

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

State Level Complaint 2015:509
Colorado Springs School District 11

DECISION

INTRODUCTION

This is a state-level complaint ("Complaint"), properly filed on May 8, 2015, against Colorado Springs School District 11 ("School District"). The Complaint was filed by Student's mother ("Parent") on behalf of her child, Student. Student is identified as a child with a disability under the Individuals with Disabilities Education Act ("IDEA").

Based upon the Complaint, the State Complaints Officer ("SCO") identified one issue subject to the jurisdiction of the state level complaint process under IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153.

COMPLAINT ALLEGATION

The Complaint raised the following issue:

Whether in the Spring of 2015 and in response to Student being the victim of bullying, the School District denied Student with a free appropriate public education by changing the Student's placement without convening an IEP meeting, without changing the Student's IEP, without consideration of reevaluation, and without consideration of the Student's educational needs.

The specific change of placement that is the subject of the Complaint and of the SCO's investigation was Student's removal from school and subsequent receipt of homebound services after March 17, 2015.

The Complaint raised a number of other issues related to bullying alleged to have been suffered by Student and retaliation allegedly suffered by Mother. Those issues and allegations were not accepted for investigation by the SCO because they do not fall under the jurisdiction of the SCO, *i.e.*, they do not articulate a violation of Part B of the IDEA. Questions regarding whether the incidents in question actually constitute bullying, whether the District's investigation of such incidents were appropriate, and issues related to requests for educational records, the administration of medication, or any other issues are not subject to the SCO's jurisdiction and will not be considered. The **only** issue considered herein is whether, in response to allegations of bullying, the District denied Student a free appropriate public education ("FAPE").

DISTRICT'S RESPONSE

The District denies that it changed Student's placement or otherwise denied Student with educational services in response to bullying allegations. First, the District notes that in addition to responding to and investigating allegations of bullying, it conducted a functional behavior assessment ("FBA") and developed a behavior intervention plan ("BIP") to provide strategies and supports to help Student interact more positively and effectively with peers. Second, it was Parent, not the District, who removed from school and requested homebound instruction. Parent unilaterally removed Student from school on or around March 17, 2015. The Parent requested mediation, to which the District agreed. In the meantime, Parent requested homebound services, and the District agreed to provide such services pending mediation "as a token of good faith."

Thus, according to the District, the provision of homebound services was not a change of placement under an IDEA (with its attendant procedural safeguard requirements), but rather an agreement in the context of dispute resolution proceedings, to which the procedural requirements of IDEA would not apply. The District contends that it was not required to identify Student's placement as "homebound" on Student's IEP because the homebound services were not the services being recommended by the IEP and were only being provided in an effort to resolve an IDEA dispute.

PARENT'S REPLY¹

Parent's Reply admitted that Parent removed Student from school after March 17, 2015, and that it was Parent who requested that Student receive homebound services.²

The remainder of Parent's Reply reiterated Parent's allegations of bullying, discrimination and retaliation. Because the SCO does not have jurisdiction to investigate such claims, they are not relevant to the issues in this case and will not be summarized herein.

In addition, Parent's Reply raises new issues not found in the original Complaint relating to discussions at an IEP meeting on February 24, 2015 and April 10, 2015. Because new issues may not be raised for the first time in a reply, those issues will not be considered herein.

FINDINGS OF FACT

1. At all times relevant to this case, Student was a resident of the District, and was identified and served as a child with a disability entitled to special education and

¹ Parent's Reply included Exhibits 1-14. Because the District's Response already had exhibits designated 1-14, the SCO will refer to Parent's exhibits using alphabetical labels (i.e., Exhibit 1 = Exhibit A, Ex. 2 = Ex. B, etc.)

² Parent's Reply, p. 1

related services. Student is identified as a child with Autism Spectrum Disorder.³ Student is an intelligent child who is able to access the general education curriculum with special education supports.⁴ Student struggles with “social communication and reciprocity, reading social cues, and frustration management which sometimes results in what appears to be escalated behaviors.”⁵ These difficulties sometimes impair Student’s ability to interact appropriately with peers.⁶

2. Until Parent removed Student from school on or around March 17, 2015, Student attended School. Prior to being removed from School by Parent, Student’s IEP provided that Student’s primary special education environment was in a general education class at least 80% of the time.⁷
3. Student had a number of behavioral/disciplinary incidents throughout the 2014-2015 school year, including incidents that Parent characterized as bullying. Parent alleges that Student was bullied on three occasions - February 19, 2015 (Student was pushed by another student at School); March 11, 2015 (Student was poked in the eye with a pencil⁸); and March 17, 2015 (Student punched by another student at School, on the playground⁹). Because of Parent’s behavior in the immediate aftermath of the March 17 incident, including grabbing another child (not her own) and yelling at staff on the playground, the District notified Parent that she would not be allowed on School property.¹⁰
4. The merits of the allegations and Parent’s characterizations of the incidents are not for the SCO to determine, nor is there evidence in the record either to verify exactly what happened in any of these incidents. The only inquiry for the SCO is whether the District’s response to these incidents was appropriate from the perspective of Student’s right to a free appropriate public education.
5. Following all three incidents, School staff conducted investigations and took action to address the situations.¹¹
6. Following a disciplinary incident at the end of 2014, School staff began to provide Student with additional behavioral support, including “check-ins” with a behavioral

³ Ex. 1.

⁴ Interview with Special Education Facilitator; Interview with Executive Director.

⁵ Ex. 1, p. 3.

⁶ *Id.*

⁷ Ex. 1, p. 1; Interview with Special Education Facilitator.

⁸ The SCO notes that the contemporaneous “Incident Report” states that Student reported the incident as an accident that was the result of “fooling around with another student.” Ex. 18, p. 1.

⁹ According to School staff, the incident also involved Student grabbing another student’s buttocks, to which the other student responded by attempting to punch Student. Ex. 6, pp. 2-3.

¹⁰ Ex. 9, p. 3.

¹¹ Exs. 3, 6, and 7.

support teacher and interventions to teach and promote positive social skills.¹² Around this same time period (January 2015), Parent requested a reevaluation.¹³

7. The District convened IEP meetings on February 25 and April 10, 2015 (the IEP was finalized on April 10).¹⁴ On February 25, the IEP team, including Parent, reviewed the evaluation, including an FBA.¹⁵ Because the meeting was running long, the team agreed to reconvene to complete the IEP and develop a BIP at a later date.¹⁶
8. In the meantime, the March 17 incident occurred, which Parent has characterized as bullying against Student. Following that incident, Parent refused to send Student back to School.¹⁷ Parent indicated that she wanted to send Student to a private facility that serves children with autism ("Autism Center").¹⁸
9. On March 18, 2015, Parent requested an independent educational evaluation and mediation.¹⁹ The District agreed to both and proceeded to arrange for the IEE and mediation.²⁰ The IEE is currently underway.²¹
10. Also on March 18, Parent demanded in-home tutoring from the District.²² The District agreed to provide home tutoring, but clearly characterized it in an email to Parent as a "stop gap effort as we work through the current situation."²³ Indeed, on the District's *Application for Approval of Homebound/Hospital Instruction*, the request for homebound instruction is described as "pending mediation re: issues at [School]."²⁴
11. The SCO notes that the District was not obligated to provide homebound services at all, given that Student was out of school because of Parent's refusal to send him there. Per District policy, homebound services are for students who cannot attend school because of a medical condition; if a student is able to attend school, even just part time, the student is not technically eligible for homebound services.²⁵ In this case, Student was able to attend school and there is no record of a medical condition, and thus was not eligible for homebound services. Nonetheless, the District agreed to

¹² Interview with Lead Special Education Facilitator.

¹³ *Id.*; see also Ex. H, p. 2.

¹⁴ Ex. 1.

¹⁵ Interview with Special Education Facilitator.

¹⁶ *Id.*

¹⁷ *E.g.*, Ex. 4, p. 3; Ex. 5, p. 2;

¹⁸ Ex. 7, p. 15; Ex. 19, p. 19.

¹⁹ Ex. 19, p. 19. The SCO notes

²⁰ Ex. 5, p. 4; Ex. 14 and 15.

²¹ Ex. 15.

²² Ex. 19, p. 312; Ex. 3, pp. 9, 11.

²³ Ex. 17, p. 1.

²⁴ Ex. 17, p. 5.

²⁵ Ex. 17, p. 1; see also District's Board of Education Policy IHBF-R, "Homebound or Hospital Instruction," at <http://www.d11.org/BOE/Policies/Section/IHBF-R.pdf>.

provide homebound instruction pending mediation as a courtesy or “stop gap” measure so that Student wouldn’t fall too far behind while the District and Parent resolved their differences.

12. In the meantime, the District proceeded with finalizing the IEP and BIP on April 10, 2015. Parent attended and participated, and the Complaint does not raise any issues that the meeting was not properly convened, that the IEP team was not properly constituted, or that the IDEA’s requirements relating to the development or content of the IDEA were in any way violated.²⁶ Though Parent indicated that she did “not agree with the LRE for my child,” the placement Parent wanted was not homebound services, but rather placement at Autism Center.²⁷
13. The resulting IEP provided that Student continue to be educated in the general education classroom at least 80% of the time.²⁸ The IEP includes goals to teach Student to appropriately express needs and emotions through work with a mental health professional or SED teacher, in addition to the behavioral supports and strategies included in the BIP.²⁹ The IEP does not recommend homebound instruction because lesser restrictive placement is appropriate for Student:

[Student] benefits from the peer interaction and grade level instruction available in the general education classroom. He is able to access the curriculum with special education support in English, language arts and math. [Student] requires small group or individual instruction in social/emotional/behavioral skills and in speech. [Student] occasionally requires small group support in his core classes. In addition, observation of [Student] has indicated that [Student] needs special education support during unstructured times of the day.³⁰

14. Based upon these facts, the SCO finds that in providing homebound services to Student, the District did not change Student’s placement or otherwise take action affecting, denying, or modifying Student’s access to special education and related services. At all times relevant to this case, the District has had an IEP in place that provided for Student to receive special education and related services in a public school setting, in a general education classroom at least 80% of the time. Those services were provided to Student prior to March 17, and would have been available after March 17 had Parent allowed Student to return to school. Thus, homebound services were not Student’s placement for special education purposes; they were provided by the District in good faith, as a courtesy pending mediation, so that

²⁶ Interview with Special Education Facilitator.

²⁷ Complaint, p. 10; Ex. 19, p. 88; Interview with Special Education Facilitator.

²⁸ Ex. 1.

²⁹ *Id.*, p.

³⁰ Ex. 1, p. 12.

Student would not fall too far behind while Parent kept Student out of school. Indeed, the District's agreement to provide homebound services when Student was not entitled to them protected Parent, because they shielded her from potential truancy charges that may have resulted from her refusal to send Student to school as required by Colorado law.³¹

15. With respect to the efforts to mediate, Parent wanted to mediate the issues of bullying, but did not request a special education mediation through the Department of Education.³² Rather, the mediation request was handled by the Director of Equal Opportunity Programs.³³ During a telephone conversation with Parent in mid-April, Parent indicated that she wanted to put the mediation on hold while she had interviews with other agencies.³⁴ Parent never contacted the Director of Equal Opportunity Programs to pursue mediation further prior to filing the Complaint in this case.³⁵

CONCLUSIONS OF LAW

1. Under the Individuals with Disabilities Education Act, public school districts are required to provide children with disabilities with a "free appropriate public education," by providing special education and related services individually tailored to meet the student's unique needs, and provided in conformity with an individualized education program (IEP) developed according to the Act's procedures. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; ECEA Rule 2.19. The Act contains extensive procedural requirements relating to the development of the IEP, including requirements that the IEP be a written document, reviewed at annually, that it be developed by a team of individuals with knowledge about the child, including the child's parents, and that it be based upon the input of the IEP meeting participants as well as evaluative data derived from valid, scientifically based assessments conducted in accordance with the Act's requirements. See, e.g., 34 C.F.R. §§ 300.301-300.304; 300.320-300.324.
2. The IDEA and its implementing Colorado rules also include procedural requirements relating to how a student's special education placement may be changed. In Colorado, changes to a child's program that constitute a "significant change in placement" must be made "upon consideration of reevaluation, and shall be made only by an IEP team ... unless the parent and the administrative unit ... mutually agree to change the IEP after the annual IEP meeting in a school year..." ECEA Rule 4.03(8)(b)(ii). When a new IEP is developed, or when a school district proposes or refuses to take any action with respect to the evaluation, identification, placement or

³¹ C.R.S., §§ 20-33-104, 22-33-107.

³² Ex. 10, p. 8.

³³ Interview with Director of Equal Opportunity Programs.

³⁴ *Id.*

³⁵ *Id.*

provision of FAPE for a child with a disability, the AU must provide the parents with "prior written notice" of the change, including specific information required by the law. 34 C.F.R. 300.503.

A. The District responded appropriately to the bullying allegations

3. Generally, allegations of bullying and retaliation raise issues of discrimination that are outside the jurisdiction of IDEA's dispute resolution processes, because they do not arise under Part B of IDEA or relate to issues involving the identification, evaluation, placement, or provision of FAPE. *See, e.g.*, 34 C.F.R. 300.153(b)(1)(state complaint must include "a statement that a public agency has violated a requirement of Part B of the Act"). The only question giving rise to a justiciable issue under IDEA is whether a student with a disability who is the target of bullying behavior continues to receive FAPE in accordance with his or her IEP.³⁶

4. The federal Office of Special Education and Rehabilitative Services explained that in response to bullying behavior against a student with a disability,

the school should, as part of its appropriate response to the bullying, convene the IEP team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP Team must then determine to what extent additional or different special education or related are needed to address the student's individual needs, and revise the IEP accordingly. ... The IDEA placement team (usually the same as the IEP Team) should exercise caution when considering a change in the placement or the location of services provided to the student with a disability who was the target of the bullying behavior and should keep the student in the original placement unless the student can no longer receive FAPE in the current LRE placement.³⁷

5. Based upon the email correspondence in the record between Parent and School staff, it is unclear as to whether Student was truly bullied - defined by OSERS as "aggression used within a relationship where the aggressor has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated" - or whether the incidents that Parent has characterized as bullying are more akin to incidents of rough play or disagreements/disputes among peers.³⁸

³⁶ *Dear Colleague Letter*, 113 LRP 33753 (OSEP/OSERS 2013)(emphasis added).

³⁷ *Id.*

³⁸ *Id.*; *See also, e.g., Jackson County Sch. Bd.*, 113 LRP 22741 (SEA FL 2012), *aff'd, A.L. v. Jackson County Sch. Bd.*, 114 LRP 47640 (N.D. Fla. 2014)(isolated instance of rough play between peers did not amount to bullying).

6. Assuming for the sake of argument that the incidents in question could be characterized as bullying, the SCO concludes that the District responded appropriately and continued to offer Student a FAPE. In investigating the allegations of bullying, District staff did nothing to deprive Student of the services under his IEP or otherwise deprive Student of a FAPE. Further, in reviewing and revising the IEP in February and April (around the time of the three bullying allegations), the IEP team included a IEP goal designed to teach Student to express wants and needs more effectively, and also developed a BIP. The Complaint makes no allegations that either the IEP or the BIP were not appropriate or not tailored to Student's individual needs. Accordingly, the SCO finds no violation with respect to the District's actions in response to allegations of bullying.

B. The District did not improperly change Student's placement or err in failing to identify "homebound instruction" as Student's placement on the IEP

7. Parent's Complaint alleges that "currently, [Student] is on a home-bound tutor due to the bullying, but [the] IEP reflects that [Student] is still attending [School] because the district would not change and reflect the correct placement on April 10, 2015."³⁹ The implication is that the District placed Student on homebound services because of bullying, such that the placement being implemented by the District is inconsistent with Student's IEP. This statement, however, is not supported by the record.

8. Though the term "placement" is not specifically defined in federal law, the Colorado ECEA provides some clarity:

The terms "placement" or "educational placement" are used interchangeably and mean the provision of special education and related services and do not mean a specific place, such as a specific classroom or specific school.⁴⁰

"Special education and related services" are those services set out in a student's IEP, based upon the Student's individual needs, including the setting in which those services will be provided.⁴¹ A change of placement occurs when there is a change in a student's IEP and/or setting in which the student will receive those IEP services.⁴² Such changes must be made by an IEP team or outside of an IEP meeting if the parents

³⁹ Complaint, p. 2.

⁴⁰ ECEA Rule 4.03(8).

⁴¹ 34 C.F.R. §§ 300.320 and 300.324.

⁴² ECEA Rule 4.03(8)(b).

and school district agree.⁴³ Amendments outside the IEP process must be pursuant to a written document amending or modifying the student's current IEP.⁴⁴

9. In this case, the IEP team never changed Student's placement to a homebound instruction setting, nor did the District undertake any such change in Student's placement outside of the IEP process. Rather, it was Parent, not the District, who removed Student from School and demanded homebound services. Though the District would have been well within its rights to refuse this demand, it provided the homebound services as a courtesy or an act of good faith pending the parties' efforts to resolve their difference through mediation. This was not, however, a change or amendment to the IEP. Student's IEP continued to offer Student special education and related services in the general education setting at least 80% of the time, to be implemented in a public school setting (in this case, at School).
10. Had Parent chosen to send Student to School, Student would have received special education and related services consistent with the IEP.⁴⁵ Parent's refusal to allow Student to attend school, and the District's subsequent agreement to provide homebound services pending mediation, however, were actions outside of the IEP process and did not amount to a change of Student's "placement" for special education purposes. There was no requirement that the IEP developed on April 10, 2015, identify Student's special education placement as "homebound services," because that statement would have been inaccurate.
11. Because there was no change in the IEP or Student's placement, there was no requirement that the District consider reevaluation, provide Parent with prior written notice, or otherwise adhere to the procedural requirements flowing from a change in placement. Accordingly, the SCO finds no violation in the District's agreement to provide homebound services to Student or in the District's refusal to identify Student's placement on the IEP as "homebound services."
12. Having found no violations of IDEA, no remedy is ordered.

CONCLUSION

The Decision of the SCO is final and is 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 C.F.R. § 300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 156, 46607 (August 14, 2006). This Decision shall become final as dated by the signature of the undersigned State Complaints Officer.

⁴³ *Id.*; see also 34 C.F.R. § 300.324(a)(4).

⁴⁴ 34 C.F.R. § 300.324(a)(4)(i).

⁴⁵ Interview with Executive Director for Special Education; Interview with Special Education Facilitator.

Dated this 26th day of June, 2015.

Wendy A. Jacobs
State Complaints Officer

APPENDIX

Complaint, filed May 8, 2015

Response, filed June 5, 2015 (pp. 1-9):

- Ex. 1 - IEP dated 4/10/2015 (pp. 1-21)
- Ex. 2 - Timeline of School Year (pp. 1-7)
- Ex. 3 - Emails between Parent and District staff (pp. 1-16)
- Ex. 4 - Emails between Parent and District staff (pp. 1-5)
- Ex. 5 - Emails between Parent and District staff (pp. 1-6)
- Ex. 6 - Emails between Parent and District staff (pp. 1-5)
- Ex. 7 - Emails between Parent and District staff (pp. 1-22)
- Ex. 8 - Emails between Parent and District staff (pp. 1-14)
- Ex. 9 - No Trespass letter to Parent (pp. 1-8)
- Ex. 10 - Emails between Parent and District staff (pp. 1-22)
- Ex. 11 - Emails between Parent and District staff (pp. 1-6)
- Ex. 12 - Emails between Parent and District staff (pp. 1-11)
- Ex. 13 - Emails between Parent and District staff (p. 1)
- Ex. 14 - Emails between Parent and District staff (pp. 1-3)
- Ex. 15 - Emails between Parent and District staff (pp. 1-3)
- Ex. 16 - Emails between Parent and District staff (pp. 1-3)
- Ex. 17 - Emails between Parent and District staff; Homebound application (pp. 1-5)
- Ex. 18 - Incident Reporting Form (p. 1)
- Ex. 19 - Emails between Parent and District staff (pp. 1-109)
- Ex. 20 - List of individuals with knowledge of facts in Complaint (p. 1)

Response, filed June 16, 2015 (pp. 1-15)

- Ex. A - Student records and emails
- Ex. B - Student report card, emails and work samples
- Ex. C - Misc. records from service providers
- Ex. D - Emails between Parent and District staff
- Ex. E - Emails between Parent and District staff
- Ex. F - Parent concerns and discipline form
- Ex. G - Disciplinary records and emails
- Ex. H - Emails between Parent and District staff
- Ex. I - IEP Agenda
- Ex. J - Staff emails
- Ex. K - Correspondence re: medication
- Ex. L - Correspondence re: draft IEP
- Ex. M - Emails between Parent and District staff
- Ex. N - News article