



# Wyoming Department of Education

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WYOMING DEPARTMENT OF EDUCATION  
SPECIAL PROGRAMS DIVISION  
SPECIAL EDUCATION COMPLAINT INVESTIGATION

**Complainant:**

Case #: 2010-12

**Respondent:**

**COMPLAINT DECISION**

**Date of Decision:** August 27, 2010

On June 29, 2010 the Wyoming Department of Education (WDE) received a letter of complaint and supporting documentation filed by \_\_\_\_\_, (hereinafter "Complainant") alleging violations of special education law with respect to \_\_\_\_\_ (hereinafter "Student"), by Respondent \_\_\_\_\_ (hereinafter "District").

Pursuant to 34 C.F.R. §§300.151 through 300.153 of the Federal Regulations implementing the Individuals With Disabilities Education Act (IDEA), WDE conducted an investigation into the allegations in the complaint. Consistent with the IDEA, Federal Regulations, and the Wyoming Department of Education Rules, Chapter 7 governing Services for Children With Disabilities WDE issues the following Findings of Fact, Conclusions, Decision, and Order for Corrective Action.

**Complaint Issues:**

Issue #1

Whether the District is in violation of its duty to provide a Free Appropriate Public Education (FAPE) by failing to provide educational and related services reasonably calculated to meet the student's unique needs pursuant to 34 C.F.R. §§300.17 and 300.101.

## Issue #2

Whether the District failed to afford the parent the opportunity to participate in team meeting(s) pursuant to 34 C.F.R. §300.322.

### **Investigatory Process:**

- Review of records consisting of the following:
  - Original letter of complaint and supporting documents.
  - Documentation provided by the District.
  - Relevant court orders.
- Consultation with WDE's Supervisor for the Services for the Visually Impaired.
- Follow up inquiries with the Complainant.
- Follow up inquiries with the District.
- The District and Complainant were given the opportunity to submit additional information to WDE for consideration during the investigation of this complaint.

### **Applicable Federal Regulations or State Rules:**

34 C.F.R. §300.17 Free Appropriate Public Education (FAPE)

34 C.F.R. §300.101 Free Appropriate Public Education (FAPE)

34 C.F.R. §300.322 Parent Participation

Wyoming Department of Education Rules, Chapter 7

### **Relevant Time Period:**

Pursuant to 34 C.F.R. §300.153(c), WDE has the authority to investigate allegations of violations that occurred not more than one year from the date the Complaint was received. In light of this limitation, the investigation and any findings of noncompliance will be limited to the period commencing June 29, 2009 and ending June 28, 2010. However, in order to fully understand the needs of the Student and the position of the District, the Student's recent special education history was thoroughly reviewed.

### **Findings of Fact:**

1. At all times relevant to this complaint, the Student was a resident of the District.
2. The Student has a complicated history of significant special education needs accompanied by sometimes violent and unsafe behaviors in the school and home environments.

3. During the 2006-2007 school year, the Student was placed in a residential treatment facility after escalating unsafe behavior that resulted in a serious injury to a teacher. The Complainant expressed concern about the distance of the facility from the Student's home.
4. In the summer of 2007, the Student was placed in a different program as a day student, permitting the Student to live at home.
5. On July 3, 2008 the Wyoming (hereinafter "Court") entered an order placing the Student in the care, custody and control of the , and placed the Student in the residential program at the same the Student had been attending. The Court entered its order upon the request of the Complainant, as was no longer able to control the Student's behavior in the home environment.
6. Pursuant to Wyoming statute, funded the residential portion of the placement. The District funded the educational portion of the placement.
7. A comprehensive reevaluation was undertaken in the spring of 2009. The following portions of the reevaluation provide salient information:
  - a. Neuropsychological Evaluation: The Neuropsychologist reported that the Student has been hospitalized on 3 occasions due to violent and uncontrollable behavior. Cognitive assessment resulted in a Full Scale IQ of 43 (below the 1<sup>st</sup> percentile), with a Verbal Comprehension Index of 55 (below the 1<sup>st</sup> percentile), a Perceptual Reasoning Index of 45 (below the 1<sup>st</sup> percentile), a Working Memory Index of 62 (1<sup>st</sup> percentile); and a Processing Speed Index of 50 (below the 1<sup>st</sup> percentile). All areas of academic achievement were measured between the kindergarten and first grade levels. "[Student] will continue to require a residential treatment setting, with educational, behavioral, emotional, and family supports for the best possibility of success. [Student] requires structure and stability of a behaviorally oriented residential setting, where therapists can focus on academic, emotional and impulse control interventions on a daily basis." At this point, [Student] can not live with in the community until the violence is decreased or eliminated. Recommendations included remaining in the current special education setting.
  - b. Psychologist's Clinical Evaluation: The Clinical Psychologist reported fewer behavioral problems in the school program as opposed to the cottage or residential settings. "At school, [Student] had fewer problems, and appeared less stressed and noncompliant. [Student] has a behavior record of fewer tantrums in the school

setting." "In the school setting, [Student] is doing fairly well, both behaviorally and academically."

- c. **Speech/Language Evaluation:** The Speech/Language Clinician reported that during therapy sessions, [Student] has made very good progress on improving production of the /th/ sound in all positions in words, phrases and sentences. Although [Student] is below age level when compared to same age students, [Student] has made good improvement in the area of receptive vocabulary skills during speech/language therapy sessions. [Student] made good improvement in vocabulary skills, but still needs assistance with functional vocabulary. [Student] could benefit from therapy to improve listening skills. [Student] has made some improvement in speech, especially with the production of the /th/ sound.
  - d. **Occupational Therapy Evaluation:** [Student] has significant visual limitations that affect every day function. [Student] needs more time to visually focus on reading, looking for self-care items, etc. Although improvements were noted, [Student] continues to need occupational therapy services in both the educational and community settings.
  - e. **Physical Therapy Evaluation:** The goals of treatment focused on improving balance skills during standing and walking, increasing range of motion, and increasing strength and body awareness. [Student] actively participates, is cooperative and performs exercises to the best of [Student's] ability. [Student's] motor status is essentially unchanged from the previous evaluation.
8. The IEP in place during the time relevant to the complaint was drafted on June 9, 2009. The District's Special Education Director participated in the development of this IEP. The following is a summary of salient points:
- a. **Measurable Annual Goal:** [Student] will increase self-control in interpersonal situations by reducing incidents per month of unsafe incidents, to safe behavior across setting for one month. Safe behavior is defined as zero incidents of unsafe, dangerous behavior, or harm to others, self, property or animals as documented.
    - i. In relevant part, the Present Level of Performance states: Data shows [Student's] unsafe behavior has stabilized at a level of 12-13 tantrums per month over the last 4 months (Feb-May 2009). [Student] has improved the ability to calm self without as many restraints or time outs, reducing the monthly average from 6 restraints and 7.6 time outs per month to 3 restraints and 3 time outs per month for May 2009.

- ii. Progress reported on November 2, 2009 indicates the Student made "tremendous behavioral progress" since when the IEP was written. The number of restraints and time outs were significantly reduced. Reasons for the success include: continuing individual and family therapy with several written plans and social stories to increase success and continuing emphasis on attachments issues; overnight home visits and increased community involvement have become possible due to increased safety; medication adjustments have been successful; teacher and residential staff are increasingly familiar with the Student and how to assist calming when upset.
    - iii. Progress reported on January 29, 2010 indicates that the Student continues to improve since the IEP was written. Data supported a further reduction in restraints and time outs.
  - b. Measureable Annual Goal: [Student] will improve visual perceptual and perceptual motor skills necessary for classroom learning and self care skills. The objectives focused on functional handwriting, visual-spatial awareness, and balance and safety.
    - i. In relevant part, the Present Level of Performance states: [Student's] visual perceptual and perceptual motor skills have improved slightly over the past year.
    - ii. Progress reported on October 28, 2009 indicates that progress toward the goal is emerging. Small gains were reported on the short-term objectives.
    - iii. Progress reported on January 27, 2010 indicates continued small gains on the short-term objectives, with progress toward attaining the goal as emerging.
  - c. Measureable Annual Goal: [Student] will improve communication ability in the areas of receptive, expressive and pragmatic language skills and articulation skills by completing short-term objectives, including improving vocabulary skills, improving production of the /th/ sound in sentences and conversation, improving pragmatic language skills, and improving listening skills to the level of 80% accuracy.
    - i. Progress reported in October 2009 indicates small but steady percentage point gains were made on the objectives, with progress toward attaining the annual goal emerging.
    - ii. Progress reported in January 2010 indicates percentage point gains to keep the Student on track for emerging progress toward attaining the annual goal.

d. Special Education and Related Services:

SPECIAL EDUCATION	AMOUNT	FREQUENCY	START DATE
Specialized Instruction	6+ hours	Daily	06/09/2009
Adaptive Physical Education	30 minutes	Daily	06/09/2009
Residential setting for after school behavior	24/7 supervision	Daily	06/09/2009
Non Violent Crisis Techniques	Ongoing	Daily	06/09/2009
1:1 Aide during cottage time	35 hours	Weekly	06/09/2009
Counseling, Community Meeting	60 minutes	4 times per week	06/09/2009
Occupational Therapy	60 minutes individual 60 minutes group	2 times per week, 1 time per month	06/09/2009
Physical Therapy	45 minutes	1 time per week	06/09/2009
Psychological Services	30 minutes individual 60 minutes family	2 times per week 1 time per week	06/09/2009
Speech/Language Services	60 minutes	2 times per week	06/09/2009
Social Skills Training	45 minutes	3 times per week	06/09/2009

9. The IEP indicated that the Student needed extended school year services during the summer in order to receive FAPE.
10. A Notice of Team Meeting was issued on October 21, 2009, convening the team to review/revise the Student's IEP on November 2, 2009.
11. On April 6, 2010 the Student was transferred from the \_\_\_\_\_ facility to a psychiatric hospital due to violent behavior. The District was notified on April 12, 2010.
12. At a Juvenile Court hearing on April 16, 2010, at which the Complainant and District were present, the Court found that the placement at the \_\_\_\_\_ residential facility was no longer appropriate for the Student for the following reasons:
  - a. Beginning on the 30<sup>th</sup> day of January 2010, the [Student] began having violent destructive episodes every few days and they have continued to this time.
  - b. On the 6<sup>th</sup> day of April, 2010, the [Student] was admitted to [psychiatric hospital] and continues to be a patient there.

- c. The most appropriate placement for the minor is a locked medical facility for own safety and [ residential facility] is no longer a safe environment for the [Student].
13. The Court also found that an out of state was the most appropriate placement for the Student, and the was willing to admit the Student to their facility.
  14. Based on its Findings, the Court ordered that the Student remain in the temporary legal custody of , with placement at the out of state .
  15. The has an accredited educational program with certified regular and special education teachers.
  16. The Court held a Change of Placement hearing on April 29, 2010. The Court ordered that the Student was to remain in the care, custody and control of with placement at a State Hospital. Further, the Court indicated that if a different, more appropriate, less restrictive alternative becomes available, the Student's Multidisciplinary Team (juvenile court team) will reconvene and will make a recommendation to the Court for further Orders.
  17. On May 7, 2010 the State Hospital submitted a Notice to Court of Transfer and Placement based on its inability to comply with the Court's April 29<sup>th</sup> Order. The State Hospital was not equipped to serve juveniles, and since the Student was still under age 18, it was not considered to be an appropriate placement. The State Hospital made arrangements to place the Student at the , which is designated as a hospital, until a treatment facility was located.
  18. The State Hospital transported the Student from the out of state to on May 6, 2010.
  19. has an educational program, and the District has an ongoing contract with to fund educational services for admitted students from the District.
  20. During the time that the Student was admitted to , the District facilitated visits between the Complainant and Student, arranging for lodging, meals, and mileage reimbursement.
  21. An IEP team meeting was convened on June 14, 2010 at the to review the Student's status. The team was convened on short notice via telephone. Complainant indicated that received a telephone call on June 10, 2010 informing of the meeting. The Complainant was present for the meeting, and an IEP was developed for implementation upon release from the hospital.
  22. The IEP team agreed that the Student should be placed at once the Student was discharged from the hospital.

23. The District indicated that the IEP team determined that placement decisions could not be made until the Student was released from the hospital.
24. On July 13, 2010, the County Attorney submitted a motion to the Court for a change of placement from [redacted] to the [redacted] residential facility. [redacted] was identified in the County Attorney's motion as the most appropriate, least restrictive facility available to meet the Student's custody needs.
25. The Court issued an Order for the Student's change of placement to [redacted] on July 26, 2010. The Court also ordered that the Student be released from the custody of [redacted], and returned to the custody of the Complainant.
26. On July 30, 2010, a facilitated IEP team meeting was convened between the District, the Complainant, an advocate, and the Student's Guardian ad Litem. The team determined that upon release from [redacted], the Student should be placed at [redacted] with supplemental special education and related services provided on a contractual basis with outside resources in order to provide the Student FAPE. In the event that resources could not be located to provide the special education and related services, the team would explore other residential placement options, including out of state options. In addition, the team agreed to reimburse the Complainant for two trips per month to visit with the Student, commencing in April 2010. The IEP team agreed, in relevant part, to the following compensatory educational services for the Student:
  - a. As of July 30, 2010, fifty-six (56) days of compensatory educational services accrued. The compensatory services are:
    - i. Physical therapy will be increased to two hours a week.
    - ii. Occupational therapy will be increased to two hours a week.
    - iii. Specialized instruction will be increased to 4 hours a day.
  - b. Additional days will accumulate until the compensatory serves are provided.
27. The Student was transported from [redacted] to [redacted] on August 16, 2010.
28. The District has expressed its commitment to locating special education and related service resources for the Student while placed at [redacted], but has not yet been successful in securing those services.

**Conclusions:**

1. The Student is identified as a learner with a disability under the Individuals with Disabilities Education Act (IDEA) by virtue of cognitive and other impairments with language and motor delays.



2. The District is obligated to ensure that the Student receives FAPE, either by providing special education and related services reasonably calculated to provide the Student educational benefit, or ensuring the provision of those services while the Student is court-placed in an out-of-district facility. *See 34 C.F.R. §§300.17 and 300.101.*

Issue #1

3. The Complainant makes the argument, at least in part, that the District should be responsible for funding the costs of hospitalizations and residential placements regardless of educational need.
4. Prior to the Court's involvement, the Student was successful in the day treatment program at the . The Complainant initiated the original Court action for behaviors outside of school.
5. While court-placed at the , the Student was successful in the education program, with data to support a decrease in unsafe and violent behavior in the school setting, and an increase in mastery of IEP goals and objectives. The Student experienced limited success in improving behavior in the residential portions of placement. Ultimately, the Student's unsafe behavior resulted in the Court ordering a change in the Student's placement.
6. The District was solely responsible for the Student's education until the 2008 court order placing the Student in a residential treatment facility. Although the District remained responsible for ensuring the provision of FAPE while abiding with court orders, the District was no longer able to determine some of the critical components of the Student's IEP, including where, how, and by whom the Student's special education services would be delivered.
7. Wyoming Statute addresses the situation, as in this case, when a student is under the care, custody and control of by order of the Juvenile Court as a Child in Need of Services (CHINS). W.S. §21-13-315 requires that court ordered placements of children in private residential treatment facilities, group homes, and day treatment programs be funded by with a contribution from WDE for the educational portion of the placement. This provision is not without limitation, as the educational program can only be funded if it meets Wyoming accreditation standards.

8. As applied to this complaint, from the point at which Student was placed by the Court in a facility in 2008, became responsible for the costs of the residential placement. By Wyoming law, WDE (either directly or indirectly through the District) was responsible for funding the educational portion of the Student's program while court-placed. remained responsible for funding the residential program until the Court's July 26, 2010 order returning the Student to the Complainant's custody.
9. Any financial contribution required by DFS from the Complainant is beyond the scope of WDE's authority and this complaint. The District's duty to ensure the provision of FAPE to the Student while court-placed was separate from Wyoming's statutory scheme for the financial obligations of parents for their court-placed children. The District would have been responsible for funding the full costs of the residential placement only if the District had made the placement.
10. The distinction between placements made for educational reasons as opposed to medical or psychiatric reasons is critical to the analysis of whether a student has been provided FAPE.
11. "If a placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including **non-medical care** and room and board, must be at no cost to the parents of the child." (Emphasis added.) 34 C.F.R. §300.108.
12. The determination of whether a residential or hospital placement is necessary in order for a child to receive FAPE has been frequently litigated across the country, resulting in a body of case law that distinguishes between placements made for educational reasons and those made for noneducational, medical or psychiatric reasons.
13. The 4<sup>th</sup> Circuit Court of Appeals ruled that a student's safety, mental health and medical issues were distinct from educational needs. The student was progressing in special day school. Therefore, the district was not obligated to fund a residential placement. The 4<sup>th</sup> Circuit noted that a residential placement is required only if residential care is essential for the child to make **any educational progress**. (Emphasis added.) *Shaw v. Weast*, 53 IDELR 313 (4<sup>th</sup> Cir. 2010).
14. The 9<sup>th</sup> Circuit Court of Appeals has recently ruled that placements made for medical, including psychiatric, reasons are noneducational, and therefore, the costs of care are NOT the responsibility of a school district. The Ninth Circuit identified the focus of the court's analysis as follows: "Our analysis must focus on whether [the residential] placement may be considered necessary for educational purposes, or whether the placement is in response to medical, social or emotional problems that are quite apart from the learning process."

*Ashland Sch. Dist. v. E.H.*, 53 IDELR 177 (9<sup>th</sup> Cir. 2009), citing *Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings*, 16 IDELR 944 (9<sup>th</sup> Cir. 1990). In the *Ashland* case, the student was hospitalized by his parents for psychiatric reasons. The district court concluded, and the Court of Appeals affirmed, that the student's medical care was unrelated to his educational needs.

15. In a similar case also from the 9<sup>th</sup> Circuit Court of Appeals and the Ashland School District, the Court ruled that a residential placement resulted from the student's out-of-school behaviors. Therefore, the residential placement was not educationally necessary. The record showed that the parents enrolled the student in a residential facility because of "risky" and "defiant" behaviors at home. Because the residential placement in this case was not necessary for the student to receive FAPE, the Ninth Circuit held that the parents were not entitled to reimbursement. *Ashland Sch. Dist. v. R.J.*, 53 IDELR 176 (9<sup>th</sup> Cir. 2009).
16. In a ruling denying reimbursement for a residential placement, the 2<sup>nd</sup> Circuit Court of Appeals reasoned, "the central inquiry is whether the student's conduct outside of the school building and outside the normal hours of the school day is such that it impedes [the] ability to derive an academic benefit from a day program." **As a general rule, a residential placement is not required under the IDEA unless there is objective evidence that the student is not progressing educationally.** (Emphasis added.) *M.H. v. Monroe-Woodbury Central Sch. Dist.*, 51 IDELR 91 (2<sup>nd</sup> Cir. 2008).
17. As applied to this complaint, much like the situation in the *Shaw* and *M.H.* cases above, since the Student was progressing in the day treatment program at the \_\_\_\_\_ prior to the Court's involvement, the day treatment program represented FAPE for the Student in the least restrictive environment. The District was not free to, nor obligated to, provide a residential program as long as the Student was meeting with any educational success in the day treatment program. The placement was made by the Court in response to a petition filed by the Complainant. The duty of the District in this situation is to ensure the provision of FAPE at the placement selected by the Court. The District was not obligated to make and fund the residential placement.
18. While the Student was court-placed at the \_\_\_\_\_ the District met its obligation to ensure the provision of FAPE as evidenced by the Student's documented progress toward IEP goals and objectives.
19. From April 6 to April 16, 2010, while the Student was hospitalized at an acute psychiatric hospital, safety and stabilization were the primary concerns. The Student did not receive educational services during this time. The lapse in service was due to an acute mental

health crisis, not the actions of the District. In much the same way as students who are hospitalized due to an acute physical illness, the Student was "absent" from educational program due to an acute illness during this period.

20. While the Student was court-placed at the \_\_\_\_\_ in another state from April 16 through May 6, 2010, stabilization and safety were the major concerns. The Court found that the Student needed a "locked medical facility for [the Student's] safety." The facility had an accredited educational program. Had the Student remained in the \_\_\_\_\_, the District would have had an obligation to work with the Center in order to ensure that the Student received FAPE. Due to the brief and transitional nature of this placement, the District had no practical opportunity to ensure the provision of FAPE to the Student.
21. From May 6 to August 16, 2010, while the Student was court placed at \_\_\_\_\_, the Student received educational services through \_\_\_\_\_ accredited educational program. However, it is unclear what, if any, special education or related services the Student received, or could receive, at \_\_\_\_\_. Although a contractual relationship exists between \_\_\_\_\_ and the District for educational services, that is not sufficient to meet the District's burden of **ensuring** FAPE. In much the same manner as the District participated in the planning of special education services while the Student was placed at \_\_\_\_\_, the District needed to affirmatively act to ensure that the Student received FAPE while at \_\_\_\_\_.
22. Although there was a very brief lapse in time between the expiration of the June 9, 2009 IEP and the new annual IEP on June 14, 2010, this amount of time is not significant, did not harm the Student, and does not result in a denial of FAPE.
23. It is possible that the Student's special education and related services needs changed as a result of the acute mental health crisis. The IDEA does not expect or require that a hospitalized student would receive the exact same special education and related services as those received prior to hospitalization. The team must determine, based on the Student's present levels of functioning and current educational need, the special education and related services necessary for the Student to receive educational benefit. That determination did not occur in this case.
24. Also, on July 26, 2010, the date legal custody of the Student reverted back to the Complainant, the District resumed the authority and responsibility for proposing a special education placement, including the provision of special education and related services, which was reasonably calculated to provide the Student with FAPE. The District will continue to be obligated to provide or ensure the provision of FAPE to the Student until one

of the following occurs: the Student is no longer a resident of the District; the Complainant revokes consent for special education services; the Student exceeds the age of eligibility for special education; or the Student graduates with a regular diploma.

Issue #2

25. It is the responsibility of the District to ensure that the parent of a child with a disability is present at each IEP team meeting or are afforded the opportunity to participate, including:
  - a. Notifying the parent of the meeting early enough to ensure that the parent will have an opportunity to attend; and
  - b. Scheduling the meeting at a mutually agreed on time and place.  
*See 34 C.F.R. §300.322.*
26. However, there are times, due to the exigency of a student's situation, that team meetings must be convened on short notice. In those cases, it may be necessary for both parties to act quickly and be flexible in order to address a student's needs in a timely manner.
27. As applied to this complaint, the Student was experiencing an acute mental health crisis, and the Court was responding to that crisis. It was reasonable for the District to convene team meetings on short notice in order to meet the needs of the Student.
28. As evidenced by the Complainant's participation in the team meetings, the Complainant was not denied an opportunity to participate in the process.

**Decision:**

Issue #1

Whether the District is in violation of its duty to provide a FAPE by failing to provide educational and related services reasonably calculated to meet the student's unique needs pursuant to 34 C.F.R. §§300.17 and 300.101.

**WDE determines that the District is in violation of its duty to provide the Student FAPE by failing to ensure the Student received special education and related services reasonably calculated to provide educational benefit based on current educational needs while the Student was placed at . . . . However, in light of the IEP team's decision regarding an appropriate plan for compensatory education for the special education services missed, no further corrective action is warranted. The parties are to be commended for voluntarily and proactively addressing the needs of the Student.**

Issue #2

Whether the District failed to afford parent the opportunity to participate in team meeting(s) pursuant to 34 C.F.R. §300.322.

**WDE determines that there is no violation.**

Pursuant to WDE's general supervisory authority, and its responsibility to address the appropriate future provision of services for all children with disabilities, this Complaint Decision, in redacted form, will be posted on the WDE website for public viewing. See 34 C.F.R. §300.151(b).

Please direct questions regarding this complaint investigation to the Wyoming Department of Education, Special Programs Division at 307-857-9285 or 800-228-6194.

Sincerely,

Peg Brown-Clark  
State Director of Special Education  
Special Programs Division



Enc: Procedural Safeguards

Cc:

Dr. Jim McBride, Superintendent of Public Instruction  
Tania Hytrek, WDE Legal Counsel