Fields of Opportunities

STATE OF IOWA

CHESTER J. CULVER, GOVERNOR
PATTY JUDGE, LT. GOVERNOR

DEPARTMENT OF EDUCATION
JUDY A. JEFFREY, DIRECTOR

March 31, 2010

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Bonnie McDougall
Iowa Protection & Advocacy Services, Inc.
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West Des Moines, IA 50265

IDEA State Complaint Concerning C[redacted] McB.
Final Decision

This matter concerns a complaint filed by Iowa Protection and Advocacy Services, Inc., on behalf of C[redacted] McB. The complaint was proper in form and contains allegations within the jurisdiction of the Iowa Department of Education. March 31, 2010, is the deadline for filing this decision, as previously extended by the Department.

During the course of this complaint, the complainants and the public agencies resolved many of the allegations. C[redacted] was determined to be an eligible individual, C[redacted]'s parent determined an independent evaluation was not necessary, and the parties reached agreement about the use of suspensions. The "live" issues remaining concern (1) whether the public agencies sought consent from the parent to conduct an initial evaluation, and (2) the use of paraeducators to provide instruction to C[redacted].

In the course of this investigation, I have applied the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* (2005), the regulations implementing that Act, 34 C.F.R. §§ 300.1 *et seq.* (2006), Iowa's special education statutes, Iowa Code ch. 256B (2007), and Iowa's administrative rules of special education, Iowa Admin. Code rr. 281—41.1 *et seq.* (2007). I have also applied other regulations and cases, as noted in this decision.

I. Whether the public agencies timely sought parental consent to conduct an initial evaluation for special education.

The record reflects that C[redacted] has a history of behavioral difficulties. The record reflects that C[redacted]'s therapist sent a letter to C[redacted]'s principal,

dated May 13, 2009, in which she inquired about the process "for having him staffed with an IEP." The letter recites that the mother had asked about an IEP for C[redacted], but was told by staff members that he did not need one. There is no evidence that a prior written notice was ever given to C[redacted]'s mother. School reports indicate C[redacted]'s behavior improved in May, with no office referrals in May 2009.

This letter, consistent with the undisputed facts in the record, also reflects that C[redacted] has had long-standing academic difficulties, the degree of which is not apparent from the record.

The record reflects an escalation of behavior concerns in the fall semester of the 2009-2010 school year. C[redacted]'s therapist requested a meeting between the public agencies, herself, and C[redacted]'s mother. The record reflects that the meeting was held on October 15, 2009, but the public agencies did not invite the mother. The mother attended because she was notified by the therapist. At that staffing, the mother was presented with two options: placement at Four Oaks for ten school days or long-term removal. There is a suggestion from the school district officials that the mother was offered a special education evaluation at this October 15 meeting; however, there is no written documentation supporting this offer, such as a prior written notice.

The record reflects further behavioral problems for C[redacted], culminating in a meeting on December 3, 2009, with the mother present. At that time, the public agencies proposed evaluating the child. Public agency personnel suggested that the evaluation be delayed until after winter break. There is a suggestion from the public agencies that the mother agreed to this delay, but there is no evidence that she was informed she could assert her right to insist that the evaluation start immediately.

Consent for evaluation was obtained on January 5, 2010, the child was found eligible, and services began on March 4, 2010.

After considering the entire evidence of record, including the child's referral record and the statements made by the child's teachers to the therapist and others and making such credibility determinations as are required (*see Clark v. Iowa Dep't of Rev. & Fin.*, 644 N.W.2d 310, 315 (Iowa 2002)), I conclude that the public agency had reason to suspect that the child was a child with a disability as of the beginning of the 2009-2010 school year. Once a public agency had reason to suspect a child may be a child with a disability, its actions are critically important. The decision to propose to evaluate a child for special education

eligibility is a high-stakes decision, and should be clearly documented. That was not done in this present case. As a general rule, after-the-fact assertions on matters of disputed fact are no substitute for contemporaneously generated documentation. For that reason, I must find and conclude that the purported offer to evaluate made on October 15 was not adequately documented and cannot find and conclude it occurred as described by the public agencies. I find and conclude that that the parent was not adequately informed of her right, at the December 2009 meeting, to demand that an evaluation begin immediately. Thus, I must find and conclude that the consent obtained in January 2010 was inappropriately delayed.

Additionally, I find that the public agencies should have suspected C[redacted] to be a child with a disability because they provided at least a portion of C[redacted]'s education in a special education classroom. In addition to providing evidence of suspicion that the child might be a child with a disability, this practice is not sustainable. A public agency's unilateral placement in a special education setting, without following proper procedures, violates the IDEA's procedural safeguards. If the public agencies are providing any special education to children who have not been identified as children with disabilities, then that practice must immediately cease.

As an explanation, I must observe that the "new" rules requiring public agencies to seek consent to evaluate whenever a public agency suspects that a child might be eligible are not new law. Rather, these new rules codify long-standing law. *See, e.g.*, *Letter to Williams*, 20 IDELR 1210 (OSEP 1993); 71 Fed. Reg. 46,637 (Aug. 14, 2006). The public agencies may properly be held to this long-standing law.

II. The use of paraeducators to provide instruction to C[redacted].

It is inappropriate for paraeducators to "teach" C[redacted]. Only licensed teachers may "teach." Paraeducators may only assist teachers. The Department need not conclude whether paraeducators were inappropriately used to instruct C[redacted], because these matters occurred prior to his eligibility determination and its jurisdiction over these allegations is limited. To the extent that any inappropriate delivery of education by paraprofessionals occurred, it should be considered in the broader context of the compensatory education award for failure to timely evaluate C[redacted].

If such inappropriate use of paraeducators is currently occurring for C[redacted] or other eligible individuals, it must immediately cease.

III. Remedy

Concerning the remedy for the inappropriate failure to evaluate, I conclude that compensatory education is the required remedy. The Department has the authority to order compensatory educational services. 34 C.F.R. § 300.151(b)(1). Compensatory education shall be supplemental to all present educational services required for this child to receive a free appropriate public education, and shall not supplant or displace those required present services. A plan for compensatory education shall be developed by the child's IEP team, under the following terms and conditions:

- The relevant time period is a reasonable period of time after the first day of school in 2009 to January 4, 2010, the date before consent for the initial evaluation was received.
- The measure of the compensatory education will be the difference in expected performance if the child were timely evaluated and the child's actual performance.
- The compensatory services shall be designed to close that "gap" between expected and actual performance.
- A day-for-day approach is one way of calculating the compensatory services, but that approach is not required.
- The services are to be provided in a manner and location determined by the IEP team. The parents are not entitled to require services in a particular location or manner, or to request monetary compensation.
- The Department is available to provide technical assistance to the team in this manner.
- If the parties are unable to establish a plan for compensatory education services within forty-five days of the date of this letter, the Department will establish such a plan for the parties.

Compensatory education shall be completed as soon as possible, but no later than one year from the date of this decision.

IV. Conclusion

For the reasons stated herein, I find and conclude that the public agencies violated the Individuals with Disabilities Education Act. I order them to provide the remedy ordered in Division III of this decision. I further order that a copy of this decision be transmitted to the Department's school improvement consultant assigned to this district.

There are no fees or costs to be awarded in this matter. Any party that disagrees with the Department's decision may file a petition for judicial review under section 17A.19 of the Iowa Administrative Procedure Act. That provision give a party who is "aggrieved or adversely affected by agency action" the right to seek judicial review by filing a petition for judicial review in the Iowa District Court for Polk County (home of state government) or in the district court in the county in which the party lives or has its primary office.

I offer my assurance to you that every attempt has been made to address this complaint in a neutral and fair manner, and in compliance with state and federal special education law. I sincerely wish the best for all involved.

Sincerely,

Lana Michelson, Chief
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Copies to:

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