

WYOMING DEPARTMENT OF EDUCATION
SPECIAL PROGRAMS UNIT
SPECIAL EDUCATION COMPLAINT INVESTIGATION

Complainants:

[REDACTED]

Case #: 2010-5

District:

[REDACTED]

**COMPLAINT DECISION
AND
ORDER FOR
CORRECTIVE ACTION**

Date of Decision:

[REDACTED]

On [REDACTED] the Wyoming Department of Education (WDE) received a letter of complaint and supporting documentation filed by [REDACTED], Complainant, (hereinafter "Complainant") alleging violations of special education law with respect to [REDACTED] (hereinafter "Student"), by [REDACTED] (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 2007 Wyoming Education Rules governing Services for Children With Disabilities, WDE issues the following Findings of Fact, Conclusions, Decision, and plan for Corrective Action.

Complaint Issues:

Issue #1

Whether the District denied the Student a free appropriate public education (FAPE) in violation of 34 C.F.R. §300.101, including:

- a. Whether the Student's IEP was reasonably calculated to meet the educational needs of the Student, including specialized instruction, a functional behavior assessment and/or behavior intervention plan pursuant to 34 C.F.R. §300.324.
- b. Whether the District failed to provide special education and related services to the Student in accordance with his Individualized Educational Program (IEP) pursuant to 34 C.F.R. §§300.34, 300.39, 300.320, and 300.324.
- c. Whether the IEP team was convened to address the lack of progress when the Student's behavior continued to escalate in the school environment pursuant to 34 C.F.R. §300.324(b).
- d. Whether the actions of the paraprofessional resulted in a denial of FAPE contrary to 34 C.F.R. §300.101.

Issue #2

Whether removing the Student from school for disciplinary reasons resulted in a change of placement in violation of 34 C.F.R. §300.530 because the removals exceeded a total of 10 school days.

Issue #3

If the removals resulted in a change of placement, whether the District failed to issue Prior Written Notice before proposing or refusing to initiate or change the identification, evaluation, or educational placement, or the provision of FAPE to the Student in accordance with 34 C.F.R. §300.503.

Investigatory Process:

Review of records consisting of the following:

- Original letter of complaint and supporting documents.
- Documentation provided by the District, including the Student's recent special education record, including evaluations and IEPs.
- The Student's attendance and discipline records.

Follow up questions were asked of the District.

Interview with the Student's private service provider.

Follow up interview with the Complainant.

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
34 C.F.R. §§300.320 through 300.328	Individualized Education Programs (IEP)
34 C.F.R. §300.101	Free appropriate public education (FAPE)
34 C.F.R. §300.503	Prior notice by the public agency
34 C.F.R. §300.530	Authority of school personnel

2007 Wyoming Education Rules, Chapter 7 (Effective for the relevant time period in this Complaint.)

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 will be limited to the period of time between [REDACTED] and [REDACTED]

Findings of Fact:

1. At all times relevant to this Complaint, the Student was enrolled in the District.
2. The Student is identified as having a Cognitive Disability.
3. The Complainant has expressed concern regarding several aspects of the Student's special education programming, and also about the treatment the Student received by a particular staff member.
4. The Complainant reports that the Student was frequently sent home from school due to his behavior. Also, she reports that the classroom teacher suspended the Student on two occasions for three days each time.
5. The [REDACTED] IEP indicates, "There were times when [Student] became upset with either staff or a student in the classroom. At the beginning of the year, he would get upset and would not allow anyone to console or calm him. Administration was called when [Student] was being physically aggressive." The IEP also noted "those behaviors are few and far between now." The team determined that the Student's behavior did not interfere with his learning.

6. However, in contrast to the progress noted above, the IEP reports of progress contain the following information:
 - [REDACTED]: The Student's post secondary goal indicates "[Student has had many inappropriate behaviors this quarter. Instead of using appropriate communication, he is throwing objects, yelling and hitting other students.]"
 - [REDACTED]: "His behaviors are unpredictable. He has hit staff and other students when he is upset."
 - [REDACTED]: "[Student's] behaviors are becoming more aggressive." "At this time community employment is not being pursued due to [Student's] erratic behaviors. He has struck staff and peers randomly and has had three physically aggressive outbursts."
7. [REDACTED] IEP does not contain a behavioral intervention plan to address the Student's behavior.
8. The District issued a Notice of Team meeting on [REDACTED]. The Notice indicates the purpose of the meeting was to develop an annual IEP and Post Secondary Transition Services.
9. The Student's IEP team met on [REDACTED]. The team also addressed and issued the following on [REDACTED]:
 - a. Prior Written Notice and Consent for Evaluation, proposing that a reevaluation needed to be conducted. No additional assessments were determined necessary, and the evaluation was considered complete based on a review of existing data.
 - b. Evaluation Report and Eligibility Determination, indicating that the Student continues to be eligible for and in need of special education under the category of Cognitive Disability. The Observation section indicates that "[Student] demonstrates periods of rage, for which known triggers have not yet been identified. When [Student] becomes upset, he becomes verbally and physically aggressive." The Report also indicates that the Student can be loud and say inappropriate things at times, and that the Student uses a "low-tech communication device" to help identify and discuss his feelings. The Complainant reported that the Student's behavior at home is good.
10. The [REDACTED] IEP indicates that the Student's behavior impedes his learning or the learning of others. It references a behavior intervention plan and an action plan, but these plans were not included in, or addressed in the IEP.
11. The IEP also indicates that the Student did not require assistive technology devices or services.

12. Further, the [REDACTED] Present Levels of Academic Achievement and Functional Performance section indicates that the Student had “three physically violent outbursts in the last quarter, and there have been 23 documented incidences of [Student] hitting staff or peers.”
13. The IEP contains four goals to address adaptive physical education, functional academics, daily living skills, and social skills. The Student was to receive all of his instruction in special education, social skills group, or adaptive physical education.
14. The least restrictive environment for the Student was determined to be a special education classroom. The District’s justification states: “He requires a specialized curriculum, 1:1 assistance, and small group instruction to acquire skills needed in the areas of life skills, social skills, behavior, and basic academic skills.”
15. The [REDACTED] IEP does not address the Student’s need for a behavior intervention plan or 1:1 assistance in any more detail.
16. The IEP does provide that the Student would receive transportation twice daily.
17. Prior Written Notice was issued on [REDACTED]. The Notice proposes to implement a new annual IEP as drafted.
18. The Complaint was filed on [REDACTED].
19. As part of the investigation, the Student’s private service provider was interviewed. She provides care for the Student two afternoons and evenings per week. The provider indicates that the Student displays no inappropriate behavior while in her care. He does not display any aggression or anger.
20. Although outside of the investigatory time frame but relevant to the investigation, on [REDACTED] [REDACTED] the District issued Prior Written Notice and Consent for Evaluation proposing that another reevaluation be conducted. Additional assessments were determined necessary. Specifically, the District proposed further assessments for functional behavior, post secondary transition, and “assessment to inform instruction and transition.” Also, the assessment plan included “a functional behavior evaluation for the purpose of developing a behavior intervention plan that is appropriate for [Student]. Postsecondary transition needs will be evaluated to support [Student] in developing postsecondary and independent living skills.”
21. An IEP Amendment was proposed on [REDACTED]. It is important to note that this Amendment is the first time paraprofessional support is provided in the Student’s IEP. The Amendment also indicates that the District proposes to hold a new annual IEP to include new goals, update the transition plan, and an updated behavior support plan.

22. The [REDACTED] Prior Written Notice issued by the District “proposes a Functional Behavior Assessment, Vocational Transition Assessment and consistent adult support. Indirect Speech and Language services 15 minutes a week are added to the annual IEP.” The Prior Written Notice also indicates “data supports that [Student] is not making the expected gains with the behavior plan.”
23. On [REDACTED], the District issued a Notice of Team Meeting to convene the IEP team on [REDACTED]. The Notice indicates the purpose of the meeting was to develop an annual IEP and obtain consent for evaluation.
24. The team proposed to evaluate the Student’s assistive technology needs and sensory motor integration needs.
25. The Student’s records did not contain any evaluation report for this most recent evaluation.
26. In the Consideration of Special Factors section of the [REDACTED] IEP, the team indicated that the Student’s behavior impeded his learning or the learning of others, that the Student has communication needs, including the need for direct instruction in the student’s language or other communication mode, and that he requires an assistive technology device or services.
27. For the first time, the [REDACTED] IEP included a reference to a behavior plan under Supplementary Aids and Services. However, the contents of the plan were not included.
28. Despite indicating that the Student required assistive technology or services, the [REDACTED] IEP does not address assistive technology.
29. The [REDACTED] IEP also indicates that the Student missed [REDACTED] class periods. However, he was only absent due to illness for two and one half days.
30. The District issued Prior Written Notice on [REDACTED], “proposing consent for an evaluation in the areas of assistive technology and sensory integration.” The Student’s social work services will be increased to 60 minutes a week. ESY services will be provided.
31. The Description of Other Relevant Factors section contains the following relevant information: “Behavior plan was reviewed, discussed and will be updated as needed based on documentation and the results of the Functional Behavior Assessment. [Student] will not be sent home as a consequence for behavior.”

Conclusions:

1. The Student receives nearly all of his instruction in a special education resource room with small group instruction and 1:1 assistance.
2. Pursuant to the IDEA, the Student has a right to receive free appropriate public education (FAPE) in conformity with his IEP. 34 C.F.R. §300.17.
3. The right to FAPE includes the right to receive special education and related services designed to meet the Student's needs that result from his disability to enable him to be involved in and make progress in the general education curriculum, and meet each of the Student's other education needs that result from his disability. 34 C.F.R. §300.320(a)(2).
4. For the duration of the time relevant to this Complaint, the Student struggled with inappropriate, and at times, aggressive behavior.
5. It was incumbent upon the District to address all educational needs resulting from the Student's disability, including his aggressive behavior.
6. Despite the fact that the [REDACTED] Evaluation Report documented that the triggers for the Student's aggressive behavior were unknown, no further assessment was undertaken to help appropriately plan for the Student.
7. Although the [REDACTED] IEP indicated the Student's behavior impeded his learning, and that he needed 1:1 assistance in the classroom, his IEP did not address these needs.
8. There is no evidence in the file that a behavior intervention plan was implemented for the Student during the period of time relevant to this Complaint.
9. Further, it is a significant concern that although the Student was evaluated in [REDACTED] two additional evaluations were conducted in [REDACTED] each time adding components to the evaluation that were not part of the previous one. This fact is significant because it is unlikely that the Student's needs changed during this time. In fact, the resulting IEPs are very similar with respect to the Student's present levels of performance, which leads to the conclusion that the three evaluations, very close in time, resulted from a lack of a comprehensive view of the Student's needs. Without a comprehensive evaluation of the Student's needs, the resulting IEPs were not sufficient to address all of his educational needs.
10. The District was not proactive in addressing the lack of expected progress, and did not convene the Student's IEP team for that purpose until after this Complaint was filed. The District continued to remove the Student from school rather than convene his IEP team to address the lack of progress. After the Complaint was filed, the District then convened the

team to conduct further evaluations to address the lack of progress and propose IEP modifications.

11. Although it is apparent that the Student did not respond well to at least one paraprofessional staff person in his classroom, the actions of the special education staff in failing to appropriately respond to the Student must be viewed in their entirety. It is the collective responsibility of the District to ensure the provision of FAPE to the Student.
12. The District is required to accurately monitor the number and duration of disciplinary removals for the Student. Any removals exceeding ten school days must be analyzed to determine if a change of placement results. In addition, regardless of whether the removal constitutes a change of placement, the Student is entitled to continue receiving FAPE during periods of removals exceeding 10 school days. 34 C.F.R. §300.530.
13. Complainant reports and District records support a conclusion that the Student was repeatedly removed from school due to his behavior. It is not clear exactly how many times or for how long the Student was removed. Based on the totality of the information considered, it is reasonable to conclude that the Student was removed from school on at least 20 different occasions during the time period relative to this investigation.
14. The cumulative total of these removals, in addition to the two suspensions of three days each, resulted in a pattern of removals constituting a change in placement.
15. That disciplinary change in placement triggered additional duties on behalf of the District and safeguards on behalf of the Student. The District did not fulfill its obligation under the IDEA with respect to the Student's change in placement for disciplinary reasons.
16. The Student was deprived of educational opportunities by repeatedly being sent home from school. His IEP services were not delivered during these disciplinary removals.
17. It is also a significant concern that when the Student was removed from school for disciplinary reasons, the District required the Complainant to take the Student home.
18. This practice resulted in the Student having a shortened school day and diminished educational opportunities, as well as not receiving the transportation service indicated on his IEP.
19. Because the cumulative disciplinary removals of the Student constituted a change of placement and ultimately altered the special education services the Student received, it was necessary for the District to provide the Complainant with Prior Written Notice of those changes. 34 C.F.R. §300.503.
20. The District failed to provide Prior Written Notice of either the disciplinary change in placement or the change in services due to the disciplinary removals.

Decision:

Issue #1

Whether the District denied the Student a free appropriate public education (FAPE) in violation of 34 C.F.R. §300.101, including:

- a. Whether the Student's IEP was reasonably calculated to meet the educational needs of the Student, including specialized instruction, a functional behavior assessment and/or behavior intervention plan pursuant to 34 C.F.R. §300.324.

WDE determines that the IEPs were not reasonably calculated to meet the educational needs of the Student, resulting in a denial of FAPE. WDE finds the District in violation.

- b. Whether the District failed to provide special education and related services to the Student in accordance with his Individualized Educational Program (IEP) pursuant to 34 C.F.R. §§300.34, 300.39, 300.320, and 300.324.

WDE determines that the District failed to provide special education and related services to the Student in conformity with his IEPs due primarily to the repeated practice of sending the Student home as a behavioral consequence, resulting in a denial of FAPE. WDE finds the District in violation.

- c. Whether the IEP team was convened to address the lack of progress when the Student's behavior continued to escalate in the school environment pursuant to 34 C.F.R. §300.324(b).

WDE determines that the District failed to convene the IEP team to address the Student's lack of progress until after this Complaint was filed, resulting in a denial of FAPE. WDE finds the District in violation.

- d. Whether the actions of the paraprofessional resulted in a denial of FAPE contrary to 34 C.F.R. §300.101.

WDE finds that the Student was denied FAPE based on the cumulative actions of the special education teacher and paraprofessionals working with him. WDE

cannot conclude that the denial of FAPE is the result of a single staff member. Therefore, WDE finds no violation on this issue.

Issue #2

Whether removing the Student from school for disciplinary reasons resulted in a change of placement in violation of 34 C.F.R. §300.530 because the removals exceeded a total of ■ school days.

WDE determines that the Student was repeatedly removed from school for disciplinary reasons, which resulted in a *de facto* change in placement. Therefore, WDE finds the District in violation on this issue.

Issue #3

If the removals resulted in a change of placement, whether the District failed to issue Prior Written Notice before proposing or refusing to initiate or change the identification, evaluation, or educational placement, or the provision of FAPE to the Student in accordance with 34 C.F.R. §300.503.

WDE determines that the District failed to issue Prior Written Notice before changing the Student's placement due to removals for disciplinary reasons. WDE finds the District in violation.

CORRECTIVE ACTION PLAN:

1. The District shall immediately cease the practice of sending the Student home for disciplinary reasons.
2. Within 30 days of the date of this Decision, the District shall provide an independent expert evaluation of the Student's behavioral triggers and the reasons for his aggression in order to develop a comprehensive behavioral intervention plan based on positive behavior supports. The Complainant shall be provided the opportunity to review the expert evaluator's credentials and the plan for the evaluation, and offer or withhold her consent for the evaluation. If the Complainant declines consent, the District shall be relieved of the obligation to provide an expert evaluator.
3. Within ten (10) days of the conclusion of the expert evaluation or the Complainant's refusal to permit the expert evaluation, the District must reconvene the IEP team for the purpose of determining an appropriate behavioral intervention plan for the Student.

4. Documentation of the team meeting, participants, and outcome shall be submitted to WDE within five (5) days of the meeting.
5. The District shall offer to provide the Student with 50 hours of compensatory education as follows:
 - a. The location of the services is to be mutually agreed upon by the Student, the Complainant, and the District. The location may include the Student's home.
 - b. The schedule of services is to be mutually agreed upon by the Student, the Complainant, and the District, taking into account the Student's interest levels and stamina.
 - c. A schedule signed by all parties detailing the dates and locations for the compensatory service shall be submitted to Diana Currah, Education Consultant at WDE no later than May 15, 2010.
 - d. If the Student does not avail himself of the services at the scheduled time and location, that day's service is considered waived by the Student. The only exception to this waiver provision is a bona fide physical illness of the Student or Teacher, in which case, the missed service must be rescheduled.
 - e. District special education service providers must maintain accurate service logs to be submitted to WDE at the conclusion of the service. Special education service providers must be either highly qualified or duly licensed.
 - f. Any compensatory education service not utilized by December 31, 2010 is deemed waived by the Student and the Complainant.
6. In light of the deficiencies and confusion surrounding disciplinary removals, technical assistance is warranted in this case. The District shall provide at least 2 hours of inservice training to key special education staff, including all case managers and paraprofessionals, on:
 - a. The affirmative obligation to address whether a student's behavior interferes with learning and the use of positive behavioral interventions and supports within the IEP.
 - b. Removing students from school for disciplinary reasons.
 - c. Disciplinary changes in placement and the resulting duties and safeguards triggered.
 - d. The affirmative obligation to issue Prior Written Notice.
7. The inservice training must be completed by June 1, 2010. The District shall provide WDE with the following documentation:

- a. The date, time, location, agenda and presenters for the training by May 1, 2010; and
- b. Copies of any materials or handouts used, in addition to sign-in sheets documenting the attendance of special education staff within 10 days of completion of the mandatory inservice training.
- c. All required submissions must be sent to WDE to the attention of Diana Currah, with a copy to the Complainant.

Recommendations:

WDE recommends that the District utilize its mandatory bullying policy to address the Complainant's concerns regarding the Student being picked on or being afraid to attend school. It is mandatory that the District comply with the Wyoming Safe Schools Climate Act through enforcement of its own policy. Please note that the Wyoming Safe Schools Climate Act applies to allegations of bullying by staff as well as students.

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 Unit at 307-857-9285 or 800-228-6194.

Sincerely,



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

cc: [REDACTED] Superintendent
[REDACTED], Board Chair
r. James McBride, Superintendent of Public Instruction
nia Hytrek, WDE Legal Counsel