

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

Federal Complaint 2002:519

Park SD R-3

Decision

INTRODUCTION

This Complaint was dated July 18, 2002, and filed July 22, 2002. The school district's response was dated August 16, 2002, and received on the same date. The complainants' response to the school district's response to their Complaint was dated August 28, 2002, and received on September 4, 2002. The Federal Complaints Officer then closed the record.

COMPLAINANTS' ALLEGATIONS

The Federal Complaints Officer is stating the violations of law as they were stated by the complainants. Only personally identifiable information has been deleted.

We allege that [director of special education], representing the Park R-3 School District denied the IEP team the choice of service providers by instructing them that there is no choice in this district (“[Proper first name] is the professional who provides motor services for our district.”) Thus IEP team members were told to provide services based upon staff availability and not upon our child's unique needs, thereby violating IDEA [20 U.S.C. § 1400 (d) (1) (A)].

“... all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living...”

Additionally we allege that occupational therapy is not the same as physical therapy and that each service outlined in IDEA Part A Section 1401 Definitions must be available to children with needs for such a service:

“(22) Related Services – The term ‘related services’ means transportation, and such developmental, corrective, and other supportive services including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation...”

We further allege that the district is using an unsupervised physical therapist to offer “occupational therapy”, without a license or registration in the field of occupational therapy, a violation of IDEA Regulations, 34 C.F.R. Section 300.23 (definition of Qualified personnel).

“As used in this part, the term *qualified personnel* means personnel who have met SEA-approved or SEA-recognized certification, licensing, registration, or other comparable requirements that apply to the area in which the individuals are providing special education or related services.”

Personally identifiable information deleted by the Federal Complaints Officer.
Bold and italics in originals.

SCHOOL DISTRICT’S RESPONSE

The school district denies all allegations.

FINDINGS AND DISCUSSION

On the one hand, the complainants are arguing that the school district has a policy of denying occupational therapy services to students who need them. Thus, as stated on the first page of the complainants’ response to the school district’s response to their Complaint:

...We want the district to follow the law by making the services of a qualified occupational therapist available as a viable choice for every IEP team to consider for any special education students in the district. None of the approximately 200 children with IEPs in the Estes Park School District are receiving occupational therapy. Common sense dictates that some of these children need occupational therapy. **It appears as though the district has engineered a process in which no child’s needs, goals, and objectives require the services of an occupational therapist.** The tape recordings of our March and May 2002 IEP meetings document the process that the district uses to deprive children in our district of the related services of occupational therapy and the failure to provide FAPE. Id. Bold and underlining added by the Federal Complaints Officer.

On the other hand, the complainants are also arguing that their son’s individual needs were not met. Thus, referring to the May 8, 2002 IEP meeting, the complainants state **“[Our son’s] unique needs were not even given a moment’s consideration** ... Our IEP team members were not even literate enough about special education to know that they are supposed to make placement decisions ... [The director of special education] states over and over again that there was going to be no choice for our son. And there was no choice. And the decision not to offer him a choice was made by school administrators even before the meeting was held. This demonstrates a total disregard for the IDEA.” Complainants’ response at page two (2). Personally identifiable information deleted by the Federal Complaints Officer. Bold and

underling added by the Federal Complaints Officer. The complainants go on to state **“We allege that the district violated the law by not permitting [our son’s] IEP team the opportunity of choosing occupational therapy as a related service. Each IEP team, for every child in the district, must have the opportunity to choose occupational therapy for any special education student for whom it is appropriate.”** **Id.** Bold and underlining added by the Federal Complaints Officer.

The complainants repeatedly state, in different ways, that what they want the school district to do, and what they believe the school district is illegally not doing, is to make an occupational therapist [OT], and OT services, “available” for their son, and for every student in the school district that needs such services, and needs them to be directly delivered by an OT. The complainants also repeatedly state, in different ways, that this does not mean that they are seeking, as the school district argues they are seeking, to dictate, in complainants’ words, “the provider of motor services”.

In order to make the of services of any employed person “available”, you either have to have the person on staff, or independently contract with such a person as necessary. The school district has no occupational therapist on staff. There is no legal requirement that it make such services “available” by having such a person on staff, and therefore the school district has violated no law by not having such a person on staff. The school district is legally obligated, as argued by the complainants, to have occupational therapy services “available” for special needs students if it is determined by the IEP team that the student needs such services. Occupational therapy services here being defined as services which can only be delivered directly by an OT, or under the supervision of an OT. However, there are some types of services which may be delivered either directly, or indirectly, by multiple professionals. For example, a school psychologist and a behavioral specialist may both participate in implementing behavioral modification techniques within a school district. The nature and extent to which one or the other of these professionals needs to participate in the implementation of such techniques, and the service delivery model which this participation dictates, is a decision for the IEP team to make. The professionals involved will also need to make certain, as will their school district employers, that these professionals have the necessary certification, or licensure, or education and experience to participate in the student’s education in the way the IEP team wants them to participate. On the facts of this Complaint, the Federal Complaints Officer does not find that any services are being provided by unqualified personnel. Concerns about whether such individuals have these qualifications, may also be addressed to the Colorado State Department of Education Licensing Division, which has jurisdiction and authority to address such concerns.

The heart of the complainants’ Complaint is that the school district is not making an OT, and OT services, sufficiently “available” because the school district has a policy of not letting this happen, and that this policy subverts the legal decision making authority of the IEP team. The complainants offer no school district written policy document which supports this argument. The complainants do point to statements made by the special education director, and the fact that, according to the complainants – “None of the approximately 200 children with IEPs in the Estes Park School District are receiving occupational therapy.” Complainants’ response at page one (1).

The Federal Complaints Officer finds nothing in the statements of the special education director, or in the allegation by the complainants that there are approximately two hundred special needs students in the school district and not one of them is getting occupational therapy, sufficient to sustain the complainants’ charge that the school district has a policy of denying students with

special needs necessary OT services. Whatever may be the view of specific members of the IEP team, ultimately, it is up to a person with designated authority by the school district to offer parents what the school district determines to be will be an IEP that provides a free appropriate public education (FAPE) for an eligible student. Usually, as is the case in this school district, that person will be the special education director. If the parents disagree, their relief is to request a due process hearing. As for the alleged 200 special needs students, and what their individual IEPs may or may not require, what the complainants are essentially arguing is that the alleged fact that none of these students is receiving OT, is, like their allegations interpreting the special education director's statements, evidence of a conspiracy in the school district's administration, and perhaps board governance, to deny occupational therapy services to students who need them. If complainants are going to sustain such a charge, they will need to do so in an evidentiary hearing where sworn testimony can be taken providing for the best opportunity possible for appropriate evidence to be developed. Independent of the due process hearing, designed to adjudicate individual disputes, the complainants are referred to private legal counsel of their own choosing for any other legal action they may be entitled to take. Also, the current appeal process for Federal Complaints provides for an evidentiary hearing, as necessary, as determined by the Administrative Law Judge.

REMEDY

Having found no violations by the school district, no remedy is ordered.

CONCLUSION

This Decision shall become final as dated by the signature of the Federal Complaints Officer. A copy of the appeal procedure is attached.

Dated today, September _____, 2002.

Charles M. Masner, Esq.
Federal Complaints Officer