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

Federal Complaint 2000:524

(Arapahoe County School District 5)

Decision

INTRODUCTION

This Complaint was dated May 24, 2000, and received by the Federal Complaints Officer in part on May 26, and in part on May 31. The school's response was dated June 14, and received by the Federal Complaints Officer on June 16. The complainant submitted a response to the school's response, dated and received June 28. The Federal Complaints Officer then closed the record.

COMPLAINANT'S ALLEGATIONS

- The school violated her son's right to a free appropriate public education (FAPE) by requiring that he attend 1999 summer school, at parent expense, due to the school's determination that his performance in algebra was below standard during his eighth grade year.
- The school violated the Individuals with Disabilities in Education Act (IDEA) when it did not allow her son to participate in Proficiency Center services at the school.
- The school violated her son's right to FAPE by not discussing extended school year (ESY) services during his May 24, 1999 IEP meeting.

SCHOOL'S RESPONSES

- There was no denial of FAPE, because the 1999 summer school was not a part of complainant's son's IEP.
- The Proficiency Center services are not denied to special education students. The complainant's son did not need Proficiency Center services.
- ESY services were not discussed at the May 24, 1999 IEP meeting because the complainant's son had not regressed.

FINDINGS, DISCUSSION, AND CONCLUSIONS

- Summer school does not have to be a part of complainant's son's IEP. The question of whether it should be or not is a question better resolved by a due process hearing than the Federal Complaints Officer, absent a negotiated or mediated resolution between the parent and the school. However, the school should pay for summer school costs, and complainant's son's entitlement to FAPE should not otherwise be conditioned upon his participation in summer school. If the complainant does not believe her son should be required to participate in summer school, she can make that argument as a part of the Individualized Education Program (IEP) process, and, if the parent and the school cannot reach a negotiated or mediated agreement, the due process hearing officer can resolve the issue. If the end result is an IEP which excludes complainant's son from summer school, then there would be no costs to be paid by the school. The issue of whether the complainant's son otherwise needs special education or related services during the summer is also a question which should be resolved in a due process hearing, if the parent and the school cannot reach a negotiated or mediated resolution.
- In its response to the complainant's allegation that special education students, including complainant's son, were denied the services of the Proficiency Center, the school stated: "No special education student is 'denied' the programming or 'service' which exists in the Proficiency Center, they receive programming and services through special education based on their individual needs, which may include exactly what happens in the Center." The Federal Complaints Officer interprets this to mean that special education students, including complainant's son, can receive Proficiency Center type services, whether or not they participate in the Proficiency Center. According to the school's response, "(Services) would be provided in the Proficiency Center, but at West, do to staffing arrangements, such services would be provided by the special education teachers with their own computer equipment and supervision."

  The complainant is entitled to argue, to a due process hearing officer, if a negotiated or mediated agreement cannot be reached with the school, that her son needs Proficiency Center type services. She is also entitled to argue that the setting for the provision of such services should be the Proficiency Center. It would then be up to the hearing officer to decide whether such services were necessary for complainant's son to receive FAPE, and, if so, whether a particular setting for delivery of such services, including the Proficiency Center, was necessary for the complainant's son to receive FAPE.

- In its response to complainant's allegation that ESY was not discussed at the May 24, 1999 IEP meeting, the school stated, "ESY services were not discussed since the student had not cognitively regressed." A regression/recoupment determination is only one possible step in an adequate analysis of whether a student needs ESY services. See Johnson v. Bixby Independent School District, 921 F.2d 1022 (10th Cir. 1990). "The analysis of whether the child's level of achievement would be jeopardized by a summer break in his or her structured educational program should proceed by applying not only retrospective data, such as past regression and rate of recoupment, but also should include predictive data, based on the opinion of professionals in consultation with the child's parents as well as circumstantial considerations of the child's individual situation at home and in his or her neighborhood and community." Id.at 1028. Bixby identified possible factors to be considered:

> The list of possible factors includes the degree of impairment, the degree of regression suffered by the child, the recovery time from this regression, the ability of the child's parents to provide the educational structure at home, the child's rate of progress, the child's behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with nonhandicapped children, the areas of the child's curriculum which need continuous attention, the child's vocational needs, and whether the requested services is extraordinary for the child's condition, as opposed to an integral part of a program for those with the child's condition. This list is not intended to be exhaustive, nor is it intended that each element would impact planning for each child's IEP. Id. At 1030, f.n. 9. See also Determining ESY Services, a 1998 publication of the Colorado Department of Education.

The school has not provided sufficient documentation to demonstrate that any or all of these factors, beyond regression, were considered, or appropriately excluded from consideration, for complainant's son. The school correctly states that the complainant's son's IEP is checked "no" in the appropriate box, indicating no need for ESY services. However, no documentation of this determination is provided. Appropriate consideration of ESY for complainant's son might have resulted in service provision other than the summer school which the complainant's son attended. Even if the school were not otherwise responsible for summer school costs, it would be in this case, since ESY was not appropriately considered.

REMEDIES

- The school shall reimburse the complainant $200.^{00}$, for tuition and transportation costs for her son's 1999 summer school.
- The school shall submit a statement of assurance, signed by the Director of Special Education, which assures that the school recognizes and accepts the Bixby decision, as described by the Federal Complaints Officer, as the policy for analyzing ESY decisions for special education students served by the school.

The school has thirty (30) days from the date of its receipt of this Decision to provide the remedies ordered.

APPEAL PROCEDURE

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

Dated today, July _____, 2000.

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Charles M. Masner, Esq.
Federal Complaints Officer