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Special Education Law Bulletin

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CASE NAME: *Denver Public Schools, FC2007:514*

Abstract: CDE Complaints Officer finds that the written IEP offer from the School District must be sufficiently specific so that the services provided and resources committed are clear.

Ruling: The Complaints Officer at the Colorado Department of Education issued a Decision on February 15, 2008 concerning the sufficiency of the description of services and support to be provided in an IEP offer from the school district. In that case, the school district initially rejected the Parents' request for the provision of full-time paraprofessional support for their child. Instead, the school district offered an IEP that stated 1:1 services would be provided "as needed." After several unsuccessful attempts to reach a compromise regarding the language in the IEP, the Parents filed a Federal Complaint with the CDE. The Parents alleged that the IEP developed by the District was impermissibly vague in its description of paraprofessional services or support to be provided to the Student. Relying on 20 U.S.C. § 1414(d)(1)(A)(i)(IV) and 34 CFR 300.320(a), as well as ECEA Rule 4.02(4)(g)(ii),* the Complaints Officer found that "the services to be provided and the resources committed by the District are not at all clear." The Complaints Officer held that: "The vague nature of the District's offer fosters [] contradiction and deprives the Student's parents of the means of knowing whether their child is receiving more or fewer services than he is entitled to under the IEP. Therefore, the District has failed to make a written offer of services that complies with federal and state law." *The ECEA Rules were amended effective December 30, 2007. There should be no practical effect from this change as the substantive requirements of IEP content is the same.

What it means: The amount of services to be provided must be stated in the IEP so that the level of the school district's commitment of resources will be clear to parents and other IEP members. The amount of time to be committed to each of the various services to be provided must be (1) appropriate to the specific service, and (2) stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP. The amount of special education or related services to be provided to a child may be stated in the IEP as a range *only if* the IEP team determines that stating the amount of services as a range is necessary to meet the unique needs of the child. A range may not be used because of personnel shortages or uncertainty regarding the availability of staff. Parents are entitled to know what services are being provided and the manner in which services are being delivered.

A copy of the February 15, 2008 Decision for Federal Complaint 2007:517 is attached hereto.

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Colorado Department of Education
Decision of the State Complaints Officer
Under the Individuals with Disabilities Education Act (IDEA)

Federal Complaint 2007:517

Denver Public Schools

Decision

INTRODUCTION

This Complaint dated December 19, 2007, was filed by attorney Karen Wilcynski, counsel for Student's parents (hereafter, the "Complainants") and was received in the office of the State Complaints Officer on December 20, 2007. The Complaint attached e-mail correspondence and two pages of Student's September 24, 2007 Individualized Education Program ("IEP"). The response of Denver Public Schools (hereafter, the "District") was received on January 16, 2008.¹ The District's response attached Student's IEP document dated May 12, 2006 (Miami-Dade County Public Schools), the District's referral for supplemental paraprofessional support, a report of the District's autism team, and selected samples of Student's work. The response was transmitted to counsel for Complainants on January 16, 2008, and a reply was timely received from Complainant on February 5, 2008.

ISSUE

Whether the IEP document developed by the District for the current academic year conforms to federal and state law in its description of services and support to be provided to Student.

CONTENTIONS OF THE PARTIES

The Complainants allege that the District has developed an IEP document that is impermissibly vague in its description of paraprofessional or adult support to be available to Student. The District's proposal is that Student will receive one-to-one support "as needed" in addition to other accommodations and modifications. Complainants request

¹ Counsel for the District requested additional time to submit a response by reason of District personnel being unavailable over the semester break. That request was granted and the District timely transmitted its response on January 15, 2008.

that the District be ordered to include a specific offer of paraprofessional services in its IEP offer to Student.

The District acknowledges that Student requires some one-to-one support, but contends that Student does not need and would not benefit from full-time paraprofessional support. As to the issue of the language of the offer, the District maintains that its draft IEP language and subsequent proposal regarding "adult supports" are legally adequate.

FINDINGS OF FACT

1. Student is an eight year-old attending third grade at his neighborhood school in the Denver Public School District. Student is eligible for special education and related services in the category of Autism.
2. On May 12, 2006, Student's IEP team in the State of Florida convened and created a program of special education instruction and services for him. The relevant portions of the IEP provided that Student was to receive full-time, one-to-one paraprofessional support throughout the school day.
3. During the summer of 2007, Student's family relocated to the Denver area and established residency within the District. Complainants provided the District with a copy of the Florida IEP.
4. Upon enrollment in the District, Student was provided with special education and related services under an interim IEP document dated August 24, 2007. The interim IEP did not specify full-time paraprofessional support for Student. The District declined to implement the provisions of the Florida program and convened an IEP team meeting on September 24, 2007. The draft IEP document created that day specified that Student was to receive adult support "as needed."
5. Ms. Katie Sisk, a special education teacher for the District, completed a referral for supplementary paraprofessional support on October 10, 2007. At that time, Ms. Sisk noted that "Student is unable to participate in General Education curriculum without serious accommodations and modifications. He needs ongoing adult support to complete any given task." She recommended that the District's Autism Team observe Student and make further recommendations.
6. On October 21, 2007, Ms. Jodi Bonebrake, Program Manager for the District's Special Education Student Services office, wrote to Complainants and confirmed that the District had not granted "para support solely for your son." While additional support was committed to Student's school, the paraprofessional would be allocated to cover the needs of Student and other children at the school.

7. Student's IEP team re-convened on November 19, 2007, to discuss the results of observations conducted by the Autism Team in early November. In the course of this meeting, Complainants and the District reached agreement on Student's need for adult supervision and support throughout the day, both in core classes and to facilitate interaction with peers at lunch and recess. There is no documentation in the record establishing agreement on the issue of the written description of such support (i.e. whether it was to be provided solely by a paraprofessional or whether it would be provided to Student on a 1:1 basis). On November 30, 2007, the District proposed IEP language that read, "[Student] will receive additional adult support(s) throughout his day to access general education classes as well as to facilitate play and social interactions."

8. Subsequent to the November 19, 2007 IEP team meeting, the District has provided Student with continuous access to a trained paraprofessional at all times with the exception of the times he is receiving direct services from his special education teacher or related services from the designated providers.

CONCLUSIONS OF LAW

The issue in this case does not require resolution of whether Student actually requires one-to-one paraprofessional support as a substantive component of his special education program. Accordingly, the District's references to the decisions in *Board of Educ. Of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), and *Reinsholdson v. School Board of Ind. School Dist. No. 11*, WL 1819976 (D. Minn., 2005) are of no assistance here. Those cases and the *Elmore County* decision cited in the District's reply do not provide guidance about the level of specificity required in a description of IEP services.

The centerpiece of any child's special education program is the IEP document setting forth *in writing* the child's present levels of performance including how his disability affects involvement and progress in the general education curriculum, a statement of measurable annual goals tailored to the child's unique needs, and a statement of the special education and related services and supplementary aids and services to be provided to the child. The latter must include a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward his goals, to be involved and make progress in the general curriculum, and to be educated and participate with other children, disabled and non-disabled. 20 U.S.C. §1414(d)(1)(A)(i)(IV) and 34 CFR 300.320(a). Colorado's Rules for the Administration of the Exceptional Children's Educational Act provide that the statement of supplementary aids and services must "include the specified amount of services to be provided so that the commitment of resources and the manner in which services will be delivered will be clear to all who are involved in both the development and implementation of the IEP." 2220-R-4.02(4)(g)(ii).

The amount of specificity required in an IEP has also been reviewed by the U.S. Tenth Circuit Court of Appeals. The court has held that technical deviations from the procedural requirements for development of an IEP document “do not render an IEP entirely invalid; to hold otherwise would ‘exalt form over substance.’” *O’Toole v. Olathe District Schools U.S.D.*, 144 F.3d 692 (10th Cir., 1998) [internal citations omitted]. In order to be actionable, a procedural violation must impede the student’s right to receive a free appropriate public education or the parents’ opportunity to participate meaningfully in educational decision-making. *Logue v. U.S.D. No. 12*, 153 F.3d 727 (10th Cir., 1998) (any deficiency in the IEP process must result in prejudice to the student or his parents before a court may find that the IDEA was violated). This legal standard mirrors the statement of congressional intent in the IDEA to strengthen the role of parents and ensure their participation in the education of their children. 20 U.S.C. §1400(c)(5)(B).

Considering language similar to the phrase “as needed” proposed by the District here, the *O’Toole* court held that term “as appropriate” failed to adequately specify the level of related services the district there committed to provide. The factual findings in this case support the same conclusion here. Drawing on the language in ECEA Rule 4.02(4)(g)(ii), the services to be provided and the resources committed by the District are not at all clear. As an example, the statement of Ms. Bonebrake on October 21, 2007, that Student would be allocated a share of the “adult support” committed by the District (Finding of Fact No. 6) is inconsistent with the District’s later provision of the full-time, one-to-one paraprofessional services sought by the Complainants. The vague nature of the District’s offer fosters this type of contradiction and deprives the Student’s parents of the means of knowing whether their child is receiving more or fewer services than he is entitled to under the IEP. Therefore, the District has failed to make a written offer of services that complies with federal and state law.

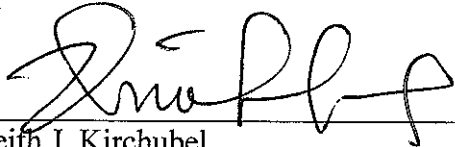
REMEDY

Complainants established that the District did not develop an IEP that conforms to applicable law. Accordingly, the District is ordered to develop an IEP document that clearly states the level of service(s) Student will be entitled to, as well as the qualification(s) of the person(s) providing those services (i.e. special education teacher, paraprofessional, etc.). The District shall provide the Complainants and/or their counsel with this documentation no later than March 3, 2008, and shall forward a copy to the State Complaints Officer at the same time to demonstrate compliance.

CONCLUSION

This Decision shall become final as dated by the signature of the Federal Complaints Officer.

Dated this 15th day of February, 2008.

A handwritten signature in black ink, appearing to read "Kirchubel", written over a horizontal line.

Keith J. Kirchubel
State Complaints Officer