

FEDEAL COMPLAINT NUMBER 98.503

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

- A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (“CDE”), on January 29, 1998.
- B. The complaint was filed by Mr. [parent] and Ms. [parent] on behalf of their daughter [student], against the Poudre R-1 School District, Dr. Don E. Unger, Superintendent and Dr. Joe Hendrickson, Director of Special Education (“the District”).
- C. The timeline within which to investigate and resolve this matter expired on March 30, 1998 but was extended by 16 days, to April 15, 1998, to allow information from an onsite visit to be reported, inclusion of a response filed by counsel to the complainant on March 31, and review of the 10 additional documents filed by the complainant, her advocates and counsel.
- D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et.seq., (“the Act”), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.
- E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education (“FAPE”) to eligible students with disabilities under the Act.
- F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.
- G. [Student] is a student with disabilities eligible for services from the District under the Act.
- H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaint; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act by not providing [student] with a free appropriate public education ("FAPE") as evidenced by:

- failing to state the amount of specific special education and related services on the individualized education plan ("IEP") which are to be provided,
- failing to provide services relative to diapering needs, and
- failing to provide services relative to communication needs..

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18), (20), (25), and (26) and 1414,

34 C.F.R. 300.2, 300.5, 300.6, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.308, 300.340, 300.343, 300.346, 300.533

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.
2. The funds were paid to the District, in part, based on the assurances contained within its application.
3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.
4. [Student] was identified as a student with multiple disabilities as documented by an IEP dated 11/17/97. The IEP contained a statement listing 47 needs for [student]. Placement, according to that IEP, was 100% inclusion into a moderate needs program. The IEP states she will be in a 2nd grade classroom all day with support from the Moderate Needs Teacher and PARA ("paraprofessional") to help her with communication and academics. She will receive restroom support at both recesses, lunch and as needed. She will have support for computers and other specials as needed. The Moderate Needs Teacher, PARA and the Regular Classroom Teacher will communicate for modifications, homework organization, and parent/school communication. She will receive OT services for fine motor skills and Speech Language services for communication.

The above was modified to also state that [student] will receive support for diapering within 15 minutes of a bowel movement.

Specific Special Education and Related Services listed on that IEP are:
Indirect instruction from a moderate needs teacher 1 hour per week
Direct instruction from a moderate needs teacher, 15 ½ hours per week
Indirect instruction from a speech language specialist (“S/L”) ½ hour per week
Direct instruction from a speech language specialist 1 hour per week
Indirect instruction from an occupational therapist (“OT”) ¼ hour per week
Direct instruction from an occupational therapist ¾ hour per week

In addition, the IEP states that [student] requires assistive technology, specifically a Dynavox for oral and written communication along with a printer attached to her Dynavox for written output.

Also, the IEP states that [student] will use 10 specific books at home and at school; the books will be spiraled in and out and use picture symbols to help her recognize words, with fluency, with understanding, with expression and with memorization.

All ten books will be level one books and the titles will be kept track. [Student] will read all 10 books in June by exam. Word recognition will be reinforced through weekly tests. Vocabulary will be from some of these books. Picture symbols will be matched to words as homework. All of these services are to begin on 11/06/97 and end on 11/06/98.

The following adaptations/modifications/accommodations are listed, on the IEP, as necessary for [student] to participate in the general education program:

- much repetition in order to learn new skills
- new skills related to current life, concrete
- smaller assignments in most content areas
- content modified so that she may learn as much as possible
- expectations adjusted for learning smaller portions
- use of Dynavox and a scribe for most written output that is longer in length
- adaptation of math activities
- modified assignments that are similar to those of other students
- use of a slant board and a rubber pencil grip for writing
- picture symbols for learning sight words
- involve word recognition in spelling
- permission to use Dynavox for oral presentations
- all areas of curriculum adapted as necessary

5. The complainants allege that
 - (a) The IEP does not contain a statement of specific special education and related services. The statement does not include specific amount of services to be provided, so that the commitment of resources and the manner in which services will be delivered is clear to all who are involved in the development and implementation of the IEP
 - (b) The IEP fails to document how diapering will happen.
 - (c) The IEP fails to document how communication needs, curriculum adaptation needs, logbook notation needs, etc. will be met.

- (d) The District is not providing [student] with the skills she needs to compensate for her disability.

The apparent reason for this perception on non-specificity is the lack of delineation of the amount of time the Moderate Needs Teacher will provide services from the amount of time the PARA will provide services. The complainants allege that by lumping together the services of the aide and the certified teacher, the District's commitment to [student] is tenuous and vague. Also, the complainant believes the phrase, "will have support for computers and other specials as needed", is not specific enough and may allow [student] to participate in music, gym or art with no support person in the room.

In addition, the complainants allege the IEP fails to designate a person responsible for diapering if no paraprofessional ("PARA") is present in the room. The complainants allege that the District must explain how the support person, if other than the PARA, would perform diapering given that he or she could not leave the room. The complainants allege that the District must explain how this person would perform diapering if that person was a male. They allege that "with no commitment by the district to provide an aide, during long periods of the day, this service is impossible to achieve".

The complainants allege:

- (a) there have been times when [student] sat in her feces long enough to cause a red rash,
- (b) there have been times she was sent out into the cold with no zipped coat
- (c) there have been times when there was no one there to adapt curriculum
- (d) there have been times when [student] has no access to her communication device.

All of this has occurred, according to the complainants, because a PARA is not specifically assigned to [student] full time and because the District allows her, at times, to be independent.

The complainants allege there should be no times of independence, but rather [student] must be accompanied by a PARA full time. A schedule prepared by the District which indicates what times [student] may be dependent or independent, is, in the words of the complainants "a smoking gun that the District has not carefully considered." The complainants allege that, when the District used the word "independent", it means no support to [student] are available.

Upon learning of the District's "Dynavox Management Plan", the complainants allege this was fabricated well after the IEP and that they were not part of that planning. Such a plan, developed by the staff, but not with the parents is alleged to be "Bad, Bad, Bad".

- 6. A letter from the Arc of Denver, relative to this complaint, states, "it seems reasonable that the IEP could reflect teacher and para professional hours of services separately". "Of specific concern is the issue of hours of provided service and the failure of the IEP document to identify who would be providing those services. This puts [the family] at serious risk of being unable

to hold accountable those professionals and paraprofessionals responsible for the education of their child.

Another advocate issued a statement saying, "I have witnessed...[[student]'s] having a deep rash on her bottom" [after school]. In an additional statement, she alleges the District is not providing support for the use of [student]'s assistive technology device, which she need full time, due to her inability to be understood.

7. This complaints investigator was informed on March 20, 1998, that McKenna & Cuneo LLC, had been retained as counsel for the complainants and hereafter would be representing the complainants. In a letter dated March 31, 1998, the law firm provided the following information.
 - (a) The refusal of [the District] to provide [student] with the Dynavox and communication support during the afternoon of each day is in direct contravention of the plain language of the IEP. It is acknowledged in the IEP that she needs this support throughout the day." She goes on to say, "...[student] has been left without her communication device and communication support for several hours..."
 - (b) "...[student]... has been left in her dirty diaper for hours, in direct contravention of her IEP." [Support for diapering within 15 minutes of a bowl movement] is impossible to accomplish without an aide in the room to support [student], even if the aide is not with [student] specifically at all times. "The District's statement in it Response that 'the moderate needs paraprofessional has been with [student] during the times she has needed assistance' simply is not true".
 - (c) Although the IEP states [student] is to have 15.5 hours of direct services in the general classroom and 1.0 hours of indirect services each week, [student] currently receives only 12.5 hours of service.
8. The District, in its response to the complaint, was represented by Caplan and Earnest LLC. Such response states in summary, "The position of the School District regarding the allegations made by Mr. and Ms. [parents] is that they are false, unsupported by fact, and bordering on frivolous. The truth of the matter is that [student] is being offered an educational program by the School District at Lopez Elementary School that for surpasses the School District's obligation of providing a free appropriate public education." "Frankly, the School District as been extremely frustrated in trying to meet [[student]'s] needs with the constant interference of Ms. [parent] in what should be the daily educational decisions of the School District's educational staff. The program that has been designed for [student] after extensive IEP meetings and with input from independent consultants is providing [student] with a great deal of educational benefit."

The District responded to the specific allegations as follows:

- (a) The IEP team followed the state's recommended process and fully completed the state's recommended form. The narrative completely

describes the services to be provided and the form then proceeds to outline exactly how many hours per week of services [student] is to receive. There is no requirement for any additional detail. Educational professionals must be given an opportunity to exercise their professional judgments in carrying out the provisions of the IEP.

- (b) The School District acknowledges that [student] is entitled to 16.5 hours of direct and indirect services from a moderate needs teacher. It is within the professional purview of that teacher, however, to determine how many of those hours are provided directly by her and how many hours she may assign a paraprofessional trained by her and under her supervision.
 - (c) The School District is under no obligation, imposed by statute or regulation, to include information on the IEP relating to the diapering needs of [student] to the degree of specificity alleged by the complainants. The IEP did not contain the names or positions of staff members with this responsibility. As with everything else that goes on in a classroom, the teacher maintains control and responsibility. Although not required, a schedule has been developed to assist with [student]'s toileting needs and that schedule has been followed by the paraprofessional. If the paraprofessional is not with [student] when a toileting issue must be addressed, all teachers who work with [student] have been instructed to send her to the moderate needs room for assistance. However, this has not been necessary to date, as the paraprofessional has been with her during the times she has needed assistance.
 - (d) [Student]'s primary form of communication is oral. She is generally understood by all of her teachers and by most of her fellow students. She has access to her Dynavox at all times when at school, except at lunch time and recess. The moderate needs teacher, paraprofessional, speech/language specialist, and occupational therapist have all been trained to program the Dynavox and do so on a regular basis. All of the special education staff who work with [student] have received formal training in the use of this device. The Dynavox is also being used for some written assignments. The regular education teacher, moderate needs teacher, paraprofessional, speech/language specialist, and occupational therapist collaborate on a regular basis concerning words and vocabulary to be included on the Dynavox. The only time that [student] does not have access to the Dynavox is when her parents fail to send it to school with her in the morning. There is simply no factual support for the allegations that [student]'s communication needs are not being met.
9. Robin Brewer, a senior consultant at CDE – relative to students with disabilities with significant support needs, was asked to observe programming for [student] on site. Specifically she was asked to observe the amount of support available to [student] in general and the amount of support available relative to diapering needs and use of the Dynavox. The following information was reported by her to this complaints investigator.

One PARA, M. is assigned to the 2nd grade classroom full time. There are 18-20 students in the class, two of which have significant support needs. M. meets with S., the moderate needs teacher, each morning to review goals and prepare for the day. M. then either works directly with [student], or is available to support her upon need. The only time M. is not available is from 11:10 to 12:15, however another PARA, V., is available during that time.

[Student]'s participation in the regular 2nd grade is amazing. She's really a contributing member of the class. Although there is constant support for use of her Dynavox, she is really improving in voiced vocabulary. There is documentation of her vocabulary increasing every day. When the kids in the class can't understand her, they tell her to "Get your Dynavox!". In Specials, she turns her Dynavox off and puts it on the floor. When she goes out to the playground, she leaves the Dynavox there on purpose. There is always a PARA on the playground during recess, and the Dynavox is returned to her. The teachers and the kids all know how to use the Dynavox. They don't know how to program it, but that isn't necessary, as the moderate needs teacher regularly re-programs it based on [student]'s needs. There is a typed Dynavox Management Plan, developed by the service providers, that is followed.

[Student] often doesn't need the support of a PARA during Specials; however one is always available should that support be needed. The PARA, while perhaps preparing the materials for the next day, is always on call.

[Student] is asked three times a day if she has to go to the bathroom (10-10:15, 12:15 and 2:10). She is allowed to say no. She can ask to go to the bathroom and she often does. (I heard her ask for a drink of water, very clearly) I specifically asked how it is determined when she has soiled her diaper and needs changing. The response was that the teachers, aides or even the kids smell it and tell the teacher. The teacher then would immediately request assistance of the PARA to change the diaper. In reviewing the "inclusion Notebook", there were no indications of problems relative to diapering. However there was a notation that she had had a bowel movement on the way to school on 1/9/98 and rash was noted. Teachers and PARA report that they always get to her within the first few minutes after soiling. I suggested that the special education teacher start documenting toileting; she said she would. We developed an easy format to do so using a scatter plot form.

The moderate needs teacher documents everything. Using a data form, she documents work on the 15 different objectives, during each of the 9 periods during the day. She documents progress on each of the objectives daily. She makes daily notes about activities relative to [student]'s day at school and sends them home. She also indicates any

homework assignments. (Copies of these forms attached to these Findings.)

I reviewed the daily schedule with the moderate needs teacher, trying to understand the specifics of the services [student] is getting. It appeared to me, after lengthy calculations that she's getting about 19 hours of special education services per week.

10. Upon being asked the direct question, "In your opinion, is this child getting the services listed on her IEP and is she getting an appropriate education?", Robin replied:

"Other parents would give anything for a situation like this. This teacher is remarkable, she must put in enormous hours on this student. It's amazing – the work she, the regular teacher, the OT and S/L person and the PARA are doing. You should see this situation and this kid. She's really doing well and everybody enjoys her being in the class."

"One sad thing – regular education teachers in the building who might get [student] next year have expressed mixed feelings about that. They would love to have [student] but are worried about the unrealistic demands of the mother. No one understands why she is constantly upset and complaining, 'cuz this kid is getting far more than just an appropriate education. She's getting the best of the best."

11. The law is clear that the amount of services to be provided must be stated in the IEP, so that the level of the agency's commitment of resources will be clear to parents and other IEP team members and that those services listed on the IEP must be provided. The law does not specifically require an IEP to state the amount of services with respect to the specific number of hours or minutes. Public agencies must ensure that the amount of services is stated in a manner that is appropriate to the specific services and clear. Ranges of time are not permitted as this would not express the agency's level of commitment to a service.

Colorado law also allows Districts to employ on a voluntary or paid basis teachers' aides and other auxiliary, noncertificated personnel to assist certificated personnel in the provision of services related to instruction or supervision of children. A paraprofessional is an individual who provides support to the certificated person in the educational program, and assists with management of the students and direct learning experiences. Delivery of instruction to a student may be carried out by the paraprofessional under the supervision of a certified person. Individual special education professionals may choose to vary the responsibilities of the paraprofessional depending upon the individual skills and interests of the paraprofessional and the needs of the students.

The following list, taken from CDE's Guidelines for Effective Utilization of Paraprofessional in Special Education, illustrates responsibilities which could be assigned to the paraprofessional by the special education professional:

- carrying out instructional programs and lessons in various learning environments as designated in the instructional plan based in the IEP
- assisting individual students in performing activities initiated by the special education professional
- reinforcing learning with individuals or in small groups
- assisting the certificated person in observing, recording, and charting behavior
- assisting the certificated person with crisis problems and ongoing approaches to behavior management
- participating in building level duties as assigned by building administrator or designee
- scoring tests and papers and assisting in data collection procedures
- performing clerical tasks, i.e. typing, filing, and duplicating
- assisting in preparation, production and maintenance of instructional materials
- maintaining and operating instructional equipment
- working with the special education professionals in developing the schedules for both students and team members

12. A review of documentation indicates the following relative to the allegations in this complaint:

- (a) The IEP form utilized by the District is identical to the form suggested by the state as meeting all regulatory requirements of the Act. All portions of the 11/17/97 IEP were completed. The amount of information and specificity provided on this IEP are far greater than the norm. Special education and related services are not only described in narrative, but each special education service is listed with the specific amount of hours per week it is to be provided.
- (b) The IEP states [student] will receive restroom support at both recesses and lunch as needed and that support for diapering will occur within 15 minutes of a bowel movement. A handwritten toileting schedule, prepared by staff, is on file. It states that toileting needs will be questioned at 10:00, 12:15, and 2:10 everyday, that [student] goes on request and that she frequently asks to go. It goes on to state that when a PARA isn't with her, there is someone available in the moderate needs room to take her to the restroom, and that teachers know to send her to the moderate needs room to use the restroom.
- (c) The IEP states [student] will receive support from the moderate needs teacher and PARA to help her with communication and academics. It also states that [student] requires assistive technology, specifically a Dynavox for oral and written communication along with a printer attached to her Dynavox for written output. Accommodations listed on the IEP include the use of Dynavox and a scribe for most written output that is longer in length and permission to use Dynavox for oral presentations. A Dynavox Management Plan for the 1997-98 school year, prepared by staff, is on file.

12. An analysis of the legal requirements, the allegations, the responses to the allegations and the results of the on site observation suggests the following:
- (a) [Student]'s IEP states the amount of special education and related services and describes those services far more specifically than is the norm. The complainants' desire to document how diapering will happen and how needs will be met is far more specific than the law requires. There is no obligation to state specifically who will do what when. Rather it is the teacher's responsibility to make certain that all services are provided commensurate with the IEP and to make certain that the total amount of time for each service delineated on the IEP is provided. It is within the professional purview of the professional teachers and service providers to determine how much time and what activities can be assigned to a PARA under their supervision.
 - (b) Although a soiled diaper and subsequent rash was noted on one occasion after the bus ride to school and on another occasion after a bus ride home, there is no indication that [student] has been left in her dirty diaper for hours during the school period. A toileting plan is in place, and teachers and students attest to the fact that if a soiled diaper is noticed via smell, [student] is immediately sent to the moderate needs room for changing. A female aide is available at all times during the day to assist with this. The IEP need not contain the names or positions of staff members responsible for this service at any given time. Rather it simply must state that the service will be provided. It is the collective responsibility of all service providers to communicate and provide assistance to insure the service is provided. In addition, although the complainants indicate that [student] is not able to communicate her toileting needs, staff have often observed her doing so. Although the CDE onsite visitor did not hear her verbalization relative to toileting needs, she did hear her clearly ask for a drink of water and therefore, believes she is capable of verbalizing her toileting needs.
 - (c) Services relative to communication needs, listed on the IEP, appear to be provided as witnessed on an onsite visit to the classroom and as documented on daily records. [Student] receives services and support from a speech/language specialist and occupational therapist, from the moderate needs teacher and from the PARA. She has a Dynavox available to her at all times, a plan for its use is in place, and she reportedly uses it often. However it was noted and observed that at times she prefers not to use it, but rather utilize her oral communication which is improving rapidly every day. There is no requirement that the Dynavox management plan be developed with the parent. Rather, this is a plan developed by the service providers to assure she has access to this technology at all times. The complainant's allegation that [student] has been left with her communication device for several hours, and that she has been left without communication support for several hours, has not been substantiated. There is no factual support for this allegation. There is however, observation notes and daily records of communication needs being met.

- (d) At the heart of this complaint, appears to be a parental desire to have a full time aide assigned only to [student] and “Velcro-ed” to her at all times, should she need assistance. The District staff and CDE consultant, however, note how much [student] is achieving in an integrated environment, how independent she is becoming and how much she is functioning like her peers, accepted by her peers and assisted by her peers. Regardless of this difference in philosophy or perception of need, the IEP governs the services to be given. The IEP meets and exceeds all legal requirements and the services provided to [student] are observed to be exemplary and in excess of the amount required.
- (e) Attitudes of teachers relative to dealing with [student]’s mother is of great concern to this complaints investigator. Third, fourth and fifth grade teachers in Lopez Elementary have openly stated that, should [student] be assigned to their room, they will seek reassignment to another grade level or another building due to the mother’s unreasonable demands. They are all quick to state that having [student] in their classroom is (or would be) a privilege, that they enjoy her and that integrating her into their curriculum is not difficult. They are also quick to acknowledge the skills, energy, time commitment and support of the moderate needs teacher relative to [student]’s needs. They contend, however, that an enormous amount of time and energy have been spent on mediation, complaint resolution and preparation for due process hearings which (in the words of one service provider) “doesn’t make sense given the ‘Cadillac’ services [student] is receiving”.

While Ms. [parent] is to be commended for advocating for her child and encouraged to continue to do so, it is suggested that she become familiar with what the law does and does not require and learn to trust the professionals working with her child. She has strongly stated in a letter that she is committed to working in partnership with the school, that [student] does receive services from a staff of highly trained professionals and that the family has a great deal of respect and honor for the team’s expertise. Hopefully this is an indication that some trust is there to build on.

III. CONCLUSIONS

The District has not violated the provisions of the Act by not providing [student] with a free appropriate public education. Specifically, it has not:

- failed to state the amount of specific special education and related services on the individualized education plan (“IEP”) which are to be provided,
- failed to provide services relative to diapering needs, and
- failed to provide services relative to communication needs.

Rather, the District is meeting and even exceeding that which is required by law. The IEP developed for [student] is one of the most complete and lengthy IEPs reviewed in this office. Reportedly, other parents would give anything for a service plan like the one being implemented for [student]. She was observed to be getting “the best of the best”.

IV. REMEDIAL ACTIONS

None.

Dated this ____ day of April, 1998.

Carol Amon, Federal Complaints Investigator