

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

State-Level Complaint 2012: 506
Adams County School District 12

DECISION

INTRODUCTION

This pro-se, state-level complaint (Complaint) was properly filed on June 4, 2012, by the mother of a child identified as a child with a disability under the Individuals with Disabilities Education Act (IDEA).¹

To comply with the federal privacy laws (i.e., Family Educational Rights and Privacy Act (FERPA) and the Individuals with Disabilities Education Act (IDEA))² and to protect the anonymity of the Complainant and her child, hereafter, the persons and locations identified in conjunction with the Complaint investigation and Decision will be labeled as follows and redacted prior to publication:

[Parent], mother of Student, (“Parent”);
[Student], child of Parent, (“Student”);
Student’s age of [Age], [Age];
[School], (“School”);
Adams County School District 12, (“District”);
[District Special Education Director], District’s Executive Director of Student Support Services, (“District Special Education Director”);
[School Legal Counsel], School legal counsel, (“School Legal Counsel”);
[School Special Education Director], School Director of Special Services, (“School Special Education Director”); and
[Special Education Teacher], School special education teacher, (“Special Education Teacher”).

The Complaint consisted of one page.

¹ The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 CFR § 300.1, *et seq.*

² FERPA, codified at 20 U.S.C. § 1232g, was enacted in 1974, to protect a parent’s access to education records and to protect the privacy rights of students and their parents. The IDEA regulations are found at 34 CFR § 300.1, *et seq.*

Based on the written Complaint, interview with Parent on June 4, 2012, and documentation submitted by Parent in support of her Complaint on June 4, 2012, the State Complaints Officer (SCO) determined that the Complaint identified one allegation subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 CFR §§ 300.151 through 300.153.³ The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

On June 6, 2012, the District's Special Education Director was notified of Parent's allegation in a cover letter which included a complete copy of the Complaint.

On June 26, 2012, the SCO timely received the District's one-page Response and exhibits marked by the SCO as "1" through "6."⁴ A copy of the District's Response and all supporting documentation was delivered to Parent on June 28, 2012.

Parent did not submit a Reply and failed to respond to multiple requests by the SCO to be interviewed after the District had submitted its Response.

On July 10, 2012, the SCO sent the District additional information that was previously submitted by Parent and marked as Exhibit E and sent Parent additional information that was previously submitted by the District and marked as Exhibit 7.

On July 24, 2012, the SCO sent Parent additional information requested from the District and marked as Exhibit 8.

On July 25, 2012, the SCO closed the record.

PARENT'S COMPLAINT ALLEGATION

Parent's Complaint contained one allegation, summarized as follows:

1. The District has not conducted an initial evaluation of Student within 60 days of receiving parental consent for the evaluation, on or around the first week of February 2012, in violation of 34 CFR§ 300.301.

Summary of Proposed Remedies. Parent proposed that the District be required to: 1) conclude the evaluation process as soon as possible, but no later than June 23, 2012, to determine Student's eligibility for special education; 2) provide compensatory education; 3) provide training for School staff on the IDEA; and 4) reimburse Parent for internet fees and mileage for Parent and Parent's Advocate to travel to IEP meetings.

³ Hereafter, only the IDEA regulation and any corresponding Exceptional Children's Educational Act (ECEA) rule will be cited (e.g., § 300.000, Section 300.000 or Rule 1.00).

⁴ On 6/20/2012, the SCO notified the Parties in writing that the District's time to submit a Response would be extended from 6/21/2012 to 6/26/2012.

THE DISTRICT'S RESPONSE

The District acknowledged that it had failed to conduct Student's initial evaluation within 60 days of receiving Parent's consent, as required by the IDEA. Although School convened an eligibility meeting on June 22, 2012, the meeting concluded before Student's eligibility for special education and related services could be determined because Parent, who was participating by phone, was disconnected from the meeting when her cell phone battery died. The District indicated that it would resume the eligibility meeting as soon as Parent agreed to a date and time. The District also indicated that it would offer compensatory services, as appropriate, based on the outcome of the eligibility meeting.

FINDINGS OF FACT

After thorough and careful analysis of the entire Record,⁵ the SCO makes the following FINDINGS:

Factual Background:

1. At all times relevant to the Complaint, Student was [Age] and attending an online charter school (School) authorized by the District. A contract between District and School allows School to conduct initial evaluations and determine eligibility for special education for students enrolled in School. The contract also provides that School will develop initial Individual Education Programs (IEPs) for students eligible to receive special education and related services.⁶
2. On February 1, 2012, Parent sent an email to School Special Education Director to request that Student be evaluated for special education.⁷ In her request for evaluation, Parent expressed concerns that Student was experiencing vision problems and was not making adequate progress in school.⁸ On February 3, 2012, School Special Education Enrollment Coordinator sent Parent written consent for an initial evaluation, informing her that School would start the evaluation process once Parent signed and returned the consent form.⁹
3. The SCO finds it more likely than not that School received Parent's signed written consent for an initial evaluation on or around February 15, 2012.¹⁰ Accordingly, the 60-day evaluation period ended on April 15, 2012. In its Response to the Complaint, the District

⁵ Appendix A, attached and incorporated by reference, details the entire Record.

⁶ Interviews with School Legal Counsel, School Special Education Director, and District Special Education Director.

⁷ Exhibit A, p. 3.

⁸ Exhibit A, p. 3.

⁹ Exhibit E, p. 1.

¹⁰ Exhibit 1, p. 1; Interviews with Parent and School Special Education Director. Although Parent's signature on the consent form is dated February 6, 2012, Parent could not recall when she signed or returned the form to School. School Special Education Director stated that School received it from Parent on February 15, 2012.

admitted that School failed to complete its evaluation of Student within 60 days of receiving Parent's written consent.¹¹

4. Based on the following evidence, the SCO finds that School completed its initial evaluation of Student on June 20, 2012:

- Special Education Teacher conducted an informal assessment/observation of Student on April 10, 2012.¹² Based on her face-to-face assessment of Student, Special Education Teacher determined that, in addition to a vision assessment, evaluations were needed in the following areas: occupational therapy, speech/language, and cognitive.¹³
- On February 15, 2012, Parent provided School Special Education Director with a privately obtained vision report from an optometrist dated February 1, 2012.¹⁴ Because the optometrist's report did not include information necessary to complete a functional vision assessment (FVA) or otherwise determine the extent of Student's visual impairment and educational needs, School arranged and paid for an examination to be conducted by an ophthalmologist.¹⁵ The exam by an ophthalmologist was conducted on April 24, 2012.¹⁶ The FVA was completed on June 19, 2012.¹⁷
- An evaluation of Student by an occupational therapist was conducted on May 2, 2012.¹⁸
- The WISC, a cognitive assessment, was administered to Student on May 18, 2012.¹⁹
- An evaluation of Student by a speech language pathologist was completed on June 20, 2012.²⁰

5. On June 22, 2012, the School convened a meeting to determine Student's eligibility for special education. School ended the meeting before eligibility was determined because Parent, who was participating by phone, was disconnected from the meeting when her cell phone battery died.²¹

¹¹ Response, p. 1.

¹² Exhibit A, p. 16.

¹³ Exhibit 6, p. 8.

¹⁴ Exhibit A, p. 9; Exhibit B.

¹⁵ Exhibit 6, pp. 14-15 and 26; Interview with School Special Education Director.

¹⁶ Exhibit 2, p. 2.

¹⁷ Exhibit 2, p. 3. Although the Ophthalmologist referred Student to a specialist for further evaluation, the examination by Ophthalmologist was sufficient to complete the functional vision assessment. Parent informed School Special Education Director that she would take Student to see a specialist in February 2013. Interview with School Special Education Director.

¹⁸ Exhibit A, p. 45; Exhibit 2, p. 14.

¹⁹ Exhibit 2, pp. 9-13.

²⁰ Exhibit 2, p. 16.

²¹ Response; Exhibit 6, p. 35.

6. On July 16, 2012, School reconvened Student's eligibility meeting, with Parent participating by phone.²² School attempted to convene this meeting at a much earlier date, but Parent informed School Special Education Director that she could not meet until after July 15, 2012, because her family had been dislocated by mandatory evacuations related to area wildfires.²³

7. At the July 16, 2012 meeting, Student's IEP team determined that [Student] met the eligibility criteria for a speech-language impairment and was in need of special education and related services as a result of this disability.²⁴ The IEP team determined that Student did not, however, qualify as a student with a visual impairment.²⁵

8. Student's initial IEP, dated July 16, 2012, provides the following special education and related services:²⁶

- 45 minutes of direct speech/language services provided by a speech language pathologist per week;
- 15 minutes of indirect speech language services per month;
- 30 minutes of direct occupational therapy provided by an occupational therapist per week;
- 30 minutes of indirect occupational therapy per month;
- 30 minutes of direct specialized instruction in reading provided by a special education teacher per week; and
- 30 minutes of indirect specialized instruction in reading per month.

On July 16, 2012, School sent Parent a copy of Student's initial IEP, prior written notice, and a request for consent for initial provision of special education and related services via email, as requested by Parent.²⁷ Student's IEP services are scheduled to begin on August 20, 2012, which is the first day of class for the 2012-2013 school year.²⁸

9. Because ECEA Rule 4.03 (1)(d) (i) requires that an initial IEP be developed within 90 calendar days of receiving parental consent for the initial evaluation, Student should have been receiving the services listed on [Student's] initial IEP from on or around May 15, 2012, through the last day of class on June 8, 2012. Of course, School would not be required or even allowed

²² Exhibit 8; Interview with School Special Education Director.

²³ Interview with School Special Education Director.

²⁴ Exhibit 8, p. 17.

²⁵ Exhibit 8, p. 17.

²⁶ Exhibit 8, p. 15.

²⁷ Interview with School Special Education Director.

²⁸ Exhibit 8, p. 15.

to provide the services listed on Student's initial IEP unless and until Parent signed and returned consent for the initial provision of special education and related services, an action Parent had not yet taken when the SCO closed the record.²⁹

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact (FF), the SCO enters the following CONCLUSIONS OF LAW:

1. As a preliminary matter, the SCO addresses the responsibilities of School, an online public charter school, and District, the authorizing school district, for conducting initial evaluations. ECEA Rule 8.04(d)(1) provides that:

When the charter contract between a charter school and its authorizer allows the charter school to provide initial evaluations and reevaluations, the charter school shall be responsible for conducting such evaluations and complying with Section 4.02 of these Rules. However, the administrative unit of the charter school remains ultimately responsible for ensuring that all such evaluations meet the requirements of Section 4.02.

Here, School and District have a contract that authorizes School to conduct initial evaluations, determine eligibility, and develop IEPs for students eligible for special education and related services. (FF 1). Therefore, School is responsible for conducting Student's initial evaluation, but the District remains ultimately responsible for any failure on the part of School to conduct the evaluation in accordance with ECEA and IDEA requirements.

2. Initial evaluations help school districts determine a student's eligibility for special education. If a student is found eligible, the evaluations provide the IEP team with information that assists the team in determining the specialized instruction and related services [Student] will need to receive a free appropriate public education (FAPE). Among the IDEA's various requirements for initial evaluations, is the requirement that they be conducted in a timely manner. In Colorado, the District must conduct an initial evaluation for special education services within 60 days of receiving written parental consent for the evaluation. 34 CFR § 300.301 (b); ECEA Rule 4.02 (3) (c) (ii). The 60-day period does not apply if the student's parent "repeatedly fails or refuses to produce the child for the evaluation." 34 CFR § 300.301 (d); ECEA Rule 4.02 (3) (c) (iii) (A).

3. Here, the District admitted, and the SCO found, that School failed to conduct Student's evaluation within 60 days of receiving parental consent. (FF 3 and 4). Because School received Parent's written consent for an initial evaluation on February 15, 2012, Student's evaluation should have been completed no later than April 15, 2012. On April 10, 2012, several days before the evaluation period ended, School Special Education Teacher conducted the first

²⁹ Calendar downloaded from School website on 7/19/12.

assessment in conjunction with Student's initial evaluation. (FF 4). School completed its initial evaluation of Student on June 20, 2012, more than two months after [Student's] evaluation should have been completed. (FF 3 and 4).

4. By failing to complete Student's initial evaluation within 60 days of receiving parental consent, the District violated the procedural requirements of the IDEA. However, it is well-settled that procedural violations of the IDEA are only actionable to the extent that they impede the child's right to FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or cause a deprivation of educational benefit. 20 U.S.C. §1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); *Sytsema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008). Because School completed its evaluation of Student during the course of this Complaint investigation, the failure to evaluate Student has been remedied. (FF 4).

5. The question now is whether School's failure to timely evaluate Student and develop [Student's] initial IEP resulted in substantive harm to Student, i.e., impeded [Student's] right to FAPE or caused a deprivation of educational benefit. The definition of a free appropriate public education is special education and related services that "are provided in accordance with an [IEP]." 34 CFR §§ 300.17 and 300.107. Where the definition of FAPE specifically references the provision of special education and related services consistent with an IEP, a failure to timely evaluate and develop an IEP for a student who is eligible for special education and related services certainly impedes [Student's] right to FAPE. Accordingly, the SCO concludes that this procedural violation resulted in substantive harm to Student and entitles [Student] to compensatory education services.

6. Compensatory education is an equitable remedy intended to place a student in the same position they would have been, if not for the violation. *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Here, Student should have been eligible to receive the services described on [Student's] initial IEP from May 15, 2012, through June 8, 2012, if not for the District's failure to conduct a timely evaluation. (FF 3 and 9). According to Student's initial IEP, direct services for these four weeks would have provided [Student] with three hours of speech language services, two hours of occupational therapy, and two hours of specialized instruction in reading. (FF 8- 9).

7. Determining compensatory education in this case is complicated by the fact that Parent has failed to respond to School's request for consent for initial provision of special education and related services. (FF 9). A public agency, here the District, is not required to convene an IEP team meeting or develop an IEP until the parent provides consent for the initial provision of special education and related services. 34 CFR § 300.300 (b)(3). Furthermore, a district will not be considered to have violated the requirement to make FAPE available to the child for a failure to provide the special education and related services for which the child's parent has failed to provide consent. *Id.*

8. Here, the District admitted that it failed to timely evaluate Student and has been working diligently to remedy the violation. It even went as far as to convene an IEP meeting and develop

Student's initial IEP, though it had no obligation to do so until Parent provided consent for initial provision of services. (FF 3-9).

9. Because School cannot provide the services on Student's initial IEP without parental consent and it is unknowable whether Parent would have provided consent even if School had timely conducted its evaluation of Student, the SCO has reduced the award for compensatory education services proportionate to Parent's failure to provide consent for such services. On July 16, 2012, following Student's IEP meeting, School sent Parent a copy of Student's initial IEP and a request for consent for initial provision of special education and related services via email and U.S. mail. (FF 8). At the time that the SCO closed the record, Parent had not yet provided consent for initial services. (FF 9). Accordingly, Student is entitled to receive two weeks of the direct services listed on [Student's] initial IEP, i.e., 90 minutes of speech language services, 60 minutes of occupational therapy services, and 60 minutes of specialized instruction in reading.

REMEDIES

The SCO has concluded that the District violated the following IDEA and ECEA requirements:

- a) Initial Evaluation at 34 CFR § 300.301 and ECEA Rule 4.02 (3)(c).

To remedy this violation, the District is ordered to take the following actions:

- 1) **By August, 24, 2012**, the District must submit to the Department a proposed corrective action plan (CAP) that addresses the violation noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities enrolled in School. The District must specifically address how its policies and procedures are carried out in District authorized charter schools. The CAP must, at a minimum, provide for the following:
 - a) Submission of compliant, written policies and procedures and, as applicable, compliant forms that address the cited violation, no later than September 7, 2012.
 - b) Effective training must be conducted for all charter school special education directors and intended designees concerning the policies and procedures, to be provided no later than October 12, 2012.
 - c) Evidence that such training has occurred must be documented (i.e., training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets) and provided to the Department no later than October 19, 2012.
- 2) **Compensatory Education Services for Failure to Provide Student with a FAPE.**

The District shall provide Student with the following compensatory education services: 1) 90 minutes of direct speech language services, 2) 60 minutes of direct occupational therapy, and 3) 60 minutes of direct specialized instruction in reading. These compensatory services shall

be in addition to any services Student currently receives or will receive that are designed to advance Student toward IEP goals and objectives.

In accordance with 34 CFR § 300.300 (b), the District will be excused from providing the compensatory services ordered here if Parent does not provide the District with written consent for the initial provision of special education and related services by 4:00 p.m. on August 10, 2012.

The Parties shall cooperate in determining how the compensatory education services will be provided. Within 10 days of receiving Parent's consent for initial provision of special education and related services, District shall convene a meeting with Parent to determine a schedule for delivering the compensatory education services described above. In scheduling this meeting, the District must follow the parent participation regulation at 34 CFR § 300.322. The District must provide the Department with a copy of the schedule for compensatory services within 10 days of this meeting.

If Parent does not make Student available for scheduled compensatory education services, i.e., Parent cancels a scheduled session or Student fails to attend a scheduled session, the District will be excused from providing the services that were scheduled for that session and will not be required to schedule a make-up session.

By October 12, 2012, the compensatory education services must be completed. To document compliance with this remedy, the District must record the compensatory education provided on service logs that include the following information: the name and title of the provider, the date and duration of service, a brief description of the service, and an indication of whether the services were compensatory or services required by the IEP. The District should also use this log to document whether Parent cancelled or Student failed to attend any scheduled services. By October 19, 2012, written documentation that the District is in full compliance with this remedy must be submitted to the Department.

The Department will approve or request revisions to the CAP. Subsequent to approval of the CAP, the Department will arrange to conduct verification activities to verify the District's timely correction of the areas of noncompliance.

The District shall provide the Department with documentation that it has complied with this requirement no later than October 19, 2012.

Please submit the documentation detailed above to the Department as follows:

Colorado Department of Education
Exceptional Student Services Unit
Attn.: Joyce Thiessen-Barrett, Senior Consultant
1560 Broadway, Suite 1175
Denver, CO 80202-5149

NOTE: Failure by the District to meet any of the timelines set forth above will adversely affect the District's annual determination under the IDEA and subject the District to enforcement action by the Department.

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 CFR § 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.

Dated this 3rd day of August, 2012.

Candace Hawkins

Candace Hawkins, Esq.
State Complaints Officer

Appendix A

Complaint, page 1.

Exhibit A: Email exchanges between Parent and School staff concerning Student's initial evaluation.

Exhibit B: Vision Evaluation conducted on 2/1/12.

Exhibit C: Notice of Meeting.

Exhibit D: Release of Information for eye evaluation.

Exhibit E: Email from School Special Education Coordinator with consent form.

Response, page 1.

Exhibit 1: Consents for Evaluation.

Exhibit 2: Evaluation Reports.

Exhibit 3: Notices of Meeting.

Exhibit 4: Draft Initial Eligibility and IEP.

Exhibit 5: District Draft Special Education Manual

Exhibit 6: Email exchanges between Parent and School staff concerning Student's initial evaluation.

Exhibit 7: School academic calendar for the 2011-2012 school year.

Exhibit 8: Student's IEP and prior written notice and consent for initial provision of special education and related services dated 7/16/2012.

Interviews with:

School Special Education Director on 7/5/2012 and 7/17/2012, and by email correspondence on 7/19/2012.

School Legal Counsel on 7/2/2012 and 7/17/2012.

District Special Education Director on 7/10/2012.

Parent on 6/4/2012. The SCO asked to interview Parent after receiving the District's Response, but Parent failed to respond to multiple requests to be interviewed.