

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

State Level Complaint 2009:501

Thompson R-2J District

Decision

INTRODUCTION

This State-level Complaint (Complaint) dated January 30, 2009, was received in the office of the State Complaints Officer on February 3, 2009. Ms. Laura Freppel determined that the Complaint identified two (2) allegations subject to the jurisdiction of the state-level complaints process under the federal Individuals with Disabilities Education Act (IDEA). Ms. Freppel notified the Thompson R-2J (District) and the Parent of that determination by letter dated February 9, 2009 which also enclosed a copy of the Complaint. The decision due date for this Complaint was April 4, 2009.

The Complainants are the parents of a child with a disability. Hereafter, the parents are referred to as the “Complainants” and the student is referred to as the “Student.”

The issues and, therefore, the scope of the investigation, between the dates of August 25, 2008 and February 3, 2009, as identified by Ms. Freppel in the February 9, 2009 letter are as follows:

1. Whether the District was required by 34 C.F.R. §300.116(d) to consider any potential harmful effect to Student if [STUDENT] remained in the current educational placement established by [STUDENT’S] 5/8/08 Individualized Education Program (IEP) as compared to home instruction for the Student. If the District was required to consider the potential harmful effect to the Student of the educational placement established by [STUDENT’S] 5/8/08 IEP, did the District do so consistent with 34 C.F.R. §300.116?
2. Whether the District has denied Student a free appropriate public education in violation of 34 C.F.R. §300.101, by (a) refusing to provide [STUDENT] with curricula and classroom materials for courses in which [STUDENT] was enrolled but did not attend due to excused medical absences, and (b) refusing to accept [STUDENT’S] work for evaluation and course credit. This issue was investigated only as it relates to curricula, classroom materials and work completed for classes that Student was attending for part of the day at [School].

The Response of the District was dated February 23, 2009 and was received in the office of the undersigned State Complaints Officer (SCO) on February 25, 2009. The District

supplemented its Response via email to Ms. Laura Freppel on February 25, 2009 which was forwarded to the Complainants via email that same day. The District sent a copy of its Response via Federal Express to the Complainants on February 24, 2009 and was received by the Complainants on February 26, 2009.

The Complainants Reply to the District's Response was received by the SCO and hand delivered to the District on March 6, 2008. In their Reply, the Complainants asked the SCO to reconsider the scope of Issue 2 in light of a case from District Court in Pennsylvania.¹ The SCO declines to extend the scope of Issue 2 as it requires a determination that is beyond the purview of a State level Complaint investigation.

Given the sharp disputes of fact submitted by the parties, the SCO requested additional information of the District on March 18, 2009. This information was received by the SCO on March 23, 2009.

On March 20, 2009, the SCO and an investigation team² interviewed the Complainants by phone. The SCO requested additional documents from the Complainants during this interview which was received via fax and email on March 25, 2009. Also on March 20, 2009, the SCO and the investigation team conducted a separate phone interview with the District's Special Education Director and Assistant Special Education Director.

On March 25, 2009, the SCO and the investigation team interviewed the School Psychologist, Assistant Principal, and Resource Teacher by phone. The SCO requested additional documentation from the School Psychologist and the Resource Teacher during this interview. The documentation was faxed to the SCO on March 25, 2009.

The SCO closed the record on March 25, 2009.

I. Whether the District was required by 34 CFR 300.116(d) to consider any potential harmful effect to Student if [STUDENT] remained in the current educational placement established by [STUDENT'S] 05/08/08 IEP as compared to home instruction for the Student. If the District was required to consider the potential harmful effect to Student of the educational placement established by [STUDENT'S] 05/08/08 IEP, did the District do so consistent with 34 CFR 300.116(d)?

B. The Complainant's Allegations

The Complaint, in relevant part alleges as follows

¹ Brad J. v. Commonwealth of PA, Dept. of Ed. E.D. PA (May 8, 1995) Unpublished opinion. Appeal of a Due Process Hearing finding of appropriate educational placement.

² The investigation team was comprised of the SCO, Ms. Stephanie Lynch (Senior Dispute Resolution Consultant), Ms. Jeanine Pow, (Principal Dispute Resolution Consultant) and Ms. Laura Freppel (Assistant State Director of Special Education).

- 1). The District failed to consider the potential for serious emotional harm to Student if [STUDENT] remained in [STUDENT'S] current educational setting. The Complainants brought up concerns regarding vulnerabilities within the physical environment and the need for additional supports for the Student and the Student's success in smaller environments and with teachers with training in Significant Identifiable Emotional Disabilities (SIED). However, the IEP team determined the Student's placement would be in the general education classroom at least 80% of the time.
- 2). The Student's emotional health deteriorated over the summer and prior to the beginning of the 2008-09 school year. The Student's medical team advised the Complainants to maintain environments free from undue stressors, including reducing time spent in general education classrooms. Prior to the beginning of the school year, the Complainants attempted to notify school staff to implement additional IEP supports or alternative learning environments. The Complainants were concerned that the Student's IEP could not be modified before school started and that it would be some time before modifications could be finalized.

C. The District's Response

The District responds that it has accommodated the Complainants' desire to provide the Student with private home instruction as a means of addressing the Complainant's concerns, and notwithstanding the IEP team's considerations regarding placement.

D. Findings of Fact (FF)

- 1) Student was a child identified as having a disability Significant Identifiable Emotional Disability (SIED) and eligible to receive special education and related services during the period covered by this Complaint.
- 2) At all times relevant to this Complaint, Student was enrolled in and attended [School], which was the Student's neighborhood school, for a partial day, except for January 20, 2009 through January 21, 2009, when the Student attended school for a full day.
- 3) **May 8, 2008 IEP Meeting:** Complainants reported there was some discussion about the educational setting on the Student's health at the May 8, 2008 IEP meeting, but alternate placements were not pursued by the Complainants or District.³ The District does not dispute said fact and the SCO finds such to be the case. The service delivery statement on the Student's IEP states that the Student would receive resource services outside of the classroom, but the service delivery table showed zero hours of direct services outside the general classroom and zero percent special education time outside the general education classroom. The recommended placement on the Student's IEP dated May 8, 2008 indicated several settings were considered and that the setting

³ Complainant Interview 3/20/09

“Inside the Regular Class at Least 80% of the Time” was selected. The justification stated:

“Student demonstrates significant social emotional needs across several educational settings, as well as in [STUDENT’S] home setting. [STUDENT] has displayed these needs over an extended period of time with significant intensity and frequency. Student continues to have difficulty identifying and applying alternative coping strategies. This educational setting would provide instruction in alternative strategies and provide support to Student for the application of these strategies.”⁴

4) There is no dispute that the School Psychologist spoke with the Complainants on August 11, 2008. The Complainants reported that the Student had a rough summer and that there was concern that the Student may have a psychotic break if [STUDENT] returns to school full-time. The School Psychologist told the Complainants that the Student might benefit from a change in environment by returning to school.⁵

5) The Complainants unilaterally implemented a program of home instruction by a privately employed teacher prior to the August 28, 2008 IEP meeting. In an email on August 26, 2008, the Complainants notified the District of the Complainants’ intention to have a private teacher provide instruction at home to the Student in the mornings and to have the Student attend classes at the school in the afternoons.⁶ Although the email expresses dissatisfaction with the Student’s IEP, it does not specifically cite concerns about the effect of the educational setting on the Student’s health. However, subsequent emails from the Complainants to the District on August 26, 2008 and September 19, 2008 indicated that the Complainants were providing such instruction because of the Student’s disability and elevated risk of having a medical emergency.⁷

6) In Complainants’ reply, they concede that all IEP meetings from August through December 2008 were requested by them specifically to address LRE, to present professional medical opinion, and to present evidence of potential harm.⁸

7) **August 28, 2008 IEP Meeting:** At the meeting the Complainants discussed what had happened with the Student over the summer. The Complainants reported that the Student was seriously emotionally disturbed and mentally ill and the Student’s stress level must be kept low or there would be an immediate adverse affect. There were also discussions on the need for a “safe zone for the Student.”⁹

⁴ District Response Document, *hereinafter* Doc.2, pp.20,22 (See Appendix for legend)

⁵ District Response Doc.8, p.1, Complainant Phone Interview 3/20/09, District Phone Interview 3/25/09

⁶ Complaint Doc.D, p.1

⁷ District Response Doc.8, pp.9,15

⁸ Complainant Reply

⁹ Complainant Phone Interview 3/20/09, School Psychologist Phone Interview 3/25/09, District Supplement 3/25/09, Doc. 15, pp.1-8.

8) As a result of the August 28, 2008 meeting, the Student's IEP was revised to include increased accommodations, and direct services outside of the general classroom were increased from 0 to 30 minutes per week. However the increase in services outside of the classroom did not change the LRE setting on the Student's IEP because the Student would be "Inside the general classroom at least 80% of the time." The justification for the setting was revised as follows: "This educational setting will provide [Student] and [STUDENT'S] general education teachers with the support they need."¹⁰

9) **September 29, 2008 IEP Meeting:** Complainants requested an IEP meeting to discuss increasing the Student's attendance at school from two classes to three classes during the day, beginning October 15, 2008. At that meeting, the Complainants reported the Student's medications had been changed and that the Student had shown improvement based on data collection by the Complainants.¹¹ The Complainants expressed concerns about the Student's ability to handle lunch and the School Psychologist agreed to support the Student during that time. There was discussion about the Student's need for stress release. The team discussed meeting in November to review how the Student was doing (at home and at school) in order to determine whether to further increase the amount of time the Student is physically present at [School]. As a result of this meeting, no changes were made to the Student's IEP.¹²

10) At the September 29, meeting, the Complainants signed permission forms to "verbally exchange information" with Student's private psychologist. The School Psychologist attempted to call the private psychologist the same day and left a message for the private psychologist to return the call.¹³

11) On October 22, 2008, the District emailed the Complainants reporting how well Student was doing in school.¹⁴ However, in emails to the District on October 23, 2008 and November 5, 2008, the Complainants reported the Student was having emotional difficulties at home related to the classes Student was attending at school. The October 23, 2008 email noted that the Student has been "vacillating back and forth between crying and saying [Student] wants to quit [Orchestra] completely, and that [Student] really likes playing with others." The November 5, 2008 email noted that the Student had a "meltdown" at home because Student was unable to participate in a school activity and because Student was worried about a class project.¹⁵

¹⁰ District Response Doc.3, pp.17,19.

¹¹ Complainant Phone Interview 3/20/09, School Psychologist Phone Interview 3/25/09, District Supplement 3/25/09, Doc.15, pp.9-11,17.

¹² School Psychologist, Resource Teacher Phone Interview 3/25/09; District Response Doc.4 p.3; District Supplement 3/25/09 Doc.15, pp.9-11,17.

¹³ District Response Doc.4, p.3; Supplement to the Record received 3/23/09 Doc.15, pp.2-3; Complainant Phone Interview 3/20/09.

¹⁴ District Response Doc.8, pp.21-22.

¹⁵ Complainant Reply Doc.H, pp.4,6.

12) On an unknown date prior to the December 19, 2008 IEP meeting, the Complainants provided the District with a letter from the Student's private psychologist. In the letter, dated November 3, 2008, the private psychologist detailed the Student's mental health diagnosis and stated that it was imperative that the Student's level of stress and exposure to high intensity emotions be kept to a minimum. In the letter, the private psychologist recommended that school personnel and family members work together to develop a program that allows for flexibility, particularly in the amount of time that the Student spends at school each day. The private psychologist noted that the recommendations had been discussed with the Complainants prior to the beginning of the 2008 school year and, as a result, the Complainants reduced Student's total time spent in school. The private psychologist further recommended that increasing Student's time at school be implemented gradually and, as Student exhibited signs of increased anxiety and stress, such time at school should be gradually reduced.¹⁶

13) In their November 11, 2008 email to the District, the Complainants requested that some of the time at the next IEP meeting be focused on a "safety net" or "temporary change in placement" when the Student's condition worsened. "[Complainants are] not sure if that means something like a temporary homebound situation, a pera (sic) or what." The [Complainants] also stated that [they] would like the Student's private psychologist to attend.¹⁷

14) In their November 18, 2008 email to the District, Complainants reiterated the request for an IEP meeting to discuss a change in placement.¹⁸

15) On December 2, 2008 the Complainants emailed the Assistant Principal and Psychologist reporting that the Student was showing instability around playing [STUDENT'S] instrument and performing with a group. The Complainants requested that Student be removed from Orchestra as recommended by the Student's private psychologist.¹⁹ In a subsequent email from the Complainants to the District on December 8, 2008, Complainants reported that the Student had a rough morning with "lots of tears and panic attacks" but that the Student was told that Student should go to school.²⁰

16) **December 19, 2008 IEP Meeting:** Attendees at this meeting included the Student's private psychologist.²¹ The SCO finds the private psychologist opined that what the Complainants were doing was working well.²² However, due to conflicting accounts of the degree of participation by the private psychologist in the meeting, it is unclear what other contributions the private psychologist made. Additionally, the following matters were discussed: the need to keep the Student's

¹⁶ Complaint Doc.C, pp. 1-2.

¹⁷ District Response Doc.8, p.26

¹⁸ District Response Doc.8, p.29

¹⁹ District Response Doc.8, p.33

²⁰ Complainant Reply Doc H, p.9

²¹ District Response Doc.8 p.42

²² Complainant Phone Interview 3/20/09, School Psychologist/Resource Teacher Phone Interview 3/25/09.

stress level low; the Student's medication changes; and that the Student did not exhibit the same behaviors at school as were observed at home. The Complainants requested a change in placement from greater than 80% of the time in the general classroom to 40-79% in the general education classroom. The team discussed the option of scheduling the Student in the GAIN (i.e., self contained) classroom every other day during the Student's elective periods as part of the safety net for stress relief. However, the team determined that the GAIN classroom would not be an appropriate setting for the Student. The team noted that, when the Student began attending school full time, the implementation of such a change would not change the LRE.²³

17) The School Psychologist subsequently discussed the GAIN classroom with the Student on January 5, 2009. The School Psychologist reported to the Complainants that the Student emphatically stated [STUDENT] did not want to go to the GAIN room. The School Psychologist discussed alternatives to the GAIN room with the Student.²⁴

18) As a result of the December 19, 2008 meeting, the Student's IEP was revised increasing accommodations and direct services outside of the general education classroom from 30 minutes per week to over 150 minutes beginning January 20, 2009 – the date the team agreed when the Student would begin attending school full time. Based on the increased services outside of the general classroom, the Student would be in the general classroom 80% of the time and served outside of the general classroom 20% of the time.²⁵ Consequently, this increase did not change the LRE setting on the Student's IEP and the justification for the Setting remained the same as contained in the August 28, 2008 IEP. [*FF 8 in this section*].

19) On January 5, 2009, after the District's winter break, the Student returned to school part time for three periods a day. On that day, the mother emailed District staff and others stating that the Student had called the mother from school and was having a crisis. The mother stated that the Student was showing psychotic symptoms during the call and that, if [Student] continued the panic attack, she would pick [STUDENT] up from school. In response, on the same day, the School Psychologist emailed the Complainants stating that Student came to see her as soon as Student got to school because the Student reportedly had had a rough morning with the tutor.²⁶

20) Beginning January 20, 2009, the Student began attending school full time.²⁷

²³ District Response, Complainant Phone Interview 3/20/09, School Psychologist/Resource Teacher Phone Interview 3/25/09.

²⁴ Complainant Reply, Doc H, p.12

²⁵ District Response, Doc.5, pp.12, 15.

²⁶ Complainant Reply Doc.H, p.11.

²⁷ Assistant Principal Phone Interview 3/25/09

21) On January 22, 2009 the Student was hospitalized for seven days.²⁸ According to the Hospital report, the Student was referred for treatment of severe anxiety and profound conflict secondary to [STUDENT'S] poor functioning at school. The Student was discharged on January 28, 2009.²⁹

22) The Student returned to school on January 29, 2009, resuming Student's prior schedule of attending school part time for the three periods per day.³⁰

E. Analysis and Conclusions of Law

As it pertains to Least Restrictive Environment (LRE), the IDEA provides:

Each public agency must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are non disabled []; and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily.

34 CFR 300.114(a)(2). In determining the educational placement of a child with a disability, each public education agency must ensure that the placement decision is made in conformity with the LRE provisions. 34 CFR 300.116(a). The IDEA provides that, unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled. 34 CFR 300.116(c). However, the IDEA also provides that, in selecting the LRE, *consideration* is given to any potential harmful effect on the child or on the quality of services that he or she needs 34 CFR 300.116(d) (Emphasis added).

Pursuant 34 CFR 300.116(d), the District was required to ensure that in selecting the LRE, consideration was given to any "potential harmful effect." The SCO concludes that the District satisfied this requirement as evidenced by FF (6-10, 12, 16-18).

II. Whether the District has denied Student a free appropriate public education, in violation of 34 CFR 300.101 by (a) refusing to provide [STUDENT] with curricula and classroom materials for courses in which [STUDENT] was enrolled but did not attend due to excused medical absences, and (b) refusing to accept [STUDENT'S] work for evaluation and course credit.

B. Complainant's Allegations

The Complaint, in relevant part, alleges as follows:

²⁸ Complaint, p.7.

²⁹ Complainant Supplement 3/25/09 Doc.J, p.2.

³⁰ Assistant Principal, School Psychologist, Resource Teacher Interview 3/25/09.

1) From August 25, 2008 to January 30, 2009 the District has refused to provide Student with teacher communications, classroom assignments and materials for six courses in which [STUDENT] was enrolled but had extended excused medical absences.

2) On October 23, 2008, the Student was given a failing grade in one disputed course and no grades or credit for the remaining five courses. On January 15, 2009, the Student was given a failing grade in two disputed courses and no grades or credit for the remaining four.

3) In August 2008, the Student began attending two (2) classes per day. In October the number of classes Student attended increased. On January 19, 2009, Student began attending classes for the full day. On January 22, 2009, Student was admitted to the hospital for seven days.

C. The District's Response

The District responds that it has not refused to provide Student with curricula and classroom materials for those classes in which the Student is enrolled.

D. Findings of Fact (FF)

1) In August 2008, the Complainants unilaterally implemented a program of home instruction by a privately employed teacher. [*FF: Section I(D)(4) above*].

2) None of the Student's IEPs specified a need for special accommodations for homework missed due to extended medical absences. However, all IEPs included extended time to complete assignments.³¹

3) The school year began on August 25, 2008.³² The Student was enrolled in and attended periods five and six at the [School] beginning August 26, 2008.³³

4) The Student began attending period four on October 15, 2008.³⁴ Two classes, Art and Orchestra, were scheduled for period four and were held on alternate days.³⁵ The Complainants wanted to discontinue Orchestra for the Student as of December 2, 2008. [*FF: Section I(D)(14)*]. The SCO finds the Student was ultimately withdrawn from Orchestra.

³¹ District Response Doc.3, p.18; Doc.5, p.13.

³² District Calendar, incorporated into record by SCO.

³³ Assistant Principal, School Psychologist, Resource Teacher Interview 3/25/09.

³⁴ District Response, Doc.4, p.2.

³⁵ Complaint Doc.A, p.1.

5). The grades in Student's progress reports reflected the work in periods four [Art only] through six. The Student received the following grades for the First Semester:

- Period four (4) [Art] – A,
- Period five (5) – B+,
- Period six (6) – C.

Student received 1.5 credits for these courses. The Student received an "F" in Orchestra because the teacher was unaware that [STUDENT] was no longer attending.³⁶

6). The school's procedure for medically excusing student absences required contacting the school attendance clerk. If a parent indicated a Student was ill, it was coded by the attendance clerk as medically excused (ill). A doctor's note regarding absences due to medical issues is only required if a student has serious attendance issues. The Assistant Principal stated that the Student's absences in periods (4), (5) and (6) during the relevant time period did not rise to the level that a doctor's note was required.³⁷

7). The school's procedure for curricula and material for excused absences provided that parents can request class work for students who have extended absences. Such requests can be made in advance if parents know of an upcoming extended absence. The Assistant Principal was unaware if the Complainants had requested curricula and material for the Student's medically excused absences for periods (4), (5) and (6).³⁸ Nothing in the record demonstrates the Complainants requested curricula and material for Student's medically excused absences.

8). The medically excused absences for Student's fifth and sixth periods total 10 days. From October 15, 2008 to January 30, 2009, Student had medically excused absences for period 4 a total of 7 days. Most absences were for one or two days, however one absence occurred over a period of time of four (4) days.³⁹

9). Student was hospitalized January 23 through January 28, 2009 [FF Section I(D)(20)].

10). On January 22, 2009, the Complainants emailed the District that they had signed releases with the Student's medical team to interact with the District on issues such as homework and information sharing.⁴⁰ The School Psychologist confirmed that the medical team did contact various individuals in the District including teachers.

³⁶ Assistant Principal Phone Interview 3/25/09

³⁷ Assistant Principal Phone Interview 3/25/09

³⁸ Assistant Principal Phone Interview 3/25/09

³⁹ District Response, Doc.7, p.2-3.

⁴⁰ Complainant Reply, Doc.H, p.36.

E. Analysis and 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 (FAPE). A FAPE is provided by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Board of Educ. Of the Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176 (1982).

Because the Complainants *unilaterally* implemented a program of home instruction by a private teacher, the analysis of this issue is limited to curricula, classroom materials and work completed for classes (periods four through six) that Student was *attending* for part of the day at [School].

There was no evidence in the record that the Complainants either requested, and as a result, were refused curriculum and materials for classes the Student was attending at the [School]. There was also no evidence in the above record that the Student's work was not accepted for evaluation and class credit and, in fact, the record demonstrates that the Student received course credit and passing grades for all of the classes [STUDENT] physically attended at [School] (FF 5).

III. Remedy

Having found no violation, the SCO orders no remedy.

IV. Conclusion

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

Dated this 3rd day of April, 2009.

Stephanie D. Lynch, Esq.
State Complaints Officer