

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

State-Level Complaint 2008:511

Douglas County School District RE-1

Decision

A. INTRODUCTION

This State-level Complaint (Complaint) was dated 11/10/08 and submitted on 11/18/08. The then State Complaints Officer, Mr. Keith Kirchubel, determined that the Complaint identified three (3) allegations subject to the jurisdiction of the state-level complaints process under the federal Individuals with Disabilities Education Act (IDEA). Mr. Kirchubel notified the Douglas County School District RE-1 (District) and the Complainant of that determination by letter dated 11/20/08, which letter also enclosed a copy of the Complaint. The original decision due date for this Complaint was 01/16/09.

The Complainant is the parent a child with a disability. Hereafter, the Complainant is referred to as the “Parent” and the student is referred to as the “Student”.

The issues and, therefore, the scope of the investigation identified by Mr. Kirchubel in the 11/20/08 letter are as follows:

- 1) Whether the accommodations and modifications specified in the Student’s Individualized Education Program (IEP), dated 04/22/08, were implemented during the period 07/09/08 to the present (i.e., 11/18/08);
- 2) Whether the Student received the math and auditory comprehension support specified in the 04/22/08 IEP during the same period; and
- 3) Whether the District timely and completely responded to the family’s request for the student’s educational records.

The District received Mr. Kirchubel’s 11/20/08 letter on 11/21/08. The District’s response (Response) was dated 12/04/08 and was received by Mr. Kirchubel on 12/08/08. By letter dated 12/12/08, Mr. Kirchubel mailed the Parent a copy of the Response. That same letter informed the Parent that her reply (Reply) to the Response was due on 12/31/08.

On 12/30/08, the Parent called Mr. Kirchubel to request an extension of time for purposes of preparing the Reply. Mr. Kirchubel approved an extension of time by permitting the Reply to be postmarked by 12/31/08.

By 01/12/09, the undersigned acting State Complaints Officer, Laura L. Freppel (hereafter referred to as the SCO),¹ had not yet received a Reply from the Parent. Between 01/12/09 and 01/15/09, the SCO telephoned the Parent three times to verify whether a Reply had been submitted and to request additional information.

On 01/14/09, the SCO interviewed the District's Special Education Director by telephone. Thereafter, the Special Education Director faxed to the SCO copies of the Student's report cards, CSAP scores and the District's records access policy.

On 01/15/09, the SCO received the Reply, which was dated and postmarked 12/31/08.² In the evening of 01/15/09, the SCO received a phone call from the Parent, who had been out of town during the week and who called the SCO as soon as she returned. On 01/15/09 and again on 01/16/09, the SCO interviewed the Parent by phone. On 01/16/09, the Parent faxed the SCO the Student's IEP Goals progress reports for the period ending 10/20/08.

Given the sharp disputes of fact revealed by the information submitted by the parties, the SCO determined, on 01/16/09, that it was necessary to conduct an on-site investigation at the Student's school. The purposes of the on-site investigation were: (a) to interview the school principal and the Student's teachers/providers; and (b) to observe the Student's classrooms. On 01/16/09, the SCO extended the decision due date to 02/27/09 due to the above-described exceptional circumstances.

On 01/21/09, the Parent faxed to the SCO the documents which she stated were produced to her by the School Principal on 08/01/08.

The on-site investigation was conducted on 02/04/09. During the onsite investigation, a team from the Colorado Department of Education (CDE)³ interviewed, separately, the following teachers/providers of the Student: [Speech Language Pathologist], [School Principal], [Learning Specialist/Case Manager], [Educational Assistant], [General Classroom Teacher], and [Science Teacher]. The District's Special Education Director attended all interviews. The CDE team also observed the classrooms of [General Classroom Teacher] and [Science Teacher]. [General Classroom Teacher] demonstrated in her classroom how information was provided in a variety ways to the Student and the class, including use of a document camera, whiteboards and easel. During the on-site interview, the District provided the CDE team with copies of the calendars/planners/logs of certain school staff; examples of different methods of providing

¹ Mr. Kirchubel left the employment of the Department effective 12/31/08 for a position at the Colorado Office of the Attorney General.

² The Reply had been addressed to the Department's main building at 201 E. Colfax Avenue instead of to the address for the Exceptional Student Leadership Unit (ESLU) at 1560 Broadway. The Reply was not delivered to the ESLU until 01/15/09.

³ The CDE team was comprised of the SCO, Ms. Stephanie Lynch (Senior Dispute Resolution Consultant) and Ms. Fran Herbert (Principal Speech Language Consultant).

written instructions/information to the Student; a student planner notebook identical to the one given to the Student at the start of the 2008-09 school year; and copies of email communications between the Parent and school staff.

The SCO closed the record on 02/05/09.

B. THE PARENT'S ALLEGATIONS

The Complaint, in relevant part, alleges as follows:

- 1) "All accommodations/modifications except, "repeat directions"...have not been followed since July 9, 2008, [Student's] first day of school. At a meeting before the start of school year, July 8, 2008, I met with [Student's] teacher who was not aware of [Student's] IEP. Since that time we have had several meetings and have asked that the IEP be implemented as mandated. As of this date, it has not been."
- 2) "On the very last page of the IEP, [Student] was to get 'support for math and auditory comprehension for 30 min. 3x's per week; and consultation from the speech language pathologist about 15 min. per week.' I have no proof that these are being followed with exception to Math help in class by an E.A. [Student] says that he is never pulled out and only has, '[E.A.] help with my math.' In short, I believe that this is another part of the IEP not being followed."
- 3) "Also, I have requested [Student's] records twice. The first time I received a two page printout from a Douglas County website with 1 part of [Student's] 5th grade report card and a blank behavior section—presented by [Student's] principal. The second time (last week) I received a file with items dating back to kindergarten. However, nothing that concerns [Student's] 4th, 5th or 6th grade year except for ½ of [Student's] 5th grade report card was in this record. There were no items relating to the request for Special Education services (approved in early 2007) or the IEP."

C. THE DISTRICT'S RESPONSE

- 1) In response to Parent's Allegation #1, above, the District states that the Student is receiving all accommodations and curricular modifications specified in [Student's] IEP.
- 2) In its Response to Parent's Allegation #2, above, the District states as follows:
 - a) "[Student] currently receives **2.5 hours** of support in the classroom which is 1.0 hours above the requirements found on page 8 [of the 4/22/08 IEP]."
 - b) "Support is provided by either a learning specialist (certified special education teacher) or an education assistant (classified assistant) as stated on page 8 of IEP."

- c) “All services are delivered in accordance with the stated delivery model found on page 8 of the IEP, in the classroom. No direct services were recommended by either the school team nor did the parents request these services at the IEP meeting held on 04-22-08. Please see [Student’s] current report card for level of function. [Student] is at grade level for proficiency in math. Also see scores on the CSAP.”
- d) “[Student] has been given numerous opportunities to come to the learning lab during the designated 6th grade DEAR time (additional academic support time) to receive extra assistance from his case manager on an as needed basis. [Student] has accessed this service a maximum of 4 times.”
- 3) During the 01/14/09 telephone interview, the Special Education Director described the service delivery model (i.e., “integrated services” provided in a “role release model”) as follows: The special education instruction/support necessary to address the Student’s auditory and math skill needs are to be provided to the Student -- (i) interchangeably by either (a) the Learning Specialist (a licensed special education teacher with a “Mild/Moderate Needs” or “Generalist” endorsement), (b) the Educational Assistant under the supervision of the Learning Specialist, or (c) the Speech Language Pathologist; (ii) primarily in the general education classroom or, rarely, in pull-out in a quiet place nearby if the general classroom is too noisy; and (iii) on either a 1:1 basis with the Student or in a small group with other students with needs comparable to those of the Student.
- 4) In response to Parent’s Allegation #3, above, the District, in relevant part, states as follows:
- a) “Request was made to the school principal to have [Student’s] cum file ready for parents on **November 6, 2008.**”
- b) “Cum file was copied and parent (father) was notified by phone with a conversation with Assistant Principal on **November 6, 2008** that it could be picked up in the BRT office which could be locked to make it secure.”
- c) “Parents picked up cum file on **November 10, 2008.**”
- d) “Contents of cum files in DCSD include the following:
- i. Birth certificate
 - ii. Enrollment paperwork
 - iii. Immunization record
 - iv. Yearly completed report cards/current on-going report cards are not included in cum file. Report card was found for the 07/08 school year and the 06/07 report card was missing, but was placed in the file on 11/26/08.
 - v. Standardized testing:

1. CoGat
2. CSAP”

The Response further notes that “IEP’s are kept in a separate file maintained by the ISS records manager and must be requested in writing. However, [Student’s] parents were provided with an additional copy at the time [Student’s] file was picked up.”

During the 01/14/09 telephone interview, the Special Education Director stated that, to his knowledge, the District received only one request for records from the Parent -- on 11/05/08. The Special Education Director did not know whether the request was made in writing or verbally. At the SCO’s request, the Special Education Director faxed to the SCO a copy of the District’s Board Policy JRA/JRC, which addresses records access by parents.

D. FINDINGS OF FACT

- 1) At all times relevant to this Complaint, the Student was a child with a disability with a speech language impairment.
- 2) At all times relevant to this Complaint, the Student had a current IEP dated 04/22/08.
- 3) The 04/22/08 IEP contains three annual goals. Goal 1 of the IEP addresses the Student’s auditory comprehension needs. Goals 2 and 3 of the IEP address the Student’s math comprehension needs.
- 4) That IEP specifies the following special education services:
 - a) Student was to receive, per week, .25 hours of indirect (consultation) services and 1.75 hours of integrated services in the general classroom from a learning specialist (certified teacher) or an educational assistant. The Student was to receive, per week, .25 hours of indirect (consultation) services from the SLP. The IEP further describes the services to be provided as: “General Education classroom with support for auditory skills and math. Learning Specialist (LS) hours may be provided by either a Learning Specialist, Speech Language therapist (SLP) and/or Educational Assistant (EA) using a role release model.”
 - b) Student was to receive the following curricular accommodations/modifications: “repeat directions; have [Student] explain directions in [Student’s] own words; break steps into smaller parts; write directions in sequence & number the steps when applicable; provide model of work to be completed; ask specific questions about directions (What’s the first step?); access fidget objects as needed; eliminate irrelevant information in directions; checklists for task completion; remove distractions from desktop/work areas; pair visual/auditory information; draw pictures/take notes during oral presentations of info; teach note taking/highlighting strategies; quiet, isolated work space; provide multiplication

table for computation; preview vocabulary/critical concepts prior to teaching; teach strategies for recall of math facts.”

- 5) The Student’s 04/22/08 IEP calls for the collaborative delivery of special education instructional services by the Learning Specialist and the Educational Assistant under the supervision of the Learning Specialist in the general education classroom. The 04/22/08 IEP does not specify any direct services to the Student. The IEP specifies that the Speech Language Pathologist would provide 15 minutes of consultative services. Consultative services are indirect services provided to a student’s teachers and other providers for the benefit of the Student. Consultative services are not provided directly to a student.
- 6) The Parent did not understand the services delivery model, in part because the “Comments” section of the 04/22/08 IEP stated that “[Student] will be provided the following services: support for math and auditory comprehension for 30 minutes 3 times per week; and consultation from the speech language pathologist about 15 minutes per week.” Based on this language, the Parent thought that the speech language consultative services were to be provided to the Student.
- 7) The 2008-09 school year for the Student began on 07/09/08.
- 8) The District did not provide all of the speech/language consultation services called for by the IEP. Between the dates of 07/09/08 and 11/06/08, the IEP specified that a total of 225 minutes (i.e., 3.75) hours of consultative speech language services be provided on behalf of the Student. 110 minutes (i.e., 1.8 hours) of speech language consultation services were provided. The SCO finds that the District’s failure to provide all required speech language consultation services did not deprive the Student of educational benefit.
- 9) The 04/22/08 IEP specifies that the District was to provide the Student with “access to fidget objects as needed”. The District did not provide the Student with fidget objects as that term is commonly understood. The Student was allowed to use common school supplies with which to fidget such as pens (to click), pencils (to tap/drum) and paper clips (as suggested by the father) unless their use by the Student became a distraction to others, at which time the [Student] was reminded to “tone it down.” Per the Parent, at times school staff expressed concern that the Student’s drumming or tapping was distracting. The Student has not been disciplined by the school for tapping or drumming.⁴
- 10) Per the 04/22/08 IEP, the Student had available an isolated work space since the start of the 2008-09 school year. Early on in the 2008-09 school year, the General Classroom Teacher attempted, on a number of occasions, to integrate the Student into group activities so as not to exclude the Student from the group activities. In October 2008, the General Classroom Teacher ceased to integrate the Student in group activities due to the Parent’s request and also because the Student does better by himself. During the time period relevant to this Complaint, the General Classroom Teacher stated that the Student spent 90% of the time in that teacher’s classroom at a desk separated from his peers. The

⁴ Per the 02/04/09 on-site interviews

SCO finds such to be the case. In the science classroom, the Student has had preferential seating near the teacher at a desk separate from the rest of the class. Based on the 02/04/09 onsite, the Student is separated from his peers in the classrooms of the General Education Teacher and the Science Teacher. Based on the 02/04/09 on-site investigation, the District is now fully implementing this accommodation and no corrective action is necessary.

- 11) Except as found in Section D.8 – D.10, above, the Student’s IEP was implemented by school staff. The fact that other students in the classrooms received many of the same accommodations as a matter of good instructional practice does not negate the fact that the Student also received the accommodations to which the Student was entitled.
- 12) Until 09/09/08, the Student received the integrated special education support services from the Learning Specialist. Beginning 09/09/08, the Educational Assistant, under the supervision of the Learning Specialist, provided math support services to the Student beyond the amount required by the 04/22/08 IEP. Sometime in October 2008, Study Hall (i.e., a learning lab) became available to the Student. The Learning Specialist and the Educational Assistant were available to provide support during Study Hall. The Student infrequently went to Study Hall. The Study Hall was not required by the Student’s 04/22/08 IEP.
- 13) Per the school staff, the Student does well in class. The Student’s progress on IEP goals was assessed by the Learning Specialist in collaboration with the General Classroom Teacher. The General Classroom Teacher used classroom curriculum assessments to monitor the Student’s progress. The Education Assistant reported her observations of the Student to the General Classroom Teacher and the Learning Specialist. The Learning Specialist gathered data and compared the data to the goal criteria and baselines to determine the Student’s progress. The data came from the Student’s work samples and tests. The Learning Specialist prepared the Goals’ progress report dated 10/20/08.
- 14) The 10/20/08 Progress Report shows that, during the relevant time frame, the Student made progress on the Student’s IEP goals. Although the Parent disputes such progress, the SCO finds that there is sufficient evidence in the record establishing that the Student made progress toward attaining the Student’s annual IEP goals, including attaining one benchmark.
- 15) The Student’s 2008-09 first trimester report card (relevant to the time frame of this Complaint) reports the following information for the Student:
 - Math: B* = meaning “Acceptable Work Modified”
 - Reading: B
 - Writing: A
 - Science: B
 - Social Studies: B
 - Progress Towards Literacy Standards: At grade level

- Progress Towards Numeracy Standards: At plan expectations
- 16) The Student has received at least some educational benefit during the time frame relevant to the Complaint even though the Student’s IEP was not fully implemented at all times by the school staff as found in Section D.8 – D.10, above.
 - 17) Via a 07/31/08 email, the Parent asked “to view all of [Student’s] records prior to our meeting (grades, attendance, previous discipline).” With regard to the 07/31/08 request, the School Principal met with the parents on 08/01/08. At that time, the School Principal provided the parents the Student’s discipline record. There were no incidents identified on the discipline record because the Student had not been disciplined. As a result of the 08/01/08 meeting, the Principal believed that the parents were satisfied with the documentation provided and did not understand that the Parents still desired full access to all education records of the Student.
 - 18) Via an 11/04/08 email to the School Principal, the Parent requested the Student’s “entire education record. I asked for these back [on 07/31/08] and was never provided more than a one-page print out. Since this is my second request, I will expect [School] to comply. Also a reminder that the entire record should be made available to me within the three-day timeline as specified in the Colorado Public Records Act. ”
 - 19) On 11/06/08, the Principal made available to the parents copies of the Student’s cumulative file maintained by the School and the Student’s 04/22/08 IEP. The District did not make the Student’s special education records, maintained separately by the District’s Instructional Support Services Department, available for review to the Parents at that time and had not done so as of the 02/04/09 on-site investigation.
 - 20) The Principal has received no training from the District regarding the procedures necessary to respond to a request for access to education records made by the parents of special education children.

E. ANALYSIS AND CONCLUSIONS OF LAW

- 1) During all times relevant to this Complaint, the Student was a child with a disability and eligible for special education services under the Individuals with Disabilities Education Act (IDEA)⁵ and its implementing regulations.⁶
- 2) Per the IDEA, children who have been determined eligible for special education are entitled to a free appropriate public education (FAPE) in the least restrictive environment. *See*, 34 CFR §§ 300.101 through 300.118. The development and implementation of an IEP is the primary means by which a child with a disability receives a FAPE. *See*, 34 CFR §§ 300.320 through 300.328. The long-standing substantive standard for determining whether a student

⁵ 20 U.S.C. § 1400 *et seq.*

⁶ 34 CFR Part 300

has received a FAPE is whether the student has received “some educational benefit.” Board of Education v. Rowley, 458 U.S. 176 (1982).

- 3) During the time period relevant to the Complaint, the Student’s IEP was not fully implemented in violation of the general FAPE provisions of the IDEA. During the relevant time frame of the Complaint, the Student did receive at least some educational benefit. Therefore, the District’s failure to fully implement the Student’s IEP did not deny the Student a FAPE.
- 4) Under the IDEA, a “participating public agency” must permit parents to inspect and review any education records relating to their children that are collected, maintained or used by the agency under the IDEA Part B regulations. A “participating agency” means “any agency that collects, maintains or uses personally identifiable information, or from which personally identifiable information is obtained, under Part B of the IDEA. 34 CFR § 300.611(b). The District is a “participating agency.” Generally, the participating public agency must comply with a parent’s request for records without unnecessary delay and, in no case, more than 45 calendar days after the request has been made. 34 CFR § 300.613(a).
- 5) The District failed to provide the parents access to all of the Student’s education records within 45 calendar in violation of 34 CFR §300.611(a).

F. REMEDY

- 1) The District shall ensure that the Student’s 04/22/08 IEP is fully implemented. To that end, the District shall convene the Student’s IEP team, including the parent(s), as soon as possible following its receipt of this Decision, but in any event no later than **03/20/09** -- unless the parties agree to a different date or the Parents agree that other means of communication will suffice. The purposes of the IEP team meeting (or other means of communication) are to address:
 - a) Identification of age-appropriate fidget objects for the Student, the use of which will likely not be disruptive to others (e.g., including other classmates and teachers). The District is responsible for (i) providing any identified fidget objects to the Student, (ii) training the Student on the use of such fidget objects; and (iii) communicating with the Student’s classroom teachers about the Student’s use of such fidget objects;
 - b) An explanation, if necessary, of what speech language consultation services are; and
 - c) Ensuring that the parents fully understand the service delivery model specified in the 04/22/08 IEP.
- 2) Consistent with 34 CFR §§ 300.611 and 300.613, the District shall make available to the parents for their review all of the Student’s remaining education records to which the parents have not yet had access as of the date of this Decision. The District shall make such education records available for the parents’ review no later than **March 6, 2009**. No later than **March 30, 2009**, the District shall submit to the Department a proposed Corrective

Action Plan (CAP) that describes how the District will train the responsible District personnel, per the District's policy JRA/JRC, so that such personnel are knowledgeable about the requirements of 34 CFR § 300.613 in order to ensure that the found violation does not recur either as to the Student or with regard to future records requests by parent of special education students. Please submit the CAP to the Department to the attention of the SCO. The Department will review and then either approve or request revisions to the CAP. The enclosed sample templates provide suggested formats for the CAP and include sections for "improvement activities" and "evidence of implementation and change."

- 3) With the submission of the CAP on **March 30, 2009**, the District shall also submit documentation that the District timely convened IEP Team or that other communications have occurred (as set forth in Section F.1, above) and that District timely provided the parents access to the Student's education records (as set forth in Section F.2, above).

G. CONCLUSION

This Decision shall become final as dated by the signature of the undersigned Acting State Complaints Officer.

Dated this 12th day of February, 2009.

Laura L. Freppel, Esq.
Acting State Complaints Officer