

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

State Level Complaint 2008:502

Douglas County School District RE 1

Decision

INTRODUCTION

This Complaint dated January 21, 2008, was filed by Student's parents (hereafter, the "Complainants") and was received in the office of the State Complaints Officer on February 1, 2008. The Complaint attached voluminous documentation pertaining to Student's special education eligibility from Student's Individualized Education Program ("IEP") developed on April 12, 2007, and subsequent IEP meetings held on July 24, 2007, and August 23, 2007, and also copies of e-mail correspondence. The Complaint and attachments were transmitted by certified mail to Douglas County School District RE 1 (hereafter, the "District") on February 11, 2008, and receipt thereof was acknowledged by District mail room staff on February 12, 2008. The transmittal also designated those issues to be investigated subject to the authority of the state complaint process.

When no response was timely received the State Complaints Officer contacted the District to verify that none had been sent. On March 27, 2008, Associate Legal Counsel for the District verified that the Complaint and transmittal had been lost between the mail room and the addressee, District Director of Special Education Programming, Mr. Liberatore. On March 28, 2008, the District requested an extension of time in which to submit a response. After permitting the Complainants to submit an opposition to the District's request, the State Complaints Officer found good cause existed for an extension and issued a directive granting the request on March 31, 2008. The extension clearly specified that the District's response had to be "sent by overnight mail (for Saturday delivery on April 5, 2008)" to the Complainants and their advocate. Alternative means for delivery were also permitted, given that Complainants live less than five miles from the District offices, so long as delivery occurred no later than April 5, 2008. The District sent its response via US Postal Service Overnight Mail on April 4, 2008. Records provided by the District indicate that delivery to Complainants was attempted on April 5, although actual delivery did not occur until April 8, 2008. As to the package mailed to Complainants' advocate, delivery was not attempted until April 7, with actual delivery accomplished on April 8, 2008. While the efforts of the District demonstrate a good faith effort to comply with the terms of the extension, the actual delivery of the response

materials on April 8, 2008, failed to substantially comply with the letter of March 31, 2008. Therefore the response of the District was deemed untimely and was not considered by the Complaints Officer. A reply from Complainants was faxed by their advocate on April 11, 2008, and acknowledged by the signature of Student's mother on April 14, 2008. The record was closed in this matter on April 14, 2008.

ISSUES

Whether the IEP team meetings held on July 24, 2007, and August 23, 2007, included all required members and whether information provided by Student's family was considered and documented by the respective IEP teams.¹

CONTENTIONS OF THE PARTIES

The Complainants allege that the IEP meeting on July 24, 2007, did not include a District administrator or designee with appropriate authority. Additionally, Complainants feel that their concerns regarding the criteria for Extended School Year (hereafter, "ESY") eligibility and Student's need for ESY services were not considered by the IEP teams.

As noted above, the untimely response of the District was not considered.

FINDINGS OF FACT

1. Student is an [AGE] year-old male residing within the boundaries of the District and eligible for special education in the category of [DISABILITY].
2. Student attends [GRADE] at an elementary school in the District. His school is on a year-round track system such that Student has four breaks annually of between 3-5 weeks each.
3. On April 12, 2007, the District convened an IEP team meeting to determine Student's eligibility for special education and the provisions of an appropriate individualized program. Complainants' advocate, Mr. Michael Kaczor of New Mexico, attended this IEP meeting. Relevant to the issues in this matter, the IEP team deferred the determination of Student's eligibility for ESY services during breaks. Pursuant to the IEP document, the issue of ESY was to be determined by July 25, 2007.

¹ The Complaint also alleged that Student's educational program failed to meet the substantive requirements of a free appropriate public education. The State Complaints Officer advised Complainants in a letter dated February 11, 2008, that such issues are beyond the scope of a state-level complaint and must be raised by a due process request.

4. On July 17, 2007, the District provided Complainants with Notice of an additional IEP meeting to be held on July 24, 2007, for the purpose of determining Student's ESY eligibility. The notice indicates the persons (by description of their positions) slated to attend and makes clear that the parents may contact the District to reschedule the meeting if the appointed time and place are not convenient.
5. The extensive e-mail correspondence attached to the Complaint contains no request to reschedule the meeting. The Complaint, itself, states that the intention of Student's parents was "to see how the School District would treat us without [the advocate's] presence.
6. Student's mother attended and participated in the IEP team meeting on July 24, 2007. From the District, the following persons participated: Ms. Tammy Lehn, SLP; Mr. Ben Lauston, Student's teacher; Ms. Connie Knaupp, special education director/designee; and Ms. Julie Browning, administrative intern/facilitator.
7. There is no indication in the record that Complainants requested the attendance and/or participation of any other persons.
8. There is no indication in the record that Ms. Browning, an intern, possessed authority to commit District resources or make building level decisions regarding service delivery. No other District participant was designated as a building level representative.
9. The proceedings of the IEP team meeting were recorded in the form of a two-page narrative attached to a copy of Student's IEP document. Ms. Kaupp described the District's ESY policy as a "regression and recoupment model." The team reviewed data pertaining to Student's reading ability which was the primary area of concern. Student's mother expressed concern that Student takes two steps forward when on track, then one step back when he is off track. She also stated that there were specific factors arising out of Student's dyslexia that should be considered in determining ESY eligibility. Ms. Kaupp committed to provide Complainants with the District's written policy on ESY eligibility.
10. The result of the July 24, 2008 IEP team meeting was that more data needed to be gathered regarding Student's abilities as they pertained to meeting the ESY criteria. A further meeting was specified to occur by August 24, 2008.
11. On July 25, 2007, Student's mother sent an e-mail to Ms. Kaupp questioning why the probability of future regression, rate of progress, and Student's unique characteristics (criteria contained in the District's eligibility policy) were not considered at the meeting on the previous day. She also expressed her feeling that she was not considered part of the IEP team and that the "decision" was made prior to the meeting. Ms. Kaup responded the same day by stating that the IEP team had reached no decision and would meet again after collecting more data. In further e-mail correspondence to Ms. Kaupp that day,

Student's mother highlighted additional factors she wished the team to consider regarding ESY eligibility, including: emerging skills and breakthrough opportunities, the length of time that Student takes to learn a skill, and whether interruption of services would be detrimental to Student's continued progress.

12. On August 8, 2008, Student's teacher, Mr. Lauston, sent an e-mail to Student's parent advising that a further IEP meeting had been scheduled for August 23, 2007, with the purpose of continuing conversations regarding ESY and sharing/discussing data being collected regarding Student's progress toward his goals. The e-mail invited Complainants to respond with any agenda items they wished to add so that Mr. Lauston could "make sure that we address those points." Student's mother responded that she did not think that the team would have time to discuss other matters.

13. Also on August 8, 2007, Ms. Kaupp sent to parents a Notice of the IEP meeting scheduled for August 23, 2008, with one agenda item: ESY. The notice contained the same additional information as that noted in Finding of Fact No 4. A corrected Notice was sent to Complainants on August 13, 2007, changing the location of the IEP team meeting in response to concerns expressed by Complainants.

14. There is no indication in the record that Complainants requested any change of the date of the meeting or the persons slated to attend.

15. Student's parents attended and participated in the IEP team meeting on August 23, 2007. From the District, the following persons participated: Ms. Tammy Lehn, SLP; Mr. Ben Lauston, Student's teacher; Ms. Connie Knaupp, special education director/designee; Ms. Cheryl Ann Smith as building principal/designee; and Ms. Julie Browning, administrative intern.

16. At the time of the meeting, Complainants had a copy of the District's written policy regarding ESY eligibility. The policy recites the following characteristics as suggestive of a student's potential need for ESY services: regression to an extent that he or she will be unable to regain the losses within a reasonable amount of time following the return to school after an extended break; significant loss of mastered skills; or extraordinary or irretrievable educational, emotional, social or physical reversals. The policy also lists the following eligibility factors: the probability of future regression based on data and objective opinion; the ability of the family to maintain the student's current skill level while the student is off-track so that regression does not occur; the child's rate of progress or continuous lack of progress; appropriateness of the student participating in an off-track academic program; and any other characteristics unique to the individual child. The policy further states that the IEP team should review the Student's IEP, and pay particular attention to evidence and data that has been collected during school breaks relevant to Student's regression and rate of recoupment. A student is not necessarily ineligible for ESY if there is no evidence of regression or an unreasonable rate of

recoupment. The likelihood of future regression is sufficient to support a finding of ESY eligibility.

17. These considerations formed the framework of the August 23, 2007 meeting. The IEP document developed during the meeting reflects the consideration of new data relative to Student's progress toward his IEP goals and objectives. The team also attached a two-page document entitled "Staffing Team Consideration of ESY Eligibility" that recorded Student's recent reading data and the following determinations:

- "[Student] came back from break close to where he was when he went off track."
- "Within 3-4 [weeks] performing at or above where he was when he tracked off."
- "No regression noted at this time—no indication of regression in the future."

18. Based on the above findings, the IEP team concluded that Student was not eligible for ESY services. Complainants signed the document but noted that they disagreed with the policy to only consider regression-recoupment in determining eligibility.

19. In subsequent e-mail correspondence with District personnel, Complainants did not indicate that their concerns had not been considered by the IEP team. On August 29, 2007, Student's mother wrote to Ms. Kaupp that "the IEP looks good."

CONCLUSIONS OF LAW

The federal requirements regarding composition of an IEP team are set forth in 20 U.S.C. §1414(d)(1)(B) and 34 CFR §300.321. Prior to December 30, 2007, the more specific Colorado requirements were contained in ECEA Rule 4.02(3)(a) for the development of an initial IEP or for the review of an IEP based on reevaluation and determination of disability and eligibility. Relevant to the issues here is the mandated participation of "the director of special education or designee who is knowledgeable about the availability of resources of the administrative unit and has the authority to commit those resources" and "persons with authority to make building level decisions." 2220-R-4.02(3)(a)(iv) and (v).

Here, the meetings on July 24, 2007, and August 23, 2007, were continuations of Student's initial IEP meeting on April 12, 2007, as the document developed then left the issue of ESY eligibility open and "to be determined." As such, the above-referenced regulatory provisions apply to the composition of the IEP team in July and August. With respect to the meeting on July 24, 2007, there is no indication in the record that any participant from the District had authority to make building level decisions. (FF No. 8) It is beyond doubtful that an administrative intern had such real authority in the absence of the building principal or vice principal. Accordingly, the IEP team meeting of July 24, 2007, lacked a required participant. However, as no decision was reached regarding Student's ESY eligibility at that meeting, the failure to include a building level representative is not a matter of substantial noncompliance in this case.

Turning to the August 23, 2007 meeting, the inclusion of Ms. Smith (FF No. 15) remedied the omission of a building representative noted at the July meeting. Ms. Kaupp participated in both meetings and represented herself as the designee of the special education director. Review of the extensive correspondence between Complainants and Ms. Kaupp furnishes ample evidence that she was the primary point of contact at the District regarding Student's special education program. Therefore, there is no basis in the record for concluding that she was not authorized to serve in the capacity in which she is listed.

Meaningful participation of parents is essential to the success of the IEP process and special education as a whole. 34 C.F.R. §300.501(b). In enacting the Individuals with Disabilities Education Act, Congress stated its specific intent to strengthen the role and responsibility of parents to ensure such meaningful participation. 20 U.S.C. §1400(c)(5)(B). One aspect of meaningful participation is adequate notice of an IEP team meeting and flexibility in the scheduling and agenda creation for such meetings. 2220-R-4.02(5)(a). Parents also have the right to designate additional IEP team participants at their discretion to ensure that the team has the benefit of necessary knowledge or expertise. 2220-R-4.02(3)(a)(vii)). Parents are full-fledged IEP team members and when resolving agenda items, IEP teams must consider parent input. 2220-R-4.02(6)(a).

In this case, the District provided adequate advance notice communicating the requisite level of flexibility. (FF No.s 3, 4, 5, 10, 12, 13, and 14). One or both of Student's parents attended the IEP team meetings in question. (FF No.s 6 and 15) Complainants clearly communicated their concerns regarding Student's ESY eligibility before, during and after the meetings and these concerns were heard by the IEP team. (FF No.s 9, 11, 12, 16, 17, 18, and 19) Clearly, Student's parents disagreed with the decision of the remaining IEP team members to deny ESY eligibility. But the issues in this case do not include whether Student needs ESY or whether the IEP team reached the correct decision based on the information available to it. Rather, the issue is whether parents had the opportunity to participate in a meaningful way, including having their input considered by the remaining team members. The evidence in this case establishes that they did.

REMEDY

Complainants established that the IEP team of July 24, 2007, was not properly composed, but failed to establish this as a matter of substantial noncompliance that justifies a remedy. Complainants did not establish violations with regard to the remaining issues. Therefore, no remedy is appropriate here.

CONCLUSION

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

Dated this 15th day of April, 2008.

Keith J. Kirchubel
State Complaints Officer