BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SACRAMENTO CITY UNIFIED SCHOOL DISTRICT.	OAH Case No. 2016090346 ORDER DENYING MOTION TO COMPEL RESPONSE TO AMENDED COMPLAINT AND TO POSTPONE HEARING AS MOOT; AND ORDER DENYING REQUEST TO SHIFT COST

On August 11, 2016, Student filed with the Office of Administrative Hearings a Due Process Hearing Request (complaint) naming Sacramento City Unified School District. Student alleged that Sacramento City substantively and procedurally denied her a free appropriate public education during the 2014-2015, 2015-2016, and 2016-2017 school years. On September 28, 2016, OAH continued this matter on joint request of the parties based on their representations that they had agreed to numerous independent educational evaluations of Student; that these evaluations were anticipated to be completed prior to winter break in December 2016; and that the parties agreed to review the results at an individualized education program team meeting in January 2017. The hearing was continued and scheduled to commence on February 21, 2017, as requested by the parties.

On January 12, 2017, Student filed a motion to amend her request for hearing along with a proposed amended complaint which included six additional sub-issues regarding the alleged denial of a FAPE for the 2016-2017 school year. On January 20, 2017, OAH granted Student's motion to amend, and the amended complaint was deemed filed on that date. All dates were re-set.

The parties attended mediation on February 21, 2017. At the prehearing conference on March 10, 2017, OAH granted the parties' second joint request for a continuance based on their joint representations that most of the independent evaluations had been completed but additional time was needed to translate the evaluation reports into Spanish and to hold an IEP team meeting to review the results. Both parties represented that further time to review the assessments would possibly resolve some of the issues for hearing. Both parties agreed that the longer the continuance, the better, but both also indicated that even a short

continuance would assist in further resolution attempts.[1] The hearing was continued from March 16, 2017, to April 11, 2017, with a prehearing conference on April 3, 2017.

On March 30, 2017, Student filed a Motion to Compel Response to Amended Complaint supported by a declaration under penalty of perjury of her counsel.[2] Attached to the motion is a copy of Sacramento City's September 2, 2016 response to Student's original complaint.

At the PHC on April 3, 2017, Sacramento City represented that it had provided required notice to Student by way of prior written notices and requested time to file a written opposition to Student's motion to compel response. The undersigned ALJ ordered a briefing schedule and continued all dates to receive further evidence and argument as to whether Sacramento City complied with title 20 of the United States Code, section 1415 (c)(2)(B)(i)(I) by providing prior written notice regarding the subject matter of the amended complaint or whether it was required to respond to Student's amended complaint. The parties were ordered to submit full briefing, supported by declarations under penalty of perjury, regarding whether Sacramento City should be ordered to file a response and to bear the burden of any costs of delay; what costs Student incurred by any delay; and whether OAH should make a finding regarding the delay and associated costs and certify the record or instead directly award Student any associated costs. Sacramento City was ordered to file its opposition and briefing by April 5, 2017, and Student was ordered to reply by April 7, 2017. The hearing was continued to April 25, 2017, with a PHC on April 17, 2017.

On April 5, 2017, Sacramento City filed a response to Student's amended complaint as well as an opposition to Student's motion to compel response. The opposition is not supported by a declaration under penalty of perjury. Attached to the opposition are unauthenticated copies of what purports to be Student's December 2014, December 2015, and May 2016 IEP's; a copy of the parties' September 2016 interim settlement agreement; and a copy of Sacramento City's September 2, 2016 response to Student's initial complaint. Sacramento City argues that: (1) the subject matter of Student's amended complaint is the subject matter of Student's IEP documents and assessments; (2) Parent received the IEP documents and these provided prior written notice; and (3) the parties resolved all assessment issues. Therefore, Sacramento City contends it is not required to provide a further response to Student's amended complaint, though it did so "out of an abundance of caution." Sacramento City further argues it should not bear the cost of any delay as Student has caused the delay and failed to identify any associated costs.

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[1] Indeed, Student requested that the hearing do dark the first day of hearing if the ALJ was not inclined to find good cause for a further continuance. Sacramento City indicated agreement to this proposal.

[2] On March 30, 2017, Student also filed a motion for sanctions and motion to shift the burden of proof. This motion is addressed in a separate order.

On April 7, 2017, Student filed a reply, supported by her counsel's declaration under penalty of perjury. This declaration does not address what, if any, costs Student incurred as a result of the delay of the hearing nor the manner in which OAH should proceed to award or remedy those costs. Student attached a copy of a 2013 prior written notice issued by Sacramento City to Student and seven redacted sample prior written notices Sacramento City issued regarding other students. Student argues the only written notice Student received was that filed April 5, 2017, and that Sacramento City failed to provide Parent any prior written notice in Spanish. Student maintains Sacramento City must bear the costs of the delay in the hearing.

APPLICABLE LAW

Required Response to Complaint

The Individuals with Disabilities Education Act requires a district to send to the parent a response to the parent's due process complaint, within 10 days of receiving the complaint, if the local education agency has not previously sent a prior written notice to the parent regarding the subject matter contained in the parent's complaint. (20 U.S.C. §1415(c)(2)(B)(i)(I); Ed. Code §56502, subd. (d)(2)(B).) The response shall include an explanation of why the agency proposed or refused to take the action raised in the complaint; a description of other options that the individualized education program team considered and the reasons why those options were rejected; a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and a description of the factors that are relevant to the agency's proposal or refusal. (*Ibid.*) The IDEA does not require or prohibit an educational agency's filing of a response with OAH.

Recently, the Ninth Circuit Court of Appeals held that when a school district fails to file a timely answer, the ALJ must not go forward with the hearing. Rather, the ALJ must order a response and shift the cost of the delay to the school district. (*M.C. v. Antelope Valley Union High School District* (9th Cir., Mar. 27, 2017, No. 14-56344) 2017 WL 1131821, at *6.)

PRIOR WRITTEN NOTICE

The district is required to provide a parent with written prior notice when it proposes or refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of a FAPE. (20 U.S.C. §1415 (b)(3); 34 C.F.R. § 300.503(a).)

The written prior notice shall include: (1) a description of the action proposed or refused by the agency; (2) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (3) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter

and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; (4) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter; (5) a description of other options considered by the IEP Team and the reason why those options were rejected; and (6) a description of the factors that are relevant to the agency's proposal or refusal. (20 U.S.C. § 1415 (c)(1); 34 C.F.R. § 300.503(b).) This notice shall be in the native language of the parent unless it clearly is not feasible to do so. (20 U.S.C. § 1415(b)(4); 34 C.F.R. § 300.503 (c)(1)(ii).)

An IEP document may serve as a sufficient prior written notice as long as the IEP contains the required content of appropriate notice. (*Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46, 691 (Aug. 4, 2006).)

Sacramento City is correct that Student's prior IEP's may provide Parent with legally sufficient prior written notice if they contain the required content and are provided in the Parent's native language. Parent's native language is Spanish. Further, if Student's IEP's addressed the subject matter of the amended complaint, the provision of these IEP's to Parent may obviate the need to provide a response to the complaint within 10 days pursuant to Section 1415(c)(2)(B)(i)(I). However, Sacramento City did not establish that the respective IEP's and the necessary notice contents were provided to Parent in Spanish. The attached December 2014 IEP is in English. The December 2015 IEP appears to be on a Spanish form and translated into Spanish with the exception of the behavior intervention plan. The May 2016 IEP is only partially translated into Spanish – the IEP notes and the behavior plan are in English as are most of the present levels of performance and progress reports on goals.

On April 5, 2017, Sacramento City sent to Student and filed with OAH a response to Student's amended complaint. As such, Student's motion to compel a response is denied as moot. Further, on April 3 2017, OAH postponed the hearing to April 25, 2017. Student has not requested a further continuance. Therefore, Student's request to postpone the hearing is also denied as moot.

Despite the undersigned's specific order regarding briefing, Student failed to establish what, if any, costs she incurred due to a delay in receiving a response to her amended complaint. Student's motion that Sacramento City bear the costs of the delay in hearing is denied as Student failed to establish any costs incurred by the late receipt of Sacramento City's response.

ORDER

1. Student's Motion to Compel Response to Amended Complaint is denied as moot.

2. Student's motion to postpone hearing is denied as moot.

3. Student's motion for Sacramento City to bear the costs of delay is denied.

DATE: April 14, 2017



THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings