

FEDERAL COMPLAINT NUMBER 98.502

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

- A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on January 21, 1998
- B. The complaint was filed by Mr. [parent] and Ms. [parent] on behalf of their son, [student] against the Manitou Springs Public Schools, Mr. Leonard Bartel, Superintendent and Ms. Theresa M. Wise, Director of Special Education ("the District") and against the Pikes Peak Board of Cooperative Educational Services, Dr. John Sansone, Director of Special Education ("the BOCES").
- C. The timeline within which to investigate and resolve this complaint expired on March 20, 1998; was extended to April 20, 1998, to allow for a meeting of all involved individuals, a postponement of that meeting, and analysis of the results of that meeting. Subsequently the timeline was extended to April 27, 1998, for additional time needed for analysis of information and legal consultation.
- D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.
- H. The complaint was brought against the District and BOCES as recipients of federal funds under the Act. It is undisputed that the District and BOCES are program participants and receive federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.
- I. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.
- J. [student] is a student with disabilities residing within the District's attendance boundaries and is eligible for special education services from the District and BOCES.
- K. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaints; a meeting of all persons involved, and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District and BOCES have violated the provisions of the Act by failing to provide [student] with a FAPE and his parents with procedural safeguards, specifically by

- not providing parents with adequate procedural safeguards, specifically “prior written notice” and “alternatives for dispute resolution”.
- refusing to grant parent’s request for an independent educational evaluation (“IEE”) relative to the need for a functional behavioral analysis,
- refusing to provide copies of discipline records which had become part of the special education record and had been discussed at the IEP meeting,
- not providing a free appropriate public education (“FAPE”) to [student] during the 1996-97 school year due to cumulative suspensions in excess of 10 school days,
- failure to provide sufficient supports to allow [student] to participate in a field trip in May, 1997,
- failure to develop IEPs with content in accordance with the Act, including amount of specific special education and related services and modifications needed to participate in regular education
- failure to write goals with measurable objectives and failure to evaluate goals and objectives,
- failure to have required personnel on IEP teams, specifically regular education teachers,
- failure to provide those services listed on the IEP.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (a)(16), (18) (19) and (20), and 1414,

34 C.F.R. 300.2, 300.5, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343, 300.344, 300.346 and 300.500, 300.502, 300.503, 300.504, 300.505, 300.532, 300.533, 300.562, and 300.532 and

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District and the BOCES were receiving funds under the Act pursuant to an approved application for funding.
2. The funds were paid to the District and BOCES, in part, based on the assurances contained within the application.
3. One of the assurances made by the District and BOCES is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child, and it will provide procedural safeguards to the parents.
4. [student] was identified as a student with emotional disabilities.
5. The complainants allegations, the District’s and BOCES’ response to those allegations follows, along with any documentation noted, and an analysis of issue based on a meeting with all the parties.

a. not providing parent with adequate procedural safeguards, specifically “prior written notice” and “alternative for dispute resolution.”

Complainant:	District	Records
Did not include all the required information: specifically, why the district was refusing that requested by parent and a description of options. No description of each evaluation procedure used as basis for refusal.	11/20/97 Written notice provided with procedural safeguards included. 12/15/97 Notice; other consecutive IEP mtgs. were agreed to at previous meetings.	District’s 9 page explanation of procedural safeguards is that provided by CDE as a model and meets all requirements.
Prior written notice on 11/20/97 did not describe plans to change to more restrictive environment, options, evaluations descriptions		Records of “Notice” in the file. Form was that recommended by CDE. Form met all requirements; form was completed accurately.
Did not notify that parents could request a conference with director of special education.	Invited John Sansone to 12/19/97 IEP meeting for informal negotiation; did attend.	Letter from the complainants requesting clarification of this issue.

Analysis: The issue appears to be related to the Director’s former practice of allowing the parents to review an IEP after its development, make suggested changes, then responding to those change requests. After numerous IEP meetings, the District went on to complete an IEP after the parents left the meeting, and it was the parents’ perception that they would have an opportunity to make changes. The District, upon receiving consultation from CDE, ended its practice of allowing changes after the meeting, and subsequently did not allow the parents to do this. Parents felt they did not receive prior notice relative to this, and there was some communication breakdown relative to the BOCES’ special education director involvement. Requirements were clarified at the meeting and the District is now aware that IEPs must be developed at meetings by a team, not unilaterally changed later.

b. refusing to grant parents’ request for an IEE relative to need for a functional behavioral analysis

Complainant:	District:	Records:
12/11/97 requested, no response;	Called Dr. George Nichols, at [parents] request. He recommended Dr. Larry Lichstein, Ph.D to do neuropsychological assessment. He did Halstead Reitan (also did WISC III and WRAT-R). 1/09/98 IEP team utilized this information	12/11/97 letter from parents requesting an IEE.
12/18/97 requested, no response		

Analysis: It was clarified that the above IEE was done at parent’s request and that Ms. [parent] had met with Terri Wise to discuss this information, which they agreed with.

c. refusing to provide copies of discipline records which had become part of the special education record and had been discussed at the IEP meetings

Complainant:	District:	Records:
Disciplinary records (requested on 12/11/97) frequently referenced in IEP meetings as basis for placement in more restrictive environment – purged, then produced on 12/17/97	Discipline records not part of special education file. After school and in-school suspension records purged. The SIED teacher, kept personal records of misconduct, and did, upon request, provide those.	Conduct reports are part of file.

The types of records and how they were maintained were discussed and it was acknowledged by Mr. [parent] that he did get those records “real fast—within a day or two” after formally requesting them. The real issue has to do with how [student]’s progress is measured relative to his goals and objectives. (See below.)

d. not providing a FAPE to [student] during 1996-97 school year due to cumulative suspensions in excess of 10 school days

Complainant:	District:	Record
Congress requires schools to provide FAPE during all suspensions/expulsions	9/96-2/97 no suspensions 2/97-4/97 7 inschool suspensions 4/97-5/97 4 inschool suspensions plus 3 inschool (parent chose 1 out of school suspension) 5/97 3 inschool suspensions (parents chose out-of-school)	Conduct Reports: 5-1 day detention of 40” 3-3 day detention of 40” 5-3 day inhouse suspension 3-1 day inhouse suspension 3 days school suspension

Analysis: The law was clarified relative to the difference between in school suspensions and out-of-school suspensions. Inschool suspensions do not contribute to the 10 days of allowed suspensions.

e. failure to provide sufficient supports to allow [student] to participate in a field trip in May, 1997.

Complainant:	District:	Records
Field trip to "old town" – Fairplay – barred with no explanation	On 5/14/97, [student] did attend a field trip, which was supported by Chris Grupp, a special education teacher. Re a second trip on 5/29/97, [student] and 5 regular education students were prohibited from going due to misbehavior with a substitute teachers and prior misbehavior on a field trip.	

Analysis: The parents were concerned that they were never notified of the first disciplinary action against their son. The principal clarified that when this was brought to his attention, he acknowledged that this was not a positive school policy and it should not have happened. He subsequently and immediately changed the school's policy based on this incident. It was clear, however, that the policy of not allowing [student] to go on the second field trip for disciplinary reasons, was not implemented only for [student], but also for five other nondisabled students. Missing a one day field trip would not constitute a denial of FAPE, but would serve as a disappointment for the student(s) involved. It seems evident that this policy is no longer in effect.

f. failure to develop IEPs with content in accordance with the Act, including amount of specific special education and related services and modifications needed to participate in regular education.

Complainant:	District:	Records
IEP did not contain completed current levels of functioning.	deny	4/24/96 IEP complete 9/4/97 IEP complete 1/9/98 IEP very lengthy
Services not detailed (no indication of how much help, how often and for how long)	deny	Complainants wrote on goal pages "how does he accomplish this and how will the school help?", They objected to goals stating what [student] will do, but rather wanted goals to state what the teacher would do.
No amounts of services were listed	deny	IEPs state hours per week and duration
No specific accommodations or modifications were listed	deny	One IEP contained no description of curriculum modifications, although checked. Two others had

		environmental and discipline modifications checked and when asked to describe, states "see behavior plan".
Incorrect calculations of time in special education	Agree. Calculation errors were noted and a letter was sent to parents.	IEP: incorrect calculations, letter later corrected this.
Services don't relate to goals and objectives.	deny	4/24/96 IEP: "self esteem, self management skills, interpersonal relationships, organization = SIED teacher 1/9/98 IEP: SIED goals and SIED teacher noted.

Analysis: It was stated that often it takes 20 or more hours to finalize an IEP for [student], to the degree of satisfaction of the parents. The IEPs appear to have all required elements and, in fact, seem very lengthy, except for one not having curriculum modifications described. The issue appears to be one of detail relative to services, goals and objectives. While the law requires IEPs to have objectives that provide general benchmarks for determining progress and a statement of the type of service to be provided, it does not require the detail of a classroom instructional plan. The complainants, on the other hand, appear to want something more like an instructional plan which includes specific service providers, methods, activities and materials that will be used to facilitate the accomplishment of the goals and objectives. This is not a requirement of the law.

g. failure to write goals and measurable objectives and failure to evaluate goals and objectives.

Complainant:	District:	Records
IEPs lack appropriate objective criteria and evaluation procedures and schedules including no sequential steps.	Deny	IEPs have lengthy objectives under each goal
There are no records of goal achievement from the previous IEP.		The file contained no IEPs which documented previous progress towards goals and objectives.

Analysis: The district acknowledged its error in not documenting previous progress prior to setting new goals and objectives. There was not agreement, however, as to whether or not this was discussed at IEP meetings. **This issue is clearly at the heart of this complaint.** Parents have no indication as to how service providers collect data relative to [student]'s progress, nor what the data is; and, therefore, have no way of determining the extent that [student] is progressing toward those goals. This lack of information has led to discussions in which there is a debate as to whether [student] has been successful or unsuccessful, with no data to support conclusions.

h. failure to have required personnel on IEP teams, specifically regular education teachers.

Complainant:	District:	Records
General education teachers not included as members of IEP committee		4/24/96 – lang. Arts tchr. 2/12/97 – counselor 4/11/97 – counselor 5/14/97 – counselor 12/8/97 – science tchr. 12/10/98 – counselor 12/19/98 – social studies tchr 1/05/98 – counselor 1/09/98 – counselor

Analysis: Clarification of the requirements for IEP team participants was given and it was acknowledged that the District had all necessary participants at its meetings. Some change, based on proposed regulations, may be necessary beginning next year.

i. failure to provide those services listed on the IEP.

Complainant:	District:	Records
	Services on 9/04/97 were consult 1-2 hours per week for processing behavior. SIED teacher was available, but [student] did not go according to behavior plan. When this didn't work, a new plan was developed on 1/09/98 taking responsibility from [student]	

Analysis: This appears to be an issue of instructional strategies utilized by teachers, rather than non provision of services. Parents, having no records of accomplishment, doubt any specific services were provided relative to each of the goals and objectives. Such doubt is understandable, given the lack of data to indicate accomplishment.

j. failure to provide a “free” education during the summer of 1997 when [student] attended a day treatment program.

Complainant:	District:	Records
5/20/97 – A 428 staffing was held, as [student]’s behavior calls for alternative placement.	District is not responsible for cost of treatment at Cedar Springs Southgate School	4/24/96 IEP: Is student eligible for services beyond the regular school year? <u>No.</u>

Note: "DSS" is supportive of day treatment which will start on 6/16/97. Parents had the following questions:

Is alternative placement the funding responsibility of the School? Why is/n't it?

Why isn't DSS responsible?

Why was there not documentation of which party pays for what?

We were told there might be some expense to us, for treatment (individual, group, family therapy)

We were charged \$1979.85 erroneously.

from 6/16/97 to 9/22/97 for following reasons:

1. Residential placement was considered by parents due to [student]'s behavior at home. This was not due to educational concerns. IEP team stated it would support cost of educational portion of day treatment, if residential not possible due to funding; but that DSS would support therapeutic costs. DSS agreed as did the parents.

2. As part of their agreement with families, DSS makes it clear that the family will be assessed a fee, based on income. District has paid educational portion of placement.

3. District would have paid full cost of NEED program, which is the district's alternative placement for students that need a day treatment setting. However, NEED is not available through the summer. If it were not for the home issues, the school would have recommended NEED to finish the school year and to begin Fall, 1997, school year.

5/14/97 General addendum to IEP, states "parents will run insurance information through PRO with B.D. and run insurance through Cedar Springs to investigate residential treatment with [student]...will contact T. Wise to inform her of status of residential treatment. If residential treatment is not an option, will investigate day treatment options with DSS".

Analysis: Clearly, an IEP was held on 4/24/96 at which time it was decided that [student] was not eligible for extended school year ("ESY") services. However another meeting was held on May 14th to discuss the fact that programming for [student] was not working. Parents were concerned relative to behavior at home, and the district stated that it appeared that [student] needed more intensive intervention/treatment that could be provided in the public school. The parents believed the only way they could get [student] back into school into the fall was to get him into treatment. Because the NEEDS program (a day treatment program sponsored, in part, by the BOCES) does not operate in the summer, placement into Cedar Springs was considered and representatives from there and from Department of Human Services ("DSS" or "DHS") were invited to the meeting. At the meeting, it was a group decision that [student] should enter the Cedar Springs facility; that DSS would pay the treatment costs and that the District would pay the education costs. That did occur and [student] remained in Cedar Springs until mid September. The District did pay the education costs and DSS did pay the treatment costs. However, as is their practice, DSS billed the parents for part of their treatment costs.

On the one hand, the District did pay the educational costs, as agreed; and the treatment costs were that of DSS. The \$1,979.85 charged to the parents was strictly for treatment. The District (as part of the BOCES) does have a day treatment program into which they would have agreed to place [student] in the fall; and it had no need to place him into day treatment until that time.

On the other, parents indicated that had they known of those costs, they would not have agreed to such placement; as they were currently getting some treatment. They also thought this was the only option to allow [student] to attend school in the District in the fall.

III. CONCLUSIONS

The District and BOCES **have not** violated the provisions of the Act by failing to provide [student] with a FAPE and his parents with procedural safeguards in the following situations:

- They did provide parents with adequate procedural safeguards, specifically “prior written notice” and “alternatives for dispute resolution”.
- They did grant parents’ request for an independent educational evaluation (“IEE”).
- They did provide copies of discipline records even though they were not part of the special education record.
- They did provide a free appropriate public education (“FAPE”) to [student] during the 1996-97 school year when he was suspended, as these suspension were not in excess of 10 school days.
- They had sufficient supports to allow [student] to participate in a field trip in May, 1997; however he was not permitted to go due to disciplinary reasons. Such discipline policy was applied equally to disabled and non-disabled students, and has subsequently been changed.
- They had the required personnel on IEP teams, specifically regular education teachers and/or counselors
- They did provide those services listed on the IEP.

The District and BOCES **have** violated the provisions of the Act by failing to provide [student] with a FAPE and his parents with procedural safeguards in the following situations:

- They developed IEPs with content in accordance with the Act, including amount of specific special education and related services, but did not always include descriptions of the modifications needed to participate in regular education.
- They did write goals with measurable objectives, but failed to evaluate them prior to the development of a new IEP.

IV. REMEDIAL ACTION

The District and the BOCES must immediately begin developing IEPs which include descriptions of the modifications needed to participate in regular education. Generally if a type of modification is checked, there would be a few items of description.

The District and the BOCES must immediately begin evaluation goals and objectives prior to the development of new IEPs. Such evaluation must include a record of the data collected, if that was part of the evaluation criteria. Such evaluation must be documented on IEPs.

On or before January 1, 1999, the District must provide written assurance to this office that the above two corrective actions have taken place, providing copies of documentation from five or more IEPs, indicating such.

V. RECOMMENDATIONS

This office does not have the authority to order the District and/or BOCES to reimburse parents for the fees they incurred for treatment when [student] was placed into Cedar Springs. Even if it did have such authority, a case may be made for either side of this disputed issue. Therefore, it is strongly recommended that the District reimburse the parents for one half of their fee (1/2 of \$1979.85 = \$990) as a good faith effort and as acknowledgment that communication relative to this issue was not clear.

It is also strongly recommended that the District streamline its IEP development process so that meetings are held for a reasonable length of time and a reasonable number of times. All decisions must be made by the team at the meetings and may not be negotiated after the IEP meeting. The District is also cautioned to list the type and amount of services consistent with the law, and not resort to including instructional strategies, methods, activities and materials as part of the IEP. These should be at the discretion of the qualified teacher or service provider and should be a part of that teacher's classroom instructional plan.

Attached to these findings is a copy of Appendix C to Part 300—Notice of Interpretation of the current regulations relative to the Individuals with Disabilities Education Act. It is recommended that the complainants refer to these when needing an interpretation of the law.

Dated this _____ day of April, 1998

Carol Amon, Federal Complaints Investigator