

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

State Level Complaint 2008:501

Boulder Valley School District RE 2

Decision

INTRODUCTION

This Complaint dated December 19, 2007, was filed by Student’s father (hereafter, the “Complainant”) and was received in the office of the State Complaints Officer on January 3, 2008. The Complaint attached documentation from Student’s Individualized Education Program (“IEP”) developed on May 18, 2007, copies of e-mail correspondence, and a health care plan dated October 8, 2007. The response of Boulder Valley School District RE 2 (hereafter, the “District”) was timely received on February 5, 2008. The District’s response attached a copy of Student’s IEP as well as the District’s Policy for Programs for Handicapped Students (Special Education), timelines of events and contacts, correspondence, health history forms, the health care plan, service delivery notes (occupational therapy and direct auditory services, and a State of Colorado Department of Public Health publication entitled “Recommendations for Management of Children with Methicillin Resistant *Staphylococcus aureus* (MRSA) in School and Child Care Settings” (rev. Dec. 2007). The response was transmitted to Complainant on February 12, 2008, and Complainant’s information in reply was received on February 28, 2008.¹ The record was closed in this matter on February 28, 2008.

ISSUE

Whether Student’s IEP was properly implemented during the period September 7, 2007, through January 10, 2008.

¹ Complainant’s reply was due two days earlier on February 26, 2008. Given the complexity of this case and the inclusion of information from a variety of sources, the reply was deemed timely. To disallow the reply would have unfairly prejudiced Complainant. However, the time deadline for decision in this case was extended by two days—to March 5, 2008—to permit due consideration of the materials in the reply.

CONTENTIONS OF THE PARTIES

The Complainant alleges that the provisions of Student's IEP have not been fully or consistently implemented. Student has received far fewer services than those called for in the IEP. Complainant seeks an award of compensatory services equal to the amount specified in the IEP but not provided by the District.²

The District's response highlights problems obtaining relevant health information from Student's family and the need to develop an implementation plan that ensured the safety of Student and his special education providers. The District maintains that Student's status as a carrier of Methicillin Resistant *Staphylococcus aureus* (hereafter, MRSA) was not disclosed until September 25, 2007, and necessitated the revision of Student's health care plan. The District concedes that Student "has not received all of the services specified in the IEP" but adds that "there have only been a few weeks during which no services were provided."

FINDINGS OF FACT

1. Student is a [AGE] year-old male residing within the boundaries of the District and eligible for special education on the basis of multiple disabilities.
2. Student's significant medical history is relevant here. He is diagnosed as having CHARGE Syndrome, a rare disorder that affects multiple organ systems including his heart, lungs, and kidney. Student has choanal stenosis, reflux and aspiration. He is on oxygen and receives all nourishment through a feeding tube. He has an inner ear malformation that results in hearing loss. Student has undergone numerous surgeries and lengthy hospitalizations. He also has a history of being immuno-compromised. As a consequence, Student's physician recommended that he not attend preschool, but rather receive services at home.
3. On May 18, 2007, the District convened an IEP team meeting to determine Student's eligibility for special education and the provisions of an appropriate individualized program. That meeting was attended by Complainant, District special education staff including a teacher/speech language pathologist, occupational therapist, school psychologist, audiologist, deaf/HoH teacher, and Student's Part C service coordinator.
4. The IEP document developed for Student on May 18, 2007, made note of the above medical history and the fact that Student had a MRSA infection. MRSA is commonly found in hospitals and long-term care facilities.

² Complainant's reply also attaches a letter from a pediatric speech language pathologist that maintains that Student should qualify for additional speech language services. That allegation is beyond the scope of the issue in this matter and not within the jurisdiction of the State Complaints Officer to decide.

5. The IEP took these factors into account and specified a program for Student that was to commence on September 7, 2007. Student was to receive the following direct services in the home each month: 90 minutes of speech/language, 90 minutes of deaf/HoH instruction, 90 minutes of occupational therapy, and 90 minutes of physical therapy. Student was also to benefit from 30 minutes of consultation per month in each discipline.
6. The above services were designed to increase Student's academic and play skills for successful participation in preschool activities, improve his ability to communicate with others, improve his motor skills related to preschool activities and improve his auditory skills. Because Student was homebound and unable to play or interact with adults or his age-level peers in a preschool setting, delivery of the services specified in the IEP was especially critical to Student's ability to achieve his special education goals.
7. Beginning on September 12, 2007, Student's service providers began to conduct home visits to meet Student and plan the implementation of his IEP. These visits comprised consultation, but no direct services to Student.
8. On or about September 25, 2007, Student's service providers attended a planning meeting at the home with Student's mother. At that time, Student's mother informed the team that Student was currently colonizing/carrying MRSA. Prior to this disclosure, the District had understood only that Student had colonized MRSA in the past (last treated in June, 2007).
9. Based on the information about Student's status as a MRSA colonizer, the District suspended delivery of IEP services to develop an appropriate health care plan.
10. *Staphylococcus aureus* ("staph") is a bacterium commonly found on the skin and in the noses of healthy people. When staph is present in the body without causing illness, a person is said to be "colonized." About 25% to 30% of people are colonized with staph at any given time. MRSA is one form of staph bacteria that has developed a resistance to antibiotic treatment. Staph bacteria are spread by skin-to-skin contact or by contact with a contaminated item such as a towel or bandage. Although staph are not usually spread through the air, certain procedures such as suctioning a person with a tracheostomy might spread these bacteria to persons within a few feet who are not using personal protective equipment. There is no evidence in the record that any school personnel perform such procedures for Student.
11. A staph infection manifests differently depending on the part of the body infected. Skin infections typically result in local redness and warmth of the infected area. Most infections are uncomplicated, but staph bacteria can get into the bloodstream or other body sites and cause more severe illness. Persons colonized with MRSA may be more

likely to develop infections as compared to non-resistant strains, and those infections more difficult to treat because there are fewer effective antibiotics to use.

12. The following procedures are recommended to prevent/minimize the spread of MRSA in school and child care settings: hand hygiene (most effective) either with soap and warm water or alcohol-based sanitizer, cover any sores or open wounds with bandages or clothing, do not share towels or personal care items, wash soiled linens in hot water, clean and disinfect surfaces of equipment that comes into contact with an open wound or potentially colonized body fluids, personnel coming into contact with such open wounds or colonized bodily fluids should glove and wash hands afterwards. Soiled trash such as gloves or other barriers should be properly disposed of.

13. On October 8, 2007, the District created a health care plan to address Student's MRSA status. Pursuant to the plan, all staff working with Student were to be certified in and practice "universal precautions."³ Student's parents were also to advise staff in advance of any illness or infection. Staff were to notify parents of any illness and should not work with Student in a contagious state. All open sores, cuts or abrasions were to be covered with a waterproof barrier and barriers (not limited to masks and disposable gloves) were to be used when in contact with any bodily fluid.

14. The provisions set forth in the health care plan were reasonable and adequate to address the risk posed by Student's MRSA colonization. As late as October 30, 2007, however, the plan was still not implemented. On that date, a District nurse, Ms. Lori McLean, advised student's parent that the District was in the process of ordering the barrier materials but would not commence services until they were received. There is no explanation in the record for this delay.

15. Following the creation of the health care plan, the District should reasonably have acquired the necessary supplies and been prepared to implement Student's IEP within two weeks, on October 22, 2007.

16. Between October 22, 2007 and January 10, 2008, inclusive, the District schedule offered approximately nine weeks of instruction. The record indicates that Student was hospitalized during the week of December 4, 2007, and was therefore unavailable to receive his specified services.

17. Service delivery records provide no evidence of any occupational therapy having been directly provided to Student prior to January 10, 2008. Consultation services did occur in this time period.

³ The practice, in medicine, of avoiding contact with patients' bodily fluids, by means of the wearing of nonporous articles such as medical gloves, goggles, and face shields.

18. Service delivery records document approximately 1 hour of direct auditory services having been provided to Student prior to January 10, 2008. Some consultation between this service provider and Student's parents did occur in this time period.

19. Complainant furnished ample evidence (in the form of signed letters) from a number of qualified persons to the effect that Student's MRSA status does not prevent them from providing services to him in the home given the appropriate protections.

20. The District failed to provide the equivalent of three months of services due to Student between September 7, and September 25, 2007 and then October 22, 2007, and January 10, 2007. Consistent with Finding of Fact No. 6 above, the failure to provide these services caused educational harm to Student.

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). In the reauthorized Individuals with Disabilities Education Act (2004) the requirement is stated as special education and related services that "are provided in conformity with the individualized education program." 20 U.S.C. §1401(9)(D).

Here, Complainant contends that the District did not implement the provisions of Student's IEP beginning on September 7, 2007. While Student did not receive direct services, the District was engaged in the process of having its service providers meet Student and plan the delivery of services with parents in their home in the first part of September. The disclosure of Student's MRSA status on September 25, 2007, necessarily affected the implementation of the IEP. As shown by Findings of Fact No. 10 through 14 and 19, MRSA is a medical situation that warranted an appropriate response to assure the safety of Student, his family, the service providers and others (including other children in the District) with whom the providers would necessarily come into contact. As also shown by these facts, and reflected in a District e-mail message, MRSA is not a "superbug" that presented insurmountable barriers to Student receiving an appropriate special education. After September 25, 2007, the District spent less than two weeks gathering information and creating the health care plan as a reasonable response to the revelation of Student's status as a MRSA colonizer. That amount of time was justified and appropriate given the circumstances. Additionally, as set forth in Finding of Fact No. 15, the health care plan should have been implemented within a reasonable amount of time, but not later than October 22, 2007. Subsequent to October 22, 2007, there is no adequate justification for the failure to serve Student, aside from those times when the District was not in session or Student was ill and unable to receive those services. Accordingly, the failure to provide any direct services to Student prior to January 10, 2008, constitutes a failure to properly implement the IEP.

REMEDY

Complainant established that Student was entitled to, but did not receive, direct services during the period September 7, to September 25, 2007, and October 22, 2007 to January 10, 2008. Taking into account breaks in the school calendar and a documented period when Student was hospitalized, Student missed the equivalent of three months of services to which he was entitled. There is evidence in the record that District personnel did consult during this time period, so the lack of direct services is the primary issue here. Student has been shorted 4.5 hours each of the four categories of direct services specified in the IEP. As documented in Findings of Fact No. 6 and 20, Student suffered educational harm as a result. Moreover, the District concedes in its response that Student needs the entire quantity of these services to compensate for the time period when none were provided.⁴

Accordingly, the District shall create a corrective action plan no later than April 4, 2008, whereby Student shall receive compensatory education equal to the amounts stated above, in addition to those services he normally receives under his IEP. Finding of Fact No. 19 underscores the feasibility of continuing to provide services to Student in his home. The compensatory services shall be delivered on a schedule and in a manner that are appropriate to Student's unique educational needs and reasonably convenient to his family. All compensatory services shall be provided by August 29, 2008, including during an extended school year session at the option of Complainant. The corrective action plan shall be submitted to the State Complaints Officer no later than April 18, 2008. Documentation that all compensatory education services have been provided shall be submitted no later than September 30, 2008.

CONCLUSION

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

Dated this 5th day of March, 2008.

Keith J. Kirchubel
State Complaints Officer

⁴ It is also noted that this Decision is applicable only to the time period prior to January 10, 2008, and does not address any subsequent developments relevant to implementation of the IEP. Student is entitled to continue to receive services under the IEP for the current term as well.