BEFORE THE IOWA DEPARTMENT OF EDUCATION

(Cite as 28 D.o.E. App. Dec. 263)

In re [redacted] a child:	)	
[redacted]	)	Dept. Ed. Docket No. SE-422
	)	DIA No. 15DOESE015
Complainant,	)	
	)	
v.	)	
	)	
IOWA CITY COMMUNITY SCHOOL DISTRICT and GRANT WOOD AREA EDUCATION AGENCY,	)	**ORDER GRANTING RESPONDENTS' MOTION TO DISMISS**
Respondents.	)	

On or about July 16, 2015, Respondents Iowa City Community School District and Grant Wood Area Education Agency filed Respondents' Motion to Dismiss. On or about July 30, 2015, Complainant [redacted] filed a Resistance to Respondents' Motion to Dismiss. During a prehearing conference held on July 30, 2015, the parties agreed upon a date for oral argument. Oral argument was held on August 3, 2015.

DISCUSSION

A. *Complaint*

Complainant [redacted] filed a due process complaint regarding her son, [redacted] on or about July 7, 2015. The due process complaint states, in relevant part:

> [redacted] placement for the 2014-2015 school year was as a student with an IEP in the pre-kindergarten program at [redacted] Elementary School in Iowa City. The program is served by Grant Wood AEA 10. This summer [redacted] receives Extended School Year programming. Ms. [redacted] disagrees with the decision to deliver [redacted] special education program for the 2015-2016 school year in a kindergarten program. She requests his IEP be amended to provide his program placement in a preschool program.
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> . . .
>
> [redacted] began preschool in August 2014. From the beginning Ms. [redacted] requested [redacted] receive another year of preschool placement rather than begin kindergarten in the school year 2015-16. Without that additional year [redacted], due to his late birthday, would be one of the youngest students in his grade. Ms. [redacted] is familiar with research that suggests that boys who are young for grade are often not developmentally

ready and struggle. She fears that [redacted], a child with a number of diagnosed challenges, would not succeed. She, his therapists and doctors, believe he would be more successful if placed with peers who are at the same developmental level, rather than at the same chronological age.

Unfortunately, the district and AEA staff repeatedly applied the word retention rather than referring to a special education program delivered in the preschool setting as a placement. They maintained, and continue to maintain, that Ms. [redacted] was requesting [redacted] be retained in preschool.

On March 6, 2015, she sent an email to the team asking for another year of preschool placement. At meeting after meeting she continued to request another year of preschool. She sent another such email as recently as July 1, 2015.

Complainant identified two potential remedies in the complaint:

1.) Incorporate the recommendations of the medical and psychological experts from the University of Iowa Children's Hospital by amending the IEP to reflect [redacted] placement in the preschool special education program for the school year 2015-16.
2.) Qualify [redacted] for a Section 504 accommodation – additional time in the preschool special education program.

B. *Motion to Dismiss*

Under the Department of Education's rules applicable to due process complaints, a motion to dismiss made by the appellee shall be granted upon a determination that any of the following circumstances apply:

a. The appeal relates to an issue that does not reasonably fall under any of the appealable issues of identification, evaluation, placement, or the provision of a free appropriate public education.
b. The issue raised is moot.
c. The individual is no longer a resident of the LEA or AEA against whom the appeal was filed.
d. The relief sought by the appellant is beyond the scope and authority of the administrative law judge to provide.
e. Circumstances are such that no case or controversy exists between the parties.
f. An appeal may be dismissed administratively when an appeal has been in continued status for more than one school year. Prior to an administrative dismissal, the administrative law judge shall notify the appellant at the last known address and give the appellant an opportunity to give good cause as to why an extended continuance shall be granted. An

> administrative dismissal issued by the administrative law judge shall be without prejudice to the appellant.[1]

Respondent argues in its motion that the due process complaint is appropriate for dismissal under subsections (a) and (d) of the rule.

1. *Section 504 Accommodation*

As an initial matter, Respondents argue that the complaint, as it relates to an accommodation under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, must be dismissed because the Iowa Department of Education lacks jurisdiction over due process complaints arising solely under Section 504.

The subject matter of a due process complaint is limited to matters relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of a free and appropriate public education (FAPE) to the child.[2] The regulations implementing Section 504 contain separate provisions for seeking redress of alleged violations of that section.[3]

In her response, Complainant expresses her belief that Section 504 applies to the dispute, but does not resist the motion to dismiss the 504 claims from the IDEA due process complaint. Accordingly, the portion of the complaint relating to a Section 504 accommodation is dismissed.

2. *Motion to Dismiss vs. Challenge to Sufficiency of Complaint*

Under the Department of Education's regulations governing due process complaints, the party or parties against whom the complaint is filed may request a ruling from the administrative law judge regarding whether the complaint is sufficient pursuant to the requirements set forth in 281 Iowa Administrative Code 41.508(2). Under that subsection, the due process complaint must include certain information, including the name and address of the child, the school of the child, a description of the nature of the problem relating to the proposed or refused initiation or change, including facts relating to the problem, and a proposed resolution of the problem to the extent known and available to the filing party.

Complainant argues that the due process complaint is sufficient under the governing law and regulations. Respondents argue that they do not seek, through their motion to dismiss, a ruling that the complaint is insufficient pursuant to this subsection; rather, Respondents seek dismissal of the complaint pursuant to 281 Iowa Administrative Code 41.1003(7).

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[1] 281 Iowa Administrative Code (IAC) 41.1003(7).
[2] 281 IAC 41.507(1); *see also Board of Education of the Shenendehowa Central School District* (N.Y. SEA 1998).
[3] *See* 34 C.F.R. § 104.7.

It is clear from the structure of the regulations that a challenge to the sufficiency of a complaint under subsection 41.508(2) is distinct from a motion to dismiss under subsection 41.1003(7). Complainant appears to argue that the sufficiency of the complaint justifies a denial of the Respondents' motion to dismiss. The regulations that the Department has implemented with regard to dismissal, however, make it clear that a determination regarding whether a complaint shall be dismissed is entirely distinct from a determination that a complaint is insufficient. The parties do not disagree regarding the sufficiency of the complaint; this order, therefore, will address whether Respondents have established that dismissal is mandated under subsection 41.1003(7).

3. *Motion to Dismiss Standard*

Complainant argues that the standard used to evaluate Respondents' motion to dismiss pursuant to subsection 41.1003(7) should be identical to the standard applied to civil actions in district court in Iowa; namely, that a motion to dismiss can only be granted if the plaintiff failed to state a claim upon which any relief may be granted when the facts pled are viewed in the light most favorable to the plaintiff.[4] Respondents, on the other hand, argue that the Iowa Rules of Civil Procedure are inapplicable to due process complaints under the IDEA and that the Department's regulations form the basis for evaluating their motion.

The Department's regulations governing motions to dismiss under the IDEA are distinct from the rules established under the Iowa Rules of Civil Procedure. The agency has not specifically incorporated the Iowa Rules of Civil Procedure into its due process hearing procedures. The only requirement for dismissal under the Department's rules is a determination that one of the grounds for dismissal applies. The regulation is silent as to whether facts outside of the complaint itself may be evaluated in making this determination. The substance of the Department's rule regarding dismissal appears to permit consideration of facts that may not be readily ascertainable in the complaint itself; for example, it is difficult to discern a situation where the complaint itself would provide all of the information necessary to determine that an issue is moot or that no case or controversy exists between the parties. Similarly, it is difficult to imagine that dismissal should be denied in the case of a child who moves after the complaint is filed and no longer resides in the LEA or AEA against whom the complaint was filed, despite the fact that the complaint itself may list an outdated address within the LEA or AEA.

In this case, however, the complaint itself provides the information necessary to determine the issue at hand. The complaint specifically identifies the issue to be addressed as whether [redacted], based on his age, birth date, and "diagnosed challenges,", should remain in a preschool general education classroom during the next academic year or move to a kindergarten general education classroom during the next academic year.

[4] *See Geisler v. City Council of City of Cedar Falls*, 769 N.W.2d 162, 165 (Iowa 2009).

4. *Placement*

Under the federal Individuals with Disabilities Education Act (IDEA), a due process complaint may be filed "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."[5]

The parties both agree that the complaint at issue here alleges violations relating to placement. There is no allegation by the Complainant that Respondents committed any violations relating to identification or evaluation of [redacted] and Complainant has not requested any remedies that relate to identification or evaluation. Additionally, the complaint does not allege that Respondents have failed to provide a free appropriate public education to [redacted] Complainant does not allege that the programming that [redacted] received in preschool was inappropriate or not in accordance with his individualized education program (IEP).

Respondents assert that the decision that Complainant is challenging – that is, [redacted] movement from a preschool to a kindergarten classroom in accordance with his age[6] – is not a decision that implicates placement as that term is defined under the IDEA. Respondents argue that the movement from one grade level to the next and the commensurate change in classroom or school is not a change in educational placement under the IDEA. Complainant argues that she should be able to challenge the district's promotion of [redacted] from preschool to kindergarten as a placement decision under the IDEA.

Complicating this issue somewhat is the fact that neither the IDEA itself nor the implementing federal regulations specifically define the term placement. The placement regulations in the federal regulations are found under the heading regarding Least Restrictive Environment (LRE).[7]

> **§ 300.115 Continuum of alternative placements**
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> (a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.
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> (b) The continuum required in paragraph (a) of this section must –
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> (1) Include the alternative placements listed in the definition of special education under § 300.38 (instruction in regular classes,

[5] 20 U.S.C. § 1415(b)(6)(A).
[6] Under Iowa law, children eligible for voluntary four year-old preschool must be four years of age on or before September 15 of the school year. If space and funding are available a school district may enroll a child who is younger or older than four years of age. Iowa Code § 256C.2 (2015); 281 IAC 16.2.
[7] *See generally* 34 C.F.R. Part 300, Subpart B.

special classes, special schools, home instruction, and instruction in hospitals and institutions); and
(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

§ 300.116 Placements

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that –

(a) The placement decision –

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
(2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118;

(b) The child's placement –

(1) Is determined at least annually;
(2) Is based on the child's IEP; and
(3) Is as close as possible to the child's home;

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

In 2006, the federal Department of Education issued final IDEA regulations intended to implement changes made to the IDEA. The Department issued the following supplementary information regarding the regulations, which addresses the definition of placement:

Comment: One commenter requested clarifying the difference, if any, between "placement" and "location."

. . .

> Discussion: Historically, we have referred to "placement" as points along the continuum of placement options available for a child with a disability, and "location" as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services.[8]

In *Letter to Fisher*, the federal Office of Special Education Programs (OSEP) addressed the question of whether a change in physical location from one school to another constitutes a change in placement when the educational program stated in the IEP remains the same. OSEP indicated that there are three components that comprise a placement decision: 1) the education program set out in the student's IEP; 2) the option on the continuum in which the student's IEP is to be implemented; and 3) the school or facility selected to implement the student's IEP. Once the decision regarding these three components is made, the assignment of a particular classroom or teacher is an administrative determination, provided it is consistent with the three components decided upon by the placement team.[9]

In *N.D. v. Hawaii Department of Education*, the Ninth Circuit conducted a review of the definitions of educational placement that had been considered and adopted by other circuits. The court concluded:

> Based on Supreme Court case law, Congress's express intent in the statute, the agency's implementing regulations, and sister circuits' decisions, we hold that "educational placement" means the general educational program of the student. More specifically we conclude that under the IDEA a change in educational placement relates to whether the student is moved from one type of program – i.e. regular class – to another type – i.e. home instruction. A change in the educational placement can also result when there is a significant change in the student's program even if the student remains in the same setting. This determination is made in light of Congress's intent to prevent the singling out of disabled children and to "mainstream" them with non-disabled children.[10]

The complaint at issue here does not allege any change in program type; [redacted] was in a 100% general education program with an IEP in preschool last year and, if his parents choose to enroll him in kindergarten this year, he will be in a 100% general education program with an IEP. His position along the continuum of alternative placements has not changed. There is likewise no allegation that there is a significant change in his educational program; the complaint does not allege that his IEP has changed or that the services he received under his IEP in preschool will be different from the services he receives under his IEP in kindergarten. The only issue here is that the Complainant wishes for [redacted] to be educated in a preschool general education classroom rather than a kindergarten general education classroom. Complainant believes that [redacted]

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[8] 71 Federal Register 46540-01; *see also Letter to Trigg*, 50 IDELR 48 (November 30, 2007).
[9] 21 IDELR 992 (July 6, 1994).
[10] 600 F.3d 1104, 1116 (9th Cir. 2010).

will perform better among peers who are at a similar developmental age, rather than a similar chronological age.

While *Letter to Fisher* addresses the school or facility as one of the components of placement, the school change in this case is solely related to grade level; the kindergarten is located at a different school than the preschool program. There is no allegation that [redacted] is being placed in a different school location than his non-disabled peers.[11] If the IEP team had made the decision that [redacted] should not attend the same school facility as his non-disabled peers would attend, that decision might implicate placement; in this case, however, [redacted] is placed at the same school where his non-disabled same-age peers are located.

Complainant argues that the school district is treating her son differently from his non-disabled peers in requiring that he attend kindergarten this year. Respondents counter that Complainant has the same options as parents of non-disabled children who are not eligible for preschool and do not wish to place their children in kindergarten: she may decide to defer kindergarten placement for an additional year. Under Iowa law, a child who has reached the age of six by September 15 of the academic year is required to attend school.[12] According to the complaint, [redacted] will be five years old on August 16, 2015. Accordingly, Complainant may elect to defer [redacted] attendance in kindergarten for one year and still be in full compliance with Iowa's compulsory attendance law.

Pursuant to rule 41.1003(7)(a), Respondents' motion to dismiss is granted. The appeal does not relate to an issue that falls under the category of placement, as that term is interpreted under the IDEA.

ORDER

Respondents' motion to dismiss is granted. The complaint is dismissed.

Dated this 14th day of August, 2015.

Laura E. Lockard
Administrative Law Judge

[11] *See Letter to Trigg*, 50 IDELR 48 (November 30, 2007) ("Public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not have a disability.").
[12] Iowa Code § 299.1A (2015).

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