

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

Federal Complaint 2006:502

Brighton School District 27J

Decision

INTRODUCTION

This Complaint, dated April 20, 2006, was filed by three employees of the Adams Youth Services Center (hereafter, the “AYSC”) and was received in the office of the Federal Complaints Officer on May 1, 2006. The Complaint was transmitted to Brighton School District 27J, (hereafter, the “District”) which operates the AYSC, on May 10, 2006. Pursuant to an agreement with the Federal Complaints Officer, on June 19, 2006, counsel for the District furnished a list of those “IDEA-eligible” students served at the AYSC during the 2005-2006 school year. The District formally responded to the allegations set forth in the Complaint on February 14, 2007.¹

ISSUE

Whether the District failed to implement the Individualized Education Programs (hereafter, “IEPs”) of seventeen students served at the AYSC by not consistently providing all of the services specified in the relevant IEPs during the 2005-2006 school year.

CONTENTIONS OF THE PARTIES

The Complainants allege that students at AYSC did not receive all of the special education services specified in their IEP during the 2005-2006 school year preceding the filing of the Complaint.²

¹ Additional details that impacted the scope of the Complaint and its investigation are set forth in the Findings of Fact under the heading “Procedural History.”

² The specific allegations pertaining to the seventeen students covered by the investigation are discussed under the Findings of Fact for each student, respectively.

The District contends that the Complainants have not established a violation of the IDEA. The District maintains that the IEPs were appropriately modified when the students entered the detention facility at AYSC and the required services were provided thereafter.

FINDINGS OF FACT

Procedural History

1. The Complaint was signed by three individuals, Mr. Bill Gotchey, Ms. Lori Liston, and Mr. Reginald Little who identified themselves as employees at AYSC as of April 20, 2006. The Complaint identified seven students by name and alleged violations of special education law with varying degrees of specificity for them. It also alleged violations for “significant numbers” of other students in general terms.
2. As part of its response on June 19, 2006, the District listed 57 students who were served at the AYSC during the 2005-2006 school year and deemed eligible for special education services. The listing identified the students’ date of birth, parent(s), street address and dates of attendance at the AYSC.
3. On June 26, 2006, the District furnished a complete set of its records for the students identified on the list to the Federal Complaints Officer. The documents were stamped with consecutive page numbers beginning with the code “AYSC” and will be referred to by such numbers herein.
4. On August 15, 2006, the Federal Complaints Officer contacted the parents of 55 students (whose addresses could be verified) by certified mail informing them about the general nature of the Complaint and seeking their permission to disclose confidential information in the IEPs to the Complainants as part of the investigation.
5. Prior to October 20, 2006, the parents of seventeen students responded to the Federal Complaints Officer with authorization to disclose confidential information to the Complainants. As a result, the Federal Complaints Officer determined that the investigation of the Complaint could only proceed as to those seventeen students.
6. On October 20, 2006, the Federal Complaints Officer transmitted copies of the seventeen sets of records covered by the authorizations to Complainants Liston and Gotchey.
7. On October 30, 2006, Mr. Gotchey mailed a response to the Federal Complaints Officer following his review of the files transmitted to him. The response contained information about the special education program at AYSC generally as well as Mr. Gotchey’s further allegations pertaining to the seventeen students covered by the investigation.

8. On December 1, 2006, Ms. Liston mailed a response to the Federal Complaints Officer. She stated that her employment with the District had been terminated following the filing of the Complaint. She also provided further allegations related to the seventeen students covered by the investigation.

9. On December 18, 2006, the Federal Complaints Officer transmitted the information from the Complainants to counsel for the District.

10. On February 14, 2007, the counsel for the District responded to the allegations of the Complaint and the further allegations set forth in the letters from Mr. Gotchey and Ms. Liston. The District response addressed each of the seventeen students individually based largely on information provided by Betty Emanuele, the Special Education Coordinator at AYSC.

11. On November 1, 2007, the Federal Complaints Officer conducted a taped interview of Ms. Emanuele at the offices of the District in Brighton Colorado. The interview lasted approximately 2 hours and was also attended by counsel for the District, Alyssa Burghardt.³ The interview covered the general nature of the AYSC, the manner in which the special education program was operated there, Ms. Emanuele's duties and her specific recollections regarding the seventeen students covered by the investigation. Ms. Emanuele was determined to be a credible witness with the ability to accurately recall facts relevant to this case.

General Background

12. During the 2005-2006 school year the District operated AYSC as a residential detention facility serving approximately 20 students at any given time. Students were placed at AYSC by court order pending adjudication or, in some cases, after adjudication. The average stay for a student at AYSC that year was twelve days.

13. Of the 20 students housed at AYSC, Ms. Emanuele estimated that typically between three to eight students would be IDEA eligible at any given time during the 2005-2006 school year.⁴

14. A school day at AYSC nominally consisted of three 1-hour instructional periods in the morning, a 1-hour lunch break, and three 45-minute periods in the afternoon. The facility features two classrooms, a multi-purpose room (also called "the floor") and a gym. Ms. Emanuele also had a separate office.

³ During playback review of the tape recording the second cassette suffered damage, though it appears to be repairable.

⁴ Unless otherwise indicated, all of the findings herein relate to the 2005-2006 school year.

15. Students at AYSC were instructed in mathematics, social studies, language arts, health, life skills and physical education. The maximum class size was ten students.
16. Students housed at AYSC actually endured a very chaotic daily schedule. Ms. Emanuele established that students were regularly removed from classes, sometimes multiple times in a day, for court appearances or meetings with their attorneys, doctors or probation officers. These removals necessarily interrupted regular and special education instruction even for those students not removed themselves.
17. AYSC staff provided a constant security presence at all times, including during the school day. Classroom doors were left open at all times for security reasons. Whenever a student was removed for any reason, restraints were employed. All staff carried personal radios that regularly broadcast communications that were audible throughout the AYSC facility.
18. A behavioral program called Positive Peer Culture was implemented at AYSC and impacted student behavior during all times of the day. This program constantly emphasized respect, responsibility, teamwork and keeping behavior under control in a way that supplemented or supplanted behavioral services that were necessary in a typical school setting.

Special Education Delivery

19. When a student first arrived at AYSC, Ms. Emanuele would meet with the student and inquire whether he or she was eligible for special education. If so, Ms. Emanuele would request records from the student's former district of attendance. She would also contact the parents of each eligible student to discuss how the change of placement to a residential detention center should impact the details of the IEP. Ms. Emanuele would secure a verbal approval of a parent for any such change(s).
20. Ms. Emanuele also supervised a para-professional, Ms. Diana Clark and coordinated the provision of special education services by Ms. Clark. Ms. Emanuele and Ms. Clark delivered the bulk of special education services to eligible students in one-to-one settings.
21. Ms. Emanuele also served as liaison with security staff at AYSC and as the staffing coordinator for those students who required a new IEP. She conducted any necessary testing and assessments for special education students and served as a mental health resource for the entire student population.
22. During the fall semester, Mr. Gotchey taught social studies and language arts. During the spring semester, he taught social studies and mathematics. Ms. Liston taught health and physical education.

23. A third teacher, Ms. Kari Costello taught life skills and mathematics. During the spring semester, Ms. Costello was replaced every afternoon by a substitute.

24. Ms. Emanuele assisted with teaching language arts and life skills to both general and special education students. Occasionally, Ms. Emanuele served as the substitute for Ms. Costello.

25. Ms. Costello also provided some special education services in the context of her regular classroom. Mr. Gotchey and Ms. Liston did not provide any special education services during their classroom time.

24. When a student needed services during a period taught by Mr. Gotchey or Ms. Liston, Ms. Emanuele removed that student from the classroom and taught the student in her office or another setting.

25. The District followed a policy set by the Special Education Director Ms. Eileen Burkhalter, who was Ms. Emanuele's supervisor, that the students' IEPs were not available to the classroom teachers. Pursuant to the policy, teachers could only access a "summary sheet" that described the goals, accommodations and test scores related to a student's special education program.

26. The IEPs of some students specified that certain services were to be delivered in a regular education setting with non-disabled peers. Ms. Emanuele acknowledged that this method of delivery is often in the best interest of students and had been effectively implemented at AYSC in years prior to 2005-2006.

27. After a confrontation in October, 2005, between Mr. Gotchey and Ms. Emanuele, the District directed Ms. Emanuele to stay out of his classroom and to avoid any situation that would place them alone together. A pervasive and dysfunctional conflict developed between Ms. Emanuele, Mr. Gotchey and Ms. Liston that prevented Ms. Emanuele from working with special education students in their classrooms.

28. Ms. Emanuele repeatedly informed Ms. Burkhalter that, as a routine matter, students were not receiving special education services in the classroom during periods taught by Mr. Gotchey and Ms. Liston—even where that practice contradicted the contents of the students' IEPs. Ms. Burkhalter did nothing to correct the problem and even stopped responding to Ms. Emanuele's telephone and e-mail contacts on the subject. Ms. Burkhalter instructed Ms. Emanuele to continue pulling students out of Mr. Gotchey's and Ms. Liston's classrooms to deliver special education services.

29. The decision to deliver special education services outside of the regular-education classroom in order to avoid the resolution of this conflict necessarily altered the extent to which students were educated in the least restrictive environment.

30. During this time period, at the direction of the District, Ms. Emanuele kept no records to document the time spent with individual students on the services specified in their IEPs or whether those services had contributed to the accomplishment of goals and objectives. Rather, Ms. Emanuele and Ms. Clark met informally each week to plan the timing and method of service delivery to special education students housed at AYSC.

31. Ms. Emanuele established that speech services were provided by District personnel and mental health counseling services were provided by Adams County personnel at her request. As with those services that she and Ms. Clark provided, Ms. Emanuele did not maintain documentation that service delivery by outside providers occurred when and in the manner specified in the IEPs.

32. Behavioral elements were also emphasized in the “life skills” curriculum. Students were regularly instructed in methods of communication, anger/conflict resolution, respect for others, and responsibility for self. This class and the positive peer culture initiative provided support needed by those special education students with behavior-related IEP goals, thereby obviating the need for many of the separate services written into IEPs developed in a standard school setting.

33. Ms. Emanuele met with the special education students regularly and encouraged them to “check in” with her any topic that concerned them.

34. Ms. Emanuele acknowledged as “lax” the failure to maintain such records and indicated that presently all special education services are documented when provided. She also established a positive working relationship with the teachers now employed at AYSC, supported by new supervision that ensures full access, as necessary, in all classrooms.

The Seventeen Individual Students

35. Student [student 1] was a [age] male who attended AYSC intermittently for a total of 34 days between August, 2005 and May, 2006.⁵ He was initially eligible for special education services in the category of [disability]. By the time of his last placement at AYSC, he had been “staffed out” of special education. Prior to that time, he was to receive services specified in an IEP dated February 16, 2005.

36. The IEP for Student [student 1] specifies four special education goals: one in the area of task completion, one in language arts, one in math and one in behavior. The IEP specifies 20 minutes per week of “mental health” services, with no separate services directed to the math and language goals. Complainants alleged that Student [student 1] received no special education services. Ms. Emanuele established that the county mental

⁵ In each case where the total number of days attended is noted, the finding represents the number of calendar days the student was present at AYSC, and not a determination of school days.

health counselor was present at AYSC four times per week and maintained a chart detailing compliance with the level of service set forth in the IEP.

37. Student [student 2] was a [age] male who attended AYSC between August 31 and November 1, 2005. He was eligible for special education services in the category of [disability]. His IEP specified only 15 minutes per week of social work counseling, but that expired on October 27, 2005. Ms. Emanuele developed a new IEP at AYSC with the participation of his mother on October 19, 2005. That IEP specified a total of five and a half hours per week of services were to be delivered, three hours in the general education classroom and the rest outside of the classroom.

38. Complainants did not dispute the level of service provided to Student [student 2] under the original IEP. Student was only at AYSC for approximately one week after the development of the October 19, 2006 IEP. Ms. Emanuele established that she and Ms. Clark provided the requisite level of service to Student [student 2] prior to his departure on November 1, 2005.

39. Student [student 3] was a [age] male who attended AYSC between February 22 and April 21, 2006. He was eligible for special education services in the category of [disability]. Student [student 3]'s IEP specified 16-20 hours per week of direct services outside of the classroom related to his goals of following classroom rules and initiating contact with his case manager.

40. Complainants alleged that Student [student 3] received services on the order of five to ten hours per week at AYSC. This case is one in which the Positive Peer Culture (FF 18) and life skills curriculum (FF 32) addressed some the requirements of this behavior-oriented IEP. Moreover, Student [student 3]'s IEP did not indicate that specially-designed instruction was required to address his "low-cognitive" performance across the curriculum. Rather, the IEP team noted that he had attendance issues and may be more successful in smaller sized classes. (Page AYSC 456) The unique features of the detention facility, including a maximum class size of 10, comported with this program.

41. Student [student 4] was a [age] female who attended AYSC intermittently for a total of 27 days between September 19 and November 15, 2005. She was eligible for special education services in the category of [disability]. Her operative IEP was developed at AYSC, with the participation of her mother, on December 14, 2004. That IEP specified 1.75 hours per week in the general classroom setting and one hour per week of direct one-to-one services as needed related to her goals in reading comprehension, written expression and behavior.

42. Complainants allege that Student [student 4] received no services, although they erroneously focus on an earlier, expired IEP. Ms. Emanuele established that the student received one-hour of in-classroom direct services in her Student [student 4]'s Tuesday life skills class and 45 minutes in her Friday language arts. Additionally, Student

[student 4] met with Ms. Emanuele outside of the classroom for individual assistance with her language goals.

43. Student [student 5] was a [age] male who attended AYSC between February 14 and March 1, 2006. He was eligible for special education services in the categories of [disability] and [disability]. Student [student 5]'s IEP, developed for the day-treatment program at Flatirons Academy, specifies 30 hours per week with SIED teachers and two hours of affective education in small, structured classrooms.

44. Complainants allege that Student [student 5] did not receive any pull-out services. This allegation is based on a misreading of his IEP. The program did not specify 30-plus hours of direct instruction in a pull-out setting. Rather, Student [student 5] required a structured, small-class, affective education. These needs were met to the extent allowed in the context of a court-ordered, security-oriented placement by the Positive Peer Culture, the life skills class, and the extremely controlled environment of the residential detention facility.

45. Student [student 6] was a [age] male who attended AYSC between October 19 and November 1, 2005. He was eligible for special education services in the category of [disability]. As with Student [student 5], Student [student 6] arrived with an IEP written for the Flatirons Academy. His IEP specified no academic goals, only SIED-related instruction and affective education.

46. Complainants allege that they were not aware of any special education services delivered to Student [student 6]. However, this allegation is based on the same misunderstanding found in FF 44. Student [student 6]'s IEP was based on a specific placement (Flatirons) that was superseded by the court's order (AYSC). To the extent possible during his less than two-week stay, he received a structured, supervised special education appropriate to his needs.

47. Student [student 7] was a [age] male who attended AYSC intermittently for a total of 31 days between January 24 and May 22, 2006. He was eligible for special education in the category of [disability]. His IEP was written for the Adolescent Day Treatment facility and included 15 hours per week of supervised special education with no direct services related to academic goals and objectives.

48. Complainants allege that Student [student 7] received no pull-out hours and nowhere near 30 hours per week of special education. As with the previous two students, Student [student 7] was not intended to receive direct services related to his behavioral difficulties. Rather, he was to participate in regular, structured classroom settings geared toward increasing his ability to "self-manage" and appropriately express his needs. These requirements were met via the life skills curriculum and the Positive Peer Culture at AYSC. Additionally, as set forth on the revised Summary of Service Plan (AYSC

1451) Student [student 7] received 0.75 hours per week of direct service in his language arts class.

49. Student [student 8] was an [age] male who attended AYSC intermittently for a total of 12 days between November 21 and December 15, 2005. Following his arrival on November 21, Ms. Emanuele requested a copy of his IEP from the Aurora Public Schools. Due to the intervening Thanksgiving holiday, his IEP was not received at AYSC until November 28, 2005 and not forwarded to Ms. Emanuele until the 30th. Student [student 8] left the facility the next day, then returned on December 14, 2006, for only one night. The circumstances of Student [student 8]'s placement at AYSC effectively prevented the implementation of a special education program.

50. Student [student 9] was an [age] male who attended AYSC from January 5 to February 2, 2006. He was eligible for special education in the category of [disability]. Student [student 9] came to AYSC from the Emily Griffin Center, where his IEP was written to provide over 30 hours of RTC (residential treatment center) services per week. It also incorporated his prior public school IEP, dated May 12, 2005, which only provided five minutes of consultation per week.

51. Student [student 9] is another case in which the supervised special education services of the RTC correlate to the life skills curriculum and Positive Peer Culture at AYSC. Aside from the minimal consultation that Student [student 9] was to receive each week, no additional special education services were dictated by his IEP.

52. Student [student 10] was a [age] male who attended AYSC intermittently for a total of 26 days between August 25, 2005, and June 1, 2006. His first stay, from August 25 through September 2, 2005, encompassed six school days. Ms. Emanuele noted in her file that his IEP was received on May 22, 2006. The District's response, however, indicates that the IEP was received on Tuesday, August 30, 2005, three days before his initial departure. Student [student 10] then returned in April, 2006 for three days. The District response states that these stays were "too short in duration" for Ms. Emanuele to revise and implement a delivery plan.

53. Ms. Emanuele, however, noted that she received the IEP on one day (May 22, 2006) and met with Student [student 10]'s mother the next day when permission was granted to implement the proposed changes in the IEP. Accordingly, the District's position that six school days (August 30 to September 2, 2005, and April 26 to May 1, 2006) was insufficient to modify the IEP is refuted by Ms. Emanuele's notations in the file. Had the District taken this action on August 30, 2005, Student [student 10] would not have lost out on approximately nine days of special education services. Therefore, the District has not established good cause for this failure to provide approximately eight hours of special education services to Student [student 10] between August 31, 2005, and May 23, 2006.

54. Student [student 11] was an [age] male who attended AYSC between September 26 and October 14, 2005. He was eligible for special education services in the category of [disability]. On his arrival at AYSC, Ms. Emanuele noted that Student [student 11] was due for a triennial review of his IEP. She contacted his mother and obtained permission to perform a full re-evaluation. Ms. Emanuele commenced assessment of Student [student 11] on October 5, 2005, and this occupied much of the time available for the delivery of special education services. Because that testing and the process of holding the triennial IEP meeting was not able to be completed before Student [student 11] was court ordered to another placement on October 14, 2005.

55. Student [student 12] was a [age] male who attended AYSC from May 4 to June 1, 2006. He was eligible for special education services in the category of [disability]. After Ms. Emanuele received his most recent IEP from the Adams 14 School District, she discussed modifications to the service delivery with Student [student 12]'s mother and obtained consent on May 11, 2006. Thereafter, Ms. Emanuele delivered services in Student [student 12]'s life skills class (1 hour per week) and language arts classes (45 minutes, twice per week).

56. Student [student 12] had two primary IEP goals: one behavior-oriented goal intended to improve peer and teacher relationships, and one transition-related goal. Given the nature of his disability and the contents of his IEP, it is evident that the major emphasis of his special education program was tailored to improvement of his behavior. Thus, the 30 hours of direct services to be provided at his prior, out-of-district placement comprise a supervised special education program. As with other students at AYSC, the life skills curriculum, Positive Peer Culture and highly controlled security environment of the facility filled that need to the extent possible.

57. Student [student 13] was a [age] male who attended AYSC between February 8 and April 13, 2006. He was eligible for special education services in the category of [disability]. Ms. Emanuele stated that she had misplaced the District Service Summary Sheet that evidenced the modification of Student [student 13]'s previous IEP. She did, however, recall receiving consent from his parent to implement changes upon his arrival at AYSC.

58. Student [student 13] is another child who required significant behavioral intervention in his prior placement. His existing IEP included a behavior intervention plan, a behavior-related annual goal with corresponding short-term objectives, and enrollment in an affective needs program and supervision for 22 hours per week. He also had academic goals in the areas of reading, written expression and math. Ms. Emanuele recalled serving student in his life skills and language arts classes as well as one-to-one time outside of the classrooms, but it is impossible to determine in what quantity. Mr. Gotchey noted that Student [student 13] received between five and ten hours per week of services from Ms. Emanuele. However, this is one example that illustrates how the

District's failure to maintain detailed records of services actually provided significantly impairs its ability to demonstrate substantial compliance.

59. Student [student 14] was a [age] male who attended AYSC for one week between November 4 and November 11, 2005. He was eligible for special education services in the category of [disability]. Ms. Emanuele did not receive his IEP from his previous district of attendance until November 10. By that time, it was too late – through no fault of the District – to implement special education services for Student [student 14].

60. Student [student 15] was a [age] male who attended AYSC intermittently for a total of 96 days between February 17 and June 1, 2006. He was eligible for special education services in the category of [disability]. When Ms. Emanuele received his most recent IEP, she determined that Student [student 15] was overdue for an annual review. That review occurred and the parent provided consent to implement a new service plan on March 15, 2006. Subsequently, Student [student 15] received 1.75 hours per week of in-class special education services and between 1 – 2 hours of outside direct services as-needed from Ms. Emanuele and Ms. Clark. He also received a minimum of 1.5 hours of counseling from the Brighton High School psychologist, Ms. Leanne Wilson, per month. Complainants do not dispute that these services were actually provided.

61. Student [student 16] was a [age] male who attended AYSC between September 19 and October 4, 2005. He was eligible for special education services in the category of [disability]. Ms. Emanuele received the existing IEP for Student [student 16] on September 27, 2005. Student departed AYSC on October 4, 2005, only 4 school-days later. There is no indication in the record that Ms. Emanuele was able to reach the parent(s) of Student [student 16] in that time period to discuss the implementation of his IEP. Moreover, Complainants state no factual basis for a finding of noncompliance in this instance.

62. Student [student 17] was a [age] male who attended AYSC between December 13, 2005, and March 10, 2006. He was eligible for special education services in the category of [disability]. His then-existing IEP was received from the prior district of attendance on January 9, 2006. It was marked “draft” and a final version of the IEP was not received by Ms. Emanuele until March 7, 2006. In the meantime, Ms. Emanuele repeatedly contacted the mother of Student [student 17] and ultimately obtained consent to implement a modified service plan (AYSC 2704) on February 2, 2006.

63. During the period between February 2 and March 10, 2006, Ms. Emanuele provided 1.75 service hours per week in Student [student 17]'s life skills and language arts classes, in addition to one-half hour to two hours of pull-out individual services according to his request. By the time Student [student 17]'s “final” IEP was transmitted to AYSC on March 7, 2006, he was only three days away from departing the facility. It did not specify any additional quantity of services beyond those he was provided after February 2, 2006. (AYSC 2714) Complainants' allegations with regard to Student

[student 17] are vague but seemingly indicate a general impression that services were not provided outside of the classroom. Ms. Emanuele's statement was far more credible and established District compliance with the IEP for Student [student 17].

CONCLUSIONS OF LAW

It is well established that a school district must provide special education services that comport with a student's IEP as one element of a free appropriate public education. *Board of Educ. Of the Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176 (1982). The District here is responsible for providing compliant special education services at AYSC pursuant to 34 CFR §300.2(b)(1)(iv). To the extent possible, the District is obligated to provide services consistent with previously-developed IEP, or to closely approximate such services. *Alexander S.* (D.S.C. 1995) 876 F.Supp. 773, 802. In this case, the issue of compliance with the IEPs for the seventeen students is significantly impacted by a number of factors established by the findings of fact herein above.

First among these factors is the nature of the placements and the detention facility itself. Each of the students was placed at AYSC pursuant to court order and was subject to abrupt removal for any number of reasons. (FF 16) Clearly, the security of the students and their availability for appearances and appointments related to the judicial process took precedence over their educational needs. Students might be removed in shackles or watch as their peers were so removed multiple times in a given day. Staff carried radios that regularly disrupted what might otherwise be a quiet educational setting. (FF 17) As a result of a judicial determination, a student's placement at AYSC could end in the middle of a class period. Taken together, these factors resulted in a difficult pattern of short stays, interruptions and distractions that distinguishes the special education program at AYSC from other standard school, day-treatment, or even residential placements.

Second, due consideration must be given to the highly-controlled environment and multiple levels of behavioral support afforded by the Positive Peer Culture and life skills curriculum at AYSC. (FF 18 and 32) Additionally, throughout the day, even when not in school, students at AYSC were closely supervised and required to adhere to strict rules of conduct applicable to teachers, staff and student peers. Ms. Emanuele established that these programs, coupled with the small class size (FF 15) substantially provided the structure and support characterized by affective needs education programs in other settings. Thus, in those cases where a student's IEP specified 20 or 30 hours of behaviorally-related supervision and special education, it was appropriate to modify the service delivery to reflect the reality at AYSC. Significantly, Ms. Emanuele discussed these modifications with the students' parents and obtained their consent in every instance. 34 CFR §300.324(a)(4)

Turning to the seventeen students at issue here, Complainants allegations are mostly very conclusory or lacking a basis in fact. Additionally, many of the allegations are based on a

misreading of the operative IEPs – as in those cases where they complain that students with behavioral needs did not receive 30 hours of direct services. Even in their prior placements, those students were not intended to receive such services. On the other hand, the statements and recollections of Ms. Emanuele were very specific and credible. In fifteen of seventeen cases, she established that services were provided in quantities that complied with the modified IEPs. In the instance of Student [student 13], there is no evidence of what services he was to receive at AYSC. However, Complainants only allege that Student [student 13] did not receive 22 hours per week of direct services. As these allegations illustrate another misreading of the existing IEP, noncompliance in this instance was not established.⁶ (FF 57 and 58)

With regard to Student [student 10], Complainants' allegations are extremely general in nature. Ms. Liston stated that "some SPED services" were provided. Mr. Gotchey wrote that "almost all hours" were not given. Nonetheless, the contradictions between the District's response and Ms. Emanuele's notations to the file prevent a finding of compliance. As set forth in Findings of Fact 52 and 53, Student [student 10] attended AYSC for approximately nine school days after the District should have been able to secure the consent of the student's parent to implement his modified IEP without receiving any special education services. Given the program specified in his modified IEP, Student [student 10] was therefore improperly deprived of eight hours of direct special education services. What impact that had on him is not known.

Finally, the investigation of this Complaint revealed an area of noncompliance that flowed from the District's failure to resolve the personnel conflict involving Ms. Emanuele, Mr. Gotchey and Ms. Liston. Because Ms. Emanuele was not being permitted into the classrooms where the Complainants taught, students were removed from those classes to receive special education services intended to be provided inside the classrooms. (FF 24, 27 and 28) Ms. Emanuele established that in-classroom instruction benefits students and had been successfully implemented at AYSC for years. (FF 26) Necessarily, the practice of removing students from the classrooms improperly and adversely altered the extent to which students were educated in the least restrictive environment with their non-disabled peers. 34 CFR §300.114. (FF 29) In short, the District neglected the best interests of its students because it sought to avoid curing a festering, dysfunctional personnel issue. However, while special education in the least restrictive environment is legally required and has established educational value, there is no evidence in the record that any of the seventeen students suffered a cognizable deprivation of educational benefits as a result of being pulled out of Mr. Gotchey's and Ms. Liston's classes. This finding is based on the short duration of attendance for students at the facility and the other distinguishing factors described herein above.

⁶ This decision should not be read as an endorsement of the District's policy of not documenting the services provided to students. To the extent that the District demonstrated compliance it did so on the strength of the statement by Ms. Emanuele and the unique character of the educational setting. It is also noted that she is now maintaining records of services actually provided.

REMEDY

This investigation established that the District failed to educate the thirteen of the seventeen students in the least restrictive environment during the 2005-2006 school year. Because there is no evidence in the record of demonstrable harm to any student as a result of this practice, no individualized relief is appropriate here. Notice is also taken of Ms. Emanuele's assurance that the personnel conflict is now resolved, providing special education staff access to all classrooms at AYSC. The District shall submit to the Federal Complaints Officer valid documentation establishing this correction in the form of policies and procedures or other measures taken by the District to ensure such access. Evidence of corrective action shall be furnished to the Federal Complaint Officer no later than December 31, 2007. The Complaints Officer reserves the right to request additional information if the documentation submitted by the District is not sufficient to show that ordered corrective action has been completed.

All of the students have moved on to other placements, some as long as two years ago. Student [student 10] left AYSC on June 1, 2006. Also, as there is no evidence in the record of educational harm suffered by Student [student 10] as a result of being deprived of eight hours of direct special education services, there is no basis upon which to award him a compensatory remedy.

CONCLUSION

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

Dated this 20th day of November, 2007.

Keith J. Kirchubel
Federal Complaints Officer