

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

**State-Level Complaint 2018:514
Denver Public Schools**

DECISION

INTRODUCTION

This state-level complaint (Complaint) was filed on April 12, 2018 by a Third-Party Complainant (Complainant) on behalf of students eligible for IDEA served by Denver Public Schools (District). After review of the written Complaint, the Colorado Department of Education (CDE) State Complaints Officer (SCO) determined that the Complaint identified five allegations of noncompliance by operation of policy, procedure, and/or practice, and that the allegations in the complaint are subject to the jurisdiction of the state-level complaint process under IDEA and its implementing regulations at 34 C.F.R. §§300.151 through 300.153.

The CDE assigned this Complaint to an independent contractor for investigation. Through this assignment, the undersigned State Complaint Investigator acts as an authorized representative of the CDE. The scope of the assignment was: 1) to investigate the allegations raised in the Complaint, 2) to make findings of fact and conclusions of law; and 3) prepare a written decision for review and approval by the CDE. In compliance with the IDEA, Federal Regulations, and the Colorado Rules for the Administration of the Exceptional Children's Educational Act (ECEA), the CDE issues this Decision.

COMPLAINT ALLEGATIONS

By operation of policy, procedure, and/or practice, the District has violated IDEA's procedural requirements governing the content, development, and delivery of Individualized Education Programs (IEPs) for IDEA eligible students specifically as follows:

1. The Special Education Director or designees participating in IEP meetings as the agency's representative do not have the authority to commit the District's resources to provide supplementary services from a paraprofessional in the general education setting because funding for such services is subject to approval by application, committee, designated administrator, or some other mechanism following the IEP meeting during which the IEP was developed, in violation of 34 CFR § 300.321(a)(4) and ECEA Rule 4.03(5)(a).

2. The District determines the provision of supplementary services from a paraprofessional outside of the IEP meeting and fails to provide prior written notice of the decision to approve or deny such services.
3. The District's process for approving funding for supplementary services from a paraprofessional unreasonably delays implementation of the IEP.
4. The District fails to clearly specify the nature, type, frequency, location, and duration of supplementary aids and services to be provided by preventing paraprofessional services from being added to the service delivery statement through application of its IEP software system.
5. The District fails to clearly specify the nature, type, frequency, location, and duration of supplementary aids and services to be provided by prohibiting IEP teams from specifically identifying paraprofessional support on an IEP and requiring such services be described by using phrases such as adult support, line of sight supervision, or other similar phrasing identified in the Complaint.

INVESTIGATORY PROCESS

The Investigation included the following components:

- The Investigator(s) reviewed the following records:
 - The original complaint and supporting exhibits filed by the Complainant;
 - CDE's acknowledgement letter;
 - The District's response to the allegations raised in the complaint and supporting exhibits;
 - The Complainant's reply and supporting exhibits; and
 - 184 student special education files, including:
 - 4 students named in the complaint;
 - 93 additional student files representing all students currently identified (per District) as having an assigned paraprofessional; and
 - 87 student files representing students receiving services in center-based programs. The 87 student files are considered a representative, random sample of the 1,349 students enrolled in center-based programs across the district.
- The Investigator conducted a telephonic interview with the 2017-18 District Special Education Director and District's legal counsel.
- The Investigator(s) provided the opportunity for all parties to submit additional information for consideration during the complaint investigation.

APPLICABLE STATUTES, REGULATIONS, OR RULES

34 C.F.R. §300.320	Definition of Individualized education program
34 C.F.R. §300.321	The IEP Team
34 C.F.R. §300.503	Prior Written Notice
ECEA Rule 4.03(5)	Participants in meetings

RELEVANT TIME PERIOD

Pursuant to 34 C.F.R. §300.153(c), CDE has the authority to investigate allegations of violations that occurred not more than one year from the date the original complaint was received. In light of this limitation, the investigation will be limited to the period of time from April 11, 2017 through April 10, 2018 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the complaint.

Due to the systemic nature of this complaint and the process of the record review, the original timeline was extended to ensure a thorough and complete investigation was conducted. In addition to the documents produced by the Complainant and District, accessing student files was difficult and time intensive. The original due date of the complaint was June 11, 2018 but was extended to August 1, 2018 to accommodate the time required to conduct the appropriate review.

FINDINGS OF FACT

1. The complaint was filed on behalf of all special education students in the District. It contains specific allegations and supporting documentation for four named students.
2. The District operates over 200 schools and serves approximately 10,000 students with disabilities.
3. During the last school year, the District made changes to the manner in which paraprofessional support for students or programs was approved and/or funded. May 7, 2018 *District Response*, p. 10. The District stated:

The paraprofessional committee was dissolved prior to April 12, 2017. The funding for additional FTE for paraprofessional support depends on the student. Many students have ongoing paraprofessional support and those are automatically funded. As discussed above, center-based paraprofessionals were traditionally funded centrally by the District. Beginning with the 2018-2019 year, such funding will be included at the school-budget level in each school's General

Fund. Non-center-based paraprofessionals are to be paid out of each building’s Mild Moderate Resources funds. In years prior, requests for additional Mild and Moderate Budget Assistance could be sought from the District. Going forward, the District’s Student Equity and Opportunity department will no longer have Mild and Moderate Budget Assistance available to fund paraprofessional requests; however, schools will be able to request budget assistance for paraprofessionals through the General Education Budget Assistance. For a new student at the school or a student moving from grade to grade, if a paraprofessional had not been previously provided, then the attached packet should be filled out.

4. During the investigation, 184 student files were reviewed for compliance with state and federal laws regarding the issues raised in the complaint. The file reviews resulted in the data aggregated and summarized below:

Data Set	Need for Para Support Described in IEP	Approval Process Documentation Provided	Number of Days for Approval	IEPs w/ Amount of Para Service Documented	PWN Documented Para Support
97 Students w Para Support	97	11*	Ranges from 1 to 62 days	9	4
87 Students Random Sample	16#	None	N/A	0	1

* Identification numbers [].

Identification numbers [].

5. Of the 184 student files reviewed, no files contained an explanation of the approval process or the possibility of a delayed start date due to the approval process. Further, no file provided information about the outcome of the approval process or when services would begin after approval.
6. All 184 files are silent as to whether a substitute paraprofessional provided support to the students while awaiting final approval on the request or while waiting for a qualified individual to be hired.
7. Upon request, the District provided nearly 100 pages of emails documenting requests and/or approvals for paraprofessional funding from various schools across the District. The following emails, in relevant part, are germane to the paraprofessional approval process:
 - January 12, 2018 email from a BCBA to the Director: Are teams still able to request 1:1 paraprofessionals for individual students or would that be impacted as a result of the

budget cuts/hiring freezes, etc.? I have a school team requesting a 1:1 para for a student and am now wondering what the process will look like for teams to request one.

- January 12, 2018 response from the Director: Yes, you can advocate for 1:1 paras. Send any requests to me with some information as to the level of need.
- January 31, 2018 email from the School Nurse to Administration: One of my students at [School], [Name of Student], has been under consideration for a 1:1 para since early December. I understand that his teacher, [Name of Teacher], reached out to you recently about the status of approving a para for him, and you referred her back to myself and Nursing Services. I am forwarding an email conversation from December where it appears to me that Nursing Services supported the team's recommendation that a 1:1 para is needed to safely monitor this student for seizures when he pushes into the general education setting. Would you please review the information below and let me know the next steps for securing a para for this student?
- February 1, 2018 Director response: I have requested that [Director of Operations] fund this para. I believe he was trying to decide if the para needs to be a nursing para or a special education para.
- March 20, 2018 email from an advocate to the Director: What is the status of funding for the position from the district? I apologize if you told me already, but I still am uncertain if that was decided or not.
- March 20, 2018 response email from the Director: It will be decided soon.
- April 2, 2018 email from the Director to a student's family: I am so sorry that this issue has taken so long to resolve. We have a process for looking at the requests for paraprofessional support for students and I was able to meet with our operations director today to review all of the students and make decisions.

I am pleased to let you know that we have been able to approve the para for [Name of Student]. The next step in the process is that we sent the list to the budget office and they will contact the school to notify them of the decision and provide the funding. This process will probably happen during the next few weeks, but I wanted to get back to you and let you know the decision.

- April 7, 2018 email from the Director to a building administrator: We will be funding some type of support for [Name of Student]. We are trying to determine if she needs a typical para or a health para. Can you tell me what she has had in the past and what will meet her significant needs?

- April 24, 2018 email from Complainant to the Director: The family and school is still waiting for a response. Please confirm or deny whether the district will fund services identified by the Individualized Education Program.
8. When interviewed, the Director of Special Education indicated that IEPs should be implemented as written, but that there was no documentation to support that “substitute” or “interim” paraprofessional services were provided while waiting for approval and/or hiring of a new paraprofessional for a student.

CONCLUSIONS OF LAW

1. The overarching purpose of the IDEA is to ensure that students with a disability have available to them a Free Appropriate Public Education (FAPE), including special education and related services that meet the unique needs of individual students and prepare them for further education, employment and independent living. *34 C.F.R. §300.1.*
2. As a learner with a disability eligible under the IDEA, every student is entitled to receive FAPE according to an IEP, which includes special education, related services, and supplementary aids and services designed to meet a student’s unique educational needs. *34 C.F.R. §300.17.*
3. The District is obligated to ensure that each student receives FAPE by providing special education services to meet the Student’s unique educational needs in conformity with an IEP developed using the procedures set out in the IDEA. *34 C.F.R. §§300.17 and 300.101.*
4. The FAPE standard was set by landmark United States Supreme Court decision in the *Rowley* case. The Court ruled that an appropriate education is one that is reasonably calculated to provide educational benefit to a student. Determining the “contours of an appropriate education must be decided on a case by case basis.” *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (1982).
5. The *Rowley* Court established a two-part test to decide whether FAPE was provided:
 - a. Has the state (i.e. public agency) complied with the procedures set forth in the IDEA?
 - b. Is the IEP developed through IDEA’s procedures reasonably calculated to enable the child to receive educational benefit?

The Supreme Court ruled if the two-part test is satisfied, then courts can expect no more.

6. A subsequent Supreme Court case more recently refined the FAPE standard. In *Endrew F.*, the Supreme Court stated: “*Rowley* sheds light on what appropriate progress will look like in many cases. . . Accordingly for a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’” *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (2017).

7. The IEP is the cornerstone of the IDEA that sets forth the FAPE that is offered to a child with a disability eligible to receive special education and related services under the IDEA. The failure of an IEP to address a child's educational needs will likely result in a denial of FAPE. *Forest Grove Sch. Dist. v. T.A.*, 52 IDELR 151 (2009).
8. The IEP must be drafted with sufficient information and detail about the amount of services that will be provided to a student so that the District's level of commitment to a student is clear. *71 Federal Register 46667*.
9. The IDEA requires that a properly constituted team develop a student's IEP. *34 C.F.R. §300.321*. The IEP for each student with a disability must state the projected date for beginning of the services and modifications, as well as the anticipated frequency, location, and duration of those services. *34 C.F.R. §300.320*. The IDEA and its implementing regulations require this level of specificity for supplementary aids and services as well as special education and related services.
10. The IDEA leaves it up to the district to designate the specific staff member to serve as its representative, provided the individual it selects meets the IEP requirements. According to various OSEP pronouncements, those people may include school psychologists and guidance counselors. *Letter to Cormany*, 34 IDELR 9 (OSEP 2000); and *Letter to Holloway*, 33 IDELR 101 (OSEP 1999).
11. As the IEP requirements are applied to the files reviewed in this complaint investigation, and based on the totality of the information reviewed, the following conclusions are warranted:
 - a. Although IEPs may have been drafted by properly constituted IEP teams, the District failed to implement the IEPs as written. Instead, the District created and implemented a separate approval process that takes place entirely outside of the team process.
 - b. It is clear that 16 of the 87 files reviewed in the random sample identified the need for "adult support" or "para support." However, none of the 16 files documented the frequency, duration, or location of the service to be provided by the District.
 - c. The IEPs of the 16 files with paraprofessional support in the random sample do not provide the parents with sufficient specificity or notice regarding the District's commitment of resources on behalf of students.
 - d. Even after administrative approval of the para support, it took weeks or months for the District to implement an IEP as drafted by the team due to the hiring process.
12. Prior Written Notice must be provided to the Parent a reasonable time before the District proposes or refuses to initiate or change the identification, evaluation, educational placement, or the provision of FAPE to the Student.

13. Inclusion of paraprofessional support in a student's IEP is a component of FAPE. Therefore, the initial proposal and any amendments to FAPE require PWN.
14. As applied to the 184 files reviewed, five files documented the need for a paraprofessional, or evidenced any consideration of paraprofessional service in the PWN. The District failed to meet its burden of providing PWN when proposing or amending paraprofessional support on behalf of students in 179 of the files reviewed.

DECISION

The Special Education Director or designees participating in IEP meetings as the agency's representative do not have the authority to commit the District's resources to provide supplementary services from a paraprofessional in the general education setting because funding for such services is subject to approval by application, committee, designated administrator, or some other mechanism following the IEP meeting during which the IEP was developed, in violation of 34 CFR § 300.321(a)(4) and ECEA Rule 4.03(5)(a).

CDE finds a violation. The separate approval process removes the paraprofessional decision, including start date, frequency, duration, and location, from the IEP team members and results in an administrative veto or override.

The District determines the provision of supplementary services from a paraprofessional outside of the IEP meeting and fails to provide prior written notice of the decision to approve or deny such services.

CDE finds violation. The District has utilized a process of determining IEP services outside of the team process. As a result, the Parent is not provided with PWN for decisions regarding paraprofessional support.

The District's process for approving funding for supplementary services from a paraprofessional unreasonably delays implementation of the IEP.

CDE finds a violation. The paraprofessional approval process sometimes took months to complete. Once completed, the recruitment hiring process commenced. The result of this combined process is that students wait weeks and months to receive the service of a paraprofessional as outlined in their IEPs. This constitutes a material implementation failure.

The District failed to clearly specify the nature, type, frequency, location, and duration of supplementary aids and services to be provided by preventing paraprofessional services from being added to the service delivery statement through application of its IEP software system.

CDE finds a violation. When paraprofessional services are noted, it is in very general terms and does not provide sufficient information regarding the frequency, duration, or location of the service.

The District fails to clearly specify the nature, type, frequency, location, and duration of supplementary aids and services to be provided by prohibiting IEP teams from specifically identifying paraprofessional support on an IEP and requiring such services be described by using phrases such as adult support, line of sight supervision, or other similar phrasing identified in the Complaint.

CDE finds a violation. The nature, type, frequency, duration or location of service is not clearly specified in student IEPs.

CORRECTIVE ACTION REMEDIES

1. By August 15, 2018, the District must submit to the Department a proposed corrective action plan (CAP) that addresses the violations noted in this Decision.
2. By August 30, 2018, the District shall submit a detailed plan to CDE for eliminating the paraprofessional approval process and supporting implementation of the IEP team's decision. The CDE will approve the plan or require revision.
3. Upon approval of the plan by CDE, and no later than September 24, 2018, the District shall send a memo to all special education administrators, case managers, and building level administrators affirming that no further approvals are needed once an IEP team determines that paraprofessional support is needed.
4. By October 30, 2018, the District shall review and amend the IEPs of the 97 students with known paraprofessional support and the 16 students from the random sample to specify the type, amount, frequency, duration, and location of paraprofessional services as follows:
 - a. The IEP amendment process may be utilized to effect the change (unless convening the IEP team is separately warranted);
 - b. The amount, frequency, and duration of services of the amended IEPs must be documented in the service delivery statement section of the IEP.
 - c. The District must upload the service delivery statement/page of each amended IEP to the DMS for independent verification by the CDE.
 - d. PWN shall be issued to parents providing notice of the amendment a reasonable amount of time prior to implementation. The District must upload a copy of the PWN for each amended IEP to the DMS.

CONCLUSION

The Decision of the SCO is final and is not subject to appeal. If either party disagrees with this Decision, their remedy is to file a Due Process Complaint, provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *See*, 34 CFR § 300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 156, 46607 (August 14, 2006).

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

Dated this 1st day of August, 2018.

A handwritten signature in blue ink, appearing to read "Lenore Knudtson", written over a horizontal line.

Lenore Knudtson
CDE assigned investigator