

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

Federal Complaint 2002:529

DPS

Decision

INTRODUCTION

This Complaint was filed on October 29, 2002. The school district's response was dated November 20, 2002, and received, by fax, on that same date. The original of the school district's response was received, by certified mail, on November 22, 2002. The complainant's response was dated December 9, 2002, and received on December 9, 2002. The Federal Complaints Officer then closed the record.

COMPLAINANT'S ALLEGATIONS

The Federal Complaints Officer is reproducing the complainant's allegations as stated by the complainant. Personally identifiable information has been deleted by the Federal Complaints Officer.

34 C.F.R. 300.300(a) (3) (i) & (ii) – Provision of FAPE

DPS has denied [student] FAPE by not identifying all of [student's] needs. They have failed to evaluate for any reading disability, and even though he had a communication need, failed to provide any individualized instruction. They based [student's] services on his cognitive disability, not on his "unique needs".

According to [student's] IEPs dated 9/18/98, 11/19/99, 9/18/2000, accommodations and modifications were listed that were necessary for [student] to participate in regular curriculum/assessments. According to his IEP dated 9/12/2001, [student] didn't need any accommodations/modifications. It appears that since he was receiving all his services in a center-based program, ...[the school district] [was] not basing his services on his "unique needs", but [was] ...[basing] [services] on his placement [based] in a self-contained classroom. I do not believe that [student's] needs no longer exist because he is in a self-contained classroom.

34 C.F.R. 300.308 – Assistive technology

DPS failed to evaluate [student] for assistive technology, thus denying him access to assistive technology that would give him access to the general education curriculum.

34 C.F.R. 300.321, 300.536, 300.532-535 – Evaluations and Reevaluations

DPS failed to evaluate [student] for a reading disability after his parents ...[expressed] concern that he may be dyslexic. According to the Social Work Staffing report by [proper name], L.C.S.W., it states, "Mother has concerns about [student] possibly having [dyslexia]." I believe that DPS failed their obligation to evaluate for a reading disability, therefore not identifying all of [student's] needs (34 C.F.R. 300.300(a) (3) (i) and §300.536(b)).

[Student's] triennial review was due September 2001. According to documentation (Pre-Meeting for reevaluation dated 10/26/99) provided by DPS, the school decided to do record reviews, interview student and family. The date of this document is very concerning. The year is 1999 (two years before the triennial), and the month and date (October 26) is a date that would be after the date of the triennial. According to this document, [proper name] was to follow through and see that a W J-R be administered. To my knowledge, this was not done. I have requested all evaluations from DPS, and did not receive this document. This document does not state who the participants were in this meeting. I am aware that an actual meeting is not required, but there should be documentation of information from the parents. As they have a right to provide their input (34 C.F.R. 300.533(a)[]) or request additional assessments (34 C.F.R. 300.533(d)[]).

DPS also provided a copy of the Permission for Reevaluation, there is no date on this document although it was provided with the triennial documents. This document is requesting permission to evaluate in every area except life skills. This is a concern, because according to [student] and his parents, this is an area that there is a need. The document that was provided does not have a signature by the parent giving consent or not. The family does not recall getting this document to sign.

34 C.F.R. 300.343 (c) (2) – Review and Revision of IEPs

DPS failed to appropriately address [student's] IEP. [Student's] IEP goals and objectives have not changed from 1999 to the present. There is no written or otherwise, explanation as to why [student] has not met any of his goals and objectives. He only has to [meet] his objectives 50% of the time to meet the objective. If he couldn't meet these objectives in the first year, they needed to discuss why and revise the objectives accordingly. They failed to do so for three years!

We are still waiting to receive [student's] new goals and objectives for this school year. We have not to this date, been given explanations for [student] not meeting his goals and objectives.

34 C.F.R. 300.344(a) – IEP team

DPS violated 34 C.F.R. 300.344(a) (2) for the IEPs dated 9/18/2000, 9/12/2001, and 9/18/2002. According to the IEPs, there was not a general education teacher present. [Student] attends Career Education Center (CEC) in the afternoons, in a cooking class. This teacher was not present for the IEP meeting, and did not participate in the development of the IEP (34 C.F.R. 300.346(d) []).

DPS violated 34 C.F.R. 300.344(a) (1) for the IEP dated 9/12/2000. According to the IEP, page 5, the parents “didn’t come.” There is no evidence that DPS made attempts to find a “mutually” agreed upon time for the IEP to allow the parents to participate.

34 C.F.R. 300.345 – Parent Participation

DPS failed to allow parent participation in the 9/12/2000 IEP. There is no documentation of DPS making any attempts to ensure the parent participation (§300.345(c)). The parents do not recall getting the notice for this meeting. If they had, they would have been there.

34 C.F.R. 300.346 – Development, review, and revision of IEP

DPS failed to consider the concerns of the parents for “enhancing” [student’s] education. DPS failed to provide any follow-up reading evaluation since the diagnostic evaluation in 1998. DPS also failed to consider assistive technology [devices] and services (300.346(a) (2) (v)[]). DPS also failed to revise the IEP each year, not discussing why [student] was not meeting those goals. DPS failed to have a regular education teacher present at the IEPs and participate in the development of the IEPs. [Student] does have a regular education teacher at CEC, there was no input provided by that teacher (§300.346(d)).

34 C.F.R. 300.347 – Content of IEP

[Student’s] IEPs do not have “statements of his present levels of educational performance,” (300.347(a) (1)), and obviously does not state how his disability affects his involvement and progress in the general curriculum.

Although [student] has goals and objectives that could be measured, according to the IEPs, they are only measured by teacher observation. Again, [student’s] goals and objectives have not been met or changed since 1999.

According to his IEP dated 9/2001, the school is not providing any accommodations/modifications or supports for [student] to “advance appropriately toward attaining the annual goals, to be involved and progress in the general curriculum in accordance with paragraph (a) (1) of this section and to participate in extracurricular and other nonacademic activities; and to be educated and participate with other children with disabilities and [non-disabled] children in the activities described in this section.”

There is no explanation as to why [student] “will not participate with [non-disabled] children in the regular class and activities...” Although [student] is participating in a

cooking class at CEC, this has been his only opportunity to participate with [non-disabled] children. This is not an academic class, he has not been given the opportunity to participate in an academic class until after the IEP meeting on [9/18/2002].

In violation of §300.347(a)(7)(i) & (ii), [student's] IEPs state that his goals and objectives are measured by "teacher observation." This is very subjective and is not documented. The [student's parents] state that they have never received any reports with [student's] report card or otherwise, of [student's] progress towards his annual goals. There [are] [no] reports to "the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year." Again, [student's] goals and objectives have not changed since September 1999.

34 C.F.R. 300.550 – Least Restrictive Environment

DPS has failed in providing [student] an education in the least restrictive environment by not ensuring, to the maximum extent, that he is educated with children who are not disabled in regular classes with the use of supplementary aids and services. [Student] was not given an opportunity to be educated in a regular class until this school year. He is attending a cooking class at CEC. We discussed the opportunity for [student] to attend a regular science class with supports at the 9/18/2002 IEP meeting. At the last meeting on September 18, 2002, [student's special education teacher] was to change [student's] schedule to include [student] in a science class with supports. To this date, this has not been done.

Id. Complainant's Complaint letter, in relevant parts, received October 29, 2002. Personally identifiable information deleted by the Federal Complaints Officer.

SCHOOL DISTRICT'S RESPONSE

The Federal Complaints Officer is treating the school district's response as a denial, with exceptions that will be noted, of all allegations of violations of relevant law.

FINDINGS AND DISCUSSION

34 C.F.R. 300(a)(3)(i) & (ii) – Provision of FAPE

The Federal Complaints Officer finds no violation by the school district of these regulatory provisions, as alleged by the complainant. Moreover, the parent(s) have not claimed that they did not consent to all of the IEP provisions made for their son. If parent(s) and school districts cannot reach consensus as a part of the IEP process, the parent(s)' ultimate relief is to request a due process hearing, if the parent(s) wish to contest the school district's offer of FAPE. If parent(s) do not contest the school district's offer of FAPE, through a due process hearing, then, assuming sufficient procedural compliance, the school district's offer of FAPE, and, if provided, provision of that FAPE, is the FAPE to which the student is entitled.

34 C.F.R. 300.308 – Assistive Technology

The Federal Complaints Officer finds no violation by the school district of these regulatory provisions, as alleged by the complainant. Whether a student needs assistive technology is an IEP team decision. The complainant has provided no information, and the Federal Complaints Officer finds none otherwise in the record, to indicate that this student’s IEP team did not follow appropriate procedures in making a determination of whether this student needed assistive technology.

34 C.F.R. 300.321, 300.536, 300.532-535 – Evaluations and Reevaluations

The Federal Complaints Officer does not find that the school district failed any obligation it may have had to evaluate the student for a reading disability. However, the Federal Complaints Officer also does not find any evidence in the record that the school district was not obligated to complete the W J-R evaluation alleged to have not been completed by the complainant, and he also finds no evidence that this evaluation was completed. He therefore finds that the school district violated the relevant evaluation regulatory requirements by not completing this evaluation. The Federal Complaints Officer also finds, as conceded by the school district, that the Permission for Re-evaluation form was deficient. However, the school district has now created a new form, submitted as a part of its response to this Complaint, and the complainant did not contest the sufficiency of this form in the response to the school district’s response to the Complaint.

The Federal Complaints Officer does not find any other violations of these regulatory provisions, as alleged by the Complainant. The parents have always had, and continue to have, the right to request an Independent Educational Evaluation (IEE), under the provisions of the Individuals with Disabilities Education Act (IDEA) regulatory provisions found at 34 C.F.R. 300.502.

34 C.F.R. 300.343 (c)2 – Review and Revision of IEPs

The Federal Complaints Officer finds that the school district staff failed to meet procedural requirements for modification of goals and objectives on this student’s IEPs. However, the Federal Complaints Officer finds insufficient evidence to conclude that the school district’s failures have denied this student FAPE.

34 C.F.R. 300.344(a) – IEP team

The school district concedes in its response that it violated this regulatory provision, by not having a regular education teacher at relevant IEP meetings.

34 C.F.R. 300.345 – Parent Participation

In its response to this Complaint, the school district states – “According to records, the parents and the student were provided with a written Notice of Meeting on September 8, 2000.” However, the school district provided no copy of this notice and the parents claim that they did not receive such notice. The Federal Complaints Officer finds that the school district violated this regulatory provision, with regard to the meeting held on September 18, 2000.

34 C.F.R. 300.346 – Development, review, and revision of IEP

The Federal Complaints Officer has found that the school district violated 34 C.F.R. 300.343 (c)(2), 34 C.F.R. 300.344(a), and 34 C.F.R. 300.345. These combined violations, most particularly the violation of 34 C.F.R. 300.343 (c)(2), are sufficient to constitute a violation of 34 C.F.R. 300.346. However, the Federal Complaints Officer does not find that these procedural violations have resulted in a denial of FAPE for this student.

34 C.F.R. 300.347 – Content of IEP

Having found violations of 34 C.F.R. 300.343 (c)(2), 34 C.F.R. 300.344(a), 34 C.F.R. 300.345, and 34 C.F.R. 300.346, the Federal Complaints Officer also finds that these combined violations are sufficient to warrant a finding that 34 C.F.R. 300.347 was violated. However, the Federal Complaints Officer does not find that the violation of this regulatory provision has resulted in a denial of FAPE for this student.

34 C.F.R. 300.550 – LRE

The Federal Complaints Officer finds no violation by the school district of this regulatory provision. Least Restrictive Environment (LRE) is an IEP team decision. The Federal Complaints Officer finds no procedural violations sufficient to warrant a finding that this student has not been educated in the LRE. The parents are entitled to request a due process hearing on this issue if they disagree with this finding.

Procedural violations alone do not necessarily constitute a denial of FAPE. On the facts of this Complaint, the Federal Complaints Officer does not find that this student has been denied FAPE in the LRE. Moreover, even if a denial of FAPE is found, it does not automatically follow that compensatory education is an appropriate remedy for such denial. Compensatory education is not damages. Its purpose is not to punish the school for wrongdoing. Its purpose is to compensate the student for education that was lost to which s/he was entitled. In order for such remedy to be appropriate, there must therefore be a determination made that the student can, in fact, be compensated, by more education, for the loss s/he has suffered. If such determination is not appropriately made, the unintended effect could be to further harm the student by forcing him or her to suffer through education from which they cannot benefit, and for which the time and resources spent in receipt of such services could be better used for the student's benefit.

The parents of the student that is the subject of this Complaint are entitled to a due process hearing on all of the issues raised in this Complaint. This includes, obviously, the allegation that this student has been denied FAPE, and the allegation that compensatory education would be an appropriate remedy for that denial of FAPE.

REMEDIES

- 1) Within thirty (30) days of the school district's certified receipt of this Decision, the director of special education shall submit to the Federal Complaints Officer a written statement of assurance that all violations found by the Federal Complaints Officer are being adequately addressed by the school district – including, as necessary, any appropriate training for school district staff.
- 2) Upon request by the parent(s), the school district shall provide the parent(s) with further IEP meeting(s) to address further educational planning for this student. Even though the Federal Complaints Officer has found no violation of FAPE by the school district as a part of this Decision, and no compensatory education has been ordered as a part of this Decision, that does not mean that the parent(s) are not entitled, as a part of the IEP process, to request services that might otherwise be labeled compensatory education. The job of the IEP team, always, is to define, and determine how to appropriately meet, a student's special needs. Given the procedural irregularities that have occurred for this student, most especially the failure to adequately document whether modifications in IEP goals and objectives were needed, the Federal Complaints Officer has determined that it could be helpful to give the parents a full and fair IEP team meeting opportunity to communicate to the school district what they believe is appropriate to meet their son's educational needs subsequent to their receipt of this Complaint Decision. If the parent(s) believe this communication has already taken place, or otherwise believe that further such IEP meeting(s) would not be helpful, then they need not request such meeting(s). In any case, if the parent(s) do not request such IEP meeting(s) within thirty days of the complainant's certified receipt of this Decision (unless an extension is of this time period is agreed to by the parties), the school district shall be under no obligation to provide the parents with such IEP meeting(s) – for the purpose of complying with this Decision remedy. Any such IEP meeting(s) held shall be held no later than thirty (30) days from the date of the expiration of the appeal period for this Complaint Decision, unless otherwise agreed to by the parties.
- 3) If the parents request IEP meeting(s) as provided for in remedy number (2), then the school district shall make a verbatim record of such meeting(s), an intelligible copy of which - sufficiently audible and including identification of all speakers (if done by electronic recording) - shall be provided to the parents at no expense to the parents. This verbatim record may be an electronic recording, or by court reporter – at the option of the school district. Given the procedural irregularities that have occurred for this student, the Federal Complaints Officer has determined that it is an appropriate remedy to provide the relevant school district staff with the opportunity to effectively document that they understand how to effectively conduct an IEP meeting. Copies of any necessary notices, or other documents, including any IEP revisions, should also, obviously, be made a part of this documentary record.

CONCLUSION

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

Dated today, December 16, 2002.

Charles M. Masner, Esq.
Federal Complaints Officer