

Colorado Department of Education
Decision of the State Complaints Officer
Under the Individuals with Disabilities Education Act (“IDEA”)¹

State-Level Complaint 2016:519
East Central BOCES

DECISION

INTRODUCTION

Complainant is the mother (“Mother”) of a child (“Student”) who is identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”). Parents brought this Complaint against the East Central BOCES (“BOCES”) on behalf of Student, who attends school in [School District] (“School District”). The complaint was properly filed on August 25, 2016, requiring that the decision be issued by October 24, 2016. The State Complaints Officer (“SCO”) determined that the Complaint identified allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153.²

COMPLAINT ALLEGATIONS

Mother and the BOCES are involved in ongoing IDEA litigation relating to Student’s education program. That litigation is currently pending in the United States District Court for the District of Colorado. The law requires that during the pendency of IDEA administrative or judicial litigation, the child shall remain in her “current educational placement” unless the parents and the school district otherwise agree. 34 C.F.R. § 300.518(a). Accordingly, the IEP being implemented by the School District was developed in October 2013, except for some minor amendments upon which the parties were able to agree.

The IDEA’s “stay put” provision is not applicable to the state complaint process. The SCO does not have jurisdiction over whether the stay put placement could or should be modified because of, *e.g.*, changed circumstances, health and safety issues, or similar considerations. Such questions would have to be raised via the administrative process or with the federal district court in which the case now sits. As such, the only question being considered herein is whether the 2013 IEP is being complied with, and if not, the extent to which any noncompliance deprives Student of a FAPE.

The SCO also notes that compliance with the 2013 IEP was also the subject of State Complaint 2016:505 (the decision in that case was issued on May 12, 2016, three months before this case was filed).³ Findings of fact from that case that are relevant to this case will be incorporated herein.

The SCO accepted for investigation the following issues:

1. Whether on August 17, 2016 (and thereafter), the School District complied with Student’s IEP in providing an individual on the bus to interpret for and support Student; and

¹The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 C.F.R. § 300.1, *et seq.*

²Hereafter, only the IDEA regulation and any corresponding Exceptional Children’s Educational Act (ECEA) rule will be cited (*e.g.*, § 300.000, Section 300.000 or Rule 1.00).

³*In re East Central BOCES*, 116 LRP 29299 (CO SEA 2016).

2. Whether Student's interpreter possessed the requisite ASL training or certification in order to serve Student pursuant to her October 2013 IEP.

FINDINGS OF FACT

Based upon a careful and thorough review of the record, the SCO finds as follows:

1. Student is [age] student who resides with her parents within the boundaries of the School District, which is part of the BOCES. Student has been diagnosed with [disability], unilateral hearing loss in one ear, low tone peristalsis, vision loss, and a swallowing disorder.⁴ Student has severe to profound hearing loss for her left ear and normal hearing thresholds for her right ear.⁵ Student is identified as an eligible student with a disability and is educated pursuant to an IEP.⁶
2. To communicate with adults and peers, Student is able to use both conceptual signs and spoken language and understands both receptively.⁷ Professionals who work with Student in the education setting credibly reported that Student uses spoken language almost exclusively to communicate with adults and peers.⁸ During the school day, Student rarely if ever signs spontaneously.⁹ Consistent with reports from Student's educators, the SCO in Case No. 2016:505 observed Student actively and effectively communicating through spoken language to peers and adults during classroom instruction and social activities as part of an on-site investigation.¹⁰ Furthermore, the communication plan lists Student's "level of communication" as spoken language first, sign language second, and pictures and symbols third.¹¹
3. Although Student now primarily uses spoken language to communicate, Student's IEP was written at a time when she was a preschool student who was not verbal.¹² When the 2013 IEP was developed, Student required sign language in order to communicate.¹³ During preschool and kindergarten, however, Student made enormous gains in spoken language and now Student prefers and is able to communicate verbally (both receptively and expressively).
4. Nonetheless, because of the IDEA's stay-put provision, Student continues to be educated under an IEP that includes a communication plan requiring Student to have access to an interpreter who is fluent in American Sign Language (ASL) in all school settings, including transportation on the bus.¹⁴ The IEP mandates that Student have "someone with her who can acknowledge the signs she demonstrates spontaneously as well as encourage her to use additional signs and words."¹⁵

⁴ Ex. 1A, p. 17.

⁵ Ex. 1A, p. 9.

⁶ Ex. 1A.

⁷ Ex. 1A, p. 6.

⁸ 116 LRP 29299, Finding ¶16; Interview with Assistant Special Education Director.

⁹ *Id.*

¹⁰ 116 LRP 29299, Finding ¶16.

¹¹ Ex. 1A, p. 15.

¹² Interview with Assistant Special Education Director.

¹³ *Id.*

¹⁴ Ex. 1A, p. 12.

¹⁵ Ex. 1A, p. 8.

5. In order to comply with Student's IEP, the School District hires interpreters from outside agencies, as there are no interpreters within the School District or the BOCES available to provide the interpreter services required by Student's IEP. Over the course of Parent's litigation with the BOCES, retaining interpreters to fulfill the requirements of Student's IEP has been difficult; on a number of occasions, interpreters have resigned from their position, forcing the School District to scramble to attempt to find a qualified replacement.¹⁶ Indeed, there is a state-wide shortage of qualified interpreters, making interpreter positions extremely difficult to fill. Nonetheless, the School District has consistently made diligent efforts to do so by, *inter alia*, publishing employment notices in newspapers, on the Department's website, and on other sites.¹⁷
6. Regarding the necessary qualifications for the ASL interpreter, the IEP states that the interpreter must be "fluent" in ASL.¹⁸ There are no other certification or authorization requirements listed.
7. Over the course of the IEP's implementation, the role of the interpreter has been filled by individuals with ASL authorization or ASL interpreter training, or by a Child of Deaf Adult ("CODA").¹⁹ Mother has agreed in the past that the use of a non-certified ASL interpreter such as a CODA was appropriate to serve Student's needs.²⁰
8. Mother now asserts that the role of the interpreter must be filled by an educational interpreter licensed pursuant to Colorado law and rules.²¹ As noted above, the IEP does not state that Student's ASL interpreter be an educational interpreter. Nonetheless, since October 3, 2016, Student has been supported by a licensed educational interpreter.
9. From the beginning of the 2016-2017 school year, the BOCES hired an interpreter (Interpreter A) to support Student in school and on the bus. Interpreter A is fluent in ASL, has training in ASL interpretation, and is qualified to serve as Student's interpreter.²²
10. On August 17, 2016 (the first day of school), Interpreter A was not on the bus to support Student because a car accident on her way to work prevented her from being on the bus on time.²³ She was, however, available at school to support Student. In any event, Student was ill that day and did not attend school, such that the presence or absence of an interpreter on the bus or in school was immaterial.²⁴
11. From August 18, 2016 through September 13, 2016, Interpreter was available on the bus and in school to support Student. Student was absent on 11 of those 18 school days, or 61% of the time.²⁵ Indeed, the SCO notes that when Mother filed the Complaint in this case on August 25,

¹⁶ See, e.g., SC 2016:505, SC 2014:514.

¹⁷ Interview with Assistant Special Education Director; Interview with Superintendent; Exs. 5 and 6.

¹⁸ Ex. 1A, p. 16,

¹⁹ Interviews with Assistant Special Education Director, Superintendent, and BOCES Special Education Director; Exs.

²⁰ *Id.*

²¹ C.R.S. § 22-20-116(7); ECEA Rules, 1 C.C.R. 301-8, Rule 3.04(1).

²² Interview with Assistant Special Education Director; Ex. 2.

²³ Interview with Assistant Special Education Director.

²⁴ Interview with Assistant Special Education Director; Ex. 10.

²⁵ *Id.*

2016, school had been in session for 7 school days and Student had not been in attendance on any of those days.²⁶

12. On September 13, 2016, Interpreter A provided notice to the BOCES that she had decided to seek another assignment, effective immediately.²⁷ Interpreter A reported that Student was not using her interpreting services at all (including on the bus), preferring to attend auditorily and communicate verbally.²⁸ Indeed, Interpreter A reported that Student “used her 0% of the time.”²⁹ Interpreter A indicated she desired an interpreting assignment in which she felt more useful and in which her services were needed.³⁰

13. That same day, Assistant Special Education Director notified Mother that Interpreter had resigned, but assured her that:

we will work diligently to find a new interpreter fluent in ASL. In the meantime, we believe Student can and should continue to attend school. In short, Student is able to hear with assistive technology, and she can communicate with spoken language, her primary language. Indeed, like last year, Student’s teachers and paraprofessionals report that Student prefers to communicate verbally and that she actively and effectively does so. Additionally, they report that Student rarely (if ever) looks to the interpreter or uses sign to communicate. Regardless, Student’s special education teacher and paraprofessionals have received training regarding the signs Student occasionally uses, including her bathroom and safety-related signs, and thus, they are equipped to respond in the event that Student uses sign with them.³¹

14. The BOCES immediately took steps to locate and hire another interpreter, and was able to secure one to support Student by October 3, 2016.³² Thus, from September 14 through September 30 (12 school days), Student did not have an ASL interpreter to support her. During this time, however, Student did have paraprofessional support familiar with the signs Student uses occasionally. As noted above, signing is not Student’s preferred mode of communication - she prefers to communicate verbally and is able to do so. As such, notwithstanding the absence of the interpreter, Student was able to ride the bus and access her education program successfully with the assistance of her paraprofessional.

15. Since October 3, 2016, Student has had the support of an interpreter (Interpreter B) who is licensed as an educational interpreter and fluent in ASL.³³ Interpreter B is qualified to support Student as required by the IEP. However, the Interpreter B has a medical condition that precludes her from being able to ride the bus for the duration of the bus route, such that Student has had ASL support during the school day but not on the bus. Student continues to

²⁶ Ex. 10.

²⁷ Interview with Assistant Special Education Director; Ex. 8.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Ex. 8 (internal quotation brackets omitted).

³² Interviews with Assistant Special Education Director and Superintendent.

³³ *Id.*

ride the bus with the assistance of her paraprofessional. Since October 3, Student has successfully ridden the bus to and from school without incident.³⁴

16. Since October 3, 2016, the BOCES has continued its efforts to hire an interpreter who is able to support Student on the school bus as well as at school.³⁵
17. Particularly given that Student does not sign spontaneously or rely on sign language to communicate, and that she is able to communicate verbally and, in fact, prefers that mode of communication, there is no evidence that not having the interpreter on the bus has limited Student's ability to access her educational program or has resulted in any loss of educational opportunity.³⁶ Further, any analysis of the educational impact of the lack of an interpreter on the bus or in school is frustrated by the fact that Student misses so much school. As of October 11, 2016, Student has already missed 15 out of a total of 38 school days, or 43% of the days that school has been in session so far this year.

CONCLUSIONS OF LAW

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

1. Under the IDEA, local education agencies such as the BOCES are required to provide eligible students with disabilities with a free appropriate public education ("FAPE") by providing special education and related services individually tailored to meet the student's unique needs and provided in conformity with an individualized education program developed according to the Act's requirements. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; ECEA Rule 2.19. FAPE is defined as special education and related services that are provided free of charge, meet State standards, include an appropriate preschool, elementary school, or secondary school education, and are provided in conformity with a properly developed IEP. 20 USC §1401(a)(9); 34 C.F.R. § 300.17.
2. Where the definition of FAPE specifically references the provision of special education and related services consistent with an IEP, a material failure to implement an IEP can result in a denial of FAPE. *Id.*; see also *K.C. v. Utah State Bd. of Educ. et al.*, 43 IDELR 29 (10th Cir. 2005); *Van Duyn v. Baker Sch. Dist. 5J*, 481 F.3d 770 (9th Cir 2007), *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003). Not every deviation from an IEP's requirements, however, results in a denial of FAPE. *E.g.*, *K.C. v. Utah State Bd. of Educ. et al.*, *supra* (minor deviations from IEP's requirements which did not impact student's ability to benefit from special education program did not amount to a "clear failure" of the IEP); *Van Duyn v. Baker, supra* (failure to implement IEP must be material to incur liability under IDEA, and minor discrepancies between the services provided and the services called for do not give rise to an IDEA violation); *Neosho, supra* (failure to implement "essential" element of IEP denies FAPE); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir.2000)(*de minimis* failure to implement IEP does not deny FAPE); *Lewis Palmer Sch. Dist. 38*, Colorado State Complaint 2015:505.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Interviews with Assistant Special Education Director and Superintendent.

3. This means that a finding that a school district has failed to implement a requirement of a child's IEP does not end the inquiry. Rather, the SCO must also determine whether the failure was material.
4. In this case, Student's IEP calls for an interpreter who is fluent in ASL to support her on the bus and in school. The SCO has found the interpreters hired by the BOCES to serve Student have been fluent in ASL and have been qualified to meet Student's needs. Indeed, as noted above, Student is able to communicate verbally and prefers to do so. She rarely if ever signs spontaneously or relies upon sign language as a means of communication. Interpreter A reported that Student relied upon her "0%" of the time. Accordingly, the SCO concludes that the BOCES complied with Student's IEP and with the IDEA as the question of the interpreters' qualifications.
5. With respect to the absence of an interpreter at school from September 14 through September 30, and on the bus since September 14, there is no dispute that this violates the IEP's requirements. Though the 2013 IEP appears to be outdated with respect to Student's need for full-time ASL support, the 2013 IEP is the one in effect and the one that the BOCES must comply with. Accordingly, the SCO concludes that the BOCES failed to implement Student's IEP by failing to have an ASL interpreter support Student at school from September 14 through September 30, and on the bus from September 14 through the present.
6. However, notwithstanding this failure to provide the ASL interpreter on the bus as required on Student's IEP, Student has had no difficulty riding the bus because of her reliance upon and preference for communicating verbally, and because she has always had the support of a paraprofessional. There is no evidence in the record demonstrating that Student has not been able to access her education program or that she has suffered any educational harm flowing from the absence of an ASL interpreter at school during the latter half of September 2016, or from the absence of an ASL interpreter on the bus from September 14, 2016 through the present.

REMEDIES

The BOCES has failed to implement Student's IEP by failing to have an ASL interpreter support Student in school from September 14 through September 30, 2016, and on the bus from September 14, 2016 through the present. The BOCES is hereby ordered to continue its efforts to locate and hire an interpreter who is fluent in ASL to support Student on the bus as well as at school.

CONCLUSION

The Decision of the SCO is final and 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 CFR § 300.507(a) and Analysis of Comments and Changes to the 2006 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.

Signed this 20th day of October, 2016.



Wendy Jacobs, Esq.
State Complaints Officer

APPENDIX

Complaint (pp. 1-3)

Response (pp. 1-8)

- Ex. 1A - 2013 IEP (pp. 1-41)
- Ex. 1B - 2016 IEP (pp. 1-25)
- Ex. 1C - Billing from interpreting agency (pp. 1-10)
- Ex. 2 - Interpreter A school transcript (pp. 1-6)
- Ex. 3 - Student attendance record (pp. 1-2)
- Ex. 4 - administrative hearing transcript excerpt (pp. 1-4)
- Ex. 5 - Mother's administrative hearing closing statement (pp. 1-20)
- Ex. 6 - Mother's Answer in federal district court matter (pp. 1-16)
- Ex. 7 - administrative hearing transcript excerpt (pp. 1-5)
- Ex. 8 - email from Assistant Special Education Director to Mother (p. 1)
- Ex. 9 - BOCES request for consent to evaluate (pp. 1-5)
- Ex. 10 - updated Student attendance record (p. 1)

Reply (pp. 1-4)