessments and reports prior to the scheduled IEP meeting. At the very least, parent asked to see the Speech assessment at the meeting. That did not occur." The complaint identifies the issue and adequate facts about the problem to permit Lincoln to respond and participate in a resolution session and mediation and prepare for hearing. However, any other claim, or claims, Student attempted to assert in Issue 6 is, or are, insufficiently pleaded.

MOTION FOR SANCTIONS

In certain circumstances, an administrative law judge, known as the ALJ, presiding over a special education proceeding is authorized to shift expenses from one party to another, or to OAH. (Gov. Code, §§ 11405.80, 11455.30; Cal. Code. Regs., tit. 5, § 3088; see *Wyner ex rel. Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1029 ["Clearly, [California Code of Regulations] § 3088 allows a hearing officer to control the proceedings, similar to a trial judge."].) Only the ALJ presiding at the hearing may place expenses at issue. (Cal. Code. Regs., tit. 5, § 3088, subd. (b).)

Expenses may be ordered to be reimbursed either to OAH or to another party. The ALJ presiding over the hearing may "order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including costs of personnel" to OAH – as the entity that is responsible for conducting due process hearings – as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay," and, "including attorney's fees, incurred by another party

as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Cal. Code. Regs., tit. 5, § 3088, subds. (a) & (e); Gov. Code, § 11455.30, subd. (a).)

Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, or employees. (Code Civ. Proc., § 128.5, subd. (f)(1)(C).) An order to pay expenses is enforceable in the same manner as a money judgment or by seeking a contempt of court order. (Gov. Code, § 11455.30, subd. (b).)

An order of sanctions shall be limited to what is sufficient to deter repetition of the action or tactic or comparable action or tactic by others similarly situated. (Code Civ. Proc., § 128.5, subd. (f)(2).) If warranted for effective deterrence, an order may direct payment of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the action or tactic. (*Id.*) The courts shall vigorously use their sanction authority to deter improper actions or tactics. (Code Civ. Proc., § 128.5, subd. (g); see also *Letter to Irby* (Office of Special Education Programs, U.S. Department of Education, February 12, 2010) [OSEP suggested a school district's remedy for frivolous claims or conduct could include a reduction of the prevailing student's attorney's fees award, or shifting the school district's attorney's fees to the student's attorney or parent].) In determining what sanctions, if any, should be ordered, the court shall consider whether a party seeking sanctions has exercised due diligence. (Code Civ. Proc., § 128.5, subd. (f)(1).) There is a dearth of caselaw defining the "due diligence" requirement.

"Actions or tactics" is defined as including, but not limited to, making or opposing motions or filing and serving a complaint. (Gov. Code, §11455.30, subd. (a); Code Civ. Proc., § 128.5, subd. (b)(1).) "Frivolous" means totally and completely without merit or for the sole purpose of harassing an opposing party. (Gov. Code, § 11455.30, subd. (a); Code Civ. Proc., § 128.5, subd. (b)(2).) Frivolous, and totally and completely without merit, has been interpreted to mean "any reasonable attorney would agree such [challenged conduct] is totally devoid of merit." (*Karwasky v. Zachay* (1983) 146 Cal.App.3d 679, 681, citing *In re Marriage of Flaherty,* 31 Cal.3d 637, 649–650.)

A finding of "bad faith" does not require a determination of evil motive, and subjective bad faith may be inferred. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.) "Bad faith" actions or tactics are those where the action taken by the party or its attorney was solely for the purpose of harassing an opposing party or causing unnecessary delay. (*Levy v. Blum* (2001) 92 Cal .App. 4th 625, 635.)

The State Bar Act and the Rules of Professional Conduct apply to proceedings before OAH. OAH is a "court" within the meaning of Business and Professions Code section 6103, which authorizes sanctions for an attorney's dereliction of duties. (*In the Matter of Moriarty* (Cal. Bar Ct., Apr. 20, 2017) 5 Cal. State Bar Ct. Rptr. 511, 522, 2017 WL 1424407 at **7-8.)

Lincoln failed to establish bad faith actions or tactics. Student has had inexplicable difficulty providing a short and plain statement of the facts to provide Lincoln "an awareness and understanding of the issues forming the basis of the complaint" regarding predetermination of the September 10, 2021, IEP. But the circumstances do not indicate Student's intention to harass Lincoln, or unnecessarily delay the case.

Further, Lincoln failed to establish any loss resulting from the filing of a new case restating Student's issues without modifying the complaint to comply with OAH's suggestions. Lincoln did not submit with its motion for sanctions any declaration or other evidence quantifying how Lincoln was harmed by the filing of a new case on the same issues Student previously withdrew without prejudice. Therefore, Lincoln established neither bad faith, nor harm; and its request for sanctions is denied.

ORDER

1. Issues 1, 2, 3, 4, and 5 of the complaint are sufficient under title 20 United States Code section 1415(b)(7)(A)(ii).
2. Issue 6 of the complaint is sufficient under title 20 United States Code section 1415(b)(7)(A)(ii), as defined and limited above. Any part of Issue 6 Student attempted to plead that is not described by this Order is insufficiently pleaded.
3. If Student seeks to state any claims in Issue 6 beyond those identified as sufficiently pleaded in this Order, Student is permitted to file an amended complaint under title 20 United States Code section 1415(c)(2)(E)(i)(II) not later than 14 days from the date of this Order.

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 to amend Issue 6, the hearing shall proceed on Issues 1, 2, 3, 4, 5, and 6 of Student's complaint, as defined and limited above.
6. All prehearing conference and hearing dates in this matter are confirmed.
7. Lincoln's motion for sanctions is denied.

Kara Hatfield

Kara Hatfield

Administrative Law Judge

Office of Administrative Hearings