

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

State-Level Complaint 2010:512

Denver Public Schools

DECISION

INTRODUCTION

This is a pro se, state-level complaint (Complaint) dated 7/30/2010.

The Complainant is the mother of a child with a disability. In order to comply with federal privacy laws (i.e., the Family Educational Rights and Privacy Act (FERPA) and the Individuals with Disabilities Education Act (IDEA))¹ and to protect the anonymity of Complainant and her child, hereafter, the persons and locations identified in conjunction with the Complaint investigation and Decision will be abbreviated as follows and redacted prior to publication:

- [Mother or Parent], Complainant, [Mother or Parent];
- [Father] [Father];
- [Student] [Student];
- [Student's] age of [Age] [Age];
- [Charter School] [Charter School];
- Denver County School District No. 1 [DPS];
- [Administrative Unit of Residence] [Administrative Unit of Residence];
- [DPS Special Education Director], District Director of Special Education [DPS Special Education Director];
- [Principal], [Charter School] Principal [Principal];
- [DPS Program Manager], District Special Education Program Manager for Charter Schools and Special Education Director Designee [DPS Program Manager];
- [General Education Teacher], [Charter School] Literacy Coordinator/General Education Teacher [General Education Teacher]; and
- [Special Education Teacher], [Charter School] Special Education Teacher [Special Education Teacher].

The Complaint was filed on the Colorado Department of Education's (CDE's) model state complaint form. Attached to the complaint form were a 12 page complaint letter and five

¹ FERPA, codified at 20 U.S.C. § 1232g, was enacted in 1974 to protect a parent's access to education records and to protect the privacy rights of students and their parents. The IDEA regulations are found at 34 C.F.R. § 300.1, et seq.

attachments that were subsequently numbered by the State Complaints Officer (SCO) as Exhibits 1 through 5.

The SCO determined that the Complaint identified five (5) allegations subject to the jurisdiction of the state-level complaints process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153.² The SCO has jurisdiction to resolve the Complaint pursuant to these regulations. The timeframe of the investigation is limited to violations occurring between the dates of 7/30/2009 and 7/30/2010.³

The overriding issues and, therefore, the scope of the investigation identified by the SCO, between the dates of 7/30/2009 and 7/30/2010, are as follows:

1. Whether DPS violated the following IDEA Part B regulations: 34 C.F.R. § 300.322 (a) through (b) (1) (ii) (prior notice of meeting requirements); § 300.503 (prior written notice requirements); § 300.324 (IEP review requirements); and §§300.114 - 300.116 (least restrictive environment requirements) in connection with the 8/6/2009 IEP Team meeting; and
2. If so, whether any such violations resulted in the DPS' refusal to admit [Student] to [Charter School] and thereby denied [Student] a free appropriate public education (FAPE) in violation of the IDEA, 20 U.S.C. § 1400 *et seq.* and its implementing regulations at 34 C.F.R. Part 300.

[DPS Special Education Director] was notified of [Parent's] allegations via letter dated 8/04/2010. The letter included a complete copy of the Complaint, including all Exhibits. DPS received the Complaint on 8/5/2010. DPS' Response was due on 8/20/2010. On 8/20/2010, DPS timely submitted its Response to the CDE. The Response included a cover letter and Exhibits lettered A through I.

On 8/21/2010, [Parent] received DPS' Response via USPS overnight mail. [Parent's] Reply was due on 8/31/2010. On 8/30/2010, [Parent] timely submitted a Reply including Exhibits numbered 6 through 10.

On 9/07/2010, the SCO requested additional information from DPS. The additional information was submitted timely to the CDE by DPS on 9/15/2010 and was lettered Exhibit J, the pages of which the SCO numbered consecutively.

In conjunction with the investigation, on 9/17/2010 the SCO interviewed the following individuals: [Principal], [DPS Program Manager], [Special Education Teacher] and [General Education Teacher]. During the interviews, the SCO requested additional information from DPS to the extent that such information still existed. On 9/24/2010, DPS submitted a letter and related attachments to the SCO indicating that the requested information was not found or was

² Hereafter the IDEA regulations will be referred to by regulation number, e.g., § 300.000.

³ The SCO's authority to investigate is limited to alleged violations that occurred not more than one (1) year prior to the date that the Complaint is received. See, § 300.153(c).

not relevant to the investigation. The letter with related attachments has been lettered Exhibit K by the SCO.

On 9/21/2010, the SCO interviewed [Parent] and requested additional information to the extent that such information still existed and was readily available. On that same date, [Parent] provided [Student's] Grade 5 Report Card for the 2008-2009 school year, which the SCO has numbered Exhibit 11.

On 9/24/2010, the SCO interviewed [Father].

On 9/24/2010 at 5:00 PM, the SCO closed the record.

THE PARENT'S COMPLAINT ALLEGATIONS

[Parent's] Complaint concerning the 8/06/2009 meeting contains five allegations that are summarized below:

1. DPS failed to provide the required meeting notice prior to the 8/06/2009 IEP Team meeting in violation of 34 C.F.R. § 300.322;
2. In conjunction with the 8/06/2009 IEP Team meeting, DPS failed to consider [Student's] individualized needs because it reviewed only the services delivery page of the Student's 5/09/08 IEP in violation of 34 C.F.R. §300.324;
3. In conjunction with the 8/06/2009 IEP Team meeting, DPS refused to consider educating [Student] in the least restrictive environment (LRE) in violation of 34 C.F.R. §§ 300.114-300.116;
4. When DPS denied [Student] enrollment at [Charter School], DPS failed to provide the parents with prior written notice and the procedural safeguards notice in violation of 34 C.F.R. § 300.503;
5. In refusing to enroll [Student] at [Charter School], DPS denied [Student] a FAPE for the 2009-2010 school year in violation of 34 C.F.R. § 300.101, et seq.

Proposed Remedy:

[Parent] proposed that DPS or [Charter School] be required to: (a) provide compensatory education to [Student] for the 2009-2010 school year; and, (b) develop a Corrective Action Plan (CAP) to remedy the IDEA violations.

DPS' RESPONSE

DPS denies the Parent's allegations. DPS summarized its Response as follows:

1. “[DPS] provided appropriate notice of the [08/06/2009] IEP meeting pursuant to 34 C.F.R. § 300.322(a) (1).”
2. “[DPS] conducted a thoughtful and thorough review of the Student’s individual needs during the IEP meeting on August 6, 2009.”
3. “[DPS] appropriately concluded that given the unique needs of the Student, the Student could not receive a FAPE at the School and appropriately concluded that the School was not [Student’s] least restrictive environment, considering the factors identified in 34 C.F.R. § 300.116.”
4. “[DPS] provided prior written notice and procedural safeguards to [Parent] per 34 C.F.R. § 300.503.”
5. “[DPS] did not deny FAPE to the student when it denied enrollment at the School for the 2009-10 school year. Instead, it complied with state school of choice law at C.R.S. § 22-36-101.”

THE PARENT’S REPLY

In her Reply, [Parent] reiterated the allegations set forth in the Complaint, denied numerous factual assertions set forth in the District’s Response, and provided additional information in support of her allegations.

FINDINGS OF FACT

After thorough and careful analysis of the entire Record,⁴ the SCO makes the following FINDINGS:

1. At all times relevant to the Complaint, [Student] was [Age] years of age and eligible for special education and related services on the basis of a physical disability involving Williams Syndrome, a rare neurodevelopmental disorder which results in physical and developmental delays.
2. At all times relevant to the Complaint, [Student] lived within the boundaries of [Administrative Unit of Residence] and was not a resident of DPS.
3. At all times relevant to the Complaint, [Student] was educated in a non-public home-based educational program consistent with Colo. Rev. Stat. § 22-33-104.5 and was not enrolled in [Administrative Unit of Residence].
4. At all times relevant to the Complaint, [Charter School] was a charter school authorized by DPS. [Charter School] is a school of choice within DPS.

⁴ Appendix A, attached and incorporated by reference, details the entire Record.

5. The Charter Contract between DPS and [Charter School] provided in relevant part:

When a student with disabilities... who has intensive service needs as identified by an IEP Team applies for admission into a charter school or a program that does not have the staff or services available to meet the needs identified on the IEP, the principal of the charter school shall convene an IEP Team meeting. The student's application for admission is contingent upon the determination by the IEP Team that the student can receive a free appropriate public education ("FAPE") in the least restrictive environment at the charter school in its existing programs and at its current level of staffing. If the determination is that FAPE is not available, the student's application for admission will be denied and the student's current placement will remain as determined by the prior IEP Team meeting, unless changed at the charter school IEP Team meeting. Representatives from the student's prior school will be invited to participate in the IEP Team meeting at the charter school. Additionally, an application for attendance at a charter school may be denied for a student seeking placement in a charter school in the same manner and for the same reasons such application may be denied for a student without disabilities.⁵

6. The Contract provided that students with disabilities having mild/moderate needs would be served at [Charter School].⁶ The Contract also provided that a student with a disability having intensive service needs would be admitted to [Charter School] *only if* the IEP Team convened by its principal determined that the student could receive a FAPE in the LRE at the [Charter School] in its existing programs and at its current staffing levels. These Contract provisions mirrored DPS' general policies that were applicable to the admission of student with disabilities to DPS' schools of choice, including its traditional schools and its charter schools.⁷

7. Per DPS' budget guidelines (Budget Guidelines) for Mild/Moderate Resources for the 2009-2010 school year, each school was required to hire a minimum of a 1.0 FTE for a Mild/moderate teacher. Middle schools and grades 6-12 were required to maintain a mild/moderate pupil teacher ratio of 20:1 across the mild/moderate program. Special education staffing levels and expenditures were required to be sufficient to ensure that every enrolled student with an IEP received a FAPE.⁸

8. The 2009-2010 school year was the first year of operation for [Charter School] with enrolled students. Consistent with the Budget Guidelines, [Charter School] had hired [Special Education Teacher] on a full-time basis to serve students with mild/moderate disabilities. As of 8/6/2009, the projected enrollment of students with mild/moderate needs at [Charter School] was fifty (50) students⁹ and 30 students had been accepted.¹⁰ Final resource allocation decisions were

⁵ Exhibit G at pages 7-8

⁶ Exhibit G at pages 7-8

⁷ Exhibits 4 and E at pages 41-42

⁸ Exhibit 10 at pages 1-2; Exhibit J at pages 25-26

⁹ Interview with [DPS Program Manager]

¹⁰ Interview with [Special Education Teacher]

to be made after the school year began when the total number of students and their needs could be more precisely determined.¹¹

9. Prior to 7/30/2009, Parent submitted an on-line application for [Student] to attend [Charter School].

10. On 8/2/2009, [Special Education Teacher] called [Parent] to schedule a meeting. During that telephone call, a meeting was mutually scheduled for the evening of 8/6/2009 at [Charter School], a mutually agreed upon location. By the end of the telephone call, [Parent] and [Special Education Teacher] both understood that [Student] and [Student's] parents would be attending the meeting.

11. As of 8/2/2009, [Parent] understood that the purpose of the 8/6/2009 meeting was to discuss the status of [Student's] application to [Charter School] and whether supports would be available for [Student] at [Charter School]. [Parent] understood that [Student's] application for admission had not yet been accepted. [Father], based on information provided by [Parent], thought that the purpose of the meeting was to meet [Principal] and to discuss [Student's] opportunities at the school. The parents did not understand that the meeting was an IEP Team meeting.¹²

12. As of 8/2/2009, [Principal], [Special Education Teacher] and [Program Manager] understood that the meeting was an IEP Team meeting, the purpose of which was to determine whether [Charter School] could provide [Student] a FAPE within the school's existing resources.¹³ Prior to 8/6/2009, [Regular Education Teacher] understood that the 8/6/2009 meeting was an enrollment decision meeting but he did not understand that it was an IEP Team meeting.¹⁴

13. Per DPS policy and the Contract, the 8/6/2009 meeting was an IEP Team meeting. The attendees at the 8/6/2009 meeting were: the parents; [Student]; [Principal]; [DPS Program Manager]; [Special Education Teacher]; and [General Education Teacher].

14. The SCO, however, specifically finds that the 8/6/2009 meeting was an enrollment decision meeting to determine whether [Student] would be admitted to [Charter School]. It was not a meeting to review or revise [Student's] IEP for purposes of ensuring that [Student's] IEP was sufficient to meet [Student's] needs. The 8/6/2009 meeting was not a meeting convened to determine [Student's] educational placement¹⁵ or the provision of FAPE to [Student].

¹¹ Interview with [DPS Program Director] and [Special Education Teacher]

¹² Interviews with [Parent] and [Father]

¹³ Interviews with [DPS Program Manager], [Principal] and [Special Education Teacher]

¹⁴ Interview with [Regular Education Teacher]

¹⁵ The term "educational placement" means "the provision of special education and related services and does not mean a specific place or a specific school." Rules for the Administration of the Exceptional Children's Educational Act (ECEA Rules), 1 CCR 301-8, 2220-R-4.03 (8) (a); Analysis of Comments and Changes to the IDEA Part B Regulations, 71 Fed. Reg. 156, 46687 (August 14, 2006). Hereafter, the ECEA Rules will be referred to by Rule number only (e.g., ECEA Rule 1.00)

15. Prior to the 8/6/2009 meeting, neither DPS nor [Charter School] sent [Parent] a written notice of IEP Team meeting for the 8/6/2009 meeting. Due to the nature of the meeting (i.e., a school choice application/enrollment decision, and not an IEP development or review meeting), it was DPS' practice to provide verbal notice of such meetings via a telephone call.¹⁶

16. [Parent] brought to the 8/6/2009 meeting a copy of [Student's] 5/9/2008 IEP, which was developed by [Student's] IEP team while attending [Administrative Unit of Residence] during the 2007-2008 school year. Because [Student] was homeschooled beginning in January 2009,¹⁷ the 5/9/2008 IEP—although more than one year old—was [Student's] most recent IEP. [Parent] also brought written information regarding Williams Syndrome. The 5/9/2008 IEP and the other written information were circulated to the meeting attendees during the meeting.¹⁸

17. According to the 05/09/2008 IEP:¹⁹

- [Student's] strengths were in areas of (a) music and rhythm, and (b) relating to peers and adults in a school setting.
- [Student's] disability affected [Student] across multiple domains of educational and functional performance including the domains of cognition, communication (language and auditory processing), social/emotional functioning and physical motor functioning.
- [Student] had substantial educational needs, including needs for: improved skills in the areas of reading and listening comprehension, number sense and written language; improved understanding of spatial concepts (e.g., through/right/left); improved understanding of appropriate interactions with peers; improved understanding of grade level content vocabulary; and improved independence in demonstrating academic motor skills.²⁰
- [Student] had significant support needs. The 05/09/2008 IEP specified that [Student] was to receive “[direct] speech/language services and consult to address understanding of language concepts and social interaction, learning specialist for academic support, and occupational therapy consult.” The IEP made multiple references to [Student's] need for visual and verbal prompting, repeated directions and the need for teacher and other adult support.²¹ The IEP specified that the student was to receive 28.25 hours per week of special education and related services support.²²
- The 05/09/2008 IEP specified numerous accommodations and curricular modifications as well as the use of multiple kinds of assistive technology equipment and software programs.²³

¹⁶ Interview with [DPS Program Manager]

¹⁷ Reply at page 3; interview with [Parent]

¹⁸ Interview with [Regular Education Teacher]

¹⁹ Exhibit 1

²⁰ Exhibit 1 at pages 7, 9, 10 and 18

²¹ Exhibit 1 at pages 3, 4, 5, 6, 7, 9 and 18.

²² Exhibit 1 at pages 32-33

²³ Exhibit 1 at page 32

- The LRE specified by the 05/09/2008 IEP was “[inside] the Regular Class at Least 80% of the Time.” The special education and related services specified by the IEP were to be delivered to the student within the general classroom.²⁴

18. Per the 5/9/2008 IEP, [Student] was a student with significant, and not moderate, support needs.²⁵

19. During the 08/06/2009 meeting, the following topics were discussed:²⁶

- [Charter School’s] mission, curriculum, programming and structure;
- [Student’s] educational and functional needs
- Possible reduction of [Student’s] special education services, including the elimination of speech language and occupational therapy services;
- [Student’s] general need for accommodations and curricular modifications, and particularly [Student’s] need for modification of [Charter School’s] math curriculum, including the possible use of an alternative to the math curriculum such as a basic math skills software program;
- [Student’s] socialization needs;
- [Student’s] needs for teacher/adult/paraprofessional supports vs. the use of differentiated instruction, assistive technology and peer supports before utilizing adult supports;
- Full inclusion of [Student] in the general education classroom; and
- [Charter School’s] ability to meet [Student’s] needs in order for [Student] to receive a FAPE within [Charter School’s] existing resources.²⁷

20. [Parent] and [DPS Program Manager] did much of the talking during the 8/6/2009 meeting.²⁸ Parent participated meaningfully at the meeting.

21. During the meeting, [DPS Program Manager] gave the parents a brochure entitled “Traditional Choice Application Students with Disabilities.”²⁹ The brochure set forth DPS’ policy regarding how decisions would be made on the applications of students with disabilities seeking admission to DPS’ schools of choice.

22. At the conclusion of the meeting, [Principal] denied [Student’s] admission to [Charter School] because [Charter School] did not have the existing resources to meet [Student’s]

²⁴ Exhibit 1 at page 34

²⁵ Exhibit 1. See CDE Guidance regarding Students with Significant Support Needs at <http://www.cde.state.co.us/cdesped/SSN.asp>

²⁶ The parties disagree regarding the specific content of the meeting discussion. [DPS Program Manager] was the only participant who took notes at the meeting, but she was unable to locate her meeting notes for production to the SCO. [Parent] taped approximately the last 7 minutes of the meeting but was unable to locate the recording or a transcript of the recording for production to the SCO. During the witness interviews, all witnesses had difficulty recalling various details of the 8/6/2009 meeting due to the lapse of time.

²⁷ Complaint, pages 6-7; Interviews with [DPS Program Manager], [Principal], [Special Education Teacher] and [Parent]

²⁸ Interviews with [Program Manager], [Father], [Special Education Teacher], [Regular Education Teacher] and [Principal]

²⁹ Exhibits 4 and B

educational and support needs, including [Student's] need for considerable curricular modifications and specialized instruction, all of which implicated substantial teacher support.³⁰

23. Given [Student's] significant support needs, [Charter School's] actual enrollment of 30 students with mild/moderate needs as of 8/6/2009, and the availability of one special education teacher, the SCO specifically finds that [Charter School] lacked sufficient teaching staff at [Charter School] to support [Student].

24. The parents did not agree with the decision to deny [Student] admission to [Charter School]. [Parent] requested a written explanation for the decision.

25. On 8/20/2009, [DPS Program Manager] sent the parents a letter³¹ entitled "Prior Written Notice". The 8/20/2009 letter documented DPS' decision to deny [Student's] admission to [Charter School]. The 8/20/2009 letter references as an enclosure a copy of DPS' procedural safeguards notice and was sent by regular mail by [DPS Program Manager]. The prior written notice letter was based on [Program Manager/Special Education Director Designee's] notes taken at the 8/6/2009 IEP Team meeting.³²

26. The parents did not receive the 8/20/2009 prior written notice letter.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the SCO enters the following CONCLUSIONS OF LAW:

1. [Student] was at all times relevant to the Complaint a child identified with a disability and eligible for special education and related services.

2. "Administrative unit of residence" means the administrative unit in which the child resides on a day to day basis." ECEA Rule 2.02 (1). At all times relevant to the Complaint, [Student] resided in [Administrative Unit of Residence]. (Finding of Fact 2).³³

3. At all times relevant to the Complaint, [Student] was a nonresident pupil who made application to attend [Charter School] under Colorado's Public Schools of Choice laws. (FF 2 and 4). See Colo. Rev. Stat. § 22-36-101, et seq.

4. Under Colorado's Public Schools of Choice law, a school district may deny resident and nonresident pupils permission to enroll in a particular school if there is a lack of teaching staff within the school requested. Colo. Rev. Stat. § 22-36-101 (3) (a). [Charter School] did not have sufficient teaching staff to support [Student] within its existing resources. (FF 8, 17, 18, 22 and 23).

³⁰ Exhibit B; Complaint at page 7; Interviews with [Principal], [DPS Program Manager], [Regular Education Teacher] and [Special Education Teacher]

³¹ Exhibit B

³² Interview with [DPS Program Manager]

³³ Findings of Fact are hereafter referred to as "FF", (e.g., FF 2)

5. DPS' decision to deny [Student] admission to [Charter School] was a school choice admission decision made pursuant to state public schools of choice laws. The state public schools of choice laws are separate from and not incorporated within the IDEA. *Cherry Creek School District No. 5*, 102 LRP 11593, 5 (CO SEA 2000) (holding that the IDEA's scope does not extend to Colorado's school choice laws).

6. Because the decision made at the 8/6/2009 meeting was a school choice admission decision made pursuant to state public schools of choice laws, and not an IDEA decision, the IDEA's legal requirements were inapplicable. Accordingly, the SCO concludes that DPS did not violate the IDEA with regard to the decision to deny [Student] admission to [Charter School].

7. As of the 8/6/2009 meeting, [Student] was being homeschooled. (FF 3). Had [Student] been enrolled in [Administrative Unit of Residence] during the 2009-2010 school year, that administrative unit would have been responsible for providing [Student] with a FAPE in the LRE. ECEA Rules 2.02 (2), 8.01 (1) and 8.02 (1).

REMEDIES

Having found no violation of the IDEA, the SCO orders no remedies.

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 C.F.R. § 300.507(a) and Analysis of Comments and Changes to the IDEA 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 28th day of September, 2010.

Laura L. Freppel, Esq.
State Complaints Officer

Appendix A
2010:512 Record

Complaint, State Complaint form, pgs. 1 and 2 and Letter of 07/30/2010, pgs. 1 through 12.

- Exhibit 1 IEP of 05/09/2008
- Exhibit 2 [Charter School] Proposal Overview & Enrollment Projection (select pages of document)
- Exhibit 3 [Charter School] website (select pages of website)
- Exhibit 4 DPS Brochure entitled Traditional Choice Application Students with Disabilities
School Year 2009-2010
- Exhibit 5 Various published articles and DPS 11/2009 Report of Student Membership by Grade
Level for 2009 – 2010

Reply, pgs. 1-8

- Exhibit 5 Denver Post Article “Colorado’s charter schools enroll fewer needs” (6/13/2009)
- Exhibit 6 Email from [Parent] to [Principal] dated 7/28/2009
- Exhibit 7 Email from [Parent] to [Father] dated 8/2/2009
- Exhibit 8 [Charter School] Application Proposal
- Exhibit 9 Article *Peer Mediated Instruction and Intervention* (Hall, T. 11/13/2009)
- Exhibit 10 Excerpt from DPS Budget Guidance Manual, pgs. 23 – 24 (2/6/2009)

Additional Documentation Supplied by [Parent]:

- Exhibit 11 Grade 5 Report Card for [Student] 2008 – 2009 School Year

Response

- Exhibit A Written Response
- Exhibit B Prior Written Notice Letter (8/20/2009)
- Exhibit C DPS Policy IHBA – Youth with Educational Disabilities
- Exhibit D [Cross-Reference to Exhibit C]
- Exhibit E Policy JC-R Secondary-Pupil Assignment Procedures-Secondary
- Exhibit F [No responsive document]
- Exhibit G Charter School Contract between DPS and [Charter School]
- Exhibit H [Cross-Reference to Exhibits E and G]
- Exhibit I List of knowledgeable DPS and [Charter School] staff

Additional Documentation Supplied by DPS

- Exhibit J Cover letter dated 9/15/2010 from [DPS Legal Counsel] to [SCO]
2009-2010 DPS Budget Guidance Manual
Document *Envisions Strategy for Identifying and Serving Students with IEPs*
- Exhibit K Cover letter dated 9/24/2010 from [DPS Legal Counsel] to [SCO] and various
attachments

Witness Interviews

9/17/2010

Face to Face Interviews
DPS Legal Counsel was present at all interviews
[Principal]
[DPS Program Manager]
[Special Education Teacher]
[General Education Teacher]

9/21/2010

Telephone Interview with [Parent]

9/24/2010

Telephone Interview with [Father]