STATE OF VERMONT
AGENCY OF EDUCATION

Special Education
Case DP # 25-09 (I.F.)

IDEA Due Process Hearing

PREHEARING CONFERENCE ORDER AND RULING ON CHALLENGE TO SUFFICIENCY

BACKGROUND

On October 21, 2024 the Vermont Agency of Education("AOE") received a Special Education Due Process Complaint, from the Parents of a Student ("Student") who resides in the Montpelier Roxbury School District ("District"). In this complaint, the Parents wrote concerns related to potential IDEA violations for the Student. The Student is currently enrolled in the 9th grade in a District school, and qualifies for IDEA services with a Specific Learning Disability ("SLD") eligibility. The Parents filed their complaint without legal counsel or *pro se.* The District is represented by attorney, Adrienne Shea. The parties waived both the mediation and resolution session, due to previous unsuccessful attempts at resolution.

In the original written complaint, the Parents checked that they wanted an expedited due process for a disciplinary issue, however, this is not a disciplinary matter. They wrote that the Student is "severely dyslexic and has been on an IEP for 8 years." They noted the Student has had many struggles with reading and progressing to grade level standards. They also wrote that in 2022, they held a mediation with the District and agreed to a private school placement where the Student has made great progress. This private school placement is online, adapts to the Student's individual needs, and provides weekly progress monitoring data to the Parents. They wrote that they had discussed the Student returning to public schools for the 9th grade, but that they were instead requesting a continuation of funding for the online private. School for the 2024-2025 school year. This would amount to $17, 155.00 in tuition expenses. For the nature of the issues, they wrote "appropriate education for Student." To resolve the problem they wrote "funding for appropriate school."

The Parents also submitted a letter for their Detailed Written Statement of Claims, which is required for an IDEA Due Process hearing, via email, on October 29, 2024 ("written statement"). In the written statement, the Parents stated that were displeased that the District stopped funding the Student's private placement in the Academy Virtual ("private school"), where the Student had made progress via remote and individualized instruction for the past two years. The Parents wrote that though the Student is a 9th grader, that she is only reading at the 2nd grade level and that "…the services previously funded for the Academy Virtual have been crucial in helping [Student] achieve educational goals that are meaningful and measured monthly for success." The parents wrote they requested a "review of this funding decision" and that they wanted to continue to advocate for a private placement for the Student. The Parents asked for $17,180.00 for tuition annually, for the next three school years.

The Parties met for the Prehearing Conference ("PHC") on November 8, 2024. During this call, the parties discussed the Notice of Insufficiency and the Prehearing Conference requirements of Vermont Special Education Rule 2365.1.6.11. The parties discussed the Parents allegations and the proposed witness list of each party to prepare for the hearing. The District timely submitted its core exhibits prior to the PHC. When asked for more specific facts about their allegations during the conference, the Parents stated that the child had increased mental health needs and that she could not access the 9th grade curriculum. The District argued that legally, the Student must have access to general education curriculum in public schools, under the IDEA. The Parents argued the Student could not access this curriculum in her current placement. As such, the Prehearing Conference did not resolve the disputes related to sufficiency of the complaint, nor clarify the allegations. As the Parents are *pro* se, the hearing officer provided each party the opportunity to provide additional written materials related to these sufficiency arguments, for further review after the conference call. During the prehearing conference, both parties also agreed to extend the timeline for the hearing, in order to clarify the allegations in dispute and to allow for the hearing officer to review the sufficiency challenge and allegations articulated in the filings and during the PHC. The Parties sent a confirmation email with the new dates for the hearing and a second prehearing conference, if needed.

DISTRICT'S SUFFICIENCY CHALLENGE ARGUMENTS

The District filed a response and written statement of defenses on October 31, 2024 and also raised concerns about sufficiency of the complaint, via a Notification of Insufficiency filed on October 28, 2024 and during the Prehearing Conference which was held on November 8, 2024. As the Parents are *pro se,* the hearing officer explained the state rules and Notice of Insufficiency during the prehearing conference. The hearing officer noted that the District properly contested the sufficiency of the filing within 15 days of receipt of the complaint, as required in VRSE 2365.1.6.5(b) and 34 C.F.R. § 300.508(d). During the Prehearing Conference, the District was allowed to present its arguments regarding the sufficiency of the complaint and the Parents were allowed to respond.

The District's sufficiency arguments in both its filing and during the prehearing conference call were that the Complaint fails to identify any problem relating to the District's proposed educational placement for the Student. The District further contended that there is no provision permitting a responsive filing in opposition to the Notice of Insufficiency. The District noted that the Student has not attended school in the District for the past two years, and that Student was enrolled in home study during this time. The District stated the Parents "…failed to identify any alleged deficiency with respect to the District's proposed IEP and offer of FAPE for the Student." (*See* Page 2, Paragraph 5 of Respondent's Notification of Insufficiency of Due Process Complaint). The District stated the Parents only demanded a private placement at the Academy Virtual ("private school") and noted that this private school is not approved by the State, and that the private school does not provide students with access to general education curriculum for 9th grade students. The District clarified the current IEP does offer both push-in and pull-out services for the Student. The District argued the Parents must first ask the IEP team for additional services, prior to filing a due process complaint and noted the Parents had agreed with the current IEP and never asked for any additional supports for the Student, prior to filing the Due Process hearing complaint. The District next argued that legally, IDEA students must have access to the general education curriculum.

During the PHC, the District additionally argued that the Parents may not receive tuition reimbursement for future years of school, and for damages related to claims that the Student has not yet experienced. The District argued the Student has never attended school in the District,

and that while the Student has been enrolled since the fall of 2024, that she has not attended the high school and has never received services. The District further argued that the Parents' allegations are so unclear that the District is not able to adequately respond, or to prepare for a defense or a hearing. The District stated that if the complaint goes to a hearing that it will need a clearly articulated allegation statement, and time to prepare a defense. Finally, the District noted that the Parents had signed a release for prior claims during a prior mediation session, which had ultimately awarded the tuition used to finance the past two years of the Student's placement at the private school. Due to this waiver, the District argued that the Parents may not bring forth any legal claims covered by; that time frame.

In its written sufficiency challenge, the District properly points to state special education rule, VSER 2365.1.6.5(a) and the federal law 20 U.S.C. § 1415(c)(2)(A) which require due process complaints to be in writing and states they must include "a *description of the nature of the problem* [emphasis added] relating to a proposed initiation or change of the child's identification, evaluation, and/or educational placement, and the facts relating to the problem." The District further successfully argued that sufficiency challenges present a pure question of law, to be resolved "on the face of the due process complaint." (H.T. v. Hopewell Valley Reg'l Bd. of Educ., No. 14-1308 FLW LHG, 2015 WL 4915652).

PARENTS' SUFFICIENCY CHALLENGE ARGUMENTS

During the Prehearing Conference, the Parents stated their claims against the District specifically are:

1) Denial of Free Appropriate Public Education (FAPE) due to the Student's placement in the public high school and the current IEP services
2) Student's Mental Health and Dyslexia needs were not addressed in the public-school placement offered by the District
3) Concerns about a lack of weekly progress data for the Student

During the PHC, the Parents also stated that they were open to other alternative placements for the Student, not just the alternative school that was noted in their complaint. The Parents argued

they do not have the support of an attorney but that they believe they should have a right to a hearing on this matter.

After the Prehearing Conference, the *pro se* Parent was given an opportunity to reply, and responded to the District's Sufficiency Challenge, by email, dated November 7, 2024. In this reply, the Parents wrote that the complaint is sufficient in that it sufficiently identifies the "nature of the problem" for the Student, as set forth in state rule 2365.1.6.2(c). The Parents further clarified their concerns to be related to "push-in services" and the use of the standard 9th Grade general education placement and curriculum for the Student and a lack of independent engagement and independent learning skills that is appropriate for the needs of this student. The Parents again stated that dispute lies in the "…sufficiency and appropriateness of the services offered and the adequacy of the proposed placement." The Parents additionally cited to relevant case law from the Second Circuit, which states that parents may seek reimbursement for private placements if they can demonstrate the Individual Education Program (IEP) proposed by a school is not adequate. *See* Reyes ex Rel. R.P. v. New York City Dep't. of Educ., 760 F. 3d 211, 215 (2d Cir. 2014). The Parents argued they are similarly disputing the placement of the Student and seeking private tuition reimbursement. The Parents argued that the District's offer of two hours per day of pull-out special education services and "push in" general education supports are not an appropriate placement for the Student, based on her needs.

The District then responded to the Parents' reply via the Respondent's Supplemental Briefing In Support of Notification of Insufficiency of Due Process Complaint ("Supplemental Briefing") dated November 7, 2024. In this briefing, the District presented two main arguments to support its Notice of Insufficiency that: 1) the mere statement that the District is not providing FAPE is insufficient to state a claim for an IDEA due process complaint and 2) the legal doctrine of ripeness applies to this matter, and precludes the Parents from filing a complaint at this time. In this briefing, the District also argued that the Parents changed the alleged account of their "issues" or facts related to the denial of FAPE with regard to the issues with the 2024 IEP, based on differing facts and claims mentioned in the prehearing conference and the subsequently filed Parent Response to the Notice of Insufficiency. The District argues, that this difference in facts and allegations related to the Student and her IEP further illustrates why the complaint is insufficiently filed, in that it is not clear as to the facts underlying the allegations of a denial of

FAPE. The District cited to a case from the Third Circuit Court of Appeals, where the Third Circuit upheld a dismissal on the basis of insufficiency due to the fact than an IDEA complaint must "…provide notice to the opposing party, including…a description of the nature of the problem…including facts relating to such problem." *See* M.S. -G. v, Lenape Reg'l High Sch. Dist. Bd. of Educ., 306 F. App'x 772, 774, 3rd Cir. (2009). The District argued that in light of these issues the complaint should be dismissed for a lack of sufficiency.

ANALYSIS

I. Sufficiency of the Complaint

A due process complaint under IDEA is deemed sufficient, unless the party receiving the complaint notifies the hearing officer and the other party in writing within 15 days of the receipt, that the receiving party believes the due process complaint does not meet the requirements in 34 C.F.R. § 300.508(b). *See* 34 C.F.R. § 300.508(d). In the instant case, the District, by way of its legal counsel did contest the sufficiency of the due process complaint in a timely manner.

The District raised two primary arguments in its Notification of Insufficiency of Due Process Complaint and subsequent briefing ("the notice of insufficiency").These arguments will be addressed in kind.

First, the District argued that the complaint is insufficient, because the Parents' complaint allegation fails to identify adequate facts underlying the allegation of a denial of FAPE, and that the District therefore has no ability to respond fairly, without an actual description of the problem in the IEP or the FAPE issues factually in dispute.

Relatedly, the District also highlighted many issues with the Parents' proposed alternative school placement, particularly under Vermont's state rules for approved independent school funding for special education services. The District noted that the proposed private school only currently offers instruction through grade eight, and the Student is currently enrolled in the 9th grade.

IDEA Section 615(c)(2)(D) states that the final decision regarding the sufficiency of a due process complaint is left to the discretion of the hearing officer. *See* Analysis of Comments and Changes accompanying the 2006 final IDEA Part B regulations, 71 Fed. Reg. 46540, 46699 (Aug. 14, 2006) and *OSEP Policy Letter 22-04*, (Apr. 15, 2022). Therefore, even when parents do not fully understand the state laws, and cannot file formal legal documents when acting *pro se,* these parents should still be allowed to file appropriate due process complaints and are entitled to a hearing, upon filing a sufficient complaint. Hearings officers may provide *pro* se complainants with information needed to equitably access a due process hearing. However, a school district must also be afforded their due process rights, which includes the right to be on notice of the complaint, and the right to prepare a defense for the hearing.

The IDEA regulations allow parties to agree to amend a complaint, if the other party agrees to the amendment of the complaint in writing. *See* 34 C.F.R. 300.508(d)(3). That is not the case for this dispute. Additionally, a hearing officer may allow a party to amend the complaint, but must do so no later than five days before the hearing is to begin. As such, in this case, the Hearing Officer did allow the *pro se* Parents to respond to the Notice of Insufficiency in writing, to clarify the allegations. However, instead of clarifying the initial allegations or the allegations as described in the prehearing conference the Parents responded with new factual concerns, as opposed to clarifying the original allegations from the prehearing conference.

A complaining party in IDEA matters is not required to include in the due process complaint *all* of the facts relating to the nature of the problem. Nor is the complaining party required to set forth in the due process complaint all applicable legal arguments in "painstaking detail." *See* Escambia County Bd. of Educ. v. Benton, 44 IDELR 272 (S.D. Ala. 2005). *See also,* Anello v. Indian River Sch. Dist., 47 IDELR 104 (Del. Fam. Ct. 2007). The IDEA's due process requirements and procedural safeguard rights for parents impose "minimal pleading standards." *See* Schaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005). However, federal circuit courts have noted that this "minimal" pleading standard is not a "bare notice pleading requirement." *See* M.S. -G., et al v. Lenape Regional High Sch. Dist. Bd. of Ed., 51 IDELR 236 (3d Cir. 2009). Courts have also held that a due process complaint must contain a description of the nature of the problem, rather than having that factual information be included in attached exhibits, and that the factual description in a complaint must be clear to the opposing party. *See* H.T. v. Hopewell

Valley Reg'l Bd. of Educ., 2015 WL 4915652, 66 IDELR 48 (D.N.J. Aug. 18, 2015). *See also* Cf. D.F. v. Collingswood Borough Bd. of Educ., Civ. No. 10-594, 2013 WL 103589, 60 IDELR 96 (D.N.J.Jan.8, 2013)(denying Plaintiff's renewed motion for summary judgement challenging ALJ's dismissal of due process complaint for lack of sufficiency when due process complaint alleged improper restraint but failed to include enough information to put district on notice of the nature of the problem), *reconsideration granted,* 2013 WL 3147976, *aff'd*, 596 F. App'x 49, 64 IDELR 261 (3d. Cir. 2015).

In this case, the Parents were able to articulate a number of viable concerns about the Student's placement and lack of regular progress monitoring as offered in the 2024 IEP, however, none of these allegations were based on or tied to any clear or specific facts related to this IEP, the Student's unique needs, or the IEP's implementation. Both the state complaint filed with AOE and the Parents' Response to the Notice of Insufficiency failed to include the specific facts at issue related to the push-out/pull-in instruction, mental health and/or progress monitoring concerns and the 2024 IEP. Additionally, the Parent's claims differed in each filing thus substantiating the District's claim that the allegations were "moving targets" that cannot be defended legally in a hearing. As such, the complaint that was filed does not meet the state or federal sufficiency standards. In light of the numerous varied allegations, the Hearing Officer does not believe that allowing the Parents to amend this complaint at this time would be helpful, as it would potentially create more confusion for both parties. However, there is no reason to preclude the Parents from refiling this matter, with more clarity and facts in the allegations. As such, the Parents may refile the complaint with their specific facts and concerns related to the IEP, the progress monitoring in the IEP, and/or the Student's mental health needs, and her current placement in a district high school. If the Parents refile the complaint they should articulate exactly what they disagree with about the 2024 IEP which may include the areas they articulated for this matter, such as push in/pull out support, progress monitoring, and/or emotional or dyslexia supports and why they believe that these concerns amount to a denial of FAPE for the Student during this school year.

II, Ripeness of the Complaint

The District next argued that as the Student has not attended school since the development of the 2024 IEP, that there is no legal basis for the complaint, under the legal theory of deprivation of FAPE, as the complaint is not yet ripe. Ripeness is a legal term of art, which describes if a matter has actually happened, in order for a current claim to be present for a hearing or legal proceeding. For a claim to be "ripe for review," a "real and substantial controversy, not a mere hypothetical question" must exist. *See* Nat'l Org. for Marriage, Inc. v. Walsh, 714 F. 3d 682, 687 (2d Cir. 2013). Under the IDEA, complainants may file a due process hearing complaint within two years from the date that they knew or should have known about the underlying IDEA legal issue. *See* 34 C.F.R. 300.507 (a)(2).

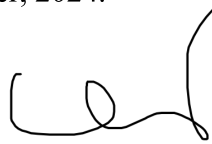
In the instant case, as the Student has not attended District schools in over two years, and there was a mediation agreement with a release of claims in place for the two years preceding this school year. The Parents have offered no data or evidence to support their claims that the 2024 IEP's pull-out and push-in services are inappropriate for the Student's needs, so it is more likely than not that there has not yet been a deprivation of FAPE for this Student, as a result of the District's proposed 2024 IEP. Additionally, the Parents and District both seem to agree that there were not concerns expressed during the 2024 IEP meeting about the placement nor any additional requests related to the Student's services or supports in the District high school. As the Student has never attended the high school, nor used a District IEP in recent years, it is unclear what violations could have actually happened by the District merely working with the Parents on the Student's three-year revaluation and her 2024 IEP. Rather, the record to date seems to show that the Parent and District worked together to meet this procedural requirement of the IDEA. As the Student has not attended District schools for the past few years, there was a mediation agreement in place for the past two years' private placement, and the District has offered FAPE via the 2024 IEP which has not been utilized to date, the District is correct that this claim is not yet ripe for legal review.

ORDERS

The District's motion to dismiss, based on a lack of sufficiency is GRANTED. The case is dismissed **without prejudice**.

The Parents may refile if and when allegations are ripe for review, and/or if there are more specific facts and details related to the specific allegations for the alleged denial of FAPE and the proposed 2024 placement in the District's high school.

Dated this 8th day of November, 2024.



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Claudette Rushing

Contract Hearing Officer

Vermont Agency of Education