

FEDERAL COMPLAINT NUMBER 98.526

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

- A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education (“CDE”), on July 6, 1998.
- B. The complaint was filed by Mr. Elliot Schoen, representing Mr. [parent] and Ms. [parent], on behalf of their son, [student], against the Poudre R-1 School District, Dr. Don E. Unger, Superintendent and Dr. Joe Hendrickson, Director of Special Education (“the District”).
- C. The timeline within which to investigate and resolve this matter expires on September 4, 1998.
- D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et seq., (“the Act”), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.
- E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education (“FAPE”) to eligible students with disabilities under the Act.
- F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.
- G. [Student] is a student with disabilities eligible for services from the District under the Act.
- H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaint; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act, by failing to provide [student] with a free appropriate public education (“FAPE”), as indicated by:

- the failure to provide those extended school year services listed on [student]’s individualized education plan (“IEP”), during the summer of 1998 and
- the failure to conduct an annual review within one year of the previous IEP, which would be in effect at the beginning of the 1998-99 school year.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (a)(16), (17), (18), (19), (20); and 1412 (2)(B), (4), (6) and 1414, as amended by 20 U.S.C. 602, 612, and 614 and its implementing regulations (as amended by statute), including but not limited to 34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343, 300.344, 300.350, 300.532, and 300.533

Fiscal Years 1995-97 State Plan Under part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.
2. The funds were paid to the District, in part, based on the assurances contained within its application.
3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.
4. [Student] is a student with significant limited intellectual capacity as identified on an IEP dated 12/4/97. That IEP was reviewed and amended on 1/15/98. An IEP dated 6/16/98 indicates [student] is a student with multiple disabilities.
5. The complainants have alleged that the District (1) failed to provide those extended school year services list on [student]'s IEP, during the summer of 1998 and (2) failed to conduct an annual review within one year of the previous IEP, which would be in effect at the beginning of the 1998-99 school year.

Failure to Provide ESY Services:

6. (a) At an annual IEP review meeting on 5/20/98, the team determined [student] was eligible for ESY services. The team updated current levels of functioning and identification of [student]'s strengths and needs which consumed a large amount of time. Ms. [parent] and Mr. Schoen, her attorney, apparently had concerns about some of the wording, and so the team agreed that Mr. Schoen could meet with the District psychologist to "wordsmith" the IEP developed to that point. The team also agreed that a group of people should meet to prepare a proposal for ESY services. Both were done. More than 50 change/additions were made by Mr. Schoen to current levels of functioning and statement of needs.

(b) The results of the planning and wordsmithing meetings were shared with the IEP team on 5/26/98. ESY services were agreed to and it was agreed they would begin on 6/17/98. Lengthy goals and objectives were written for the ESY program. [Note: This was done even though the purpose of ESY is to maintain learned skills, not to develop new ones. Generally, goals and objectives to be maintained are derived from the previous IEP, not newly developed.] Again, however, Mr. Schoen apparently expressed concerns about some of the wording and it was agreed that "wordsmithing" would be done.

(c) On 6/16/98, a "wordsmithing" meeting was held. More than 150 changes/additions were made by Mr. Schoen to the entire IEP. Apparently, the meeting did not completely resolve the concerns and so it was agreed that Mr. Schoen would meet with the District's counsel to develop proposed wording.

(d) At a 5 hour meeting on 6/24/95, the two attorneys agreed on new language which was then presented to the District for consideration. District representatives apparently then spent approximately 20 hours incorporating the changes. The resulting document was then forwarded to [student]'s parents on 7/20/98 with a request that they provide any additional input and suggestions they may have. According to the District, they have not responded.

(e) The IEP sent to the parents indicates the District agreed to most of the suggested changes from Mr. Schoen. Four goals with 16 objectives and 10 modifications were agreed to for the summer ESY program. These included objective criteria and evaluation procedures and schedules. These were then to be revised and revisited on the basis of data collected during the summer months.

(f) The proposed revised ESY IEP, still dated 6/16/98, indicates the following services are to be provided for ESY:

[Student] will receive instructional services to assist with learning adaptive behavior skills to increase his participation in the community, vocational, social/interpersonal, recreational and leisure activities. Career exploration and ongoing functional vocational evaluation will be supported through work trials in actual vocational sites within the community. Community experiences for shopping, recreation, fitness and leisure activities will also be provided in actual community settings. SWAAC evaluation will be provided to better understand [student]'s preferred modes of communication. Teacher and support personnel time in addition to the four hour daily schedule will be provided as needed to assist [student] in having sufficient time to transition back home at the end of his day. These will be provided for in an individualized program to run through 9/11/98. An additional IEP meeting will be held by 9/4/98 to review the IEP and determine characteristics of services for programming after 9/11/98.

Specific services, to be provided from 6/17/98 through 9/11/98 were:

Special Instruction: 16 hours per week
Special paraprofessional ("PARA"): 16 hours per week
Developmental Disabilities ("DD") consultation: as needed
SWACC-S/L consultation: as needed

[Student]'s programming was to occur in community based settings for summer programming.

7. ESY services began for [student] on 6/17/98. On that day, according to the District, [student] participated successfully in a community shopping activity, and transportation proceeded without significant incident. On Thursday, 6/18/98, however, [student] exhibited non-compliant and aggressive behavior in a grocery store. The duration and severity of the behavior resulted in a call to police. The nature of the outburst, according to the District, was similar to behavior observed in the school setting. As a result, the District requested a meeting with the parents to redesign community activities that would

minimize the risk of another incident and injury to [student] and others. The parents refused the meeting and withdrew [student] from the summer ESY program.

8. The complainants allege that a 30 day activity calendar (agreed to by the District) was not developed, rather only a rough outline of the Initial Activity Schedule; and that the activities on the schedule did not relate to [student]'s goals and objectives. They allege characteristics of services were not developed and that behavior and behavior supports for use in the community were not prepared. They specifically allege the teacher and PARA were not properly trained to work with [student] in the community. They allege that community and vocational based IEP goals and objectives had not be drafted and that data collection and baseline data had not been determined. Also, they allege that the people identified as needed to develop the ESY program were not consulted and that the male paraprofessional support issue was not resolved. Also, they allege that no provisions for services were made for [student]'s sever language deficit. They allege that the disturbance at a community site that required police intervention could have been avoided if ESY services had been appropriately implemented. In addition the complainants allege that the District has failed to provide the services of a summer speech/language specialist and that a communication system has not been developed.
9. Documentation exists (in the form of a letter from the District's Director of Special Education to the parents) of the District's desire to continue the ESY program for [student] indicting "we will welcome your thoughts as we meet to insure that the summer program is effective".
10. The District proposed that in light of the intensity of the June 18 outburst, community settings initially be limited to the tree farm job site, parks, and other open areas where injury to [student] or others would be less likely. The intent was to move to other community settings, such as stores and recreation centers, when [student] demonstrated more consistently compliant behavior. The District, in its response to the complaint, denies the allegation that the outburst could have been avoided by different implementation. "The program was commenced as agreed in the IEP meetings with a teacher very familiar with [student]'s behaviors and appropriate intervention strategies. In the school setting, [student]'s outbursts were also sometimes unpredictable and violate. Indications were that similar outbursts had previously occurred outside of school and school activities."
11. This complaint investigator was unable to contact Mr. Schoen relative to this matter. Mr. Schoen was provided a complimentary copy of the District's response to this complaint, but did not subsequently provide any further communication to this office. An attempt to reach Mr. Schoen by telephone was not successful, as he has left his Colorado law office and is not scheduled to start at a Virginia law office until September 8th. As a result, this complaint investigator called the parents to better understand this situation.
12. Ms. [parent] indicated that she had chosen not to attend the requested meeting and not to continue the ESY program because the District wants to place [student] in a more restrictive setting which would just be baby-sitting. She shared her frustration with the fact that the ESY IEP had never been finalized and was always in draft form. In a later telephone message, she indicated that the main problem was the lack of trained staff relative to the behavior plan. She states that "training" is listed as a service on the ESY IEP. [Note: this is not documented on the IEP].

Failure to Conduct Annual Review:

13. The complainants also alleged that the District has failed to conduct an annual review within one year of the previous IEP, which would be in effect at the beginning of the 1998-99 school year. They state that [student]'s IEP has not been completed and is not appropriate. They allege that characteristics of services, the amount of time required for educational services, goals and objectives, educational placement, appropriate related services and appropriate assistive technology have not been determined. They allege that the District's proposal to wait until the first two weeks of school to discuss the school year's program is unacceptable.
14. The District, in its response to the complaint, acknowledges that the IEP team, including the parents, agreed in May that further review of the needs, goals and services for the 1998-99 school year should occur at the beginning of the school year, when the team would have the benefit of the summer program experience. The District has offered to hold a meeting as soon as staff returns. The District reports that Mr. Schoen, the parents' attorney, indicated that the parents were interested in looking at placements outside the District, including possible residential settings. The District states that it has offered to discuss possible alternative settings and assist in this effort during the summer months. They report that the parents have not availed themselves of this opportunity, however.
15. Ms. [parent], in her telephone conversation with this complaints investigator, indicated that the District had contacted her on 9/1/98 to arrange an IEP meeting. When asked about her concerns, she stated that the problem was that the District never documents the decisions of the IEP team at the IEP meetings. Rather, the IEP is written by one person, utilizing his language and District input, and does not reflect the parental input. Then the parents request changes, often through their attorney, and the IEP is negotiated and, thus, never gets completed. She also indicated that she had heard that the District wants this meeting to insist on out-of-District placement.

Summaries:

16. In summary, the complainants have requested that an appropriate IEP be developed prior to the beginning of the school year, that adequate training be provided to teachers and paraprofessionals, and that the District provide compensatory services for [student] for lost ESY services.
17. The District states that it has dedicated an extraordinary amount of time and resources to identifying and providing appropriate services for [student], that his educational needs have been identified using the expertise of well-respected outside consultants and experienced staff, and that programming has clearly been appropriate and responsive to [student]'s needs. When questioned as to why the District developed a new IEP for ESY services, District counsel indicated it was because the parents requested a change from a more academic environment to a community based environment. The District felt the summer ESY program would be a beginning and a mechanism for determining what might be the most effective community based services during the school year.

III. DISCUSSION

Failure to Provide ESY Services:

18. The law is clear, when developing an IEP for each student with disabilities, the IEP team must consider whether ESY services are necessary. The applicable legal standard for this purpose is "whether the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months". The purpose of ESY is to preserve skills learned and educational benefits accrued during the regular school year. It is not to confer additional educational benefit. Once it has been determined that a student needs ESY, the IEP team must determine the duration of the program in terms of number of hours per day, number of days per week and number of weeks during the summer. There is no need to write an ESY IEP, nor to develop new goals and objectives, as the purpose is maintenance of those skills or developmental benchmarks already achieved. Specific instructional strategies and activities are at the discretion of the licensed service providers.
19. The District determined that [student] met the criteria for receipt of ESY services. The District went on, however, to develop/draft a complete "ESY" IEP, including all components of a regular IEP. This included current levels of functioning, needs, new goals and objectives, evaluation criteria and schedules, and determination of services. This is clearly beyond the scope of ESY, where IEP teams need only determine what services a student is to be provided to allow him to maintain current skills.

The District even went further, allowing the IEP team, of which the parents were a part, to determine strategies, activities, calendars and schedules, those things normally determined by the service providers. When the District proposed to change the activities, they called in the parents for that determination. The parents refused to meet, believing the District wanted to change the activities which they did not want. They subsequently withdrew [student] from the ESY services.

20. The complainants' allegations that the 30 day activity calendar was not fully developed, that the activities did not relate to goals and objectives, that characteristics of services were not developed, and that behavioral supports were not prepared or trained have no merit; as these are not requirements of the IEP. The IEP simply states that [student] is to receive 16 hours per week of special instruction and support by a PARA.

The complainants' allegation that community and vocational based IEP goals and objectives were not drafted and that data collection and baseline data had not been determined, also have no merit, as new goals and objectives are not required for ESY. [It is interesting to note, however, that the IEP dated 6/16/98 does contain this information.]

The complainants' allegation that no provisions were made for [student]'s severe language deficit, that the District failed to provide the services of a summer speech/language specialist and that a communication system has not been developed, again, have no merit. The services listed for ESY simply state SWACC-S/L consultation as needed.

The complainant's request for compensatory services for [student] based on the lost ESY services, is problematic, given that it was the parents who withdrew [student] from the ESY program rather than the District's refusing to provide those services.

Failure to Conduct Annual Review:

21. The law is clear in that IEPs must be in effect at the beginning of each school year. Meetings must be conducted at least once each year to review and, if necessary, revise the IEP. However, the meetings may be held anytime during the year, including at the end of the school year, during the summer-before the new school year begins, or on the anniversary date of the last IEP.
22. Because of the numerous meetings and the negotiations that took place relative to the wording of the [student]'s IEPs, it is unclear as to when the last IEP for [student] was actually completed. It is clear, however, that there is currently an IEP that is less than a year old and that can be utilized at the beginning of the school year. It does seem important, however, that, if the focus of [student]'s program is changing from academic to community based, that specific services for the coming school year need to be revisited. It is unfortunate that [student] did not have the opportunity to participate in community based services during the summer to service as a baseline for programming during the school year.
23. Of greatest concern to this complaints investigator, is the fact that IEPs are not developed at IEP meetings, but rather negotiated among the parties. It would be far more constructive for [student], to have the IEPs developed by a team through consensus, rather than negotiated between two attorneys. Both the parent and District counsel were questioned as to why this has occurred. The parent stated that it is due to the District's not recording the decisions of the IEP team, on the IEP, as they are made. Rather, she indicated, one person writes the IEP, utilizing his language and mostly the District's input, often ignoring the parents' input. Then the IEP is sent to the parents for approval, which – of course – starts the negotiation process. District counsel indicates that it is due to the fact that IEPs take so long. She states that often the parents have a need to talk about something different from IEP development and that counsel for parents often has a need to talk about things that happened a year ago or to "nit-pick" the wording.

III. CONCLUSIONS

The District has not violated the provisions of the Act, by failing to provide [student] with a free appropriate public education ("FAPE"), as indicated by not providing those extended school year services listed on [student]'s IEP, during the summer of 1998, nor by failing to conduct an annual review within one year of the previous IEP, which would be in effect at the beginning of the 1998-99 school year. It was the parents who withdrew [student] from the ESY program; and an IEP less than a year old is in effect.

The District has violated the provisions of the Act, however, by failing to develop [student]'s IEPs at IEP meetings, but rather by allowing individuals to negotiate and significantly revise IEPs unilaterally. The District's willingness to continue IEP meetings at length, allow parental change of the IEP after the meeting and generally delay finalization unless there is parental approval, is not helpful in this case. The parents desperately need a completed IEP, of which they are given a copy (even if handwritten) at the end of the IEP meeting, which they can understand and consider final. Should the parents then not agree with the decisions of the IEP team, they may exercise their right to appeal or to simply ask for another IEP review.

The extraordinary amount of time and resources, both human and financial, dedicated to providing appropriate services and outside consultation to [student] is noteworthy and acknowledged by this complaints investigator.

IV. REMEDIAL ACTION

The District must immediately terminate its practice of allowing changes to [student]'s IEP to be made other than as part of an IEP meeting. The next IEP for [student] must be developed at the IEP meeting with a copy of the IEP given to the parents as the end of that meeting. Should the District choose to later type the decisions of the IEP team made at the meeting, it may do so; but, in the interim, give the hand-written IEP to the parents. The typed version of the IEP must match the hand-written version. No changes may be made, other than through the IEP review process.

No later than two weeks after the next IEP meeting for [student], the District must provide this office with a copy of that finalized IEP and written assurance that the above was done.

IV. RECOMMENDATIONS

As has been recommended (and even ordered) to the District previously, it is, again, strongly recommended that the District streamline its IEP process to facilitate IEP development in a lesser amount of time. Technical assistance should be given to the special education staff relative to IEP facilitation and development. Such assistance should emphasize streamlined facilitation to assure IEP development within a reasonable amount of time, and non-acceptance of unilateral modification to IEPs, either by staff or parents. It should also address the required content of IEPs so as to eliminate time spent on group determination of instructional strategies and activities which is at the discretion of the licensed service providers, not a decision for IEP teams. Requirements for determination of ESY services should also be addressed to eliminate the time spent on writing new goals and objectives, which is not required.

There appears to be a tendency for the parents and their attorney to micro-manage [student]'s education. While their commitment to obtaining an appropriate education for [student] is admirable, it is also evident that such micro-management may be interfering with good decisions being made. Parents and District personnel need to trust one another and make joint decisions with which all are comfortable, rather than creating an adversarial environment. It is recommended that parents view [student]'s program and successes in the "big picture" rather than scrutinizing each event and that they consider the merits of the IEP as a whole, rather than wordsmithing every detail. Trusting licensed, trained service providers to make good decisions relative to strategies and activities would certainly be more conducive to team decision making.

Dated this 3rd day of September, 1998

Carol Amon, Federal Complaints Investigator