

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

Federal Complaint 2003:524

Wiley School District RE-13-J/Southeastern BOCES¹

Decision

INTRODUCTION

This Complaint was dated 11/03/03 and filed on 11/05/03. The response of the Wiley School District RE-13-J/Southeastern BOCES (hereafter referred to as the District) to the Complaint was dated and postmarked 11/20/03 and received on 11/25/03. The Complainants' response to the District's response was dated 12/07/03 and received on 12/11/03. The Federal Complaints Officer closed the record on 12/11/03.

The Complainants are the parents of a child who has been identified as having a physical disability.

COMPLAINANTS' ALLEGATION

The Complaint contains the following allegation:

From August 19, 2003 to October 10, 2003, [Student] did not have the direct in the regular education classroom support of 18.5 -25.0 hours/week that is provided for by his IEP. He in fact had no support for the dates listed above. The Special Education Instructor informed the High School Principal, Ruthann Cullen, several times of the need to have a person support [Student] in his classes. It was not until we, [Student]'s Parents, called and stated that we would call the Superintendent on the following day that the issue was addressed. At the time of this writing things are better, [Student] has support for 15.5 hours per week, which is still in violation of his IEP. On behalf of our child I request that you investigate this matter and order whatever compliance actions are necessary to correct this violation.

THE DISTRICT'S RESPONSE

The District's response to the Complaint generally states as follows: The student's 08/27/02 IEP called for a minimum of 18.5 hours per week of direct services from the special education staff

¹ The Complainants state that their complaint is primarily against the Wiley School District and not against the Southeastern BOCES. However, under Colorado special education law, the Southeastern BOCES is the administrative unit that is responsible for providing the special education services. See, Rule 3.01 (2) (b) of the Rules (for the) Administration of the Exceptional Children's Educational Act, 1 CCR 301-8, Rules 2220-R-100, *et seq.*

in the regular classroom for four class periods of service each day to be provided by a teacher's aid. On 08/19/03 the student's IEP team, including the parents, met and decided not to support the student with a teacher's aid in the regular classroom for a trial period to end on 09/22/03 and to monitor the student for that period of time. The parents did not object to this decision which was implemented. According to the District, the rationale for this decision was two-fold: (1) the District faced staffing problems in covering the IEP requirements for a number of special education students, and (2) The IEP team believed that the student could receive educational benefit without an aid in every class. At the 09/22/03 IEP team meeting, which was a triennial review, the IEP team decided to reinstate the teacher aid for four academic classes for a total of 18.5 hours per week. Those services began on October 6, 2003, except that the student has received 15.5 hours of teacher aid services, not 18.5 hours, because, for the 2003-04 school year, the District reduced class time for all students from 55 minutes per class to 47 minutes per class (and the parents were made aware of the reduction in class time), resulting in fewer minutes of service per week. The District asserts that the student has made educational gains since the start of the 2003-04 school year despite the lack of services specified by the student's relevant IEPs. The District has produced a document dated 11/14/03 showing that the student is earning passing grades in his regular classroom academic courses. The District states that it has now hired a paraprofessional who is available to provide whatever direct services are needed by the student.

FINDINGS OF FACT AND CONCLUSIONS

The District concedes that, between the dates of 08/19/03 and 09/22/03, it did not provide the student with all of the services called for by his 08/27/02 and 09/22/03 IEPs. The District states that the student's IEP team met on 08/19/03 and decided not to provide special education support services on a trial basis until the student's triennial evaluation and review. The parents dispute that the IEP team made such a decision.

The District also concedes that, between the dates of 10/06/03 through the date of its response (11/20/03), the student has received 15.5 direct hours of special education support in four academic courses instead of the minimum 18.5 hours per week called for by the student's 09/22/03 IEP. The District argues, in effect, that the 18.5 hours of services was an administrative mistake because, at the beginning of the 2003-04 school year, the District went from 55 minute class periods to 47 minute class periods and the student was to be supported in only four academic classes. The parents dispute whether the IEP team made an administrative mistake in specifying that the student was to receive a minimum of 18.5 hours of direct services.

34 C.F.R. §300.350 (1) (a) requires the public agency to provide special education services in accordance with each child's IEP.

When facts are in dispute, the usual process in most legal settings for resolving the factual 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 complaints process, unlike the due process hearing, makes no provision for an evidentiary hearing. Special education factual disputes are more properly resolved in a due process hearing. Another way of resolving a factual dispute is to examine the

documentation submitted by the parties and the surrounding circumstances to see whether they provide a definite answer.

The Federal Complaints Officer has carefully reviewed the documentation and other information provided by the parties. The Federal Complaints Officer makes the following findings of fact:

1. The student's 08/27/02 IEP states that the student was to receive "direct and indirect academic support in the regular education setting from special education teachers and classroom/school aides."² The IEP specified "Direct in General Classroom" services for a range of 18.5-20 hours per week.

2. The student's 09/22/03 IEP states that the student was to receive "special ed support in his academic areas especially affecting his written and language arts based curriculum as well as support in math. Additionally, he will receive support while working towards his transitional goals through both special ed and speech."³ The IEP specified "Direct in General Classroom" services for a range of 18.5 – 25 hours per week.

3. The documentation and other information submitted by the parties is sufficient to find that on 09/22/03, the IEP team decided and intended that the student should receive special education support in his academic courses, including math. The student's academic courses for the fall semester were five in number -- World History, Biology, English 10, Sociology and Integrated Math II. Each class was 47 minutes each and the services computation (47 minutes X 5 courses X 5 days) results in 19.58 hours per week. The 09/22/03 IEP specifies that the student is to receive a minimum of 18.5 hours per week and that he should also receive special education services to support him in attaining his transition goals – which accounts for the upper range of 25 hours.

4. The documentation and other information provided by the parties is sufficient to find that the reason the student did not receive special education support in his academic classes between 08/19/03 and 10/06/03 was because the District did not have or was unable to have staff available to provide those services;

The Federal Complaints Officer concludes that the District has violated § 300.350 (a) (1) because it has failed to provide the student with all of the services specified by the student's 08/27/02 and 09/22/03 IEPs.

NEW ALLEGATIONS NOT CONTAINED IN THE ORIGINAL COMPLAINT LETTER

In response to the District's response to the Complaint, the Complainants have made the following new claims:

1. District personnel have violated confidentiality safeguards.

² Page (6c) Page 7 of 9 of the 08/27/02 IEP in the narrative describing the specific services to be provided.

³ Page (5c) Page 9 of 11 of the 09/22/03 IEP in the narrative describing the specific services to be provided.

2. The parents, and not the District, have been providing the assistive technology needed to support the student's educational needs.
3. The District's documentation of the student's progress towards his IEP goals and short term objectives is not meaningful.

These allegations were not made in the original Complaint letter that went to the District and to which the District was asked to respond. Therefore, the Federal Complaints Officer is not going to consider these new allegations to be a part of this Complaint. If the Complainants wish to file a further complaint about these allegations, in accordance with the regulatory 1-year statute of limitations, they are entitled to do so.

FREE APPROPRIATE PUBLIC EDUCATION

Part B of the IDEA requires each local educational agency, along with the state educational agency, to ensure that a free appropriate public education (FAPE) is available to all children with disabilities, aged 3 through 21. The Federal Complaints Officer has determined that the District has violated §300.350 (a) (1).

Having found a violation, the Federal Complaints Officer must next determine whether the District's failure to provide all of the services required by the student's IEPs between 08/19/03 and the present has resulted in a denial of the student's right to a FAPE. The parties disagree on this point.

As was stated earlier, the federal complaints process is not well suited for resolving factual disputes. The Federal Complaints Officer has carefully reviewed the documentation provided by the parties. The District has submitted a report card for the student which, for the first quarter of the 2003-04 school year, shows that the student received passing or better grades in his regular education academic courses.⁴ The parents have submitted four October 2003 progress reports based on the student's 09/22/03 IEP goals. Those progress reports were individually completed by the student's regular education teachers. The progress reports show that the student (a) has made some progress toward achieving some of his annual goals and short term objectives, and (b) the student has made no discernible progress with regard to other goals and objectives. Some teachers recorded progress on certain goals while, for the same goals, other teachers reported no progress. The Federal Complaints Officer therefore finds that the documentation and other information submitted by the parties do not provide a definite answer to the question of whether the District's failure to provide the student with all of the services called for by the 08/27/02 and 09/22/03 IEPs has deprived the student of a FAPE. The Federal Complaints Officer therefore finds that there is insufficient evidence to conclude that the District has deprived the student of a FAPE.

⁴ The accommodations section of the student's 08/27/02 IEP required the student's teachers to base the student's grades on (a) the amount of improvement that the student makes, (b) on IEP objectives, and (c) on effort as well as achievement.

If the parents believe that the student has received only trivial educational benefit from the District resulting in a deprivation of his right to FAPE, the parents are entitled to request a due process hearing.

REMEDY

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 that the District recognizes and accepts as valid the violation found by the Federal Complaints Officer. This statement shall include a statement of assurance explaining how the violation found will be addressed to prevent its recurrence.

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 today, December 23rd, 2003.

Laura L. Freppel
Federal Complaints Officer