

Colorado Department of Education
Decision of the State Complaints Officer
Under the Individuals with Disabilities Education Act (IDEA)

Federal Complaint 2007:516

Denver Public Schools

Decision

INTRODUCTION

This Complaint dated December 18, 2007, was filed by attorney Jessica Spangler, counsel for Student's mother (hereafter, the "Complainant") and was received in the office of the State Complaints Officer by facsimile on the same date. The Complaint attached Student's September 25, 2007 Individualized Education Program ("IEP") document including a Functional Behavior Assessment and Behavior Intervention Plan. The response of Denver Public Schools (hereafter, the "District") was timely received on January 28, 2008.¹ The District's response attached information received from Student's prior placement in the State of [STATE], written procedures for the District's Alternative Resources Team, a three-page Intervention Plan (undated) with attachments, and a Referral for Alternative Placement Services Program dated December 12, 2007. The response was transmitted to Complainant on January 29, 2008, and a reply was timely received from Complainant on February 2, 2008.

ISSUE

Whether the District implemented Student's special education program as specified in his September 25, 2007 IEP document during the period November 1, 2007, to December 21, 2007.

CONTENTIONS OF THE PARTIES

The Complainant alleges that Student's IEP was not implemented from the time Student relocated from [STATE] and enrolled in the District, through the date of the Complaint.

¹ Counsel for the District requested additional time to submit a response by reason of District personnel being unavailable over the semester break. That request was granted, permitting the response to be mailed as late as January 18, 2008. The District complied with the extension and the Decision in this matter was not delayed.

Complainant requests that Student receive compensatory education in an amount equal to the quantity of services omitted during the relevant period.

The District acknowledges that it committed “a number of procedural errors in relation to this out-of-state transfer IEP.” The District concedes that Student is entitled to compensatory services to make up for those missed between November 1, 2007, and January 10, 2008.

FINDINGS OF FACT

1. Student is a [AGE] year-old attending [GRADE] in the Denver Public School District. Student is eligible for special education and related services in the category of [DISABILITY].
2. On September 25, 2007, Student’s IEP team in the State of [STATE] convened and created a program of special education instruction and services for him. The relevant portions of the IEP provide that Student is to receive 1,530 minutes of special education services per week, delivered by a one-on-one paraeducator. The services are broken down as follows: 855 minutes per week of behavioral/social,² 225 minutes per week of written language instruction, 300 minutes per week of reading instruction, and 150 minutes per week of mathematics instruction. Student is also entitled to transportation as a related service. Student’s IEP also contains a Functional Behavior Assessment and a Behavior Intervention Plan documenting his substantial needs in this area and the historically significant adverse impact of behavior on his ability to access education. There are also indicators that Student’s behavior has the real potential to adversely impact the children around him.
3. Student’s IEP specified that his placement would be in a day-treatment facility known as the [FACILITY] located in a [CITY] area hospital. This placement was appropriate to Student’s academic, behavioral and emotional needs and did not afford the opportunity for him to be educated with non-disabled peers.
4. On or about October 24, 2007, Student relocated to the Denver area and established residency within the District.

² There is no indication in the record that Student was to receive 14.25 hours per week of direct instruction or services related to his annual goal for self care and self regulation. Rather, these minutes reflect the therapeutic milieu characteristic of a day-treatment program where Student’s behavior was closely supervised and/or monitored.

5. On November 1, 2007, Complainant registered Student with the District. The District informed Complainant that Student's first day of school would be November 5, 2007, in an elementary school classroom.³

6. Also on November 1, 2007, Complainant shared Student's IEP with a special educator employed at the subject school. That person confirmed that the specified services could not be provided at the school. Complainant was then informed that a Student Services Area Program Manager, [PROGRAM MANAGER], would coordinate the District's implementation of Student's IEP.

7. The record establishes that Complainant and [PROGRAM MANAGER] discussed Student's needs and the District's ability to meet them. Given the nature and extent of Student's IEP services, [PROGRAM MANAGER] communicated that an appropriate placement would likely require weeks to arrange. Complainant agreed that an attempt to "piecemeal interim services" at the neighborhood school was appropriate because an educational environment that did not include the services in the IEP may have posed a risk to Student and others.

8. [PROGRAM MANAGER] then contacted Student's previous school district in [STATE] to obtain information relevant to Student's educational program. That information, transmitted to the District on an unknown date, is substantially similar to the IEP documents Complainant presented to the District on November 1, 2007.

9. The District referred the matter to its Alternative Resources Team ("ART") which coordinates the placement of students with significant needs. The procedures for the ART state that the team meets twice per month. The ART is to notify the referring school within 24 hours of the team deciding on a recommendation. The referring school then has the responsibility to contact the parent with the ART meeting results. No time frame is specified for this contact. Nowhere in the ART procedures is the issue of maintaining services for a transferring student covered.

10. Ultimately, the District decided on a placement for Student that was not implemented until January 14, 2008. Although the District pledged to provide homebound services to compensate for the lack of IEP services following Student's enrollment, none were actually tendered prior to January 14, 2008.

11. Student's IEP contains a statement that year-round school may be necessary for consistency and prevention of additional behaviors, as well as support of his educational needs. This statement forms the basis for a finding that a lengthy interruption in Student's special education program caused him educational harm.

³ In its response, the District described the enrollment process as significant only in that it assigned an identification number to Student and initiated the process of his special education program being reviewed. The written notice handed to Complainant contains none of this information but, rather, purports to communicate the information reflected in this finding.

12. As set forth below, the District was required to implement Student's educational program no later than November 19, 2007. From that date to December 21, 2007, Student was to have received the following instructional services: 22 hours of reading, 11 hours of math, 16.5 hours of written language.

CONCLUSIONS OF LAW

It is well established that a school district must provide special education services that comport with a student's IEP as one element of a free appropriate public education. *Board of Educ. Of the Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176 (1982). In the context of a transfer from another state, the process is governed by 34 CFR 300.323(f).⁴ The Colorado ECEA Rule in effect prior to December 30, 2007, and relevant to transfers from out of state is section 4.03(2). The provisions of these two rules are contradictory, however. For reasons grounded in the constitutional doctrine of supremacy, the federal regulation must prevail. This was the determination of the Colorado Department of Education in a guidance document published when the IDEA 2004 Part B regulations were first promulgated: that any contradictory provision in the Colorado Rules would give way.

34 CFR 300.323(f) mandates that when a child with a disability who had an IEP in effect in another state, transfers to and enrolls in a public agency in a new state, the new agency must (in consultation with the child's parents) provide a Free Appropriate Public Education, including services comparable to those described in the IEP until such time as the new agency can conduct a new evaluation (if necessary) and develop a new IEP (if appropriate). No timeline is specified by which the new agency must implement this program. In this case, where Student arrived with no advance notice on November 1, 2007, and with an IEP specifying extensive services to be provided by a full-time paraeducator in a non-school setting, it is unrealistic to think that such a program could be arranged on-the-spot. In Complainant's reply, counsel states that Complainant "waited patiently" for the District to provide Student with an education that would be comparable to the [STATE] placement and appropriate to his needs. It is the finding of the State Complaints Officer that some patience was, in fact, warranted under the circumstances but the failure of the District to provide any special education services until January 14, 2008, violated Student's rights as a child with a disability. The District was obligated to act diligently to implement Student's [STATE] IEP and even with the complexities of that program should have placed him or tendered comparable services no later than November 19, 2007.

⁴ Complainant's counsel cites to Colorado ECEA Rule 4.03(1) as controlling authority. That rule, (as it existed prior to the December 30, 2007 amendment) applies to transfers occurring within the state and not the situation confronted in this case.

REMEDY

Complainant established that the District did not properly implement Student's September 25, 2007 IEP from November 19, 2007, through December 21, 2007. During this period, Student missed four weeks and two days of instruction and services and suffered educational harm as a result. These missed services total 49.5 hours as set forth in Finding of Fact No. 12. Accordingly, the District shall create a corrective action plan no later than March 14, 2008, whereby Student shall receive compensatory education equal to the amounts stated above, in addition to those services he normally receives under his IEP. The compensatory services shall be delivered on a schedule and in a manner that are appropriate to Student's unique educational needs and reasonably convenient to his family. All compensatory services shall be provided by August 29, 2008, including during an extended school year session at the option of Complainant. The corrective action plan shall be submitted to the State Complaints Officer no later than April 4, 2008. Documentation that all compensatory education services have been provided shall be submitted no later than September 30, 2008.

CONCLUSION

This Decision shall become final as dated by the signature of the Federal Complaints Officer. A copy of the appeal procedure is attached.

Dated this 13th day of February, 2008.

Keith J. Kirchubel
State Complaints Officer