



Wyoming Department of Education

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WYOMING DEPARTMENT OF EDUCATION
SPECIAL PROGRAMS UNIT
SPECIAL EDUCATION COMPLAINT INVESTIGATION

Complainants:

[REDACTED]
[REDACTED]
[REDACTED]

Case #: 2010-7

District:

[REDACTED]
Special Education Director
[REDACTED]
[REDACTED]
[REDACTED]

**COMPLAINT DECISION
AND
ORDER FOR
CORRECTIVE ACTION**

Date of Decision: May 21, 2010

On March 24, 2010 the Wyoming Department of Education (WDE) received a letter of complaint and supporting documentation filed by [REDACTED], (hereinafter "Complainants") alleging violations of special education law with respect to [REDACTED] (hereinafter "Student"), by [REDACTED] County School District [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 Department of Education Rules, Chapter 7 governing Services for Children With Disabilities (in effect for the period of time relevant to this Complaint investigation), WDE issues the following Findings of Fact, Conclusions, Decision, and Order for Corrective Action.

Complaint Issues:

Issue #1

Whether the District failed to conduct an evaluation of the Student's Occupational Therapy (OT) needs in a timely manner after the parents' request pursuant to 34 C.F.R. §300.303(a)(2).

Issue #2

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

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 records.

Follow up interviews were conducted with the District.

The District and Complainants 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. §300.34

Related Services

34 C.F.R. §300.39 Special Education

34 C.F.R. §300.303 Reevaluation

34 C.F.R. §§300.320 through 300.328 Individualized Education Programs (IEP)

2007 Wyoming Department of 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 prior to 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 March 25, 2009 and ending March 24, 2010.

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 Autism, Other Health Impairments, and a Speech/Language Disability, and is eligible to receive special education and related services under the Individuals with Disabilities Education Act (IDEA).
3. The Student struggled with regular attendance, missing 134 class periods during first semester and 109 class periods during second semester during the [REDACTED] school year. The Student had surgery during this time period.
4. The Student's most recent annual IEP is dated [REDACTED]. The IEP indicated that the Student's behavior interfered with learning.

5. The IEP Goals and Benchmarks are summarized below:

Goal Number	IEP Goals and Benchmarks	Progress
1.	Physical Therapy: Student will demonstrate improved strength, dynamic balance, and coordination to fully participate in the school environment as measured by completing the following 3 objectives: <ul style="list-style-type: none">• [Student] will help to establish home exercise program that he can complete over the summer months and be compliant with.• [Student] will perform single leg stance on a balance	[REDACTED] [Student] met two of his three objectives at the end of last school year. [Student] is easily distracted and has difficulty remaining on task throughout

Goal Number	IEP Goals and Benchmarks	Progress
	<p>disk for 10 second duration on each leg.</p> <ul style="list-style-type: none"> [Student] will perform 10 push ups in full extension position, "military style", to increase UE strength and core stability. <p>REVISED Physical Therapy goal: Student will demonstrate improved strength, dynamic balance and coordination to fully participate in the school environment, as measured by completing the following three objectives:</p> <ul style="list-style-type: none"> [Student] will remain on task for the entire 30 minute treatment session with 2 redirection cues. [Student] will be able to complete 10 push ups in full trunk extension without rest period. [Student] will be able to perform patterned hopping with correct technique to improve overall balance and agility; also with being instructed with one set of directions to improve listening skills and remaining on task. 	<p>the treatment session. This is incorporated into his new goal for this school year.</p> <p>██████████: Unable to perform hopping due to pain in left forefoot. Remains on task for five minute intervals before needing redirection.</p> <p>██████████: Remains on task for 30 minutes in new setting. Is able to perform correct hopping single and double leg with correct technique. Close to meeting short term objectives #1 and #3.</p>
2.	<p>Behavior: [Student] will comply with all directions the first time asked, without arguing, by May 2010 with 85% accuracy.</p> <ul style="list-style-type: none"> By ██████████ [Student] will identify and repeat the directions when given with no more than one redirection given to him by staff with 90% accuracy. By ██████████ [Student] will comply with oral directions when given with no more than one redirection by staff with 90% accuracy. By ██████████ [Student] will identify the difference between asking for clarity of directions and arguing with 90% accuracy. By ██████████ [Student] will comply with adult direction without arguing when given by staff with 90% accuracy. 	<p>██████████: Progress emerging.</p> <p>██████████: Progress emerging.</p> <p>██████████: Progress emerging.</p>
3.	<p>Communication: [Student] will verbally interact in a social language group using appropriate social/pragmatic conventions with 90% accuracy.</p> <ul style="list-style-type: none"> [Student] will ask questions for clarification using appropriate prosody with 90% accuracy with no more 	<p>██████████: Progress emerging. Questions more on target.</p> <p>██████████:</p>

Goal Number	IEP Goals and Benchmarks	Progress
	<p>than 1 cue per session.</p> <ul style="list-style-type: none"> [Student] will use compatible verbal and nonverbal messages for specific situations with 90% accuracy. 	<p>Progress emerging.</p> <p>██████████</p> <p>Progress emerging.</p>
4.	<p>Science: [Student] will develop an understanding of scientific content through inquiry.</p> <ul style="list-style-type: none"> [Student] will identify the layers of earth and the function with 85% accuracy. [Student] will choose a science fair experiment and present it to the class in at least a 5 minute presentation with 90% accuracy. [Student] will create a representation to show formation of the earth (ex. Volcano, erosion) with 85% accuracy. 	<p>██████████: The District did not report progress. The District reported that the original progress report was inadvertently sent home to parent and no copy was kept.</p> <p>██████████: Emerging progress.</p> <p>██████████: Emerging progress.</p>
5.	<p>Math: [Student] will use numbers, number sense and number relationships in problem solving situations with 85% accuracy.</p> <ul style="list-style-type: none"> [Student] will solve 2 and 3 digit division problems without the use of a calculator with 85% accuracy. [Student] will estimate to determine the product of two values up to 100 given 3 choices with 90% accuracy. [Student] will use money to make same-number comparisons using a 2 to 1 proportion with 85% accuracy. 	<p>██████████ The District did not report progress. The District reported that the original progress report was inadvertently sent home to parent and no copy was kept.</p> <p>██████████: Emerging progress.</p> <p>██████████ Emerging progress.</p>
6.	<p>Language Arts – Writing: [Student] will use the writing process and use appropriate strategies to write a variety of expressive and expository pieces with 85% accuracy.</p> <ul style="list-style-type: none"> [Student] will construct a written piece of work with at least 5 paragraphs to include an introduction, 3 details, and a conclusion using the word processor with 85% accuracy. [Student] will complete daily oral language exercises using appropriate grammar conventions with 85% accuracy. [Student] will compile written work with legible handwriting on college rule notebook paper with no 	<p>██████████ The District did not report progress. The District reported that the original progress report was inadvertently sent home to parent and no copy was kept.</p> <p>██████████ Emerging progress.</p> <p>██████████</p>

Goal Number	IEP Goals and Benchmarks	Progress
	more than 2 mistakes per assignment.	Emerging progress.
7.	<p>Language Arts – Reading: [Student] will use the reading process to demonstrate an understanding of literacy and informational texts with 85% accuracy.</p> <ul style="list-style-type: none"> • [Student] will identify the main idea, supporting details, and summarize informational texts with 85% accuracy. • [Student] will identify story elements from a selected story including character, setting, events, and tone with 85% accuracy. • [Student] will gather research from at least 3 sources to compose a 5 paragraph publication with 85% accuracy. 	<p>██████████: The District did not report progress. The District reported that the original progress report was inadvertently sent home to parent and no copy was kept.</p> <p>██████████ Emerging progress.</p> <p>██████████ Emerging progress.</p>
8.	<p>Occupational Therapy: [Student] will develop functional writing abilities through keyboarding and penmanship with 90% accuracy.</p> <ul style="list-style-type: none"> • [Student] will accomplish the first 10 units of Type to Learn with 90% accuracy. • [Student] will write his name and basic phrases/sentences with size and spacing to facilitate legibility on 90% of trials. 	<p>The District did not report progress on this goal. District staff indicated that the Complainant did not permit the Student to receive OT services from the District's Occupational Therapist.</p>

6. The IEP team determined that the Student would receive the following special education, and related services:

Special Education	Amount and Frequency	Related Service	Amount and Frequency
Behavior Management	224 – 280 minutes, 4-5 times per week	Counseling Services	30 minutes, 1 time per week
Core Academic Skills/ALT	224 – 280 minutes, 5 times per week	Occupational Therapy	30 minutes, 1 time per week
		Physical Therapy	30 minutes, 1 time per week
		Speech – Language Pathology	30 minutes, 1 time per week

7. The following supplementary aids and services were identified in the IEP:
 - a. Verbal prompts when off task;
 - b. Redirection when off task;
 - c. Large breaks of uninterrupted time;
 - d. Assistance with writing tasks, large rule paper and word processor;
 - e. Break up assignments/extended time; and
 - f. Paraprofessional in all classes outside of the SPED department.
8. The [REDACTED] IEP also included a Behavior Intervention Plan (BIP) and a supervision protocol.
9. The Complainant expressed concern that the supervision protocol was not implemented, permitting the Student to enter the girl's restroom.
10. The documentation provided by the District included a copy of an entry in a telephone log on [REDACTED] indicating that the Complainant no longer wanted the Student to receive OT, wanted the services removed from his IEP, and no longer wanted a particular staff person to provide the service.
11. Prior Written Notice was issued by the District on [REDACTED] indicating that the team proposed additional supports for the Student and a sensory integration evaluation.
12. On [REDACTED] the District issued a Prior Written Notice and Consent for Evaluation proposing additional assessment to determine sensory needs.
13. The Complainant offered her written consent for the sensory assessment on [REDACTED].
14. Prior Written Notice was again issued on [REDACTED], proposing additional supports for the Student and "sensory integration testing." The explanation of why the District was proposing the additional supports and sensory testing indicated: "The team is trying to ease the stress and anxiety level that [Student] exhibits at home."
15. The District's written response to this Complaint indicates that the Complainant would not permit the OT evaluation to be conducted by the District's Occupational Therapist.
16. On [REDACTED], the District issued a Prior Written Notice proposing additional sensory supports for the Student and that "the team agrees that an OT eval be completed as soon as possible." The Notice indicated that the Complainant objected to a particular staff person conducting the evaluation due to conflicts between the Student and the staff, as well as the Complainant and the Staff. The proposal indicates that the OT evaluation would be completed by an Occupational Therapist.

17. The District issued prior Written Notice and Consent for Evaluation on [REDACTED] proposing that the District conduct a comprehensive 3 year reevaluation of the Student. The District indicated that the Complainant did not offer consent for the reevaluation.
18. Email correspondence dated [REDACTED] between the District and a neighboring school district confirmed that the District made arrangements to contract with another Occupational Therapist in response to the Complainant's objection to the District's Occupational Therapist.
19. The OT evaluation by an independent Occupational Therapist was conducted on [REDACTED] and [REDACTED]. The Complainant participated in the evaluation through completion of an interview on [REDACTED].
20. On [REDACTED], the District again sought consent from the Complainant to commence the reevaluation process by issuing another Prior Written Notice and Consent for Evaluation.
21. The Complainant offered her consent for the reevaluation on [REDACTED].
22. Email correspondence between the Student's teacher and the District's Director of Special Education indicate that the Complainant wanted to schedule a meeting to review the results of the OT evaluation without waiting for the conclusion of the comprehensive reevaluation.
23. The record is unclear if the Student's IEP team was able to convene to review the OT evaluation results prior to the conclusion of the comprehensive evaluation.
24. The District reported that OT services were not provided to the Student in the [REDACTED] school year based on the Complainant's refusal.
25. This Complaint was filed on [REDACTED] prior to the conclusion of the reevaluation.
26. The IEP team was convened on [REDACTED] to review the results of the comprehensive evaluation and draft the annual IEP.
27. Complainants participated in the May 6, 2010 IEP team meeting, but indicated that they were placing the Student in a residential treatment facility in another state.

Conclusions:

1. The record demonstrates that the District communicated regularly with the Complainant regarding the Student's needs and concerns.
2. According to 34 C.F.R. §300.303(a)(2), the District was obligated to ensure that a reevaluation of the Student's educational or related service needs was conducted if warranted.
3. Based on the [REDACTED] Prior Written Notice, the IEP team concurred that an OT assessment was warranted to gather more information regarding the Student. However, the

Complainant was unwilling to make the Student available for the evaluation unless it was conducted by an Occupational Therapist outside of the District.

4. Courts have historically found that parents must allow their child to be evaluated by the school district if they want their child to receive FAPE. In *Gregory K. v. Longview School District*, 811 F.2d 1307 (9th Cir. 1987), the Ninth Circuit stated "if the parents want [their child] to receive special education under the Act, they are obligated to permit such testing." In *Andress v. Cleveland Independent School District*, 64 F.3d 176 (5th Cir. 1995), the Fifth Circuit concluded that "a parent who desires for her child to receive special education must allow the school district to evaluate the child ... there is no exception to this rule." See also *Vander Malle v. Ambach*, 673 F.2d 49 (2nd Cir. 1983).
5. The District affirmatively and proactively attempted to evaluate the Student's OT needs, but the Complainant frustrated that process through her refusal to permit the District's Occupational Therapist to conduct the evaluation.
6. The District remained willing to appropriately provide for the Student's OT needs, but did not implement the OT services on the IEP during the [REDACTED] school year due to the Complainant's refusal.
7. The 10th Circuit Court of Appeals has concluded that the parents' withdrawal from the IEP process made a district's procedural violations harmless. Procedural deficits are effectively excused if a parent refuses to participate in the process. *Sytsema v. Academy Sch. Dist. No. 20*, 50 IDELR 213 (10th Cir. 2008).
8. When a parent acts to frustrate the IEP process, including the reevaluation process, the 3rd Circuit Court of Appeals has ruled that a school district will not be liable for the resulting denial of FAPE. *M.S. v. Mullica Township Bd. Of Educ.*, 49 IDELR 154 (3rd Cir. 2008). See also *Winkelman v. Parma*, 53 IDELR 215 (N.D. Ohio 2009).
9. The actions of the Complainant in refusing to permit the District's Occupational Therapist to conduct an assessment frustrated the process and caused the delay from [REDACTED] to [REDACTED] in reevaluating the Student's sensory needs.
10. The actions of the Complainant in refusing to permit the Student to receive OT services from the District's Occupational Therapist served to frustrate the IEP process, causing a denial of service. In light of the Complainant's actions, the District will not be responsible for this denial.
11. The District committed two procedural violations with respect to the Student's IEP:

- a. The Physical Therapist unilaterally amended the Student's PT goal to reflect the Student's progress and needs in the fall of [REDACTED]. The resulting PT goal was similar to the preceding one, and progress was reported on this amended PT goal.
 - b. The District did not report on the Student's progress on four of the academic IEP goals in the fall of [REDACTED]. Progress was reported in the next two reporting periods in [REDACTED] on the same goals. Because the Student made progress toward achieving these goals, the error was only procedural in nature.
12. These procedural violations did not cause any loss of educational opportunity for the Student. The 10th Circuit Court of Appeals had determined that procedural violations of the IDEA are only actionable if they result in substantive harm. *Sytsema v. Academy Sch. Dist. No. 20*, 50 IDELR 213 (10th Cir. 2008).
13. In another 10th Circuit Court of Appeals case, the court has ruled that "... liability under IDEA is determined not by imagining the possibilities of what might have been, but rather by determining whether the preponderance of the evidence indicates that the school district's procedural failures resulted in a denial of educational benefit to the student. As the district court points out, such an inquiry implicitly seems to require determining whether the school district's actions caused the student to suffer an educational loss." *Garcia v. Bd. Of Educ. Of Albuquerque Public Schools*, 49 IDELR 241 (10th Cir. 2008).
14. The Student's progress on the amended PT goal and on the four academic goals supports a conclusion that the procedural error did not result in substantive harm.
15. In response to the Complainant's concern that the Student did not receive adequate supervision consistent with his IEP, the [REDACTED] IEP appropriately addressed the Student's educational and behavioral needs, and provided him with adequate supervision throughout his school day.
16. There was no documentation in the Student's records to suggest that he was left unsupervised or permitted to enter the girl's restroom.
17. Absent exceptional needs on the part of the Student, permitting some degree of privacy and independence while using a restroom would be expected to encourage appropriate life skills.

Decision:

Issue #1

Whether the District failed to conduct an evaluation of the Student's Occupational Therapy (OT) needs in a timely manner after the parents' request pursuant to 34 C.F.R. §300.303(a)(2).

WDE determines that the actions of the Complainant were the cause of the 5-month delay in conducting the OT reevaluation. No violation.

Issue #2

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

WDE determines that the District committed procedural errors by amending the PT goal outside of the IEP process and by not reporting progress on the four academic goals in the fall of 2009. The District is in violation.

CORRECTIVE ACTION PLAN

In light of the deficiencies and confusion surrounding the provision of special education and related services to the Student in accordance with his IEP, 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, on the requirements of implementing the IEP, amending an IEP by agreement, and documenting progress toward IEP goals at least as frequently as progress is reported for nondisabled students. The inservice training must be completed by September 1, 2010. The District shall provide WDE with the following documentation:

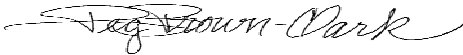
- a. The date, time, location, agenda and presenters for the training by July 1, 2010;
and
- b. Copies of any materials or handouts used, in addition to sign-in sheets documenting the attendance of special education staff within 10 days of completion of the mandatory inservice training.

All required submissions must be sent to WDE to the attention of Diana Currah, with a copy to the Complainants.

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 800-228-6294.

Sincerely,



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

cc:

[REDACTED] Superintendent
[REDACTED], Board Chair
Dr. Jim McBride, Superintendent of Public Instruction
Tania Hytrek, WDE Legal Counsel