

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

Federal Complaint 2005:515

Arapahoe County School District 5 (Cherry Creek School District)

Decision

INTRODUCTION

This Complaint was dated 08/23/05 and filed on 08/29/05. The response of the Arapahoe County School District 5 (District) was received on 09/21/05. Complainant's response to the District's response was received 10/11/05. On 10/20/05, the Federal Complaints Officer contacted the attorney for the District by telephone for additional information. Additional information via voice mail messaging was received from the District on 10/21/05. On 10/26/05, the Federal Complaints Officer contacted Complainant by phone and email for additional information and received additional information from Complainant via email on that same date. The Federal Complaints Officer closed the record on 10/27/05.

Complainant is the parent of student who has been identified as being a child with a disability.

ALLEGATIONS

Complainant has made the following allegations:

- 1) "[Student's] IEP does not state how often and how I am to be informed of progress toward [Student's] annual goals. I have not received any reports informing me of [Student's] progress toward [Student's] annual goals since November 8, 2004. [School] provides report cards to parents six times per year, and during the entire 2004/2005 school year, I only received one partial report informing me of [Student's] progress on [Student's] annual goals. I did receive some incomplete information during an IEP meeting held in February 2005, I have received no information regarding her progress since that time...These are violations of ECEA Rule 4.02(4)(f) and 24 (sic) C.F.R. § 300.347(a)(7)."
- 2) "The] IEP team made no determination as to which services were to be provided as Extended School Year ("ESY") services. This is a violation of 24 (sic) C.F.R. § 300.309 and the CDE ESY guidelines. [Student's] IEP states that [Student] is to receive ESY services, but there was never any discussion as to what those services would be, what goals were to be maintained, nor the frequency and duration of the services...I only learned what services were being provide 3/5 of the way through ESY after asking the ESY teacher what [Student] was doing during ESY...Despite an IEP meeting in February

and May of 2005, ESY services were never discussed, nor was any evaluation as to what those services would be conducted aside from a determination of eligibility.”

- 3) “[For] the ESY services that were provided during June, July and August 2005, [Student] did not receive services pursuant to [Student’s] communication and literacy plans. [Student] did not have ESY teachers trained in her modes of communication, nor did a speech language therapist, vision service provider and teacher collaborate to determine necessary adaptations and kinds of literacy materials to be used during ESY. This failure to comply with the communication and literacy plan is a violation of both ECEA and IDEA.”

THE DISTRICT’S RESPONSE

The District’s summary position regarding each allegation is set forth below.

Allegation 1

“It is the district’s position that, while there are no entries identifying the number of times and how the Charging Party would be informed of [Student’s] progress on identified special education goals, that [Student’s] progress was reported three official times during the 2004-2005 school year in November, late February and May, and that Charging Party received monthly reports from general education teachers, as well as daily/weekly email correspondence on [Student’s] progress from the special education teacher, in accordance with legal requirements.”

Allegation 2

“It is the district’s position that extended school year services were discussed at both the February and May IEP review meetings, and that [Special Education Teacher] had spoken to the parent about the summer school program, advising that the program would be split into two sessions, one in June and one in August, and discussing what academic goals would be reviewed. ESY forms were completed for the student and she did enroll in the June session of summer school and received educational services as directed under the ESY IEP.”

Allegation 3

“It is the district’s position that the appropriate staffing team members did give input at the respective IEP meetings in February and May [2005], and that the case manager completed the IEP forms in light of the recommendation that [Student] receive extended school year services in the area of educational goals, since this was the area wherein there would be significant regression. [ESY Teacher] reported progress on these goals to the parent at her request on or before the end of the first summer school session. It is believed that [Student] did not attend the second summer school session in August due to a family scheduling conflict.”

In a 10/21/05 voice mail message, the District provided the following information: There were no meetings or other collaboration between [Student’s] ESY teacher and [Student’s] regular school year service providers; the ESY teacher had no recollection about [Student’s]

communication and literacy modality plans; the ESY teacher communicated verbally with the student during the ESY services; and no sign language interpreter was present during the ESY services.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Federal Complaints Officer makes the following findings of fact and conclusions of law:

Allegation 1

34 C.F.R. Sec. 300.347¹ is the IDEA regulation which establishes the required content for the individualized education program (IEP). Sec. 300.347(a)(7) requires that the IEP contain a statement of “[how] the child’s progress toward the annual goals...will be measured...and...[how] the child’s parents will be regularly informed (through such means as periodic report cards), at least as often as parents are informed of their nondisabled children’s progress, of – (A) Their child’s progress toward the annual goals; and (B) The extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.”

The parties agree that [Student’s] IEPs dated 06/07/04, 02/24/05 and 05/10/05 fail to describe how Complainant was to be informed of the [Student’s] progress toward [Student’s] annual goals and how often progress information was to be provided to Complainant. The Federal Complaints Officer finds such to be the case. The Federal Complaints Officer therefore concludes that, in this regard, the District did violate Sec. 300.347(a)(7). Having found a violation of Sec. 300.347(a)(7), the Federal Complaints Officer does not believe that there is a factual basis for concluding that this violation denied [Student] a free appropriate public education (FAPE). Based on the record before the Federal Complaints Officer, it appears that Student received all of the services that were specified in [Student’s] IEPs during the regular 2004-05 school year.

The parties also agree that, during the 2004-05 school year, regular education students at [Student’s] school received official report cards three times per year and unofficial progress reports six times per year. The parties dispute whether [Student’s] progress on her annual goals was reported to Complainant at least as often as the progress of nondisabled students was reported to their parents.

Sec. 300.347(a)(7) does not require that progress toward IEP goals be reported to parents of children with disabilities at exactly the same time as when regular education students receive progress reports. Rather, progress toward IEP goals must be reported to the parents of children with disabilities *at least as often* as parents of nondisabled children are informed of their children’s progress.

Nor does the regulation require written progress reports. In its comments to the IDEA 1997 final regulations, the Office of Special Education and Rehabilitative Services of the U.S. Department

¹ Hereafter the IDEA 1997 Regulations will be referred to by section number only (i.e., Sec. 300.347).

of Education (OSERS) explained why it was declining to include in those regulations a definition of “progress report”:

It is not appropriate or necessary to include a definition of “progress report” because that term is not used in either the statute or these final regulations. The provision in Sec. 300.347(a)(7)(ii) is incorporated verbatim from the statute. No additional burden was added by the NPRM or these final regulations.

Under the same statute and regulations, the manner in which that requirement is implemented is left to the discretion of each State.

Therefore, a State could elect to ensure that report cards used for children with disabilities contain information about each child’s progress toward meeting the child’s IEP goals, as suggested by commenters, but would not be required to do so.

With respect to the frequency of reporting, the statute and regulations are both clear that the parent of child with a disability must be regularly informed of their child’s progress at least as often as parents are informed of their nondisabled children’s progress.

Requiring a “detailed written narrative” of how a child is progressing toward meeting the IEP objectives, as suggested by a commenter, could add unnecessary burden. However, the commenter’s concern about using a grade to designate a child’s progress in meeting the IEP objectives in some cases may be valid because a grade does not always lend itself to sufficiently describing progress toward the annual goals. The statute and regulations make clear that a written report is sufficient, *although in some instances, an agency may decide that a meeting with the parents (which does not have to be an IEP meeting) would be a more effective means of communication.*

The agency must ensure that whatever method, or combination of methods, is adopted provides sufficient information to enable parents to be informed of (1) their child’s progress toward annual goals, and (2) the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

Generally, the reports to parents are not expected to be lengthy or burdensome. The statement of the annual goals and short term objectives or benchmarks in the child’s current IEP could serve as the base document for briefly describing the child’s progress.² [Emphasis added].

ECEA Rule 4.02(4)(f) essentially tracks Sec. 300.347(a)(7) and, like the federal regulation, neither requires written progress reports nor requires the progress of special education students to be reported to parents at exactly the same time as nondisabled students receive progress reports. ECEA Rule 4.02(4)(f), like the federal regulation, requires the District to report progress to parents of children with disabilities at least as often as the progress of nondisabled students is reported to their parents.

² Federal Register: March 12, 1999 (Volume 64, Number 48) at page 12594.

- a) To the extent that Complainant alleges that the District violated Sec. 300.347(a)(7) and ECEA Rule 4.02(4)(f) because the District did not provide *written* reports of progress at the *same*³ time that nondisabled students received official and unofficial progress reports, the Federal Complaints Officer finds no such violation.
- b) To the extent that Complainant alleges that she was not informed of, or inadequately informed of, [Student's] progress between 11/08/04 and the end of the 2004-05 school year, the facts surrounding this allegation are disputed by the parties.

In most legal settings, when facts are in dispute, the usual method for resolving the dispute is to place witnesses under oath and subject them to examination and cross-examination to assist the fact finder in determining which of the witnesses is the more credible. However, the federal complaints process is not well-suited for resolving factual disputes. The Federal Complaints Officer has no authority to place individuals under oath for purposes of examination and cross-examination to determine their credibility.

Another way of attempting to resolve a factual dispute is through an examination of the documentation submitted by the parties. The Federal Complaints Officer has carefully reviewed the documentation provided by Complainant and the District. Because Sec. 300.347(a)(7) and ECEA Rule 4.02(4)(f) do not require written progress reports, the Federal Complaints Officer finds that the submitted documentation fails to resolve the factual dispute about whether the District informed Complainant of [Student's] progress toward [Student's] IEP goals between 11/08/04 and the remainder of the 2004-05 school year. The Federal Complaint Officer finds that there is insufficient information in the record to conclude that the District did or did not violate the IDEA. Complainant is entitled to request a due process hearing to resolve this factual dispute.

Allegation 2

Sec. 300.309 requires the child's IEP team, including the parent, to determine whether the child is in need of extended school year (ESY) services. Sec. 300.309 further provides that ESY services must be provided "only if the child's IEP team determines, on an individual basis, *in accordance with Secs. 300.340-300.350*, that the services are necessary for the provision of FAPE to the child." [Emphasis added]. The Federal Complaints Officer interprets the latter requirement to mean that the IEP team, including the parent, is responsible for determining whether ESY services are necessary and, if necessary, what the nature and scope of those services will be.

The 02/24/05 and 05/10/05 IEPs clearly document that [Student] is eligible for ESY services. However, the parties dispute whether the nature and scope of the ESY services were determined

³ In this case, it is worth noting the distinction between "at the same time" versus "at least as often." Assuming, without deciding, that [Student's] progress was adequately reported at the February and May IEP team meetings, the District would have complied with the "at least as often" requirement because it would have officially reported [Student's] progress *earlier* than the official report card dates for nondisabled students.

by [Student's] IEP team, including Complainant, during the 02/24/05 and/or 05/10/05 IEP team meetings.

The Federal Complaints Officer has carefully examined the documentation provided by the parties. Pertinent to this examination are the following documents:

- a) The first is a document is entitled "Extended School Year Determination" and is dated 02/24/05, which was also the date of the February 2005 IEP team meeting. That document identifies the participants in the ESY determination meeting as being *only* [Special Education Teacher] and [Speech Language Pathologist]. That document was submitted by the District.
- b) The second document is entitled "Special Education Extended School Year I.E.P." and is dated 05/20/05. That document is not linked in any way with either the 02/24/05 or 05/10/05 IEP team meetings. That document identified the skill levels to be maintained by [Student] during the 2005 summer ESY sessions as well as the frequency and duration of the skills practice. Although the ESY IEP contained an area for documenting the parent's agreement or disagreement with the ESY IEP, that area was not completed by Complainant. There is no documentation indicating that the ESY IEP was discussed with Complainant, given/sent to Complainant and/or that Complainant failed to return the signed ESY IEP. Although the ESY IEP contained space for documenting team recommendations for service delivery, that space was left blank. That document was submitted by the District.
- c) The 02/24/05 nor the 05/10/05 IEPs fail to document discussions or decisions made by the IEP team regarding the nature and scope of [Student's] ESY services for the summer of 2005. Those documents were submitted by the District.

Based on the record before her, the Federal Complaints Officer finds that specific nature and scope of [Student's] ESY services were determined outside the 02/24/05 and 05/10/05 IEP team meetings. The Federal Complaints Officer therefore concludes that the District violated Sec. 300.309. The Federal Complaints Officer further concludes that this violation was substantive, and not technical, in nature, and deprived [Student] of a FAPE. Had the entire IEP team, including Complainant, been involved in the determination of ESY services, it is probable that [Student] would have received ESY services consistent with both [Student's] Literacy Modality Plan and Communication Plan. Please see the Finding of Fact and Conclusions for Allegation 3, below.

Allegation 3

Sec. 300.350(a) requires the District to provide special education and related services to a child with a disability in accordance with the child's IEP.

[Student's] 02/24/05 and 05/10/05 IEPs contain both a Literacy Modality Plan and a Communication Plan. [Student's] Literacy Modality Plan states that [Student's] primary literacy mode is vision and that the Literacy Modality Plan is to be implemented by [Student's]

speech language therapist, vision service provider, teacher and team members who “will collaborate to determine necessary adaptations and the kinds of literacy materials appropriate for [Student’s] special vision needs.” The student’s Communication Plan states that [Student] has a severe/profound hearing loss and that [Student’s] primary communication mode is American Sign Language (ASL). The Communication Plan further states that “[the] staff members working with [Student] do use [Student’s] mode of communication.”

The parties agree that: (a) [Student] received ESY services during the summer of 2005, (b) none of [Student’s] service providers during the normal school year collaborated with the ESY teacher to determine appropriate adaptations and literacy materials for use during [Student’s] ESY services, (c) the student’s ESY teacher used verbal communication and not sign language with the student, and (d) a person trained in sign language was not present when the student was receiving ESY services. The Federal Complaints Officer finds that such was the case.

The Federal Complaints Officer therefore concludes that the District violated Sec. 300.350(a) because it failed to implement [Student’s] Literacy Modality Plan and Communication Plan during the provision of ESY services to [Student], which plans were critical components of [Student’s] IEP. The Federal Complaints Officer further concludes that such violation denied [Student] a FAPE. Given the nature of [Student’s] severe/profound hearing disability, it is improbable that [Student] benefited from the ESY services because the ESY services were provided verbally and not in Student’s primary literacy mode, which was ASL and/or functional sign language.

The parties are in disagreement about the number of days that [Student] was made available by Complainant for ESY services. The District states that ESY for [Student] was offered in two sessions but [Student] was made available for only the first session. Complainant states that ESY services were offered in 5 one-week sessions for 4 days per week and that [Student] attended 4 of the five sessions.⁴ Based on the record before her, the Federal Complaints Officer is unable to resolve this factual dispute.

REMEDIES

1. Within thirty (30) days of the date of the District’s certified receipt of this Decision, the District’s special education director shall submit to the Federal Complaints Officer a written statement that the District recognizes and accepts as valid every violation found by the Federal Complaints Officer. This statement shall be accompanied by a corrective action plan developed to effectively address the violations found so as to prevent their recurrence not only as to this student but as to all students with disabilities for whom the District is responsible. The Federal Complaints Officer reserves the right to request revision of the corrective action plan if it is insufficient.

2. The Federal Complaints Officer orders that this student is entitled to the equitable remedy of compensatory educational services for those violations that have resulted in a denial of FAPE. The Federal Complaints Officer orders the District to reconvene the student’s IEP team,

⁴ This information was provided by Complainant via email on 10/26/05 after the Federal Complaints Officer contacted Complainant to learn Complainant’s position on the number of days that Complainant made [Student] available for ESY services.

including Complainant, no later than 12/16/05, unless that date is changed to another date mutually agreed upon by the parties. At that meeting, the IEP team shall determine: (a) the number of days that the student was made available by Complainant for ESY services during the summer of 2005, and (b) given the number of days that student was made available for ESY services by Complainant, the nature and scope of the compensatory educational services to be provided to the student. The completion date for the delivery of the compensatory educational services to [Student] shall be on or before 08/31/06. When the delivery of compensatory educational services to [Student] is finished, the District shall immediately notify in writing both the Federal Complaints Office and Complainant of that fact.

In making its determination about the nature and scope of compensatory services to be provided to the student, the IEP team, including Complainant, should consider that the equitable nature of compensatory services does not demand a mechanical or formulaic approach for determining what those services should be but may involve a qualitative approach that is (a) focused on the individual needs of [Student], and (b) is reasonably calculated to provide the educational benefits (i.e., maintenance of learned skills) that [Student] would likely have received had the ESY services been provided consistent with [Student's] Literacy Modality and Communication Plans.

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 this 28th day of October, 2005.

Laura L. Freppel
Federal Complaints Officer