

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

State Level Complaint 2008:512

Denver Public Schools

Decision

INTRODUCTION

This State-level Complaint (Complaint), dated November 11, 2008, was received in the office of the State Complaints Officer on November 18, 2008. The then State Complaints Officer, Mr. Keith Kirchubel, determined that the Complaint identified four (4) allegations subject to the jurisdiction of the state-level complaints process under the federal Individuals with Disabilities Education Act (IDEA). Mr. Kirchubel notified the Denver Public School District (District) and the Complainant of that determination by letter dated November 26, 2008 which also enclosed a copy of the Complaint. The original decision due date for this Complaint was January 16, 2009.

The Complainant is the parent of a child with a disability. Hereafter, the Complainant is referred to as the “Complainant” and the student is referred to as the “Student.”

The issues and, therefore, the scope of the investigation identified by Mr. Kirchubel in the November 26, 2008 letter are as follows:

1. Whether the District implemented the accommodations and modifications specified in the Student’s Individualized Education Program (IEP) document, including the use of a computer for written assignments and those items specified in paragraph D.3 of the Complaint from November 18, 2007 through November 18, 2008;
2. Whether a trained and qualified paraprofessional was provided as specified in the student’s IEP from November 18, 2007 through November 18, 2008;
3. Whether the triennial IEP meeting held on October 3, 2008, included all necessary team members and addressed the topics identified in the notice for such meeting; and
4. Whether the District reasonably complied with Complainant’s request for information in advance of the IEP meeting on October 3, 2008.

The response of the District was dated and hand delivered to Mr. Kirchubel on December 16, 2008. By letter dated December 17, 2008, Mr. Kirchubel mailed the Complainant a

copy of the Response. That same letter informed the Complainant that her reply to the Response was due on January 5, 2009. The Complainant's reply to the District's response was received on December 31, 2008.

Given the sharp disputes of fact revealed by the information submitted by the parties, on January 15, 2009, it was determined that an on-site investigation at the Student's school was necessary. The purpose of the on-site investigation was to interview the school principal and the Student's teachers and service providers in order to resolve the factual disputes. Consequently, on January 15, 2009, the decision due date was extended, by letter to the parties, to 2/27/09 due to the above-described exceptional circumstances.

The on-site investigation was conducted on February 11, 2009. During the on-site investigation, a team from the Colorado Department of Education (CDE)¹ interviewed, separately, the following individuals: [Student's Physical Therapist], [Student's Service Provider from District's Assistive Technology Resource Team (ATRT)], [Special Education Department Chair], [Principal], [Student's Paraprofessional], [Student's Speech Language Pathologist], [Student's General Classroom Teacher], and [Student's Special Education Case Manager].

During the on-site interview, the District provided the CDE team with the Physical Therapist's Service Logs; ATRT Status Notes dated 1/8/09 and 2/3/09; the Speech Language Pathologist's Diary; a note about issues relevant to this Complaint regarding the District's Encore IEP system; a community sign activity completed by the Student; draft IEP pages pertaining to the Student's community sign annual goal; District Facility Management records pertaining to the school elevator; and the Student's IEP dated 11/24/2008.

The undersigned State Complaints Officer (SCO) closed the record on February 11, 2009.

I. Issue: Whether the District implemented the accommodations and modifications specified in the student's Individualized Education Program (IEP) document, including the use of a computer for written assignments and those items specified in paragraph D.3 of the Complaint from November 18, 2007 through November 18, 2008.

A. *Contentions of the Parties*

The Complainant alleges as follows: numerous accommodations on the Student's IEP have not been implemented; the Student has not consistently been provided with a computer and printer for all written assignments; the Student has not had access to the elevator due to faulty functioning or because staff has not permitted the Student to use the elevator without a pass; a substitute paraprofessional has not been provided when the

¹ The CDE team was comprised of Ms. Stephanie Lynch, the undersigned State Complaints Officer, Ms. Gina Quintana (Senior Consultant for Significant Support Needs) and Ms. Laura Freppel, Assistant Director of the Exceptional Student Leadership Unit.

Student's one to one paraprofessional is absent; and the paraprofessional does not consistently attend the Student's classes or leaves early.

The District responds as follows: it has fully implemented each specified accommodation and modification on the Student's IEP; it has provided the Student with a laptop computer and printer and has provided support and training through the District's Assistive Technology Resource Team (ATRT); the Student's teachers report that the Student has [STUDENT'S] laptop in class each day; and the paraprofessional often implements the specific provisions in the Student's IEPs requiring modification of assignments, step by step instruction, or frequent reinforcement. The Student has unrestricted access to the elevator as necessary; although the elevator was unavailable for use a total of nine (9) days during the relevant time period, the District acted quickly to repair the elevator when it was out of service; and the Student is sufficiently mobile, and when the elevator was out of service, the malfunction did not impede the Student's instruction. Further, the District states that the paraprofessional has rarely missed a day of class; when the paraprofessional is absent, substitute paraprofessional coverage is provided; and teachers and school staff report that the paraprofessional is always in class with the Student.

B. Findings of Fact

1. Student is a child with a disability and eligible to receive special education and related services during the period covered by this Complaint. During the relevant time frame, the Student received special education and related services inside the regular class at least 80% of the time.
2. The Student's IEP dated October 10, 2007² lists numerous accommodations and modifications. The accommodations and modifications relevant to this Complaint are:
 - assistance highlighting important materials within presentation of assignments,
 - ensure a safe environment throughout the day,
 - drill repetition of skill,
 - redirection of attention to task when necessary,
 - consistent and frequent positive reinforcement,
 - provide and use visuals as needed when necessary,
 - frequent checks for understanding,
 - allow extra time to respond to both oral and written questions,
 - allow additional time for teacher tests when needed,
 - allow [Student] to stretch when necessary,
 - formal and informal testing provided by an individual familiar with [Student],
 - preferential seating,
 - scribe,
 - assistive technology for computer access,
 - use of laptop computer,
 - use of printer for laptop computer,

² District Response Exhibit 1.

- use of the elevator when needed to get from floor to floor, and
- one on one paraprofessional throughout the school day.

3. The same one-to-one paraprofessional worked with the Student during the relevant time period.³

4. A list of the Student's accommodations was provided to the Student's teachers at the beginning of the year. However, no additional explanation was given to the teachers defining the accommodations, addressing when the accommodations needed to be implemented, or who was responsible for implementing the accommodations.⁴

5. The staff members working with the student have varying interpretations of many of the above accommodations (e.g., assistance highlighting important materials within presentation of assignments, ensure a safe environment throughout the day, drill repetition of skill, preferential seating, and scribe).

6. The staff members working with the Student have an inconsistent understanding of *when* many of the accommodations are to be implemented because the phrases associated with some of the accommodations (i.e., "as needed," "when needed," and "as necessary") are undefined. Many of the staff members believed that, because the student does not express or show a need for the accommodation, the accommodation does not have to be implemented. However, per school staff, the Student is passive and will respond if spoken to but, generally, the Student does not initiate communication.

7. Although one teacher modified the Student's grades, little or no attention was given to modifying the classroom curriculum to enable the Student to independently access the general education curriculum. During the onsite investigation, a classroom teacher stated a need for special education support and assistance in modifying the curriculum for the Student.

8. Many accommodations have not been implemented because most of the school staff assumed the paraprofessional was responsible for implementation of the accommodations because he worked one on one with the Student. However, the paraprofessional did not understand many of the accommodations. Further, during the onsite interview, the paraprofessional stated that some of the accommodations could not be implemented because "the Student is in a mainstream classroom."

9. The laptop computer and printer are essential accommodations to enable the Student to participate in the general education curriculum. During the onsite interviews, both the physical therapist and the ATRT representative emphasized the importance of this accommodation to the Student. The ATRT representative stated that, if the Student's work is not printed out and turned in, the Student does not receive credit for the class.

³ Based on the on-site interviews with school staff

⁴ Based on the on-site interviews with school staff

10. On August 21, 2007, the ATRT provided a laptop computer and printer to the Student and the paraprofessional working with [Student]. On August 19, 2008, the ATRT delivered a laptop to Student for the 2008-09 school year. The printer was connected to the laptop and was working. The ATRT provided training to the Student and paraprofessional on the use of the laptop computer several times between September 24, 2008 and October 24, 2008. Based on input from the IEP team meeting on October 3, 2008, the ATRT developed a technology plan. Copies of the plan were provided to the Student and the paraprofessional, as were written and pictorial directions for hardware and software.⁵ Despite this training and support, the paraprofessional either was unable or unwilling to properly implement the accommodation of the laptop computer. Nearly all staff members interviewed reported that the paraprofessional either was reluctant to use the computer or was not proficient in using the computer.

11. Beginning with the 2008-09 school year, the accommodation of the laptop computer was not consistently available in classes for the Student to complete written assignments. In the onsite interview, the general classroom teacher reported that the computer was not in her class for the first 3 – 4 weeks of school. Even when the computer was available in class, the Case Manager acknowledged that the accommodation was not being implemented in the manner intended.

12. Although the printer was in the building,⁶ use of the printer was not implemented until October 2008. Additionally, when the printer was brought to class, the use of the printer has been inconsistent because the paraprofessional was unable or unwilling to implement this accommodation.

13. The Student was allowed to use the elevator. However, the paraprofessional reported that a teacher had questioned the paraprofessional about the Student's use of the elevator. The principal stated that a substitute or new teacher may have challenged the Student's use of the elevator, but that staff members who know the Student would not do so. During the relevant time period, the elevator at Student's school was out of service a total of 9 times, but steps were promptly taken to get it repaired. During the on-site investigation, the principal provided adequate documentation showing that the elevator successfully underwent the 5 year inspection process on July 31, 2008.

14. For the relevant time period, the paraprofessional's attendance log shows that the Student's paraprofessional was absent 4 days and left early on 4 days. On the days for which the paraprofessional was fully absent, a substitute is indicated. On the days the paraprofessional left early, no substitute coverage is indicated.

15. The paraprofessional has not been with the Student at all times during the school day. During the onsite interviews, one service provider noted that the paraprofessional was not always with the Student in order to fade the Student's dependence on the one to one assistance. During her interview, the Case Manager acknowledged that the paraprofessional was found reading the paper rather than assisting the Student in class.

⁵ District Response Exhibits 6-7.

⁶ Per interviews with school staff

C. Conclusions of Law

It is well established that a school district must provide special education services that comport with a student's IEP as one element of a free appropriate public education (FAPE). *Board of Educ. of the Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176 (1982); 34 CFR §§ 300.101 and 300.201. The IEP must include the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals, to be involved in and make progress in the general education curriculum, and to be educated and participate with other children with disabilities and nondisabled children.⁷

Based on the Findings of Fact in Section I.B, above, the SCO concludes that many of the Student's accommodations specified by the Student's IEP, including use of a laptop computer and printer, and a one-to-one paraprofessional, were not fully implemented in violation of the IDEA's general FAPE provisions. *See*, 34 CFR §§ 300.101 and 300.201. While the Student's IEP contained numerous accommodations and modifications,⁸ the accommodations and modifications were not fully implemented,⁹ in large part because the school staff did not fully understand what the accommodations were, how the accommodations were to be implemented and by whom. The paraprofessional was not consistently available to the Student and was unable or unwilling to implement the Student's accommodations for which he was responsible.¹⁰ In this regard, the SCO concludes that the District's failure to fully implement the Student's accommodations denied the Student a FAPE.

With regard to the school elevator, the SCO concludes that the District did implement this accommodation. As with all things mechanical, malfunction will occur from time to time. In this case, the District obtained repair of the elevator without undue delay.¹¹ There is insufficient evidence in the record to conclude that the Student was denied use of the elevator when it was functional.

II. Issue: Whether a trained and qualified paraprofessional was provided as specified in the student's IEP from November 18, 2007 through November 18, 2008.

A. Contentions of the Parties

The Complainant alleges as follows: the paraprofessional acknowledged that he was not properly trained or told of his job description; the paraprofessional has not allowed the Student to complete [STUDENT'S] own work because the paraprofessional "did not

⁷ 34 C.F.R. § 300.320(a)(4)

⁸ Finding of Fact 2

⁹ Findings of Fact 5-8, 10-12, and 14-15

¹⁰ Findings of Fact 10-12 and 14 - 15

¹¹ Finding of Fact 13

want to be bothered with a computer;” the paraprofessional has not allowed the Student to attempt to do class work and has told the Student that the class work is too hard; and the Complainant has had to request the ATRT to provide training to school staff.

The District responds as follows: the paraprofessional assigned to Student is highly qualified pursuant to No Child Left Behind and trained and certified for the position; the paraprofessional holds an associates degree, has over 20 years of experience as a paraprofessional in the public school setting and is familiar with the requirements of the one-to-one paraprofessional position; the paraprofessional has received training individual to the Student; the paraprofessional reviewed the Student’s IEP and regularly communicates with the Case Manager; the paraprofessional attends each IEP meeting; the paraprofessional receives additional training throughout the school year as appropriate; and the paraprofessional is seated next to the Student and works closely with the Student in a supporting role in all classes.

B. Findings of Fact

1. The Student has had the same one-to-one Paraprofessional working with [Student] during the relevant time period.¹² This paraprofessional has worked with the District for 20 years in various roles, however this is the first time he has worked with a child with this type and degree of disability.
2. The paraprofessional did not fully understand the Student’s disability. During the onsite interviews, the paraprofessional stated that the Student has “quite a disability,” but later stated that the Student doesn’t have any special needs that require extra care to ensure the Student’s safety. Additionally, the paraprofessional stated that he received no training on working with the Student’s type of disability for the first six months he was assigned to the Student.
3. The paraprofessional did not understand his role in providing one to one support for the Student. The general classroom teacher communicated a concern that the paraprofessional is “doing a lot of [Student’s] work in class” to the Case Manager.¹³ During the onsite interviews, the teacher reported that it was an “all or nothing” situation explaining that the paraprofessional “liked to do it all or else he does not provide the Student a lot of assistance.” The paraprofessional acknowledged he has completed the Student’s work because he believed the Student is incapable of completing the work. Additionally, several staff members stated that the paraprofessional gave his handwritten notes to the Student to type into the computer which only created extra work for the Student. The paraprofessional also reported that he uses the study hall period to have the Student retype whole chapters from a history book or to retype poetry into the computer.
4. As indicated in Section I.B.8, above, the paraprofessional does not understand some of the Student’s accommodations.

¹² See Section I.B.3

¹³ District Response Exhibit 9.

5. While the paraprofessional scribed or took notes for the Student, the paraprofessional's handwriting, which is primarily in script and not printed, was difficult to read, if not illegible. Difficulty in reading the paraprofessional's handwriting was reported by several staff members during the onsite interview, some of whom believed that it would be difficult for the Student to read the paraprofessional's handwriting.

6. Despite the training provided, the paraprofessional was unable or unwilling to properly implement the accommodations of the laptop computer and printer for the Student.¹⁴

C. Conclusions of Law

The IDEA specifically allows paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulation or written policy, to be used to assist in the provision of special education and related services to children with disabilities. *See*, 34 CFR §§300.201 and 300.156(b)(2)(iii). The Rules for Administration of the Exceptional Children's Educational Act (ECEA) provides that each administrative unit will determine the qualifications and competencies required for paraprofessionals.¹⁵

Here, there is no dispute as to whether the paraprofessional meets the qualifications set out in the IDEA and ECEA Rules. The dispute is whether the paraprofessional was properly and effectively trained to support the unique needs of the Student.

Based on the record, the SCO concludes that the District failed to properly and effectively train the paraprofessional to support the unique needs of the Student. Because the paraprofessional was not properly and effectively trained in the Student's disability or to support the unique needs of the Student,¹⁶ the paraprofessional did not understand his role in providing one to one support to the Student in regular education classes or other education related settings, such as study hall;¹⁷ the paraprofessional did not know how to implement many of the Student's accommodations.¹⁸ The paraprofessional has completed much of the Student's work, making it unlikely that the Student received meaningful, and not trivial, educational benefit during that part of the 2008-09 school year that is relevant to this Complaint. In this regard, the District's failure to appropriately and effectively train the paraprofessional has denied the Student a FAPE.

¹⁴ *See* Section I (B), Findings of Fact 10 -12

¹⁵ 1 C.C.R. 301-8, 2220-R-3.04(1)(e)

¹⁶ Findings of Fact 1-2

¹⁷ Finding of Fact 3

¹⁸ Findings of Fact 4-6

III. Whether the triennial IEP meeting held on October 3, 2008, included all necessary team members and addressed the topics identified in the notice for such meeting.

A. *Contentions of the Parties*

The Complainant alleges the following: the general education teacher signed as a participant in the IEP meeting, but was not present at the IEP meeting held on October 3, 2008; the physical therapist was not in attendance and the physical therapy report submitted included information that did not pertain to Student; the school nurse wrote academic goals on the Student's Health Care plan; no IEP goals were ever submitted, "closed out," or discussed at the October 3, 2008 meeting; at the conclusion of the meeting, the IEP was incomplete and documents were omitted; and, despite three subsequent meetings with school personnel after October 3, 2008, the IEP was still incomplete or incorrect as of November 11, 2008.

The District responds as follows: the meeting notice sent to the Complainant in advance of the October 3, 2008 meeting indicated that the special education teacher, the general education teacher, the principal, and the special education director/designee may be in attendance at the meeting; additional discretionary personnel (speech language pathologist and ATRT representative) were also in attendance at the October 3, 2008; and the physical therapist attended the final IEP meeting on November 24, 2008; the purpose of the meeting was to hold the triennial reevaluation to determine special education eligibility and disability; and the IEP team discussed the results of the evaluations and assessments conducted, closed out certain goals and set forth new goals in IEP over two meetings.

B. *Findings of Fact*

1. A Notice of Meeting dated September 16, 2008 was provided to the Complainant that indicated the purposes of the meeting were a triennial review to discuss the assessments that have been completed; to determine whether the child continues to be in need of special education services, how those services can be provided; and to develop a new IEP for the child. The Notice of Meeting indicates that a special education teacher, a general education teacher, the principal/designee, and special education director/designee may be in attendance at the meeting.¹⁹

2. On October 3, 2008, the IEP meeting was held. The following signatures were on the 10/03/08 IEP participation page indicating that the following individuals were in attendance: The Complainant, the Case Manager (as the special education director/designee), a special education teacher, the Student, the principal, the general education teacher, the speech/language pathologist, the Complainant's advocate, the paraprofessional, and a representative from the ATRT. An "X" is marked next to the general education signature line.²⁰

¹⁹ District Response Exhibit 3.

²⁰ District Response Exhibit 2.

3. Not all participants attended for the entire duration of the October 3, 2008 meeting. At the onsite visit, the speech language pathologist acknowledged that she left the meeting early. The general education teacher acknowledged that she attended the meeting for 10 – 15 minutes only and that she signed the October 3, 2008 IEP participation page after the October 3, 2008 meeting. There is no evidence in the record showing that, prior to the meeting, the parent agreed in writing to the general education teacher’s excusal from the meeting.

4. The physical therapist was not in attendance at the October 3, 2008 meeting. The physical therapist provided consult services for the Student. At the onsite visit, the physical therapist acknowledged that, subsequent to the October 3, 2008 meeting, she heard that the Complainant disagreed with two statements in her evaluation report. The physical therapist subsequently changed her report based on the Complainant’s input.

5. There is no evidence that academic goals were included on the Student’s Health Care Plan. During the onsite visit, it was noted by the Chair for the school’s Special Education Department that it would not be uncommon for providers from other disciplines, such as the school nurse, to include recommendations for the Student’s IEP.

6. The content of the October 3, 2008 IEP meeting covered the Student’s reevaluation, progress toward goals, accommodations, post secondary transition, and the paraprofessional. At the onsite interview, the speech language pathologist stated that she presented her report and her goals at the October 3, 2008 meeting. The other staff members in attendance at the October 3, 2008 meeting also reported covering areas such as goals, accommodations, and post secondary transition. The Case Manager acknowledged that the support provided by the paraprofessional was discussed at the meeting, but it was not the primary topic of discussion at the meeting.

7. Following the October 3, 2008 meeting, several draft documents reflect hand written notations. Specifically, notations appeared on the copies of the draft IEP documents dated October 3, 2008; the goals and objectives pages from the Student’s IEP dated October 10, 2007 bear notations of goals “met”, “not met”, and “no progress”. An additional document dated November 5, 2008 lists accommodations/modifications.²¹

8. The October 3, 2008 IEP meeting covered many of the typical content areas. The meeting was concluded with the understanding that the goals were not finalized and that the IEP meeting would be continued at another date. The Case Manager reported that she attempted to schedule another meeting at the conclusion of the October 3, 2008 meeting and that a date was arranged, but that date was later cancelled by the Complainant. Another date was scheduled, and subsequently cancelled by the Complainant.

9. As indicated by the school’s Contact Log, the Complainant and the Case Manager met to review IEP changes on October 20, 2008. The Contact Log indicated that many phone calls had been exchanged between the Case Manager and the Complainant. On

²¹ District Response Exhibit 2.

November 7, 2008, the Case Manager contacted Complainant to schedule the “next IEP meeting” to review requested changes to the IEP.²²

10. The Student’s IEP was finalized in the IEP team meeting held on November 24, 2008.

C. *Conclusions of Law*

The IDEA provides in relevant part:

The IEP team for each child with a disability must include:

- (1) the parent(s) 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
 - (ii) is knowledgeable about the availability of resources of the public agency;
- (5) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described previously;
- (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.²³

[Emphasis added]

A member of the IEP team is not required to attend an IEP team meeting, *in whole or in part*, if the parent of a child with a disability and the public agency agree, in writing that the attendance of the member is not necessary because the member’s area of curriculum or related services is not being modified or discussed in the meeting.²⁴ A member of the IEP team may be excused from attending an IEP team meeting, *in whole or in part*, when the meeting involves a modification to or discussion of the member’s area of the curriculum or related services, if – (i) the parent, in writing, and the public agency consent to the excusal; and (ii) the member submits, in writing to the parent and the IEP team, input into the development of the IEP prior to the meeting.²⁵

²² District Response Exhibit 9.

²³ 34 C.F.R. § 300.321(a)

²⁴ 34 C.F.R. § 300.321(e)(1)

²⁵ 34 C.F.R. § 300.321(e)(2)

Based on the Findings of Fact, the SCO concludes that the District violated 34 CFR § 300.321(a) because the general education teacher did not attend the October 3, 2008 IEP Team meeting *in its entirety* and the relevant procedures for excusal were not utilized.²⁶ With regard to the physical therapist and the speech language pathologist, the District did not violate 34 CFR § 300.321(a) because neither was identified on the September 16, 2008 Notice of Meeting and were not required IEP Team members.²⁷

With regard to the content of the IEP annual review, the IDEA states:

Each public agency must ensure that the IEP team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revises the IEP as appropriate, to address (A) any lack of expected progress toward the annual goals and in the general education curriculum, if appropriate; (B) the results of any reevaluation conducted; (C) information about the child provided to, or by the parents; (D) the child's anticipated needs; or (E) other matters.²⁸

In this regard, the SCO concludes that the District did not violate the IDEA. The parties agreed to continue the October 3, 2008 meeting. As such, the topics discussed at *both* the October 3, 2008 and November 24, 2008 IEP meetings collectively satisfied the requirements of the IDEA.²⁹ The Student's IEP was completed at the November 24, 2008 IEP meeting.³⁰

IV. Whether the District reasonably complied with Complainant's request for information in advance of the October 3, 2008 IEP meeting.

A. Contentions of the Parties

The Complainant alleges that, prior to the IEP meeting held on October 3, 2008, she requested in writing to be provided with all documentation in advance but she was only provided with half of the IEP documentation the night before the meeting.

The District responds as follows: the Complainant requested all documents such as testing documents, worksheets, and drafts one week before the scheduled IEP meeting; the principal and the case manager agreed that all documents available would be provided to the parent with the exception of test protocols; the case manager was directed to gather the documents and provide them to the Complainant; and it provided the Complainant with a draft IEP and all prepared reports, assessments and evaluations by early afternoon the day before the IEP meeting.

²⁶ Finding of Fact 4

²⁷ Finding of Fact 1

²⁸ 34 C.F.R. § 300.324(b)(1)

²⁹ Findings of Fact 6-10

³⁰ Finding of Fact 10

B. Findings of Fact

1. On September 26, 2008, the parent delivered a letter to the Case Manager. The letter stated, “In regards to the Triennial Evaluation/meeting that is set for October 3, 2008 at 2:10 p.m. I am requesting per IDEA 614(b)(2)(A), that copies of ‘all’ documents be given to me prior to the meeting, to include the entire testing documents, worksheets, drafts, et., any and all documents that will be pertain (sic) to this meeting.”³¹

2. On September 26, 2008 at 4:17 PM, the principal sent an email to the special education case manager that stated: “I have read the note and I believe [Complainant] is requesting reports so she may read them prior to the meeting. We will not give test protocols or test documents, only the results. We can have the test protocols at the meeting but they will not leave the building with [Complainant]. We would be in compliance if [Complainant] had access to information, a draft IEP and reports by 3:00 PM on Thursday October 2. Since you will be out of the building on T/W... the info is to her (sic) by 3:00 on Thursday. You should request that the SW and psychologist, speech nurse (sic) have their reports to you by 3:00 on Thursday to give to [Complainant] Copies can all be marked draft.”³² At the Onsite visit, the Principal confirmed that she spoke with the Complainant and clarified that the Complainant wanted the *draft* documents, not the IEP from the previous year.

3. On September 26, 2008 at 4:58 PM, the principal sent another email to the special education teacher and special education case manager that stated: “I called [Complainant] tonight after looking at the statute that she quoted (which does not state what documents or time frame needed) I let [Complainant] know that she would have draft copies of the reports by Thursday afternoon. She wanted them sooner and I let her know that I can not (sic) verify that all reports would be ready before then... So- all draft reports should be ready by Thursday at 3:00 PM for mom to review prior to the meeting.”³³

4. On September 26, 2008, the evaluations of the Student were in progress and evaluation reports and the IEP had not yet been drafted. In the onsite interviews, the physical therapist stated that her report was not completed as of September 26, 2008 and the speech language pathologist did not complete testing until September 30, 2008.

5. On October 2, 2008, the Complainant was given several IEP documents marked as “DRAFT” dated October 3, 2008. These documents included:³⁴
 - *Annual Review: Present Level of Academic Achievement Functional Performance, and Educational Needs* in the areas of academic, social emotional and life/skills transition;

³¹ District Response Exhibit 12

³² District Response Exhibit 12.

³³ District Response Exhibit 12.

³⁴ Complaint

- *Documentation of Evaluation Data, Present Level of Academic Achievement, Functional Performance, and Educational Needs* (Evaluation Reports) which included evaluations administered, classroom observation dates, and a summary of findings completed by the school social worker, the school psychologist, the school nurse, the physical therapist, and the case manager;
- *Special Education and Related Services* service delivery table;
- *Curricular Accommodations/Modifications*;
- *Post Secondary Transition Outcomes* (2 of the same page);
- A blank *Permission for Consent Prior to Inviting Agencies to Discuss Transition Services for Students*;
- *Determination of Eligibility and Disability*;
- *Determination of Disability* for physical disability, speech language disability, perceptual or communicative disability; and
- *Additional Information* which listed numerous further accommodations and modifications.

C. Conclusions of Law

Each participating agency must permit parents to inspect and review any educational records relating to their children that are *collected, maintained, or used* by the agency under the IDEA. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, and in no case more than 45 days after the request has been made.³⁵ The IDEA cross-references the definition for “education records” established by the Family Educational Rights and Privacy Act (FERPA).³⁶ “Education records” means those records directly related to the Student and maintained by an education agency.³⁷ The Family Compliance Policy Office (FCPO) of the U.S. Department of Education explains that a school is not required *to create* education records that do not already exist at the time a parent requests access to records.³⁸ A copy of the student’s evaluation reports and IEP must be provided to a parent, however there is no requirement to provide such documents in advance of the IEP meeting.³⁹

The SCO concludes that the District had no obligation to provide the documents requested by the Complainant because the requested documents did not exist at the time of the request. Therefore, the SCO finds no violation of the IDEA. The SCO notes that the school attempted to comply with the Complainant’s request and provided the Complainant with the requested documents prior to the IEP meeting.

³⁵ 34 C.F.R. § 300.613(a)

³⁶ 34 C.F.R. § 300.611(b)

³⁷ 34 C.F.R. § 99.3(a)

³⁸ *Letter to Anonymous* (FPCO September 2007).

³⁹ 34 C.F.R. §300.322(f), 34 C.F.R. §300.306(a)(2), *See also* IDEA Preamble, Fed Reg. Vol 71, No 156 (08/14/06) at page 46645: “The Act does not establish a timeline for providing a copy of the evaluation or the documentation of determination of eligibility to the parents.”

REMEDY

1. The District shall ensure that the accommodations and modifications in the Student's IEP are fully implemented. To that end, the District shall convene the Student's IEP team, including the Complainant, as soon as possible following its receipt of this decision but, in any event, no later than **Friday April 3, 2009**. The Complainant shall cooperate with the District in scheduling this IEP team meeting. The purposes of this IEP team meeting are as follows:

- (a) The development of a consistent and common understanding among IEP team members of each accommodation and modification specified in the Student's IEP;
- (b) The development of a consistent and common understanding among IEP team members of when and how the accommodations and modifications will be implemented for the Student;
- (c) An identification of the individual school staff members who are responsible for implementing each accommodation and modification for the Student (e.g. Classroom Teacher, Paraprofessional, Case Manager);

Such common understandings and identified responsibilities shall be documented in writing and copies of the written documentation shall be distributed to each of the Student's teachers and providers **within five (5) school days** following the IEP Team meeting. The District shall also provide a copy of the written documentation, and all other documents related to the IEP meeting (e.g., notice of meeting, participation page, meeting notes) to the Department no later than **Friday April 10, 2009**.

2. With regard to the Student's assigned paraprofessional, no later than **Friday March 13, 2009**, the District shall ensure that any paraprofessional assigned to the Student is effectively trained, capable of supporting the Student's unique needs and, in fact, is doing so. At a minimum, the paraprofessional assigned to the Student must be able to demonstrate:

- (a) Understanding of (i) the Student's disability; (ii) his/her role in providing one to one support to the Student; and (iii) the accommodations and modifications in the Student's IEP for which the paraprofessional is responsible to implement;
- (b) Proficiency that is independent (i.e., not dependent on the assistance of others) in using the Student's assigned computer, printer, software and any other assistive technology (e.g., flash drives for transferring information from teacher/provider computers to the Student's assigned school computer and to [STUDENT'S] home computer) such that the paraprofessional is able to and will effectively assist the Student with such assistive technology; and

- (c) The ability to produce legible handwriting (printed and not in script) for classroom activities that preclude the Student's use of the computer.

The District shall provide written documentation to the Department evidencing the assigned paraprofessional's training, proficiencies, and capabilities, and also implementation documentation, no later than **Friday March 27, 2009**.

- 3. Additionally, as to the school, the District must correct the cited noncompliance as soon as possible but, in any event, no later than **Wednesday September 2, 2009**. Consequently, on or before **Friday April 3, 2009**, the District must submit to the Department a proposed Corrective Action Plan (CAP) for the school that effectively addresses how the cited noncompliance will be corrected so as not to recur as to the Student and all other students with disabilities attending the school.⁴⁰ The CAP must address:

- (a) How accommodations and modifications in the IEPs of students with disabilities attending the school will be explained to school staff responsible for implementing the accommodations and modifications; and how the District will ensure that the accommodations and modifications are fully implemented by the responsible school staff:
- (b) How it will ensure that school staff both understand and, in fact, implement the requirements for IEP Team member attendance at IEP Team meetings, including the limited circumstances under which required IEP team members may be excused, in whole or in part, from an IEP team meeting consistent with the attendance excusal requirements established by 34 CFR §300.321(e).

The Department will review the CAP. Following such review, the Department will either approve or request revisions to the CAP. The enclosed sample templates provide suggested formats for the CAP and include sections for "improvement activities" and "evidence of implementation and change." The Department will conduct verification activities in September 2009 to verify the District's timely correction of the noncompliance.

Please submit the CAP and other documentation required, above, to the Department to the attention of the undersigned SCO as follows:

Ms. Stephanie Lynch
State Complaints Officer
Exceptional Student Leadership Unit
Colorado Department of Education
1560 Broadway, Suite 1175
Denver, Colorado 80202- 5149

⁴⁰ 34 C.F.R. § 300.151(b)

Failure by the District to meet any of the timelines set forth, above, will subject the District to enforcement action by the Department.

CONCLUSION

This Decision shall become final as dated by the signature of the undersigned State Complaints Officer.

Dated, this 27th day of February 2009.

Stephanie Lynch, Esq.
State Complaints Officer