



Wyoming Department of Education

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WYOMING DEPARTMENT OF EDUCATION
SPECIAL PROGRAMS DIVISION
SPECIAL EDUCATION COMPLAINT INVESTIGATION

Complainant:

Respondent:

Case #: C-0191-12

COMPLAINT DECISION

Date of Decision: February 6, 2013

On December 11, 2012 the Wyoming Department of Education (WDE) received a complaint and supporting documentation filed by _____ (hereinafter "Complainant") alleging violations of special education law with respect to _____ (hereinafter "Student"), attending _____ (hereinafter "District").

In conformity with 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 raised in the complaint. Pursuant to the IDEA, Federal Regulations, and the Wyoming Department of Education Chapter 7 Rules, WDE issues the following Findings of Fact, Conclusions and Decision.

Complaint Issue:

Issue

Whether the District violated its child find obligation by failing to timely identify the Student as eligible for special education and related services consistent with 34 C.F.R. §§300.8 and 300.111.

Investigatory Process:

- Review of records consisting of the following:
 - Original letter of complaint and supporting documents;
 - The District's response to the allegations;
 - The Student's education records, including behavioral reports and data; and
 - Evaluation results from the
- Follow up inquiries with the District.
- WDE requested that the Complainant respond to additional questions via email and certified mail. No response was received.
- WDE offered the Complainant and the District the opportunity to submit additional information throughout the investigation of this complaint.

Applicable Federal Regulations, State Statutes or Rules:

34 C.F.R. §300.8 Child with a Disability

34 C.F.R. §300.111 Child Find

34 C.F.R. §300.301 Initial Evaluations

34 C.F.R. §300.304 Evaluation Procedures

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 alleged violations of law that occurred not more than one year prior to the date the complaint was received. In light of this limitation, the investigation will be limited to the period commencing December 12, 2011 to December 11, 2012. However, it should be noted that this one-year investigatory period exceeds the length of the Student's enrollment in the District. Therefore, any findings of noncompliance with respect to the current complaint will be limited to the period commencing August 17, 2012 through the filing of the complaint on December 11, 2012.

Findings of Fact:

1. The Student enrolled in the District on August 17, 2012 prior to the commencement of third grade. The Complainant met with the Special Education Director at that time, informing the District that the Student was previously diagnosed with Asperger's and ADHD disorders. The Complainant further informed the District that she would be requesting an

evaluation of the Student, but wanted to wait until an evaluation at the in was complete.

2. On August 20, 2012, the day before school commenced, the District arranged for the Student to take a tour of the school and meet his teacher. The District staff took photos of the Student's stuffed dog he had brought with him for the tour, and then placed the pictures throughout the Student's environment to help ease his anxiety and transition into the new school.
3. The Student was referred to the Behavior Intervention Team (BIT) on August 20, 2012.
4. The BIT recommended behavioral assessments to assist in program planning for the Student. Behavior checklists were utilized to gather current information regarding the Student's behavior. The Complainant offered her consent to the BIT on September 26, 2012 to utilize the behavior checklists.
5. Teacher Intervention Records were maintained regarding the Student commencing with the first day of school.
6. The team developed a Recess Transition plan to assist the Student with experiencing a successful recess period, reducing adult involvement and interaction while increasing the opportunity for peer socialization. The Recess Transition plan commenced September 26, 2012. The transition was scheduled for completion by November 5, 2012.
7. The District developed an Emergency Plan in the event that the Complainant needed to be contacted during school hours. This undated plan was signed by the Complainant and the Principal.
8. The behavior intervention plan developed by the District included materials for sensory input, building breaks into the Student's schedule, encouraging the Student to utilize a 5 point feeling chart provided by the Complainant, providing the Student with an individual picture schedule, providing the Student with a cool down/calm down place, utilizing social stories, and pre-teaching any changes in schedule or routine. The Complainant received weekly data collection logs. As part of the plan, the Complainant was to sign and return the data collection sheets to school. District staff indicate that the Complainant stopped signing and returning the weekly data collection sheets on October 15, 2012.
9. District notes document that the BIT met weekly with the Complainant. The Principal documented that the BIT attempted to accommodate the Complainant's requests for social skills training, supervised recesses, and motor circuit activities, but could not accommodate the request for 1:1 supervision throughout the day.

10. "Think Sheets" were used to help the student process through negative behaviors, identifying the inappropriate behavior and problem-solving on more appropriate ways to handle difficult situations.
11. A Special Education Referral form was completed on September 26, 2012. The reason for the referral was documented as "parent request."
12. The Student participated in a social skills group one day per week commencing on October 3, 2012.
13. On October 4, 2012 the Complainant met with District staff to discuss a special education evaluation in order to determine if the Student met eligibility criteria as a learner with a disability under the IDEA. District staff notes indicate that the team was still waiting on the results of the evaluation. The proposed assessment included reviewing the results of all assessment data collected by

as well as the following:

The proposed assessment process for [Student] will include assessing current academic performance, collecting classroom data, and district test scores. Assessments will be administered to determine [Student's] general intelligence, communication skills, and to assess his adaptive behavior. Observations of [Student] in the classroom, parent and teacher interviews will also be conducted to collect additional information. He will also receive a vision and hearing screening given by the school nurse as well as an occupational therapy sensory screening. Health/medication information will also be obtained from and social/emotional data from the BIT process will be obtained. Also, and ADOS [Autism Diagnostic Observation Schedule] will be administered and we are requesting that it will be videotaped to ensure the validity of the administration.

14. The Complainant offered her consent for the evaluation on October 4, 2012.
15. The District documented a behavioral incident on October 18, 2012. The Student was not able to calm himself after an incident with another student. The District called the parent and suspended the Student for the remainder of the day, or approximately one hour. District records indicate this was the only suspension the Student received.
16. Although the record is not clear when the After Visit Summary was drafted or received by the District, the After Visit Summary contained the following Findings, in relevant part:
 - IQ has been average or higher, not a good explanation for his difficulties – my scores today also reassuring
 - Achievement and other standardized school-based testing have been reassuring, do not offer an explanation for his areas of difficulty

- ADOS (test for autism). [Student] lacks insight into social relationships and is less interested in a conversational partner than expected, but does not have the profound social skills deficits that are needed for a diagnosis of autism. . . He does not meet criteria for an autism spectrum disorder now. He does have some rigid thinking that will respond well to strategies used for kids with autism. Not having autism does not mean he gets a clean bill of health: he does have social skill deficits.

17. Recommendations from the _____ include, in relevant part:

- Consult with a skilled child psychiatrist or developmental-behavioral pediatrician to discuss a trial of mood stabilizer medication.
- Ongoing evaluation/monitoring and treatment with a clinical child psychologist for both individual and family behavior management training.
- School should work closely with the prescribing physician and treating psychologist to determine adequacy of modifications for [Student]. Likely that he will need modifications for attention as well as social skills instruction along with mental health support for times of crisis as well as for mediation with adults around his mental health needs.

18. The After Visit Summary also states: “This is only a brief summary from today’s visit. You will receive a more complete report by mail in 4-6 weeks.” However, it is unclear if the Complainant ever received the report.

19. A handwritten note dated October 30, 2012 indicates that the District received the “After Visit Summary” from _____. The note states:

The Team has determined that additional assessment data are needed. The proposed additions are a functional behavior assessment and parent forms that look at adaptive behavior. The Team had anticipated receiving this information from _____ after an October 8, 2012 appointment. The Team received an After Visit Summary from [Complainant] and those assessments were not included in the summary from _____. The team is proposing to conduct those assessments.

20. In a November 7, 2012 email, the Complainant expressed her concern regarding the current behavior plan, believing that it did not have a sufficient focus on positive behavior.

21. A Notice of Team Meeting dated November 13, 2012 documents that a team meeting was scheduled on November 19, 2012 to review evaluation results for the Student.

22. The Multidisciplinary Evaluation Team report documents the Student’s cognitive functioning to be in the average range; academic skills were average and above with the

exception of math calculation, which was measured in the low average range; behavioral skills ranged from average to at risk and/or clinically significant.

23. Fall and Winter DIBELS benchmark assessment in reading documents that the Student ranks 4th in the entire third grade class and first in his own class.
24. On November 19, 2012 the evaluation team determined that the Student met eligibility criteria as a learner with Other Health Impairment based on the ADHD diagnosis adversely affecting the Student's educational performance due to limited alertness. The team also ruled out Autism Spectrum Disorder and Emotional Disability eligibility. As part of the eligibility determination process, the team concluded that the Student's behavior did not adversely affect his educational performance.
25. The team documented that although the Student met eligibility criteria in the category of Other Health Impairment, the Student does not need special education and related services in order to be successful. The Student's needs were identified as structure, sensory breaks, social skill development and consistency. Those needs could be met in the regular education environment without specially designed instruction. The team documented that the BIT interventions were successful, resulting in "positive gains in the [Student's] behavior." The Complainant disagreed with the team's conclusion.
26. The School Psychologist's notes summarizing the November 19, 2012 meeting indicate that the team concluded the Student did not require specialized instruction in order to be successful at school and that his needs could be met through general education. It was suggested that a 504 plan be implemented to document and ensure accountability of the accommodations and behavioral interventions. The Complainant became angry and disagreed.
27. A November 29, 2012 letter to the Complainant documents that the team considered the Student eligible under Section 504 at the meeting on November 19, 2012. The letter further states an email was sent to the Complainant on November 26, 2012 to set up a meeting to develop a Section 504 plan, but the Complainant did not respond. The District requested that Complainant choose an afternoon for the team to be convened to finalize the Section 504 plan, including the use of a Check In-Check Out process as part of a behavioral intervention plan.
28. District notes document that the Complainant was notified of the Section 504 committee meeting on November 26, 2012, November 28, 2012, and December 6, 2012. A meeting was convened on December 12, 2012, but the Complainant did not attend. An Accommodation plan was developed and sent to the Complainant on December 13, 2012.

29. Office referrals decreased from two in August, one in September and October, and none in November or December. Staff notes also document improvement in the Student's willingness and ability to complete the Think Sheets while processing inappropriate behavior.
30. The Complainant withdrew the Student from the District after filing this Complaint. The District notified WDE on January 16, 2013.

Conclusions:

1. At the time of the Student's enrollment in the District, he was not currently identified as a learner with a disability under the IDEA.
2. Also at the time of the Student's enrollment, Complainant made it known to the District that the Student was being evaluated at _____ for difficulties related to the Student's enrollment in a prior district.
3. The District provided the Student with transition opportunities to his new school, and developed behavioral interventions at the beginning of the school year. The Student continued to receive the assistance of the BIT during the time period relevant to this complaint.
4. Although the Student's behavior continued to be challenging, the documentation provided by the District demonstrates behavioral improvement.
5. At all times relevant to this complaint, the Student received average and above grades in school.
6. Child find remains the ongoing obligation of a school district for all students who are suspected of having an IDEA disability and the need for special education, even if they are advancing from grade to grade. *See 34 C.F.R. §300.111(c)*. A child suspected of having a disability but who has not failed, is making academic progress, and is passing from grade to grade must be considered in the child find process as any other child suspected of having a disability. The child does not have to fail or be retained in a course or grade in order to be considered for special education and related services. *See 71 Federal Register 46584*.
7. Further, based on the fact that the Student's concerns were primarily behavioral in nature, the District cannot avoid its child find obligation based solely on the fact that the Student made academic gains. IDEA eligibility is much broader than academic performance, and child find obligations remain ongoing even if the Student advances from grade to grade. *See 34 C.F.R. §300.111(c)*. The group determining the eligibility of a child for special education and related services must make an individual determination as to whether, **not**

withstanding the child's progress in a course or grade, he or she needs or continues to need special education and related services. (Emphasis added.) *71 Federal Register 46580*.

8. The District was responsible for child find activities regarding the Student pursuant to 34 C.F.R. §300.111.
9. After the child find obligation is triggered, a school district must propose a full and individual initial evaluation before determining eligibility and providing special education and related services to an eligible child. *34 C.F.R. §300.301(a)*. The evaluation must be sufficiently comprehensive to determine whether a child is a student with a disability, and the content of an eligible child's IEP (if eligible) by ensuring that the child is assessed in all areas related to the suspected disability, and administering assessments in order to identify all of the child's special education and related service needs. *34 C.F.R. §300.304*.
10. In response to the Complainant's concerns and request, the District proposed a special education evaluation. This evaluation was to be conducted in conjunction with the assessments provided by
11. The evaluation plan was revised after receipt of the After Visit Summary from
The team, including the Complainant, had expected more detailed information from the evaluation to assist with IDEA eligibility determinations and educational planning. When the team learned that the anticipated assessment information was not forthcoming, the District supplemented its evaluation strategy to collect additional assessment data.
12. The District proposed a comprehensive evaluation and administered assessments consistent with the evaluation plan. After the evaluation, the District drafted an Evaluation Report and conducted a meeting to review the evaluation results. The District complied with the IDEA's evaluation requirements consistent with 34 C.F.R. §300.304.
13. In order to be determined an eligible *child with a disability* under the IDEA, the child must be evaluated in accordance with the IDEA's procedures. The resulting inquiry after evaluation is a two-prong test: The evaluation must result in a finding that the child has an IDEA disability, **and** who, by reason thereof, needs special education and related services. *34 C.F.R. §300.8(a)(1)*. A finding that the child has one of the IDEA disabilities, but the child does not need special education must result in a determination that the child is NOT a child with a disability under the IDEA. *34 C.F.R. §300.8(a)(2)*.
14. *Special education* is defined as specially designed instruction to meet the unique needs of a child with a disability. *Specially designed instruction* means, adapting, as appropriate to the

needs of an eligible child, the content, methodology, or delivery of instruction to meet the unique needs of a child that result from the child's disability and to ensure access of the child to the general curriculum so that the child can meet the educational standards within the public agency that apply to all children. 34 C.F.R. §300.39.

15. Students who can benefit from general education classes with accommodations and modifications do not have a need for special education. *C.M. v. Dep't of Ed., State of Hawaii*, 58 IDELR 151 (9th Cir. 2012). (The student participated in small classes designed to provide additional support.); *E.M. v. Pajaro Valley Unified Sch. Dist.*, 53 IDELR 41 (N.D.C. 2009), *reversed and remanded on other grounds*, 57 IDELR 1 (9th Cir. 2011). (The student did not require specialized instruction in order to receive educational benefit.); *A.P. v. Woodstock Bd. of Educ.*, 50 IDELR 275 (D. Conn. 2008), *affirmed*, 55 IDELR 61 (2nd Cir. 2010). (Although the student had difficulties in the classroom, he responded well to interventions. He did not meet the second eligibility requirement - being in need of special education.)
16. As applied to the Student, the evaluation conducted by the District according to the IDEA procedures resulted in a determination that the Student met the criteria in the Other Health Impaired disability category. However, the team then determined the Student was not a *child with a disability* under the IDEA because he did not need special education and related services. The second prong of the eligibility test was not met.
17. The Student was receiving behavioral interventions and accommodations that permit him access to and success in the general curriculum. The Student was making progress in the curriculum consistent with state and district educational standards. The Student was making behavioral gains and improvement.
18. The record supports the District's determination that the Student did not require special education in order to be successful.

Decision:

Issue

Whether the District violated its child find obligation by failing to timely identify the Student as eligible for special education and related services consistent with 34 C.F.R. §§300.8 and 300.111.

WDE finds that the District met its child find obligations to the Student by conducting a timely comprehensive evaluation and using the data gathered during the comprehensive evaluation to make a determination that, although the Student was found to meet criteria

as having Other Health Impairment, the Student did not need special education in order to be successful. Therefore, WDE finds no child find obligation.

In light of the fact that no violations were found during the investigation of this complaint, the investigation is considered complete. WDE shall close this complaint file after distribution of this decision. 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,

A handwritten signature in black ink, appearing to read 'T. Dobler', with a horizontal line above it.

Tiffany Dobler
Director, Special Programs Division

cc: District Superintendent
District Board Chair
Dr. Jim Rose, Interim Director of Education