

Colorado Department of Education
Decision of the State Complaints Officer
Under the Individuals with Disabilities Education Act (“IDEA”)¹

State-Level Complaint 2016:513
Douglas County School District RE-1

DECISION

INTRODUCTION

Complainant is the mother (“Mother”) of a child (“Student”) who is identified as a child with a disability under the IDEA. Mother brings this Complaint against Douglas County School District RE-1 (“School District”) on behalf of Student and all students requiring extended school year services (“ESY”). The complaint was properly filed on March 31, 2016, requiring that the decision be issued by July 29, 2016. The State Complaints Officer (“SCO”) determined that the Complaint identified two allegations subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153.² The SCO has jurisdiction to resolve the Complaint pursuant to these regulations.

COMPLAINT ALLEGATIONS

The SCO accepted for investigation the following issues:

1. Whether the School District denied Student a free appropriate public education (“FAPE”) and deprived Mother of meaningful input by developing an Individualized Education Program (“IEP”) on May 20, 2016 that provided ESY services that were based upon the School District policy rather than on Student’s individual needs; and
2. Whether the School District, since on or about June 2015, has denied students who are eligible for special education, specifically ESY services, a FAPE and deprived parents of meaningful input by determining students’ ESY services based on the School District policy rather than on students’ individual needs.

To resolve the Complaint, Mother proposes, in summary, that the School District add back the fourth week of ESY services for all students for the Summer of 2016 and determine students’ ESY services based on individual needs rather than the School District policy. Mother also proposes that the School District utilize nine predictive factors to determine ESY services for students and provide parents with days, times, and weeks of ESY services by February for summer ESY services. Mother further proposes that ESY services be provided for Student and all other children who live on the west side of the interstate at Middle School.

¹ The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 C.F.R. § 300.1, *et seq.*

² Hereafter, only the IDEA regulation and any corresponding Exceptional Children’s Educational Act (ECEA) rule will be cited (e.g., § 300.000, Section 300.000 or Rule 1.00).

RESPONSE

The School District failed to submit a response to the Complaint.³ Accordingly, pursuant to Colorado's State-Level Complaint Procedures, SCO deemed all allegations in the Complaint as admitted by the School District.

FINDINGS OF FACT

1. The School District has a policy regarding ESY services ("ESY Policy") which the School District has used to determine ESY services for students during the summers of 2015 and 2016. The School District's ESY Policy for the summer of 2015 provided students with four weeks of ESY services. The School District's ESY Policy for the summer of 2016 provided students with three weeks of ESY services.⁴
2. The School District did not use the nine predictive factors to determine ESY services for Student for the summers of 2015 and 2016. Rather, the School District provided ESY based upon its policy. The School District did not inform Mother that it was applying its ESY policy in determining Student's ESY services during the summers of 2015 and 2016, rather than base the ESY determination on Student's individual needs.⁵
3. The School District did not respond to numerous requests from Mother from July 14, 2015 through February 16, 2016 to discuss Student's ESY services. The School District avoided Mother's requests from May 4, 2016 through May 18, 2016 for an IEP meeting to discuss Student's ESY services.⁶
4. The School District is not providing ESY in the least restrictive environment ("LRE") for Student.⁷

CONCLUSIONS OF LAW

Based on the Findings of Fact above, the SCO enters the following CONCLUSIONS OF LAW:

1. The IDEA requires local education agencies such as the School District to provide eligible students with disabilities with a FAPE, by providing special education and related services individually tailored to meet the student's unique needs, and provided in conformity with an IEP developed according to the Act's requirements. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; ECEA Rule 2.19. The ECEA rules define special education as instruction that is *specially designed to meet the unique needs* of a child with a disability. ECEA Rule 2.43 (emphasis added). The IDEA's procedural requirements for developing, reviewing, and revising the IEP require a school district to timely convene an IEP meeting with the required participants (including the child's parents) in order to review the student's progress, new evaluative information, parent concerns, etc., in order to develop a current education plan. In the development of an IEP, parents must be afforded the opportunity to attend and meaningfully participate, which includes giving consideration to their concerns about their child.

³ School District's Paralegal informed SCO that a Response had been submitted to the Department, however, Special Education Director confirmed that the School District never submitted a Response.

⁴ Complaint.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

34 C.F.R. §§ 300.321(a)(1), 300.324(a)(ii) and 300.501(b).

2. In the seminal *Rowley* case, the Supreme Court explained that the IDEA established a procedure that would involve full participation of all concerned parties, including parents, at every stage of the process. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176 at 205-206 (1982). The IDEA thus requires educational agencies, teachers, and parents to jointly prepare and update an IEP tailored to the unique needs of the child, specifying the child's present educational performance, annual goals, required services, and criteria for evaluating progress. *Id.* at 181. The IDEA's procedural requirements for developing a student's IEP are specifically designed to provide a collaborative process that places particular importance on parental involvement.

[W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, e.g. 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP ... demonstrate[s] the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

Rowley, 458 U.S. at 205-206.

3. Typically, contemplation of the two pronged analysis set forth in *Rowley* is necessary to determine whether the procedural violation resulted in a denial of FAPE. *Rowley, supra* at 206-207. "[The inquiry in cases brought under IDEA] is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Id.* It is well-established, however, that where the procedural inadequacies seriously infringe upon the parents' opportunity to meaningfully participate in the IEP process, the result is a "per se" denial of FAPE. See, e.g., *O.L. v. Miami-Dade County Sch. Bd.*, 63 IDELR 182 (11th Cir. 2014); *Deal v. Hamilton County Bd. Of Educ.*, 392 F.2d 840 (6th Cir. 2004); see also, 34 C.F.R. § 300.513(a)(2)(ii) ("In matters alleging a procedural violation, a hearing officer may find that the child did not receive a FAPE only if the procedural inadequacies ... [s]ignificantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child...").

4. ESY services are defined as special education and related services that are provided beyond the normal school year in accordance with the student's IEP and at no cost to the parents. 34 C.F.R. § 300.106(b). The Act recognizes that ESY services are a necessary component of a FAPE for some, but not all, students with disabilities, and provides that *ESY determinations are to be made on an individualized basis* through the IEP process. 34 C.F.R. § 300.106 (emphasis added). In implementing

the ESY requirements, the Act also provides that a public agency, like the School District, may not “[u]nilaterally limit the type, amount, or duration of [ESY] services.” 34 C.F.R. § 300.106(3)(a).

5. With regard to the development of the ESY services, state educational agencies have consistently concluded that school districts are required to make individualized determinations of ESY services by using the IEP process as provided in 34 C.F.R. § 300.106(a)(3). State educational agency decisions have directed that school districts may not unilaterally determine services, but rather, must conduct IEP meetings and develop the students’ IEPs to reflect their educational needs and have ordered school districts to provide compensatory education when developing ESY programming without consulting with parents. *See, e.g., School Dist. Of Philadelphia*, 115 LRP 2750 (SEA PA 12/23/14)(finding that a district violated the IDEA when it unilaterally determined a student’s ESY services without parental input); *see also In re: Student with a Disability*, 9 ECLPR 30 (SEA MT 2011).

6. With regard to the requirement for educating a child in the LRE, the Second Circuit has concluded that the requirement must be adhered to for ESY programming. Specifically, the Second Circuit held that the LRE requirement applies in the same way to ESY placements as it does to school-year placements, specifying that the LRE requirement is not strictly limited by the range of ESY programs that the School District chooses to offer and that school districts must consider an appropriate continuum of alternative placements and offer the student the least restrictive placement from that continuum that is appropriate for the student’s needs. *T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145 (2d Cir. 2014). While not controlling, the Second Circuit’s holding is persuasive and supported by the plain language of the IDEA.

7. In this case, rather than developing ESY services based upon students’ individual needs, the School District has applied its ESY Policy to determine students’ ESY services for the summers of 2015 and 2016, specifically, determining that students who require ESY would receive four weeks of ESY services in 2015 and three weeks in 2016. Although the ESY policy may be appropriate for some students, ESY services must be determined based on individualized needs and goals rather than a standardized policy. The School District’s application of its ESY policy has the potential to deny IDEA eligible students the individualized supports and services to which they are entitled under IDEA. Accordingly, SCO concludes that application of the ESY policy constitutes a systemic violation of IDEA’s fundamental requirement that special education and related services be individually tailored to meet the unique needs of each student.

8. The School District’s application of its ESY Policy to determine students’ ESY services also prevented Mother and parents of other students in the School District from meaningfully participating in the design of individualized ESY programs, resulting in a per se denial of FAPE. SCO notes that Mother continually attempted to communicate with the School District and to request IEP meetings in order to determine Student’s individualized ESY services, to no avail. Accordingly, SCO concludes that the application of the ESY Policy resulted in a per se denial of FAPE for Student and all students in the School District eligible for ESY services during the summers of 2015 and 2016.

REMEDIES

The SCO concludes that the School District has violated the following IDEA requirements:

- a. Failure to determine and provide ESY services on an individual basis to Student and all students in the School District, in violation of 34 C.F.R. § 300.106; and
- b. Failure to provide parents with meaningful participation in the development of ESY services for Student and all students in the School District, in violation of 34 C.F.R. § 300.501.

To remedy these violations, the School District is ordered to take the following actions:

- 1) By no later than August 15, 2016, the School District must submit to the Department a proposed corrective action plan ("CAP") that addresses the violation noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom the School District is responsible. The CAP must, at a minimum, provide for the following:
 - a. Submission of the School District's written policies and procedures regarding ESY services, as well as the total number of students who qualified for ESY services in the School District during the summers of 2015 and 2016, no later than August 29, 2016.
 - b. Schedule a meeting with the Department to review and discuss the School District's written policies and procedures and to plan effective trainings (as determined by Department) related to the cited violations, no later than September 16, 2016.
 - c. The Department will determine whether the School District will submit to the Department between three and ten percent of the students affected by the ESY policy for review and monitoring at the beginning of the 2016-17 school year and again at the end of the 2016-17 school year.
 - d. Submission of compliant, written policies and procedures and, as applicable, compliant forms that address the cited violations, no later than October 3, 2016.
 - e. Effective trainings (to be determined by Department) must be conducted for all special education administration staff, including any staff who serve as the School District's special education designee designees (which may include case managers, special education teachers, building administrators, district administrators, disability specific service providers, and general education teachers), concerning the policies and procedures. Evidence that such training has occurred must be documented (i.e., training schedule(s), agenda(s), curriculum/training materials, and legible attendee sign-in sheets) and provided to CDE no later than December 1, 2016.
- 2) Conduct an IEP meeting at the beginning of the 2016-17 school year, but no later than September 16, 2016, to discuss Student's ESY services and progress made during the summer of 2016. The IEP team must create a plan for addressing any deficiencies that is consistent with its consideration of Student's individualized need for ESY services. These compensatory services shall be in addition to any services Student currently receives, or will receive, that are designed to advance Student toward IEP goals and objectives. The parties shall cooperate in determining how the compensatory education services will be provided, with special consideration to Student's needs, stamina, cooperation, and schedule.

The School District shall provide the Department with documentation that it has complied with this requirement, including a complete copy of all documentation related to the IEP meeting, no later than October 17, 2016.

The Department will approve or request revisions to the CAP. Subsequent to approval of the CAP, the Department will arrange to conduct verification activities to verify the School District's timely correction of the areas of noncompliance.

Please submit the documentation detailed above to the Department as follows:

Colorado Department of Education
Exceptional Student Services Unit
Attn: Linda Tegtmeier
1560 Broadway, Suite 1100
Denver, CO 80202-5149

NOTE: Failure by the School District to meet any of the timelines set forth above will adversely affect the School District's annual determination under the IDEA and subject the School District to enforcement action by the Department.

CONCLUSION

The Decision of the SCO is final and not subject to appeal. If either party disagrees with this Decision, their remedy is to file a Due Process Complaint, provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. See, 34 CFR § 300.507(a) and Analysis of Comments and Changes to the 2006 Part B Regulations, 71 Fed. Reg. 156, 46607 (August 14, 2006).

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

This 27th day of July, 2016.

Lisa A. Weiss, Esq.
State Complaints Officer

APPENDIX

Complaint, dated March 31, 2016, pages 1-8

- Exhibit A: 1/13/16 IEP with handwritten notes
- Exhibit B: 1/13/16 conference summary; February 2016 calendar page with handwritten notes
- Exhibit C: 11/21/13 Private Clinic evaluation report with handwritten notes
- Exhibit D: Email correspondence
- Exhibit E: Correspondence from School; Student's unofficial School transcript, dated 12/14/15
- Exhibit F: 3/9/16 handwritten note

Interview with Mother