

BEFORE THE IOWA DEPARTMENT OF EDUCATION

In re Complaint Concerning O.J.,)
A Child with a Disability,)
)
B.J,) Complaint 19-19
Complainant,)
)
And)
) DECISION
Woodward-Granger Community School)
District and Heartland Area)
Education Agency,)
)
Respondents.)

On April 9, 2020, a parent of O.J. ("Complainant") filed this complaint under the Individuals with Disabilities Education Act ("IDEA"), alleging IDEA violations by the Woodward Granger Community School District ("District") and Heartland Area Education Agency ("AEA"), collectively the "Respondents." The core of Complainant's grievance is the Respondents' alleged failure to provide required IDEA services to O.J. after the District closed due to the COVID-19 pandemic. The Respondents answered through counsel. Both the Complainant and the Respondents skillfully and assertively advanced their respective contentions.

After considering their contentions in light of the facts and the unusual circumstances presented by the COVID-19 disaster emergency, we conclude the complaint is NOT CONFIRMED.

Findings of Fact

O.J. is an early elementary age student with a disability. At the time of the school closure in March due to COVID-19, O.J.'s individualized education program called for, among other things, specially designed instruction and speech-language services. Those services stopped after the school closure. The District provided voluntary educational services to all students, and did not implement the IEP services called for in O.J.'s IEP. The Complainant demanded those services continue, either in-person or virtually. The Respondents declined to do so.

The Complainant sought an outside evaluation and services for O.J., and seeks reimbursement for those services.

Findings and Conclusions: Jurisdiction and Timelines

The Department has jurisdiction of parties. Unless noted below, the Department has jurisdiction of the subject matter and the allegations are properly resolved through a state complaint. Iowa Admin. Code r. 281-41.153(2).

The complaint is timely filed. *Id.* r. 281-41.153(3). The Department's decision deadline is June 8, 2020. *Id.* r. 281-41.152(1).

Findings and Conclusions: Scope of State Complaint Review

The IDEA regulations and state rules require the Department to investigate any complaint alleging a public agency violated a provision of the IDEA or of Iowa Administrative Code chapter 281-41. *Id.* r. 281-41.153(2). The Department is to make an independent assessment of the complaint. *Id.* r. 281-41.152(1). The assessment and findings of fact are based upon a preponderance of the evidence when the record is considered as a whole. *Letter to Reilly*, 64 IDELR 219 (OSEP 2014). Consistent with *Letter to Reilly*, the Department does not assign the burden of producing evidence to either party.

The Department assesses the actions taken by the public agencies from the vantage point of when the public agencies acted. They are not judged with the benefit of hindsight. *K.E. v. Independent Sch. Dist. No. 15*, 647 F.3d 795 (8th Cir. 2011). The actions of the public agencies are viewed through a compliance lens. The standard is "compliance with the law's basic requirements." *IDEA State Complaint Decision 14-01*, 26 D.o.E. App. Dec. 390, 400 (2013). Failure to implement recommended practices or best practices will not result in a finding of noncompliance, assuming that the law's mandatory minimum terms have been met. *Id.*

Conclusions of Law

The decision to close Iowa's schools, and the schools in other states, in response to COVID-19 created a question of how to provide special education services. The IDEA does not address statewide school closures because of planet-wide pandemic. The United States Department of Education issued a guidance document on March 12, 2020, attempting to address these questions. *Questions and Answers on Providing Services to Children with Disabilities during the Coronavirus Disease 2019 Outbreak*, 76 IDELR 77 (OSEP 2020) (hereinafter "OSEP FAQ"), at <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>.

Notably, the first page of the document contains the following important disclaimer:

It does not create or confer any rights for or on any person. This Q & A document does not impose any additional requirements beyond those included in applicable law and regulations. The responses presented in this document generally constitute informal guidance representing the interpretation of the Department of the applicable statutory or regulatory requirements in the context of the specific facts presented here and are not legally binding.

Id. at 1. The first question, on page two, contains the language pertinent to this complaint.

Question A-1: Is an LEA required to continue to provide a free appropriate public education (FAPE) to students with disabilities during a school closure caused by a COVID-19 outbreak?

Answer: The IDEA, Section 504, and Title II of the ADA do not specifically address a situation in which elementary and secondary schools are closed for an extended period of time (generally more than 10 consecutive days) because of exceptional circumstances, such as an outbreak of a particular disease.

If an LEA closes its schools to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population, then an LEA would not be required to provide services to students with disabilities during that same period of time. Once school resumes, the LEA must make every effort to provide special education and related services to the child in accordance with the child's individualized education program (IEP) or, for students entitled to FAPE under Section 504, consistent with a plan developed to meet the requirements of Section 504. The Department understands there may be exceptional circumstances that could affect how a particular service is provided. In addition, an IEP Team and, as appropriate to an individual student with a disability, the personnel responsible for ensuring FAPE to a student for the purposes of Section 504, would be required to make an individualized determination as to whether compensatory services are needed under applicable standards and requirements.

If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. (34 CFR §§ 104.4, 104.33 (Section 504) and 28 CFR § 35.130 (Title II of the ADA)). SEAs, LEAs, and schools must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP developed under IDEA, or a plan developed under Section 504. (34 CFR §§ 300.101 and 300.201 (IDEA), and 34 CFR § 104.33 (Section 504)).

Complainant stands upon the last sentence, as he contends that it is possible to provide instructional services and speech services to O.J. The Department must decide whether this sentence supports this complaint and compels a finding in Complainant's favor. We conclude it does not.

This non-binding guidance document is entitled to weight only to the extent that it has the power to persuade. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); see also, e.g., Anuradha Vaitheswaran & Thomas A. Mayes, *The Role of Deference in Judicial Review of Agency Action: A Comparison of Federal Law, Uniform State Acts, and the Iowa APA*, 27 J. Nat'l Ass'n Admin. L. Judiciary 402, 407-09 (2007) (briefly discussing *Skidmore* deference). In its context and as to the points at issue in this state complaint, we conclude this document has limited persuasive power. We conclude this document starts, but not ends, conversations.

The day after this document was released, the Council of Administrators of Special Education, the Council of Chief State School Officers, and the National Association of State Directors of Special Education jointly hosted a webinar, with Laurie VanderPloeg, the OSEP director, explaining the OSEP FAQ and taking questions. The questions illustrated the practical

difficulties states and school districts would have in implementing the *OSEP FAQ*. There were questions about children served by more than one district, questions about the degree to which a district remained open, questions about instructional methods, and questions about how to meet IDEA timelines during closures. Many of these questions remain unanswered. We draw two conclusions from this webinar. First, the *OSEP FAQ* is premised on an overly simple open-or-closed dichotomy; however, the states were considering options between "completely open" and "completely closed." Second, the non-binding *OSEP FAQ* does not completely address the many problems and options confronting states, school districts, and intermediate agencies.

Fundamentally, the *OSEP FAQ* and the joint webinar left the states, school districts, and intermediate agencies to fend for themselves in light of challenges raised by a global pandemic. That is what Iowa has done. Iowa has provided school districts with the option to provide required services, in which students are required to participate, or voluntary educational enrichment opportunities, in which students and their families may choose to participate. This was a matter of necessity, as school districts needed the ability to respond to local concerns, including educational infrastructure, staff skills and

abilities, and parent and family needs. This required-voluntary choice that districts make for all students has implications for special education. If a district is providing voluntary educational enrichment opportunities, in a manner consistent with the Department's guidance, these voluntary educational enrichment opportunities become the key comparison point for determining what a child with a disability is entitled to receive from the school district. If a district provides voluntary educational enrichment opportunities, the district must provide children with disabilities an equal opportunity for participation in those educational services. 34 C.F.R. § 300.107 (IDEA); *Id.* §§ 104.2(b)(2), 104.34(b), 104.37(a)(2) (Section 504). OCR has held that voluntary academic enrichment programs, such as summer school, are included in this requirement. *See, e.g., Savannah (Mo.) Sch. Dist.*, 50 IDELR 262 (OCR 2007); *St. Paul (Minn.) Pub. Schs.*, 41 IDELR 37 (OCR 2003).

The *OSEP FAQ* recognizes this, but does not seem to contemplate districts making a choice to provide *only* educational opportunities. In the joint webinar, Director VanderPloeg provided the following explanation of educational services and educational opportunities: "Well, educational services would be what we would be considering this the IEP

services that would be provided; educational opportunity is making sure that they have equal access as what will be provided to the general education population.” This answer from Director VanderPloeg, when considered with the other questions that were not answered and other concerns raised in the webinar, provide a reasonable basis for the Department and Iowa’s school districts and AEAs to choose to provide voluntary services and choose to provide such special education services and supports that are necessary for an equal opportunity for participation.

Complainant also asserts that the AEA could provide IEP-required speech services, even if the district was providing voluntary services. While that may be the case, the AEA may permissibly determine it would honor each district’s decision on whether to provide required or voluntary services, due to the AEA’s requirement to provide area-wide equity in services. See, e.g., Iowa Code ch. 273 (2020).

While O.J. may be entitled to services to address or mitigate lost opportunities because of COVID-19 (see, e.g., OSEP FAQ, p. 2, such services being conceptually distinct from Extended School Year Services, see Iowa Admin. Code r. 281-41.106), there is nothing that requires those services to be provided at the time or in a manner demanded by the Complainant,

in light of the most unusual circumstance of COVID-19 school closures. Certainly the *OSEP FAQ* does not provide a legally adequate reason to compel such a result.

In this circumstance, although this complaint is not confirmed, we think it is fair for O.J.'s IEP Team to consider whether the services demanded by the Complainant would have been required, not because they were specified in the IEP, but because they were necessary for an equal opportunity for participation in the voluntary services that the Respondents provided.

We discern at least two additional allegations raised by the Complainant. First, he objects to the Respondents including parental concerns in the most recent IEP by cross-reference to an attached document prepared by O.J.'s parents, rather than included in the IEP. The IEP is required to be in writing; however, nothing dictates the form that such writing takes. Iowa Code r. 281-41.320. There is no violation. Second, he seems to assert that the IDEA was somehow violated because the parents received the most recent IEP through counsel for the Respondents in the course of this state complaint. The parents received a copy of the IEP within a reasonable time, and it

makes no difference how they received it. There is no violation. *Id.* r. 281-41.322(6).

We have considered the rights of other children served by the Respondents, as required by the IDEA (see, e.g., *id.* r. 281-41.151(2)“b”) and as demanded by the Complainant. Our conclusion is the same.

There being no confirmed violation of the IDEA, no corrective action is ordered or necessary. Iowa Admin. Code r. 281-41.151(2). For that reason, we cannot order the reimbursement the Complainant seeks, and need not consider whether Complainant was required to give Respondents notice of their intent to seek reimbursement. That being said, the Respondents, in determining what COVID-19 Mitigation services O.J. requires, must determine the extent to which O.J.'s performance is due to the outside services his parents provided.

See, e.g., Letter to Lillie & Felton, 23 IDELR 714 (OSEP 1995). It would be improper to determine services the Respondents are required to provide in the future based on growth due to services they did not provide in the past.

In summary, at the time these decisions were made, see *K.E.*, 647 F.3d 795, and with the immediacy that such decisions were required, these decisions were reasonable responses

applying the IDEA in light of an unimaginable planetary disaster. The fact that different or better decisions could have been made is immaterial. *IDEA State Complaint Decision 14-01*, 26 D.o.E. App. Dec. at 400. We cannot conclude the Respondents violated the IDEA.

Summary and Conclusion

This complaint is NOT CONFIRMED.

Any pending matter or motion is overruled. Any allegation not specifically addressed in this decision is either incorporated into an allegation that is specifically addressed or is overruled. Any legal contention not specifically addressed is either addressed by implication in the legal discussion contained herein or is deemed to be without merit. Any matter considered a finding of fact that is more appropriately considered a conclusion of law shall be so considered. Any matter considered a conclusion of law that is more appropriately considered a finding of fact shall be so considered.

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 gives 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 which the party lives or has its primary office. A party may also have the right to seek review through an administrative law judge by filing a due process complaint.

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

Sincerely,

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Concur,

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Done on the 8th day of June, 2020.

Copies to parties and counsel