

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

Federal Complaint 2003:515

Elizabeth School District C-1

Decision

INTRODUCTION

This Complaint was dated 04/28/03 and filed on 6/24/03. The Elizabeth School District C-1 (District) received an extension of time to 07/18/03 for filing its response to the Complaint. Those parts of the District's written response that were prepared by the District's special education director were received on 07/08/03 and 07/10/03. The student's speech language pathologist (SLP) also prepared a response which was faxed on Sunday 07/12/03 and received by the Federal Complaints Officer on 07/14/03. The Complainant received an extension of time until 08/11/03 to file her response to the District's response. The Complainant did not submit a response to the District's response. The Federal Complaints Officer closed the record on 08/12/03.

The Complainant is the parent of child who, during the relevant time period, was identified as being a preschool child with a disability. The Complainant has also filed a federal complaint regarding the child's sibling. *See*, Federal Complaint 2003:516.

COMPLAINANT'S ALLEGATIONS

The Complainant has made the following allegations:

1) "[Student] has had three IEP in the past year. One was in May of 2002, one I requested on December 13, 2002, and one called by the school on April 13, 2003...None of them have been followed. [Student has] quite possibly never gotten the allotted amount of speech therapy per week that is [Student's] right. Periods of more than four weeks have gone by of no therapy at all...No speech therapy was done in the month of January...I have been told by [SLP] that her day to work in the class is Monday. If there is a holiday or school closure on Mondays, there is no make up time. If there is more that one child that is allotted one hour per week and the therapist is in the class for one hour working here and there with all of them, together or apart, *or* if she talks to the teacher about them, then they all have received the help that is legally theirs...No one received any speech therapy for the whole month of September 2002 and the whole month of January 2003. In addition to that, [Student] did not receive speech service at all in a period of a school week, periodically through out the school year, most recently the weeks of: April 21, 2003 and April 28, 2003. On April 29, the boys told me that [SLP] was in the room, but had never talked, or 'played' with them. The week of May 12, was the last time they

got any help with their speech, and that is questionable. One child said she was there, and the other said he never talked with her. Last day of school was May 29, 2003.”

In support of this allegation, Complainant submitted documentation entitled “Speech-Language/Pre-Academic Homework.” “[SLP] started a running page of communication in [Student’s] notebook at the beginning of the year. This page would explain what [Student] worked on. A couple of times [Student] did not have [his] notebook with [him] on Mondays, because honestly, I felt it was too much weight for [his pack], when she more than likely would not be there. I am sending the pages so you can see exactly how many weeks were *not* written in.” (Emphasis in the original).

2) “We have put in the IEP that [Student] needs ‘predictable schedule for class and therapy, and advanced warning of schedule change’ and it is obvious that has not been followed with the sporadic times of the therapy sessions.”

3) “Up until April 18, 2003, [Student] has needed a Paraprofessional who was hired to be there to help him with his sensory needs, and aid in keeping him in his ‘comfort zone’. I have asked several times for [SLP] not to physically touch my child as that is extremely uncomfortable for him. In November, [SLP] physically removed him from the situation. It did upset [Student], to the point of completely disrupting the entire class. His Paraprofessional was told to stay away, and not to help. I then asked [SLP] not to initiate contact with [Student] until we could get another IEP set up, that was also ignored.”

4) “On the IEP that was done on December 17, 2002 for [Student], I asked for the Kindergarten speech therapist to be transitioned in for [Student’s] therapy, in the end of January, beginning of February, so [Student] would not have to deal with [SLP]. Everyone discussed it and thought it might help, and that it could be put into affect. That request was put into the IEP, but for the last few months of school...When I asked about the request, I was told that they did not realize what they agreed to, and that it simply wasn’t done that way. If therapy was needed, then it was with [SLP]. [Student] needed the help, so I could only hope that she would not upset him again.”

THE DISTRICT’S RESPONSE

Allegation 1. The written response prepared by the District’s special education director states as follows:

The IEPs have been followed, as closely as possible, given vacations, absences of [Student], required trainings of staff and occasional absences of staff. It is important to note that the whole preschool program, including the services of the special education paraprofessional and the COTA, is a part of the IEP that has also been followed...Services on the IEPs are a combination of “indirect” (with staff) and “direct” with the child, but seldom are delivered to only one child at a time. That is not usually the best use of the staff or the best thing for children. It is difficult to work on social skills or communication without including peers. The Homework Sheets that were sent to me are just that: homework ideas for parents. They are not indicative of which days therapy occurred and are not intended to be completed every week.

The response submitted by the SLP states as follows:

One of the misunderstandings was that [Complainant] thought [Student] had one-on-one therapy, which was not developmentally appropriate... This year I created an individualized home program for [Student] with [his] specific sound errors that included diagrams for production of each sound and homework pages. This was a home program, which had a note page in the front so I could explain what sounds to work on. [Complainant] often forgot to bring [the] home program notebooks to school... In truth there were days that the boys were sick, I was sick, holidays, and/or special events.

With its response, the District submitted [Student's] attendance records and speech language (S/L) services log for the 2002-03 school year.

Allegation 2. The District generally contends that “[Student’s] IEPs have been followed, as closely as possible, given vacations, absences of [Student], required trainings of staff and occasional absences of staff. It is important to note that the whole preschool program, including the services of the special education paraprofessional and the COTA, is a part of the IEP that has also been followed.”

Allegation 3. The District agrees that on 11/18/02 an incident occurred involving the student. The response submitted by the District’s special education director provided the following description of what occurred:

The paraprofessional for [Student] was required for a variety of reasons as stated in the 12/02 Intensive Needs Checklist: for safety, for prompts, for transitions, for assistance in multi-step directions, for assistance in peer interactions, and to assist in meeting IEP goals and objectives. According to [SLP], the incident in November occurred like this: the team was concerned that [Student] was too reliant on the para, so during a therapy session, the para was asked to leave the table. [Student] objected initially and was very upset, then calmed down. [SLP] did not touch [Student]. After the incident, [SLP] and [Student] worked well together. She did, at mom’s request, use a more play-based intervention, but an SLP cannot do therapy without “initiating contact”.

The District’s SLP separately provided the following description of what occurred:

[Student] did cry one time in November when I was trying to work on some sounds at a small table in the classroom during work time. I had asked his Paraeducator not to “shadow” him that day because the preschool team was working on his independence. That same day, after the episode with [Student], I met with the teacher and we discussed how to help him become more independent and I also suggested that doing therapy only in play which was more appropriate. I also spoke to his mother about the episode and she asked to call an additional meeting, which I set up in December.

Allegation 4. The District’s states that the Complainant was told that the SLP would not change until May 2003, when the District would begin introducing the new SLP that would be working

with [Student] in the fall 2003. “It would be an extremely rare circumstance (one that has not occurred in my 6 years as director in Elizabeth) to change therapists.”

FINDINGS OF FACT AND CONCLUSIONS

Allegation 1.

A. Missed Services

34 C.F.R. § 300.350(a)(1)¹ requires each school district to provide special education and related services to a child with disabilities in accordance the child’s IEP.

The Federal Complaints Officer has carefully examined the documentation provided by the parties. With regard to the S/L Homework document submitted by the Complainant, the Federal Complaints Officer finds that it was not used routinely nor was it intended to document the provision of S/L services. The Federal Complaints Officer further finds that the District’s attendance records and S/L services log document the S/L services actually received by the student. The Federal Complaints Officer has relied on such records in making her findings of fact.

The Federal Complaints Officer makes the additional findings of fact:

- 1) Per the 05/17/02 IEP, [Student] was to receive 15 minutes per week of indirect (consultation) S/L services and 60 minutes per week of direct S/L services in the general classroom. The projected beginning date of those services was 05/17/02.
- 2) Per the 12/13/02 IEP, [Student] was to receive 15 minutes per week of indirect (consultation) S/L services and a range of 30 to 60 minutes per week of direct S/L services in the general classroom. The projected beginning date of those services was 12/13/02.
- 3) Per the 04/18/03 IEP, [Student] was to receive 15 minutes per week of indirect (consultation) S/L services, a range of 30-60 minutes per week of direct S/L services in the general classroom, and a range of 30-60 minutes per week of direct S/L services outside of the general classroom. The projected beginning date of those services was 04/18/03.
- 4) There were 36 full or partial weeks in the District’s 2002-03 school year (excluding winter and spring breaks).
- 5) [Student] was scheduled to receive S/L services on Mondays.
- 6) [Student] received S/L services for 23 weeks of the school year.

¹ Hereafter, the IDEA regulations will be cited by section number only, e.g., § 300.350 (a)(1).

- 7) [Student] did not receive services for 3 weeks in September 2002.² The District provided no explanation for those missed services. The District did not make up those missed services.
- 8) [Student] did not receive services for 2 weeks when the SLP was sick or required to attend an emergency meeting. The District did not make up those missed services.³
- 9) [Student] did not receive services for 5 weeks because holidays or other “no-school days” (days when instructional services are not provided) fell on [Student’s] scheduled day for services (i.e., Monday). The relevant IEPs do not state that S/L services, which are to be provided weekly, will not be made up when the day of delivery falls on holidays or other no-school days. The District did not make up those services.⁴

The Federal Complaints Officer concludes that the District violated § 300. 350(a)(1) because the student’s IEPs specified weekly S/L services and the District failed to provide such services for 10 out of 36 weeks.

The Federal Complaints Officer also finds that [Student] was absent on 3 days⁵ when the SLP was available to provide services. Generally, a school district is not responsible for making up special education services when the services provider is available but the student is absent from school. The Federal Complaints Officer concludes that, with respect to S/L services missed due to the student’s absences, the District has not violated § 300. 350(a)(1).

B. Individual vs. Small Group Services

The Federal Complaints Officer finds that none of the relevant IEPs specify that the S/L services to which the student was entitled were to be provided on an individual or one-on-one basis. In the absence of such specification, how required services are delivered is a question of methodology that is left to the District’s discretion unless the methodology selected by the District fails to provide the student with a free appropriate public education (FAPE). The Federal Complaints Officer makes no such finding of a denial of FAPE with regard to the District’s provision of group rather than individual services. The Federal Complaints Officer concludes that the District has not violated § 300. 350(a)(1).

Allegation 2. The Complainant alleges that the District failed to provide the student with a predictable schedule for class and therapy, and advance warning of schedule changes as required by his IEP. The District did not directly address this allegation but generally contends that [Student’s] IEPs “have been followed as closely as possible...”

As was stated above, § 300. 350(a)(1) requires each school district to provide special education and related services to a child with disabilities in accordance the child’s IEP. The Federal

² The missed weeks in September were 09/09/02, 09/16/02 and 09/23/02.

³ The missed weeks due to the SLP’s absences were 12/16/02 and 05/12/03.

⁴ The missed weeks due to Monday holidays or “no school days” were 09/02/02, 01/20/03, 01/27/03, 02/17/03 and 05/26/03.

⁵ The student was absent on 10/07/02, 12/09/02 and 01/13/03.

Complaints Officer has carefully examined [Student's] IEPs for the 2002-03 school year. The Federal Complaints Officer finds as follows:

- 1) The 12/13/02 IEP states, as a *recommendation* for working with [Student], that [Student] “[n]eeds predictable schedule for class and therapy and advance warning of schedule changes or when there is a substitute teacher.” (Emphasis in the original).
- 2) The 04/18/03 IEP states, as a *recommendation* for working with [Student], that [Student] “[n]eeds predictable, routine, schedule, give advance warnings of schedule changes.”
- 3) The 05/17/02 does not contain any such language.

The Federal Complaints Officer finds that the language relied upon by Complainant in support of her allegation is a recommendation/suggestion for working with [Student] and not an IEP requirement. The Federal Complaints Officer concludes that, with respect to this allegation, the District has not violated § 300.350(a)(1).

Allegation 3. As the Federal Complaints Officer understands this allegation, Complainant is concerned with how the SLP interacted with her child during the 2002-03 school year, including interactions during an incident that occurred on 11/18/02. The parties agree that, on that date, the student became upset while the SLP was working with the student. The parties do not agree whether the SLP touched the student or physically removed him from the classroom setting.

The Federal Complaints Officer has carefully examined the 05/17/02 IEP, which was the governing IEP at the time of the 11/18/02 incident, as well as the other information provided by the parties. The Federal Complaints Officer finds that the incident that occurred on 11/18/02 was isolated in nature. Further, there is nothing in the 05/17/02 IEP that specifies that the student's paraeducator was to “shadow” the student at all times or that precluded the preschool team, including the SLP, from using strategies and interventions that were intended to assist the student in either developing “independence skills” or when the student became upset. Even if the SLP physically touched and/or physically removed the student from the situation, as is alleged by the Complainant, such actions were not precluded by the 05/17/02 IEP or by the Individuals with Disabilities Education Act (IDEA) and its implementing regulations. The Federal Complaints Officer concludes that, with respect to this allegation, the District has not violated the IDEA.

Allegation 4. The Complainant alleges that, during the 12/13/02 IEP meeting, (1) the IEP team agreed to transition in the Kindergarten speech language therapist in late January or early February 2003 “so [Student] would not have to deal with [Speech Language Pathologist]”, (2) the 12/13/02 IEP records that agreement, and (3) the District ignored the agreement. The District denies making any such agreement.

As is set forth above, § 300.350(a)(1) requires each school district to provide special education and related services to a child with disabilities in accordance the child's IEP. Generally, a school district has broad discretion in selecting the teachers and related service providers who will be providing the child with specialized instruction and related services.

The Complainant and the District dispute whether, during the 12/13/02 IEP meeting, the IEP team agreed to transition in the Kindergarten SLP in late January – early February so that the student would not have to work with his then assigned SLP. The parties also dispute the content of subsequent conversations between the Complainant and the District’s special education director regarding this issue.

When facts are in dispute, the usual process in most legal settings for resolving the dispute is through an evidentiary hearing in which individuals testify under oath, and the testimony is then subject to cross-examination. It is through this process that the fact finder determines the credibility of the individuals, and by extension, which version of the facts is the more credible. The Federal Complaint process, unlike the due process hearing, makes no provision for an evidentiary hearing. Another way of resolving a factual dispute is to examine the documentation submitted by the parties and the surrounding circumstance to see whether they provide a definite answer.

The Federal Complaints Officer has carefully examined the 12/13/02 IEP and other information submitted by the parties. The 12/13/02 IEP provides, as a *recommendation* for working with the student, that the student “[n]eeds transition over last few months of school for new speech therapist.” This recommendation is a suggestion and not an IEP requirement. The 04/18/03 IEP contains an Early Childhood Transition Plan which specifies certain transition activities but does not describe specific transition activities involving the student’s then current SLP and the Kindergarten SLP. The Federal Complaints Officer finds that, with respect to this allegation, there is insufficient evidence to conclude that the District violated § 300.350(a)(1).

DENIAL OF FAPE

§§ 300.300 and 300.321 require each State receiving assistance under Part B of the IDEA to ensure that a free appropriate public education (FAPE) is available to all children with disabilities, aged 3 through 21. This requirement applies to all public agencies (such as school districts) within each State. *See*, § 300.321(b)(i)(A).

It is well-established in the federal Tenth Circuit Court of Appeals that mere technical deviations from the IDEA do not render an IEP entirely invalid. “To hold otherwise would exalt form over substance.” Urban v. Jefferson County School District R-1, 89 F.3d. 924 (10th Cir. 1995).

The Federal Complaints Officer has concluded that the District violated § 300.351 (a)(1) when it failed to provide the student with all of the S/L services specified by the student’s IEP. The Federal Complaints Officer finds that the District’s failure to provide the student with 10 weeks of S/L services is not a “mere technical deviation” from the student’s IEP. The Federal Complaints Officer concludes that the District has denied the student a FAPE.

REMEDY

- 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 of assurance explaining how the violations found will be addressed to prevent their recurrence not only as to [Student] but as to all student with disabilities attending the District.
- 2) The Federal Complaints Officer orders that this student is entitled to compensatory education services in the amount of 5 hours for missed direct S/L services, to be provided over the course of the 2003-04 school year.

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 14th day of August 2003.

Laura L. Freppel
Federal Complaints Officer