

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

Federal Complaint 2007:504

El Paso County School District Eleven

Decision

INTRODUCTION

This Complaint, dated January 31, 2007, was filed by the City and County of Denver Department of Human Services (hereafter, the “Department”) and was received in the office of the Federal Complaints Officer on February 14, 2007. The response of El Paso County School District Eleven (hereafter, the “District”) was timely received from counsel for the District on March 8, 2007.¹ The Complainant’s reply to the District’s response was received on March 21, 2007. The record was closed in this matter on March 29, 2007.

ISSUE

Whether El Paso County School District Eleven provided appropriate special education services specified in Student’s Individualized Education Program (IEP) dated April 14, 2006, subsequent to Student’s disciplinary removal on August 30, 2006.

CONTENTIONS OF THE PARTIES

The Department alleges that the District failed to provide special education services to Student as required by 34 CFR 300.530 after he was suspended and subsequently expelled from school.

The District alleges that it had insufficient information about Student’s behavioral history to allow it to make a determination of a proper educational placement after August 30, 2006. Additionally, the District alleges that the Department lacks standing to bring this Complaint.

¹ On March 5, 2007, the Federal Complaints Officer approved an extension of time for receipt of the response.

FINDINGS OF FACT

1. Student is a male, born [DOB], living with his [parents] within the boundaries of the District. Student is eligible for special education services in the category of [disability].
2. Student enrolled in the District's [School] (hereafter, the "School") on August 2, 2006. At the time of his enrollment, Student's most recent agreed-upon and implemented IEP was a triennial dated April 14, 2006, (hereafter, the "4/14/06 IEP") and developed by his prior school district, Fountain-Fort Carson School District Eight.
3. At the time of his enrollment in the District Student was a minor in the legal custody of the Department pursuant to an Order of the Juvenile Court of the State of Colorado for the City and County of Denver dated July 25, 2006.
4. At the time of his enrollment the District was aware that Student was on probation and had a documented history of verbally and physically aggressive behavior, especially when he became angry. The 4/14/06 IEP included elements of a behavior support plan to address these concerns.
5. At no time between August 2, 2006, and August 30, 2006, did the District request information from Student's [parents] or the Department pertaining to Student's history of behavioral problems. Nor did the [parents] or the Department provide such information to the District during this time.
6. On August 30, 2006, Student was involved in an incident at the School that escalated to the point where he assaulted District administrative and security personnel, and bit one staff member on the arm, causing injury. Documents submitted by the District did not establish that this injury falls within the definition of "serious bodily injury" as used in 20 U.S.C. §1415(k)(1)(G).
7. On September 5, 2006, the District convened a Manifestation Determination hearing relating to Student's conduct on August 30. The results of the hearing were inconclusive as to whether the conduct was substantially related to Student's disabilities and whether the conduct was a direct result of the District's failure to implement the 4/14/06 IEP. Due to the seriousness of the underlying conduct, however, the District proposed to place Student in an Interim Alternative Educational Setting where he was to continue to work toward the goals set forth in the 4/14/06 IEP.
8. The September 5, 2006, Manifestation hearing was conducted without the presence of Student's natural parents or his appointed Educational Surrogate Parent, Ms. Ruth Buechler. The District knew of Ms. Buechler and attempted to reach her by

telephone as reflected in the report for the September 5 hearing, but these attempts were not successful. Although Student's [parents] were present, the District understood at the time that the [parents] were not authorized to make educational decisions on his behalf.

9. On September 6, 2006, the District wrote to Student's [parents] requesting them to identify the individual legally authorized to make educational decisions on behalf of Student, and also requesting "documentation" needed to complete the manifestation determination process. The letter states that the District would only provide options for Student's interim placement after receipt of documents it required.² The letter contains no description of the nature and scope of such documentation.

10. On September 8, 2006, counsel for the District wrote to the Department requesting documentation of instances in which Student exhibited similar behavior as well as all of Student's educational and medical records. The letter represents that counsel had spoken to Ms. Buechler and was unsure of her status as Student's appointed educational surrogate.

11. On September 11, 2006, the District requested that the Colorado Department of Education (CDE) confirm the appointment of Ms. Brenda Ball as Student's new Educational Surrogate Parent. On September 13, 2006, CDE confirmed the appointment in a letter to Ms. Ball.

12. On September 13, 2006, counsel for the District received from Ms. Buechler a CDE letter confirming the appointment of Ms. Buechler as Student's Educational Surrogate Parent effective February 18, 2003.

13. On September 14, 2006, counsel for the District wrote to Ms. Buechler expressing the District's intention to ignore the appointment of Ms. Buechler as Student's educational surrogate and to proceed with further manifestation determination hearings without her participation.

14. On September 15, 2006, the District convened a further Manifestation Determination hearing related to the August 30, 2006, incident. Student's [parents] were not present at the hearing, nor was a representative of the Department due to a failure to provide timely notice of the hearing. Those present at the hearing determined that the Student's conduct of August 30, 2006, was not a manifestation of his disabilities based on statements in the 4/14/06 IEP that he knew the difference between right and wrong and was able to control himself in most situations. The report of the hearing also states that "[a]ccording to the data available, the IEP and behavior plan were implemented."

15. The 4/14/06 IEP states that Student "becomes angry and more easily frustrated than the majority of his peers. He can become both verbally and physically aggressive

² The letter also attaches an undated "Interim Alternative Educational Setting" report based on a determination by the District that its staff member suffered "serious bodily injury" on August 30, 2007.

when he is angry. He can also become noncompliant and argumentative.” The IEP continues: “[Student] will receive no office referrals for this type of behavior.”

16. The record establishes that the IEP and behavior plan were not implemented on August 30, 2006. Following a classroom incident on August 29, 2006, in which he was disruptive, verbally aggressive, and non-compliant, the next day Student was referred to the office of the Assistant Principal. This directly contradicts the provision in the IEP cited above.

17. As a result of the September 15, 2006 hearing, Student was referred to a disciplinary due process hearing. On September 25, 2006, the District conducted a hearing at which Student was ordered expelled through December 21, 2006.

18. On September 25, 2006, the Department provided the District with the Department’s entire educational file on Student as confirmed by Dr. Robert Howell’s letter to Ms. Ball dated September 27, 2006.

19. On October 9, 2006, the District received from Ms. Ball a letter of appeal of the finding of the September 25, 2007 manifestation determination hearing. Additionally, in her role as Student’s Educational Surrogate Parent, Ms. Ball agreed that an alternative placement would be appropriate for Student.

20. Also on October 9, 2007, Dr. Howell wrote to the Department characterizing the documents received from the Department as “educational IEP records.” Dr. Howell opined that these records would likely be sufficient to resolve manifestation issue but were inadequate to determine Student’s placement needs.

21. The records provided to the District reflect Student’s history of angry and aggressive behavior. In 2001, he was described as “extremely sensitive and often very explosive in the classroom.” In 2002, Student was noted to exhibit “volatile behaviors, threatening others” that required “a high level of supervision, assistance with sorting out appropriate behavior, a very creative and structured environment.” Again, in 2002, it was documented that Student had “serious behavioral problems” that included hitting another student and an incident where police had to be called to the campus. In addition, Student’s foster parent reported having called the police in response to Student’s “out of control and threatening behavior” in 2002. The same report documents Student having been placed in an emergency mental health hold after he became “assaultive and combative.” A report in 2003 reiterated Student’s problems with “anger and physical aggression” particularly directed at peers and staff when agitated. That report also emphasized Student’s positive progress in areas of compliance, attitude and leadership over a two-month period. A behavior support plan dated 2004 again describes Student’s history of “assaultive behavior towards others” but sets forth a series of responses that are documented as being successful in de-escalating his behavior. Late in 2004, Student was

cited for defiant behavior and hitting the side of a bus as reported by the bus driver. In January of 2005, Student was suspended for assaulting another student.

22. On October 24, 2006, a threat assessment was conducted by District security staff. The report of that assessment noted a prior investigation of Student for felony menacing with a weapon in 2002 for which Student received four years probation. The conclusion of the threat assessment was that Student presented a high risk for repeated violence and posed a danger to staff or students engaged with him in a conventional classroom setting. The assessment attaches a chronology of “assaults/aggressive behavior” derived from Student’s “educational” records.

23. On October 30, 2006, Student’s Manifestation Determination hearing was re-convened. The result of the hearing was that the review of Student’s history revealed that Student’s conduct on August 30, 2006, was substantially related to his diagnoses of psychotic, impulsivity and mood disorders and was, therefore, a manifestation of his disabilities.

24. Student received no educational services from August 30, 2006, to January 15, 2007, inclusive.

25. The seriousness of Student’s conduct and diagnoses, coupled with the multiplicity of people and agencies involved in his educational history presented the District with a unique and extremely complex situation. The actions of the District in this case do not support a finding of systemic noncompliance.

CONCLUSIONS OF LAW

1. The Department has standing in this matter to file the Complaint. “An organization or individual may file a signed written complaint under the procedures described[.]” (34 CFR §300.153(a).) Contrary to the arguments raised by counsel for the District, the procedures for a State Complaint do not require the complainant to be certain type of public agency or an individual with parental rights. In other respects, the Complaint in this matter conformed to these procedures and raises an issue relating to the failure to provide services appropriate for determination by the Complaints Officer.

2. The District failed to provide required educational services to Student from September 18, 2006, through January 15, 2007.³ The District was entitled to remove Student from his placement for a period of ten school days following the incident of August 30, 2006. (20 U.S.C. §1415(k)(1).) Thereafter, regardless of whether Student’s conduct was or was not determined to be a manifestation of his disability, or whether he inflicted serious bodily injury on District staff, the District was obligated to provide

³ September 1, 4, and 15, 2006, were non-school days.

educational services that would allow him to progress toward the goals established in his IEP.

If Student's conduct was a manifestation of his disability, as set forth in Finding of Fact (FF) 23, then the District was required to return him to the placement from which he was removed, unless he inflicted "serious bodily injury" or his Educational Surrogate Parent agreed to a change of placement. (20 U.S.C. §1415(k)(1)(F).)⁴ Here, although Student's conduct on August 30, 2006, was violent and therefore extremely troubling, the evidence did not establish an injury rising to the stringent definition of "serious bodily injury." Additionally, Student's Educational Surrogate Parent communicated her willingness to consent to a change of placement as set forth in FF 19.

If, on the other hand, Student's conduct was not a manifestation of his disability or did result in serious bodily injury, the District was nonetheless obligated to continue to provide educational services, albeit in an appropriate alternative setting. (20 U.S.C. §1415(k)(1)(D)(i).

The District maintains that it required more information to recommend an appropriate educational setting for Student after August 30, 2006. (FF 9, 10, and 20). Despite the District's awareness of Student's history of aggressive misconduct and the presence of a behavioral support plan in the 4/14/06 IEP, it did not request any records prior to September 5, 2006. (FF 4, 5 and 9.) Additionally, the District's unilateral replacement of Ms. Buechler as Student's Educational Surrogate hindered the process of discovering the details of his past. Ms. Buechler had been involved in Student's education for more than three and a half years (FF 12) but she was not included in the manifestation determination process (FF 8 and 13) but was dismissed upon criteria that have no cognizable basis in law or fact.⁵ Ultimately, the records delivered to the District on September 25, 2006, furnished sufficient history of Student's behavioral problems and the relative success of prior approaches to those problems that the District could reasonably have offered a safe and suitable educational program for him. It bears remembering that Student's Educational Surrogate Parent was agreeable to discussion of alternative placements for him. That the District had serious safety concerns regarding Student (FF 22) and did not possess every bit of information available in Student's medical history does not excuse its reluctance to put forth an offer of any type whatsoever. Accordingly, the District failed to provide the educational services to which Student was legally entitled.

⁴ This statute also requires the IEP team to develop or review a previously-developed behavioral intervention plan. While there is no evidence that this occurred in this case, the Complaint did not raise a separate issue on this point.

⁵ Counsel for the District provides no authority for the four factors cited in her September 14, 2006, correspondence and is mistaken in the assertion that the CDE had no record of Buechler's prior appointment (FF 12).

REMEDY

In order to redress the educational harm suffered by Student as a result of the failure to provide services between September 18, 2006, and January 15, 2007, the District shall provide compensatory education to Student as follows: 66 days of instruction consistent with his most recent agreed-upon and implemented IEP, to include an updated behavior plan, to be provided in addition to regular instructional days that Student is already entitled to. Student's educational program should be reviewed and updated by his IEP team as circumstances warrant. Student's program of compensatory education shall be completed no later than December 31, 2007.

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 16th day of April, 2007.

Keith J. Kirchubel
Federal Complaints Officer