

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

State-Level Complaint 2016:507
Pikes Peak BOCES

DECISION

The Complaint was filed on behalf of Student, a child with a disability who resides within the geographic boundaries of the Pikes Peak BOCES (“BOCES”). The Complaint was properly filed on March 14, 2016. The SCO determined that the Complaint raised the following issue subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153:

Whether the BOCES violated the Student’s rights under the IDEA by denying his parents’ request to have Student’s paraprofessionals attend and participate in Student’s upcoming IEP meeting scheduled for April 14, 2016.¹

To resolve the Complaint, Student seeks an order directing the BOCES to allow Student’s paraprofessionals to attend and participate in Student’s IEP meeting.²

FINDINGS OF FACT

The essential facts of this case are undisputed.

1. Student’s parents have requested that Student’s paraprofessionals be included in Student’s upcoming meeting, which will take place during school hours, i.e., hours that the paraprofessionals are employed and paid by the BOCES. Parents contend that “no one has more knowledge about [Student]” or Student’s progress, day-to-day functioning throughout the school building, interaction with peers, behaviors, communication, and the implementation of the IEP, than Student’s paraprofessionals.³

¹ Subsequent to the filing of the Complaint, the IEP meeting was rescheduled to April 26, 2016.

² Student objects to the issue as framed by the SCO, arguing that “the issue is not necessarily whether the Parents can compel the attendance of a specific person at their child’s IEP Meeting,” but rather whether “the BOCES can categorically refuse to allow paraprofessionals – as an entire class of special education service providers – from attending any disabled student’s IEP Meeting and from being an IEP Team member.” Correspondence from Student’s attorney to the SCO, dated April 1, 2016. The SCO disagrees. Student’s Complaint makes specific allegations and seeks specific relief relating to the BOCES’ denial of the Parents’ request to have Student’s paraprofessionals in attendance at Student’s IEP meetings. There is no allegation of a “categorical” refusal by the BOCES to ever allow paraprofessionals from attending any disabled student’s IEP meeting or from ever being an IEP team member, nor does the Complaint include a statement of facts supporting such an allegation.

³ Complaint, p. 2.

2. The BOCES has denied that request, contending that the paraprofessionals are not a required member of the IEP team, and that it cannot be compelled by parents to include BOCES staff or employees at an IEP meeting if those individuals are not otherwise already required by law to participate in the meeting.
3. The BOCES' job description for the paraprofessionals provides that they assist special needs students "with significant support needs (SSN) by providing specialized individualized instruction; including academic support, monitoring behaviors, functional life skills," "in maintaining personal health and hygiene functions," and in getting "to and from classes and bus stops."⁴ Such duties are to be executed "[u]nder the general supervision of the special education teacher and building principal."⁵

CONCLUSIONS OF LAW

1. The Individuals with Disabilities Education Act ("IDEA") provides that eligible children with disabilities must be provided with a "free appropriate public education" ("FAPE"), comprised of special education and related services tailored to meet each child's individual needs. See 20 U.S.C. § 1401 *et seq.* FAPE is a term of art under IDEA, and is defined as special education and related services that are:
 - a) Are provided at public expense, under public supervision and direction, and without charge;
 - b) Meet the standards of the [state education agency]...;
 - c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
 - d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of [34 C.F.R.] §§ 300.320 through 300.324.

20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; ECEA Rule 2.19⁶ (emphasis added).

Thus, the IEP, by definition, is what constitutes FAPE for a child.

2. The IDEA includes extensive procedural requirements governing the creation of the IEP, including timelines for when it must be developed and in place, who must participate in the development of the IEP, and what the document must include. 34§ C.F.R. § 300.320 – 300.324. With respect to who must participate in the development of the IEP, the

⁴ Job Description, p. 1.

⁵ *Id.*

⁶ Colorado's Rules for the Exceptional Children's Educational Act, which implement the federal IDEA's requirements, are codified in the Code of Colorado Regulations at 1 CCR 301-8, and are cited as "1 CCR 301-8, 2220-R-[rule number]." For ease of reading, references herein to these rules will be cited as "ECEA Rule [rule number]."

regulations provide that the public agency (*i.e.*, in this case, the BOCES) must ensure that the IEP Team for each child with a disability includes –

- 1) The parents of the child;
- 2) Not less than one regular education teacher of the child (if the child is, or may be participating in the regular education environment);
- 3) Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;
- 4) A representative of the public agency who
 - i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
 - ii) Is knowledgeable about the general education curriculum; and
 - iii) Is knowledgeable about the availability of resources of the public agency.
- 5) An individual who can interpret the instructional implications of evaluation results ...;
- 6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
- 7) Whenever appropriate, the child with a disability.

34 C.F.R. § 300.321(a).

3. The individuals identified in subsections (1) through (5) of Section 300.321(a) are mandatory IEP team members whose attendance must be secured by the public agency, and their attendance may only be excused if the parents and the public agency both agree in writing. 34 C.F.R. § 300.321(e). Colorado takes that requirement even further by prohibiting altogether the excusal of the director of special education or designee. ECEA Rule 4.03(5)(a).
4. On the other hand, by the explicit terms of the law, any individuals included in the IEP pursuant to 34 C.F.R. § 300.321(a)(6) are discretionary. That is, an IEP team must include the individuals listed in subsections (1) through (5), but may also include other individuals “with knowledge or expertise” at the discretion of the parent or the public agency.
5. There is abundant authority, including that cited by Student, holding that the development of an IEP team without the mandated members described in 34 C.F.R. 300.321(a)(1) – (5) violates the IDEA, and can result in an IEP being deemed insufficient to provide a child with FAPE. *See, e.g., M.L. v. Federal Way Sch. Dist.*, 387 F.3d 1101 (9th

Cir. 2004)(failure to include general education teacher in IEP meeting violated the IDEA's procedural requirements).

6. Further, as noted by Student, at least one federal court has held that when a school district prohibited the parents' attorney (who was obviously not an employee of the school district) from participating in their child's IEP meeting, the school district violated 34 C.F.R. § 300.321(a)(6) and prevented the parents from having meaningful participation in the IEP process. *Blackman v. District of Columbia*, 72 F. Supp. 3d 249 (D.D.C. 2014).
7. The issue in this case is distinguishable from the authority cited by Student, however. The question is not whether the absence of mandated IEP members is a violation, or whether a school district may bar from an IEP meeting individuals "with knowledge and expertise" who are not affiliated with or employed by the school district. Rather, the question is whether 34 C.F.R. § 300.321(a)(6) means that parents may compel a school district to include particular school district employees of the parents' choosing in an IEP meeting, where the school district has selected other school individuals meeting the requirements of 34 C.F.R. 300.321(a)(1) – (5). Student has offered no authority supporting that interpretation of the law, nor has the SCO's research yielded any cases or other authority supporting Student's argument.
8. As noted by the BOCES, courts and SEAs have held that where a school district included the required members of the IEP team, parents could not complain about the particular individual selected by the school district to fulfill a particular IEP team role or compel additional school district employees to attend. *B.D. v. Puyallup School District*, 456 F. App'x 644 (9th Cir. 2011) ; *Pine City Public School Dist. #578-01*, 115 LRP 35719 (MN SEA 2015)(school district was entitled to designate social worker to fulfill IEP team role of LEA representative over parents' insistence that principal should fulfill that role); *Newbury Local Schools*, 115 LRP 34858 (OH SEA 2015)(school district included the mandated members of the IEP team, and parents could not compel the vocational director to attend the IEP meeting).
9. The Ohio SEA's decision in *Newbury Local Schools, infra*, is particularly instructive. In that case, the IEP team's discussion and consideration included the student's job training and vocational needs. The vocational director did not attend the IEP meeting; rather, the student's job training teacher attended the IEP meeting to discuss vocational/job training opportunities. The parents argued that the job training teacher was not able to "answer to other job opportunities" that the vocational director would have been able to discuss, such that the absence of the vocational director rendered the constitution of the IEP team improper. The Ohio SEA disagreed, finding that the IEP team included all of the required members under 34 C.F.R. § 300.321(a), and that the

job training coach was capable of addressing the student's progress and needs. Though the Ohio SEA did not specifically reference 34 C.F.R. § 300.321(a)(6), implicit in the *Newbury* decision is the notion that where an IEP team is otherwise properly constituted, the federal regulations, including the discretionary right of parents to include other individuals "with knowledge and expertise" in an IEP meeting, do not permit parents to compel school districts to include school district personnel or employees that the school district would not otherwise have included.

10. This interpretation is supported by the comments to the 1999 IDEA regulations (when the right of parents and districts to include other individuals with knowledge and expertise was added to the IDEA), as well as guidance issued by the federal Office of Special Education Programs ("OSEP"), which is the office within the United States Department of Education charged with interpreting and enforcing the IDEA. The Analysis of Comments and Changes to the 1999 IDEA regulations characterizes the change to the law as the right "to bring other individuals to the IEP meeting and their discretion," and explains that "individuals with knowledge about the child could include neighbors or friends of the parents, or advocates, who, in the judgment of the parents, are able to advise or assist them at the meeting." 34 C.F.R. Section 300, *Analysis of Comments and Changes*, 64 Fed. Reg. 12585 (March 12, 1999). Further, OSEP's interpretation of the 1999 regulations provides that a school district "may designate which teacher or teachers will serve as IEP team member(s)..." 34 C.F.R. Part 300, Appendix A, Question 26.
11. Most significantly, in 2003 OSEP received a request for guidance on the exact question at issue here, specifically whether "a public agency is required to ensure attendance at an IEP meeting of an individual who the parent invites and who is an employee of the public agency..." *Letter to Byrd*, 104 LRP 1216 (OSEP 2003). In response, OSEP advised that "[t]he Federal regulations ... **do not address the public agency's responsibility to make an employee of the agency ... available for IEP meetings. That determination may be addressed by the State and/or local policy.**" *Id.* (emphasis added). Thus, OSEP's interpretation of IDEA is that it does not expressly require a public agency to make an employee of the agency available for IEP meetings at a parent's request, but that such a policy could be made at the state or local (school district) level. OSEP's interpretation of the statute and regulations it is entrusted to administer is entitled to deference. *E.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
12. Colorado's rules implementing IDEA expressly incorporate the federal IDEA requirements regarding who must participate in an IEP team meeting, and do not give parents the right to compel school districts to include at IEP meetings school employees whom the district would not otherwise include. ECEA Rule 4.03 ("the requirements regarding IEPs shall be consistent with 34 CFR § 300.320 through § 300.325").

Accordingly, the SCO has no basis or authority to interpret the federal regulations any differently than OSEP.

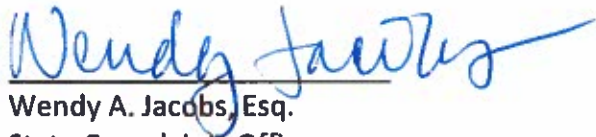
13. Therefore, where the IDEA regulations do not give parents the right to compel a school district to make a particular school district employee available for IEP meetings, the SCO concludes that the BOCES was within its rights to deny the Parents' request that the BOCES include Student's paraprofessionals in its IEP meetings.

CONCLUSION

Having found no violation of IDEA by the BOCES, no remedy is ordered. Student's request for an order compelling the BOCES to include Student's paraprofessionals at Student's IEP meeting is hereby denied.

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 19th day of April, 2016.



Wendy A. Jacobs, Esq.
State Complaints Officer

APPENDIX

Complaint dated March 11, 2016
BOCES Response dated April 1, 2016, including attached job description for paraprofessionals
Student's Correspondence/Brief dated April 1, 2016
BOCES Reply dated April 8, 2016