

FEDERAL COMPLAINT NUMBER 98.514

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

- A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on April 9, 1998.
- B. The complaint was filed by Ms. Susan M. Weiner representing Ms. [parent] on behalf of her son [student], against the Clear Creek School District, Dr. Joanne Ihrig, Superintendent ("the District") and the Mount Evans BOCES, Ms. Jane Snyder, Director of Special Education ("the BOCES").
- C. The timeline within which to investigate and resolve this expired on June 8, 1998, but was extended by two weeks to allow for analysis of considerable information.
- D. The process for receipt, investigation and resolution of the complaints 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.
- E. 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 receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.
- F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegation contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.
- G. [Student] is a student with disabilities eligible for services from the District and BOCES under the Act.
- H. 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 complaint; 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:

(1) failing to provide [student] with a free appropriate public education ("FAPE") as indicated by:

- failure to evaluate for and consider extended school year services for 1996-97 and 1997-98
- failing to convene a team to develop an IEP for the 1997-98 school year, but rather unilaterally developing the IEP,

- failing to develop IEPs which included annual goals and short term instructional objectives which measure progress toward the goals, with objective criteria and evaluation procedures and schedules,
- failing to evaluate goals and objectives,
- refusing to consider the issue of tutoring and extended school year (“ESY”) at IEP meetings, as requested by the parent, and

(2) violating the parent’s rights during the 1995-96, 96-97, 97-98 school years by:

- failing to provide notice of meetings,
- failing to provide parents the opportunity to participate in meetings

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18), (19), (20); and 1412(2)(B), (4), (6) and 1414, as amended by 20 U.S.C. 602, 612, and 614 and its implementing regulations (as amended by statute), including but not limited to 34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.131, 300.180, 300.235, 300.237, 300.300, 300.340, 300.343, 300.344, 300.345, 300.350, 300.504, 300.532 and 300.533 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 BOCS 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 their application.
3. One of the assurances made by the District and BOCES is that in accordance with the Act, they will provide a FAPE, including special education and related services, to each eligible student with disabilities within their jurisdiction to meet the unique needs of that child.
4. [Student] is an 12 year old student enrolled in the District, who was originally placed into special education in the second grade commensurate with an IEP developed on 4/28/94. He was determined to be eligible for special education due to a perceptual communicative disorder.
5. The following is a list of the complainants’ allegations followed by the District’s and BOCES’ responses as well any documentation found when investigating the allegation.

The District and BOCES failed to provide notice of IEP meetings and failed to provide parents the opportunity to participate in those meetings.

The **complainants allege** that:

- (a) a meeting was held on 3/10/96 without notification of the parents
- (b) an IEP review was held on 3/14/96 without notification of the parents

(c) meetings to determine Extended School Year (“ESY”) eligibility were held in the 1995-96, 96-97, 97-98 school years without notice to the parents

(d) a meeting was held just prior to 2/15/98 in which retention of [student] was determined

The **District’s and BOCES’ response** states that parents were notified of all annual and triennial meetings, that Ms. [parent] not only attended every meeting, but actively and fully participated in developing all of the IEPs. ESY was considered during those meetings. Some meetings were held at the request of [parent], therefore no written notices were provided; and Ms. [parent] did attend all of those. There is no record of a meeting held on 3/10/96. In response to Ms. [parent]’s concerns, she was contacted on 2/15/98 to discuss her concerns and options from a regular education perspective. Retention was an option, however his programming for the next year was determined, later, by an IEP team.

Records indicate the following:

<u>Date</u>	<u>Purpose</u>	<u>Written Notice</u>	<u>Record of Parent Participation</u>	<u>ESY Considered</u>
3/3/94		Assessment	Parent gave consent	
4/28/94	Initial	4/18/94	Yes	Yes
2/8/95		Educ. Assessment	Parent gave consent	
4/20/95	Annual	3/7/95	Yes	Yes
3/14/96	Annual	2/29/96	Parent canceled	
4/11/96	Annual	Rescheduled at parent request	Yes	Yes
10/18/96		Triennial Assessment early at parent request	Parent gave consent	
11/19/96	Triennial	11/7/96	Yes	Yes
1/24/97	Review	At parent request	Yes	Yes
10/29/97	Review	10/24/97	Rescheduled	
11/11/97	Review	10/29/97	Yes	“To be considered later”
1/9/98	Review	At parent request	Yes	
4/9/98	Review	3/27/98	(parent rescheduled)	
4/21/98	Review	3/31/98	Yes	Yes

The District and the BOCES failed to hold a meeting to develop [student]’s IEP for the 1997-98 school year.

The **complainants allege** there was no IEP in place at the beginning of the 1997-98 school year and that a pre-written IEP was mailed to [parent] for signature.

The **District’s and BOCES’ response** indicates that no one met to write [student]’s 1997-98 IEP. The plan Ms. [parent] was asked to sign related to regular education matters and [student]’s 1/24/97 IEP. The IEP team did meet on 11/11/97 for an annual review and IEP development.

Records indicate IEP reviews were held on 11/19/96, 1/24/97 (2+ months later) and 11/11/98 (10+ months later).

The District and BOCES failed to properly evaluate for and consider extended school year services.

The **complainants allege** there was no consideration, discussion or explanation of ESY until the last year, but rather the box labeled "NO" was automatically checked. A specific request for ESY evaluation and determination was made by [parent] on 3/10/97, and the principal agreed to do so; however this was never done.

The **District and BOCES response** indicates ESY was properly considered, discussed and evaluated in each year for which [student] qualified for special education. The District takes its responsibility in considering ESY services seriously and follows the guidelines provided by CDE. It is part of the District's procedures to consider ESY at each annual review, triennial, and most additional meetings. It is standard procedure for the team facilitator to explain to the team members the purpose for ESY. The Director of Special Education, having participated in [student]'s IEPs since 1/24/97, personally verifies that the parent was provided with information regarding ESY and consideration of evaluations and predictive factors were done at these meetings. [Student]'s case manager conducted formal pre and post testing for [student] over spring break, 1997. [Student] did not demonstrate significant regression during the pre and post writing samples taken. Further, [student]'s writing samples in the fall of 1997 after the summer break did not indicate significant regression.

Records indicate ESY was considered at the following meetings: 4/94, 4/95, 4/96, 11/96, 1/97 and 4/98. The 11/11/97 IEP indicates ESY would be considered later, which it was on 4/21/98. Ms. [parent] was a participant in those meetings and records do not indicate any disagreement with the ESY decisions. Records contain a 3/13/97 pre spring break writing sample and a 3/27/97 post spring break writing sample. Records contain a writing sample from fall, 1997. Records contain a 3/19/98 pre spring break writing sample and a 4/6-7/98 post spring break writing sample, along with scoring information, analysis (dated 4/17/98) and interpretation of results. A letter from the principal to [parent], dated 10/7/97 indicates that ESY was determined at the 1/24/97 IEP meeting.

The District and BOCES refused to consider the parent's request for tutoring and ESY evaluation on 3/10/97, and provided no notice of such refusal. By not responding to either request, [student] was denied FAPE.

The **complainants allege**, although the principal honored the request by writing a note to a service provider to consider these, it was never acted upon.

The **District's and BOCES' response** indicates Ms. [parent] never brought the request for tutoring to an IEP team for consideration. Her request was only made to the principal. Tutoring in reading was not considered for [student] because the 11/96 IEP listed reading as a strength and tests scores indicated [student] did not qualify for special education supports in reading. The 11/11/97 IEP did not identify any reading needs. The response also indicates that [student]'s case manager conducted formal pre and post testing for [student] over spring break, 1997, and that [student] did not demonstrate significant regression during the pre and post writing samples. Also, [student]'s writing samples in the fall of 1997 after the summer break did not indicate significant regression.

Records indicate ESY was considered on 1/97 and it was determined that [student] did not qualify for ESY. A letter from the principal to [parent], dated 10/7/97 indicates that ESY was determined at the 1/24/97 IEP meeting and explains the ESY determination process. Records

contain a 3/13/97 pre spring break writing sample and a 3/27/97 post spring break writing sample, again not demonstrating regression.

The District and BOCES failed to develop IEPs which included annual goals and short term instructional objectives which measure progress toward the goals, with objective criteria and evaluation procedures and schedules; and the District and BOCES failed to evaluate goals and objectives.

The **complainants allege** there are no baseline data, no target dates and no analysis of progress toward goals and objectives on prior IEPs.

The **District's and BOCES' response** indicated that [student]'s program has been carefully monitored and designed to meet his individualized needs; that progress is revisited often and that evaluations indicate [student] has made significant gains in developing his reading and writing skills, but that he still struggles to remain focused and to complete work. Evaluation information is found under current levels of performance and/or in the minutes. If an objective does not have a schedule, it is presumed the schedule is "in one year". They acknowledge that writing measurable goals is an area they continually work to improve.

Records indicate the following:

<u>IEP Date</u>	<u>Goals</u>	<u>Measurable STOs</u>	<u>Objective Criteria</u>	<u>Evaluation Procedures</u>	<u>Evaluation Schedules</u>	<u>Evaluated Completed</u>
4/28/94	Five	5, 3, 3, 2, 3	Yes	Some	Year	Five 4/95
4/20/95	Three	2, 4, 4	Yes	Some	Year	Three 4/96
4/11/96	Three	2, 2, 2	Yes	Some	Year	Yes
11/19/96	One	2	Yes	Yes	Year	No
1/24/97	Two	3, 4	No	Yes	No	No
11/11/97	Four	3, 4, 4, 3	Yes	Yes	Some	Due 11/98
1/9/98	Modified	Yes	Yes	Yes	Some	Due 1/99
4/21/98	One	4	Yes	Yes	Yes	Due 4/99

IV. DISCUSSION

1. The law is clear that parents must be provided with prior written notice of all IEP meetings and they must be afforded the opportunity to be active participants in all major decisions relative to special education.

The complainants allege a meeting was held on 3/10/96 without notification. A review of records indicates no meeting was held that date. The District and BOCES know of no meeting held on that date. There was a meeting held on 3/10/97 between Mr. and Ms. [parents] and the principal. The meeting was held at parental request to address concerns and make some modifications to regular education which is permissible.

The complainants allege a meeting was held on 3/14/96 without notification or opportunity to participate. Records indicate a meeting was scheduled for that date and prior written notice was provided. At the last minute, the parent was not able to attend and she requested that it be rescheduled. It was rescheduled for 4/11/96, was held, and the parent attended.

The complainants allege meetings were held during the past three school years to determine ESY, but that the parent was not given notice of those meetings and was not given the opportunity to participate. Records indicate that ESY was considered at six different IEP meetings, that the parent was notified of those meetings (other than when it was rescheduled according to a parent request), and that the parent participated in those meetings.

The complainants allege a meeting was held just prior to 2/15/98 in which retention of [student] was determined. Records give no indication of this meeting and no indication of retention. The District acknowledges that several options relative to regular education were discussed with Ms. [parent] on 2/15/98, but that no decisions were made until the IEP team met on 4/21/98.

This investigator can find no documentation to substantiate this allegation. In fact, there is ample documentation of prior written notice of all meetings and of parental attendance. Interviews with staff indicate that Ms. [parent] is a very active participant in those meetings.

The complainant/attorney, in a telephone conversation, suggested that attitude in this particular school may be one of the central issues. The family is encouraged by the fact that [student] will be attending a new school next year.

2. The law is clear in that IEPs must be developed prior to placement into special education and then must be reviewed at least yearly.

The complaints allege the District failed to hold a meeting to develop [student]'s IEP for the 1997-98 school year.

Records indicate a IEP was developed on 11/19/96 which would have been in effect until 11/19/97. However the parent requested a review on 1/24/97. That meeting was held and the 11/19/96 IEP was revised accordingly. A new IEP was then developed on 11/11/97, which replaced the 11/19/96 modified IEP. This was within the year's time allowed for review.

This investigator can find no documentation to substantiate this allegation. When school began in the fall of 1997, [student] received services under the 11/19/96 IEP as modified on 1/24/97. A new IEP was then developed on 11/11/97 within appropriate time lines.

3. The law is clear in that when developing IEPs, teams must consider whether ESY services are necessary. That is, the team must decide whether the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months. The purpose of an ESY is to preserve skills learned and educational benefits accrued during the regular school year. The purpose is not to confer additional educational benefit. Entitlement to an ESY is contingent on either showing significant jeopardy in the past or a prediction of significant jeopardy in the future.

The complainants allege the District did not properly evaluate for or consider ESY services.

Records indicate that ESY was appropriately considered at IEP meetings. However, the complainant alleges the District simply checked the "no" box with no discussion or explanation of ESY. There is documentation of pre and post writing samples done prior to the summer of 1997 and 1998, on which decisions were based or reconfirmed.

It is obvious that the District's and the complainant's perceptions of ESY decisions are quite disparate. The process of complaint resolution, however, does not allow for taking testimony under oath for determining credibility. Rather, this investigation must rely on the documentation in such a situation. Documentation does not substantiate this allegation.

4. The law is clear in that specific special education and related services to be given to a student, must be determined by an IEP team, in which the parent is afforded an opportunity to participate.

The complainants allege the District refused to consider the parent's request for tutoring and ESY evaluation of 3/10/97, and provided no notice of such refusal.

Special education and related services to be provided to a student, including tutoring, are determined by IEP teams, not parents or administrators unilaterally. There is no documentation that tutoring was requested as a possible service in any of the IEP meetings. Rather, the parent asked the principal to consider such. Although the purpose of the requested tutoring is not clearly stated, it may be assumed (based on the private tutoring) that the request was for tutoring in reading over the summer as an ESY service. The IEPs during that period did not have any specific reading goals; and since the purpose of ESY is to preserve skills learned during the regular school year, there would be no basis on which to provide reading ESY tutoring. Since reading skills were not part of the goals, evaluation for regression in reading would not be appropriate. Evaluation for regression in writing was done at parental request to reconfirm the IEP teams' decision relative to ESY on 1/24/97.

This investigator can find no information substantiating this allegation.

5. The law is clear in that IEPs must contain statements of annual goals, including short-term instructional objectives with appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

The complainants allege there are no baseline data, no target dates and no analysis of progress towards goals and objectives. The complainant/attorney strongly suggests that the lack of baseline data is one of the central issues relative to this complaint. She suggests that additional time needs to be spent on what worked, what didn't work, where is the student now and how can we fix any problems.

Documentation indicates that previous years' annual goals were evaluated on 4/95, 4/96, 11/96 and 1/97, prior to writing the new goals. However this was not done relative to the goals written on 1/24/97. Evaluations for 11/97, 1/98 and 4/21/98 are not yet due. Although four of the IEPs reflect that the previous goals were evaluated, there is no record of teacher observations, writing samples, etc.

The District admits it can improve in this area.

III. CONCLUSIONS

The District and BOCES have **not** violated the provisions of the Act by doing any of the following:

- failing to evaluate for and consider extended school year services for 1996-97 and 1997-98

- failing to convene a team to develop an IEP for the 1997-98 school year, but rather unilaterally developing the IEP,
- failing to develop IEPs which included annual goals and short term instructional objectives which measure progress toward the goals, with objective criteria and evaluation procedures and schedules
- refusing to consider the issue of tutoring and extended school year (“ESY”) at IEP meetings, as requested by the parent,
- failing to provide notice of meetings, nor by
- failing to provide parents the opportunity to participate in meetings.

The District and BOCES **have violated** the provisions of the Act by failing to evaluate the previous year’s goals and objectives when developing the 1/24/97 IEP.

IV. REMEDIAL ACTION

Goals and objective written on 11/11/97, 1/9/98 and 4/21/98 must still be evaluated within a year from the time each was written. The District and BOCES must provide documentation to this office that each was done in a timely manner and must provide a description of the documentation of the work samples, recorded data, observations, discussions, interviews, writing samples, etc. that are listed as evaluation procedures and objective criteria.

Dated this 22nd day of June, 1998

Carol Amon, Federal Complaints Investigator