



# Wyoming Department of Education

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WYOMING DEPARTMENT OF EDUCATION  
SPECIAL PROGRAMS UNIT  
SPECIAL EDUCATION COMPLAINT INVESTIGATION

Complainants:



District:



Case #: 2010-6

COMPLAINT DECISION  
AND  
ORDER FOR  
CORRECTIVE ACTION

Date of Decision: May 12, 2010

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"). The Complainant and District agreed to engage in mediation, extending the timeline for this Decision until [REDACTED].

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) by failing to provide an individualized education plan (IEP) that was reasonably calculated to meet the Student's educational needs consistent with 34 C.F.R. §§300.17 and 300.101.

**Issue #2**

Whether the actions of the paraprofessional resulted in a denial of FAPE by failing to meet the Student's educational needs consistent with 34 C.F.R. §300.320.

**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.
- Service Provider logs.

Follow up questions were asked of the District.

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)

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]

Findings of Fact:

1. At all times relevant to this Complaint, the Student was enrolled in the District.
2. The Student is identified as eligible for special education and related services in the disability category of Other Health Impairment. He is currently [REDACTED] and remains eligible to receive FAPE through the 2010-2011 school year. Complainant reports that the Student is under legal Guardianship in her care.
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 indicates the Student is refusing to attend school.
5. Recent assessments conducted by the District were summarized in a [REDACTED] Multidisciplinary Evaluation Team Report as follows:
  - a. [REDACTED] Test of Nonverbal Intelligence (TONI-3) Quotient – [REDACTED]; 1<sup>st</sup> Percentile; Range – Intellectually Deficient.
  - b. [REDACTED] Vineland – II Teacher Rating Form Report
    - i. Communication Standard Score – [REDACTED]; Below the 1<sup>st</sup> Percentile; Adaptive Level – Low.
    - ii. Daily Living Skills Standard Score – [REDACTED]; Below the 1<sup>st</sup> Percentile; Adaptive Level – Low.
    - iii. Socialization Standard Score – [REDACTED] Percentile; Adaptive Level – Moderately Low.
    - iv. Motor Skills Standard Score – [REDACTED] Below the 1<sup>st</sup> Percentile; Adaptive Level – Low.
  - c. [REDACTED] Vineland – II Parent/Caregiver Rating Report
    - i. Communication Standard Score – [REDACTED]; Below the 1<sup>st</sup> Percentile; Adaptive Level – Low.
    - ii. Daily Living Skills Standard Score – Not reported.
    - iii. Socialization Standard Score – Not reported.
    - iv. Motor Skills Standard Score – [REDACTED] Below the 1<sup>st</sup> Percentile, Adaptive Level – Low.

6. The Student's most recent reports from his primary medical providers indicate the following relevant information:
  - a. [REDACTED] Clinical Notes: "[Student] is nonverbal, cognitively delayed. He is nonambulatory." Diagnostic impressions include: ". . . cognitive and global developmental delays" secondary to neonatal encephalitis.
  - b. [REDACTED] Clinical Notes: "[Student] is nonverbal and cognitively delayed. He is nonambulatory." Diagnostic impressions include: ". . . global and cognitive developmental delays" secondary to neonatal encephalitis.
  - c. [REDACTED] Clinical Notes: "[Student] is nonverbal and cognitively delayed. He is unable to ambulate." Diagnostic impressions include: "Global developmental delay" secondary to neonatal encephalitis.
  
7. The Student's annual IEP team meeting was convened on [REDACTED]. The IEP indicates that the Student's disability category continued to be Other Health Impairment. The following relevant entries appear in the IEP:
  - a. From the Student's perspective, the IEP indicates that "[Student] can move and operate his chair and go where he wants. The Student can use his board to communicate with non-disabled peers and knows some sign. He likes to come to school to be with other people, and he likes to play video games, especially with peers."
  - b. The Complainant's perspective included information that she believed the Student enjoyed going to the Life Skills program.
  - c. From the District's perspective, it was a concern that the Student did not attend school on a daily basis.
  - d. In the Consideration of Special Factors section, the team indicated, in relevant part, that the Student's behavior does not impede his learning; that he needs opportunities for communication and direct instruction in his mode of communication; and that the Student requires an assistive technology device.
  - e. In the Present Levels of Academic Achievement and Functional Performance section, the team indicated, in relevant part, that the Student has used his speech device a few times with the peer tutors. The Student had not engaged in any aggressive behaviors at school. He was enrolled in a general education class 6<sup>th</sup> period that he has not attended due to the [special education classroom] schedule. The team indicated that the Student continues to need Occupational Therapy (OT) services, and that OT will continue to be part of the Student's IEP. In Adaptive Physical

Education, the Student's poor attendance resulted in a decrease in his range of motion, strength, and endurance. It was noted that "Follow through with his stretching and strengthening exercise program both at home and at school will allow [Student] to maximize his activity level to improve his success with positive life long health, well being, and overall functioning in all settings." In the area of communication, the following learning need was identified: "[Student] needs to interact with others, to become a communication initiator, partner and participant in order to become a more functional and appropriate employee or member of a classroom." With respect to Social Work services, the team indicated: "SW services will continue as [Student] attends [District High School] in the areas of utilizing his Echo communications (device) to establish open communications with both peers and adults at school and in the community."

8. The following Measurable Annual Goals and benchmarks, with periodic reports of progress were included in the Student's [REDACTED] IEP:

Measurable Goal	Benchmarks	Progress Reported
<p>Independent Living Skills: [Student] is limited physically when completing tasks. Typical peers can complete all daily tasks with limited verbal prompts. [Student] will care for his personal needs and personal materials, with minimal physical assistance and verbal prompts, on a daily schedule, completing 8 out of 10 tasks with 80% accuracy.</p>	<ul style="list-style-type: none"> <li>[Student] will complete a daily hygiene routine, with minimal assistance, within a set amount of time determined for each task, 8 out of 10 times with 80% accuracy.</li> <li>[Student] will independently follow a task time schedule, transitioning from each task at set time intervals, 5 out of 10 times with 80% accuracy.</li> <li>[Student] will independently collect materials needed for tasks, with minimal verbal prompts, 8 out of 10 times with 80% accuracy.</li> </ul>	<p>[REDACTED] No progress. [Student] has attended four days of school this quarter. [Student] is choosing not to attend school at this time.</p> <p>[REDACTED] No progress. [Student] has chosen not to attend school this quarter.</p>
<p>Functional Academics: [Student] uses multiple means of communication including gestures, a speech device, and some basic sign language. Typical peers communicate with gestures, verbal speech, and written</p>	<ul style="list-style-type: none"> <li>[Student] will correctly answer basic money questions, (using \$1, \$5, \$10, and \$20 bills only) on 8 out of 10 trials with 80% accuracy.</li> <li>[Student] will correctly answer comprehension</li> </ul>	<p>[REDACTED] No progress. [Student] has attended four days of school this quarter. [Student] is choosing not to attend school at this time.</p> <p>[REDACTED] No progress. [Student] has chosen not to</p>

Measurable Goal	Benchmarks	Progress Reported
language. [Student] will use his communication skills to answer questions in a manner that is understood by the recipient, on 8 out of 10 occasions with 80% accuracy.	<p>questions, after reading material or listening to others read, on 8 out of 10 occasions, with 80% accuracy.</p> <ul style="list-style-type: none"> <li>[Student] will complete tasks using a written format, including shopping lists, notes, etc. on 8 out of 10 occasions with 80% accuracy.</li> </ul>	attend school this quarter.
Social Work: [Student] will continue to use his appropriate communications (device) to establish ongoing relationships with both peers and adults as needed 100% of the time.	<ul style="list-style-type: none"> <li>[Student] will attend social skills group one time a week.</li> <li>[Student] will use the Eco daily with interaction peers and adults (sic).</li> </ul>	<p>██████████ [Student] has shown no measurable progress during the time period 1<sup>st</sup> qtr ██████████ He has not attended the 1x weekly social skills group. There has been no progress.</p> <p>██████████ [Student] has not attended [District High School] during the qtr. No progress.</p>
Adaptive P.E./PT/OT: [Student] will demonstrate strengthening and stretching routine by completing two sets of 10 stretches, bridge and push-ups with an accuracy of 8 out of 10 times.	<ul style="list-style-type: none"> <li>Demonstrate 2 sets of 10 stretches without resisting 8 out of 10 times.</li> <li>Demonstrate 2 sets of 10 bridges without resisting 8 out of 10 times.</li> <li>Demonstrate 2 sets of 10 push-ups without resisting 8 out of 10 times.</li> </ul>	<p>██████████ No progress. Absent. Is student's choice not to attend school.</p> <p>██████████ No progress. Absent. Is student's choice not to attend school.</p>

9. The IEP contained the following Measurable Postsecondary Goals:

Measureable Goal	Transition Service Activity	Time Frame
Education and Training: [Student] will have competitive paying community employment upon high school graduation.	<ul style="list-style-type: none"> <li>Tour different worksites.</li> <li>[Student] will complete a Career Interest Inventory.</li> </ul>	One year.
Career/Employment: After completing high school, [Student] will have work ethic	<ul style="list-style-type: none"> <li>Tour different worksites.</li> <li>Has been employed in the community and will be</li> </ul>	One year:

Measureable Goal	Transition Service Activity	Time Frame
skills that he can translate into maintaining a part-time job in the community.	again based on an Attendance Contract.	
Independent Living: After completing high school, [Student] will live in an assistant (sic) living facility.	<ul style="list-style-type: none"> <li>• Participates in functional life skills.</li> <li>• Tours assistant living sites.</li> </ul>	One year.

10. The IEP indicated that the Student needed to attend the public high school with a 90% attendance rate in order to “walk” with the [REDACTED] class for graduation.
11. The areas of specialized instruction on the Student’s IEP included “CBI – II” for 1225 minutes per week in a resource room, and Adaptive Physical Education for 250 minutes per week in the resource room or gym.
12. Related services on the IEP included 25 minutes per week of Physical Therapy and 50 minutes per week of School Social Work Services.
13. Supplementary aids and services included frequent breaks, peer tutor and extended time for the Student to express answers to questions.
14. Program modifications and supports included:
  - a. OT support for District staff regarding UE needs, equipment needs, and adaptive modifications for five (5) minutes each week.
  - b. Speech/Language Pathologist – indirect/ consult services for seven (7) minutes each week.
  - c. Parent training for behavior management two times during the school year.
  - d. Modified grading throughout the year.
  - e. Modified curriculum throughout the year.
15. The Least Restrictive Environment (LRE) justification stated:  
 [Student] is removed from the general education classroom to receive his services in the areas of reading, written language, math, traveling instruction, independent living skills, and vocational skills due to his lack of progress with interventions in a classroom and low cognitive ability. [Student] benefits and has shown improvement when placed in a self-contained resource room that minimizes distractions and offers him a small group setting of peers with similar disabilities. [Student] does take one general education elective each

semester at the high school. Six out of seven classes are in the self-contained resource classroom called Community-Based Instruction or CBI.

16. The IEP was amended by agreement [REDACTED] to place the Student in a Life Skills class to work on vocational skills. The Student was to be provided transportation from his home to the Life Skills program in the morning, to the District high school for the remainder of his day in the CBI - II classroom, and then home at the end of the day. The IEP Amendment stated: "Due to the change in schedule, [Student] will not receive direct services in Adaptive Physical Education at the high school but will have monitored services."
17. Prior Written Notice of the proposed change was issued [REDACTED]. The proposed changes were described as follows:

[District] proposes to implement a new school and community schedule beginning on [REDACTED] with [Complainant's] agreement. These changes include [Student] participating at Life Skills, Adult Transition Training and Services. This reduces his time from 1,225 weekly minutes to 750 weekly minutes in the CBI - II educational setting. Physical Therapy for 25 weekly minutes and Adaptive Physical Education for 250 weekly will be reduced to 10 weekly minutes of monitor. Additionally, vocational education will be added for 1,000 weekly minutes for [Student's] morning community schedule.
18. Transportation services between home, school and the Life Skills program were also added to the Student's IEP on [REDACTED].
19. This Complaint was filed on February 26, 2010.

**Conclusions:**

1. The Student is a learner with significant educational needs resulting from his cognitive, motor, communication, behavior and health deficits. He is [REDACTED] and under legal Guardianship due to cognitive impairments.
2. It appears as though the Student would have been most accurately identified as a learner with Multiple Disabilities rather than Other Health Impairment. It is unclear from the Student's records why the District considered Other Health Impairment as his eligibility determination.
3. 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.

4. 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).
5. Regardless of the identified category of disability, the District is responsible for identifying and meeting all needs that result from the Student's disability, "whether or not commonly linked to the disability category in which the child has been classified." 34 C.F.R. §300.304(c)(6).
6. "An appropriate educational program must:
  - 1) be designed to meet the student's unique needs;
  - 2) be designed to provide the student with some educational benefit; and
  - 3) be provided in the least restrictive environment."

*Gallup-McKinley County Schools*, 108 LRP 21191 (NM SEA 2007) citing *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

7. For the duration of the time relevant to this Complaint, the Student struggled with poor attendance and school refusal.
8. The District identified lack of attendance as the reason no progress was reported on all of his IEP goals.
9. It was incumbent upon the District to address all educational needs resulting from the Student's disability, including his refusal to attend school.
10. It was the responsibility of the District to review the Student's IEP to address the lack of expected progress toward the annual goals and in the general curriculum. 34 C.F.R. §300.324(b)(1)(A).
11. Further, it was the responsibility of the District to conduct a reevaluation of the Student's educational needs if his needs warranted a reevaluation. 34 C.F.R. §300.303(a).
12. Given the duration and extent of the Student's absenteeism, the lack of any progress on his IEP goals, the IEP requirement that the Student attend school at least 90% of the time in order to "walk" for graduation, and the fact that the Student's postsecondary goals included transition into employment where consistent attendance would be necessary for success, the District should have determined that a reevaluation was in order to assess the reasons for the Student's school refusal rather than forgo any IEP progress as the Student's "choice." See *Springfield School Committee v. Doe*, 53 IDELR 158 (D. Mass. 2009). In the

*Springfield* case, the court ruled given the student's absenteeism, and the fact that his IEP addressed improving his handling of school responsibilities, the district should have determined that a reevaluation was in order. In a similar case, Office for Civil Rights (OCR) found a denial of FAPE when a student's IEP did not address her absenteeism. "Because the district neither reevaluated the student nor convened an IEP meeting, it denied the student FAPE." *Anacortes School District No 103*, 53 IDELR 241 (OCR 2009).

13. The District's failure to affirmatively address the Student's absenteeism through either reevaluation or behavior intervention planning resulted in a denial of FAPE.
14. The team identified the need for the Student to receive direct instruction in communication. The Student's inability or limited willingness to communicate with others was of concern to the IEP team and the Complainant. In light of the District's obligation to address all areas of need resulting from the Student's disability, it was incumbent upon the District to provide direct instruction in communication and include his assistive technology device on the Student's IEP.
15. However, the IEP did not provide direct instruction in communication or the use of his assistive technology communication device. The conclusory statement that the Student would use his device in "daily interactions with peers and adults" is not reasonably calculated to result in progress for the Student.
16. The Office of Special Education Programs (OSEP) in the United States Department of Education has opined that "if the IEP team determines that a child with disabilities requires assistive technology in order to receive a free appropriate public education, and designate such assistive technology as either special education or a related service, the child's IEP must include a specific statement of such services, including the nature and amount of such services." *Letter to Anonymous*, 18 IDELR 627 (OSEP 1991).
17. The District is obligated to provide the Student with FAPE in the LRE. 34 C.F.R. §§300.114 through 300.117. The continuum of placements available to the Student must include separate schools or programs, like the Life Skills program, or home instruction if necessary in order for the Student to receive FAPE. 34 C.F.R. §300.115. The IEP team must determine an appropriate placement based on the principles of LRE.
18. Since FAPE is defined as special education and related services to meet the Student's unique needs resulting from his disability (34 C.F.R. §§300.17 and 300.101), special education and related services must be provided to the Student in any placement determined to be appropriate by the IEP team.

19. In light of the fundamental importance of communication skills for the Student's success in school and postsecondary employment opportunities, and the identified need for increased communication in the Student's IEP, it was incumbent on the District to ensure that the Student's communication needs were addressed in both the District and Life Skills programs.
20. The Student's placement in the Life Skills program resulted in a reduction of special education service due to the fact that the Student no longer received the Adaptive Physical Education service that had previously been provided on a daily basis or the Physical Therapy service that had been provided weekly. This reduction in service was based on a change in schedule rather than the Student's improved functioning. The discontinuation of Adaptive Physical Education and Physical Therapy service when the Student continued to need those services resulted in a denial of FAPE.
21. The District remained obligated to meet all of the Student's needs and provide special education services to the Student, even in another setting. There is no evidence in the Student's records to support a conclusion that the Student received any special education or related services while attending the Life Skills program, a placement made by the IEP team.
22. Although the Life Skills program may have been an appropriate placement for the Student with the provision of special education and related services based on the Student's unique needs, placement in the Life Skills program without special education and related services denied the Student FAPE.
23. Despite the concerns expressed by the Complainant regarding the Student's interactions with one particular staff member, the record does not support a finding that those interactions resulted in a denial of FAPE.

**Decision:**

**Issue #1**

Whether the District denied the Student a free appropriate public education (FAPE) by failing to provide an individualized education plan (IEP) that was reasonably calculated to meet the Student's educational needs consistent with 34 C.F.R. §§300.17 and 300.101.

**WDE determines that the IEP was not reasonably calculated to meet the educational needs of the Student, as it failed to address all of his**

educational needs resulting from the Student's disability, causing a denial of FAPE. WDE finds the District in violation.

**Issue #2**

Whether the actions of the paraprofessional resulted in a denial of FAPE by failing to meet the Student's educational needs consistent with 34 C.F.R. §300.320.

WDE finds that the Student was denied FAPE based on the cumulative actions of the District, including the special education teacher, paraprofessionals, and service providers 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.

**CORRECTIVE ACTION PLAN:**

1. Within 30 days of the date of this Decision, the District shall arrange for a comprehensive expert evaluation of the Student, specifically addressing the functional, motor, behavioral, vocational, transition and communication needs of the Student, including assistive technology devices and services with a focus on effective, real-life skills. 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 evaluation.
2. The expert evaluator shall be retained by the District for the purpose of designing, implementing and reviewing the Student's special education services for the remainder of time the Student receives special education or compensatory services from the District.
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 IEP for the Student addressing ALL areas of need resulting from his disability.
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 seek the assistance and input from the expert evaluator regarding a plan for appropriate compensatory services for the Student. The District shall be

required to provide a minimum of 150 hours of compensatory services to the Student unless the expert evaluator determines a different amount. The plan, developed in conjunction with the expert evaluator, shall address the type, amount, frequency and duration of compensatory services, taking into account the Student's interests, stamina, and aspirations. In the event that the Complainant does not offer her consent for the independent expert evaluation, then the District and Complainant shall determine the compensatory service plan.

6. Within ten (10) days of the conclusion of the expert evaluation or the Complainant's refusal to permit the expert evaluation, the District shall submit to WDE an agreed upon plan for compensatory services.
7. In light of the deficiencies surrounding this Student's IEP and other concerns regarding the CBI - II classroom and provision of services to similarly situated students that have come to the attention of WDE, a targeted monitoring of the CBI - II program, its components, and the service delivery model will be undertaken by WDE within 60 days of the date of this decision. In fulfillment of its general supervisory responsibility, WDE shall work directly with the District in correcting any deficiencies noted as a result of this targeted monitoring, and any findings will be addressed separate from this Complaint in order to protect the confidentiality of other students' identities and records.
8. All required submissions must be sent to WDE to the attention of Diana Currah, with a copy to the Complainant.

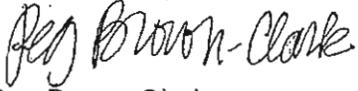
**Recommendations:**

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