

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

Federal Complaint 2001:514

Arapahoe County School District 5, Cherry Creek

Decision

INTRODUCTION

This Complaint letter was dated March 13, 2001, and received by the Federal Complaints Officer on March 15, 2001. The school's response was dated April 2, 2001, and received by the Federal Complaints Officer on April 2, 2001. The complainant's response to the school's response to her Complaint was dated April 16, 2001, and received by the Federal Complaints Officer on April 17, 2001. The Federal Complaints Officer then closed the record. The Federal Complaints Officer subsequently received into the record a letter from the Independent Educational Evaluator, dated April 17, 2001, and received April 20, 2001 – and then again closed the record.

COMPLAINANT'S ALLEGATIONS

- The complainant alleged that the school violated 34 CFR 300.532(c)(1), of the Individuals with Disabilities Education Act regulations (IDEA), which requires that: "Any standardized tests that are given to a child – (i) Have been validated for the specific purpose for which they are used; and (ii) Are administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the tests." Id.
- The complainant alleged that the school violated 34 CFR 300.533(c), of the IDEA, which requires that: "The public agency shall administer tests and other evaluation materials as may be needed to produce the data identified under paragraph (a) of this section." Id. Paragraph (a) includes a description of evaluation data, which should be considered, as appropriate, during initial evaluations, and reevaluations, of students.
- The complainant alleged that the school violated the notice requirements of 34 CFR 300.503 and 34 CFR 300.504.

SCHOOL'S RESPONSE

The school denied all allegations.

FINDINGS AND DISCUSSION

34 CFR 300.532(c)(1) and 34 CFR 300.533(c)

The factual basis for the complainant's allegations that the school violated 34 CFR 300.532(c)(1) and 34 CFR 300.533(c) – which addresses the school's obligation to insure the integrity and sufficiency of evaluations – are the complainant's allegations that a school staff member, who was a part of the evaluation/eligibility/Individualized Education Program(IEP) team – a school psychologist – was critical of the accuracy of the independent educational evaluation (IEE) submitted by the student's parent, and therefore the school had an obligation, pursuant to 34 CFR 300.532(c)(1) and 34 CFR 300.533(c), to do further evaluation of the parent's daughter in order to make up for the shortcomings of the IEE. The school responded that the school psychologist was not critical of the accuracy of the IEE, but only critical of some of the terminology used by the IEE evaluator.

The Federal Complaint process, unlike the due process hearing, makes no provision for an evidentiary hearing in which persons testify under oath, and are subject to having their testimony cross-examined. Absent having a tape recording or transcript available of meetings between parents and school staff, an evidentiary hearing is the only other lawful method known to the Federal Complaints Officer for trying to resolve differing versions of what people said at such meetings – unless, of course, an analysis of documents or circumstances can provide a definitive answer, which is not the case here. Where no definitive answer is available, the Federal Complaints Officer does not believe it would be appropriate to find that the complainant's version of what was said is the most accurate, solely because the complainant makes the allegation that this is the case. Moreover, the school did do further evaluation of the student in addition to the IEE. The Federal Complaints Officer has found nothing in the record which leads him to conclude that the school's evaluation, including the school's interpretation of the IEE, was legally insufficient – notwithstanding the fact that the IEE evaluator recommended, in his recommendation number seventeen (17), that the student receive special education (IEP) or Section 504 services, and the IEP team, to the contrary, decided special education services were not appropriate. (It is unknown to the Federal Complaints Officer whether a decision has been made with regard to Section 504 services.)

The IEP team was entitled to reach a different conclusion than the IEE evaluator, and the IEP team was entitled to consider and give what it believed was appropriate weight to the IEE. The Federal Complaints Officer has identified nothing in the record to indicate that the process by which the IEP team went about its job was legally insufficient. However the school psychologist characterized the IEE, by her actions she has gone on record, as a member of the evaluation/eligibility/IEP team, as validating the integrity and sufficiency of the eligibility/evaluation/IEP process for this student. If the parent wishes to further contest that process, and the determination of non-eligibility that was made for her daughter, she has a right to do so in a due process hearing. The Federal Complaints Officer finds that the school did not violate 34 CFR 300.532(c)(1) or 34 CFR 300.533(c).

34 CFR 300.503 and 34 CFR 300.504

The notice the school gave to the parent was partially sufficient. In Exhibit #3 of the complainant's response to the school's response to the Complaint, the parent submits a signed letter, dated April 12, 2001, the last paragraph of which states:

I would like to make one last comment regarding how the staffing ended. (Student) and I were not in agreement with the ineligibility decision, and there was no explanation of how we could address this no consensus. I did not see anything in my Educational Rights of Parents to explain this process. The pamphlet explains what to do in regards to graduation and if my child no longer needed education services, but not what to do if there was disagreement about the initial eligibility for educational services. Id. Parenthetical supplied.

A copy of the Educational Rights of Parents document, referenced in the parent's letter dated April 12, 2001, was submitted by the school as a part of the school's response to this Complaint. A copy of this document, along with the rest of the school's response, was provided to the complainant for her use in preparing a response to the school's response. This is the copy of the same document that was given to the parent prior to the November 15, 2000 meeting, at which the parent and student, and one of their advocates, were in attendance, at which meeting the student was determined ineligible for special education services. The pages of this document are not numbered, but the last boxed heading in the document is entitled "Impartial Due Process Hearing". The Federal Complaints Officer finds that the information contained within this section is sufficient to notify the parent that the impartial due process hearing is the appropriate dispute resolution mechanism for the parent to use if s/he wishes to contest the outcome of an IEP meeting over appropriate services or placement issues, including, as was the case here, an initial determination that the student was not eligible for special education. The Federal Complaints Officer finds that the Educational Rights of Parents document used by the school is legally sufficient to meet the requirements of 34 CFR 300.504.

The notice requirements of 34 CFR 300.503, however, were not fully met by the school. These requirements, while not specifically cited to the regulation, are reproduced in the first boxed heading – entitled, "Prior Notice To Parents" – of the Educational Rights of Parents document used by the school. The determination of ineligibility made by the evaluation/eligibility/IEP team on November 15, 2000, was a proposal to refuse to initiate special education services for this student, which therefore triggered that 34 CFR 300.503 notice be given, the contents of which are itemized in seven (7) parentheticals at 34 CFR 300.503(b). The Educational Rights of Parents document used by the school re-states all of these seven (7) notice content requirements, in sometimes slightly different language, beginning with an additional numbered item (for a total of eight), which includes incorporating the notice in native language requirement of 34 CFR 300.503(c). Of the seven (7) notice content items listed under 34 CFR 300.503(b), the Federal Complaints Officer finds that the written documents provided to the parent by the school – which includes all the evaluation/eligibility/IEP documents submitted by the school in response to this Complaint, and the Educational Rights of Parents document which was similarly submitted by the school – evidence that the school provided sufficient notice to the

parent of five (5) of the seven (7) notice content items listed under 34 CFR 300.503(b), although these notice content items were not provided in a single document.

What the Federal Complaints Officer finds lacking in the school's 34 CFR 300.503 notice is the content notice items listed at 34 CFR 300.503(b)(2) and 34 CFR 300.503(b)(3). These regulatory provisions require that the 34 CFR 300.503 notice include, respectively, "An explanation of why the agency proposes or refuses to take the action"; and, "A description of any other options that the agency considered and the reasons why those options were rejected...". *Id.* The Federal Complaints Officer does understand that there may have been discussion at the November 15 meeting of the substance of these notice content requirements. The Federal Complaints Officer also understands that, at least in part, the evaluation documents can be argued to speak for themselves. However, 34 CFR 300.503 requires that specific written notice be given, and the Federal Complaints Officer understands the purpose of 34 CFR 300.503(b)(2) and (3) to be, as specifically applied to the facts of this Complaint, to provide the parent with information sufficient to document why the evaluation/eligibility/IEP team found this student ineligible for special education, thus providing the parent with sufficient information to determine whether, and if so how, to prepare an argument to contest a determination of ineligibility in a due process hearing. The Federal Complaints Officer finds nothing in the record to indicate that this notice was sufficiently given. Had such notice been given, the weight the IEP team gave to the IEE, and why such weight was given, could have been sufficiently documented – thus providing any necessary answer to how the school psychologist, and/or any other member of the team, interpreted the IEE in relation to all of the other evaluation information used to determine whether this student was eligible for special education services. The Federal Complaints Officer finds that the school violated 34 CFR 300.503, by not meeting the content notice provision requirements of 34 CFR 300.503(b)(2) and (3).

SECTION 504

The Federal Complaints Officer has no jurisdiction over allegations of violations of Section 504. There is nothing specific in law or regulation, of which the Federal Complaints Officer is aware, that specifically requires a school to automatically refer a student determined not to be eligible for special education for possible Section 504 services. However, the school, independent of its legal obligations under IDEA, does, obviously, have legal obligations under Section 504 to identify and provide services to students eligible under Section 504, and therefore such referral may be good practice. The Federal Complaints Officer refers the parent to the school's Section 504 Coordinator and/or the Office for Civil Rights (OCR), in order to address her concerns about her daughter's entitlement to Section 504 services.

REMEDY

Within thirty (30) days of the date of this Decision, unless extended by the Federal Complaints Officer, the school shall provide the parent with written notice sufficient to meet the requirements of 34 CFR 300.503(b)(2) and (3), with a copy sent to the complainant and to the

Federal Complaints Officer. Within this same thirty (30) days, unless extended by the Federal Complaints Officer, the Director of Special Education shall provide a Statement of Assurance sufficient to guarantee that such notice will be given to similarly situated parents in the future. While the Federal Complaints Officer has found that five (5) of the content notice requirements of 34 CFR 300.503(b) were met for this student through disparate documents, the Federal Complaints Officer strongly recommends that the school develop a single standard form containing all seven (7) content notice items listed at 34 CFR 300.503(b), for the purpose of meeting its future obligations to parents under 34 CFR 300.503(b). The school is advised to contact the Federal Complaints Officer for guidance in meeting the notice requirements specified in this Remedy, both for the parent of the student subject to this Complaint, and for future similarly situated parents.

CONCLUSION

This Decision shall become final as dated by the signature of the Federal Complaints Officer. A copy of the appeal procedure is attached to this Decision.

Dated today, April _____, 2001.

Charles M. Masner, Esq.
Federal Complaints Officer