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

Federal Complaint 2000:530

Arapahoe County School District 5, Cherry Creek

Decision

INTRODUCTION

The complainants' Complaint letter was dated September 5, 2000, and received September 7. The school's response was dated September 26, 2000, and received September 27. The complainants' response to the school's response was dated October 5, 2000, and received October 6. The Federal Complaints Officer then closed the record.

FINDING OF EXCEPTIONAL CIRCUMSTANCES

34 CFR 300.661(b)(1) permits an extension of time for processing a Complaint if "exceptional circumstances" are found. The Federal Complaints Officer finds that there were exceptional circumstances. The complainant's Complaint alleges twenty-nine (29) separate and different violations of the IDEA regulations. These twenty-nine (29) allegations, plus supporting documents, plus the school's response to each allegation (the school mis-numbers the total as twenty-eight, since it mistakenly gives two allegations the number twenty-seven (27)), plus supporting documents, plus the complainants' responses, is an amount of information sufficient in volume and complexity to create exceptional circumstances.

FINDINGS AND DISCUSSION

With the exception of complainants' first listed allegation – 34 CFR 300.13/FAPE – the Federal Complaints Officer addresses each of the complainants' allegations in the order they presented them in their Complaint letter – numbered one through twenty-nine, with the second allegation listed, 34 CFR 300.24(b)(15), becoming the first in the series of twenty-nine (29), and 34 CFR 300.13/FAPE becoming the last.

1) ALLEGATION OF VIOLATION OF 34 CFR 300.24(b)(15)/RELATED SERVICES/TRANSPORTATION. Transportation is a related service. Whether or not it is required is a determination to be made by the IEP team. The Federal Complaints Officer finds no violation by the school in the process of making this determination. If the complainants disagree with a determination by the IEP team, they are also entitled to request a due process hearing to contest that determination. If the complainants believe their son is being discriminated against because of his disability, they are entitled to file a complaint with the Office for Civil Rights (OCR).

2) ALLEGATION OF VIOLATION OF 34 CFR 300.26(b)(1)/SPECIAL EDUCATION/AT NO COST. The Federal Complaints Officer is uncertain whether the complainants are alleging that homebound instruction or transportation, or both, is a kind of specially designed instruction. However, he does understand them to be alleging that this section requires the school to provide free transportation for their son. The school is only required to provide free transportation for their son if the IEP team determines transportation to be a necessary related service. The IEP team did not make that determination. The Federal Complaints Officer finds no violation by the school in the process of making that determination. The relief available to the complainants is the same as indicated by the Federal Complaints Officer under the discussion of 34 CFR 300.24(b)(15).

3) ALLEGATION OF VIOLATION OF 34 CFR 300.142(e)(2)(i)/METHODS OF INSURING SERVICES/NO PUBLIC INSURANCE REQUIRED BY PARENTS. Neither the complainants or the school directed the Federal Complaints Officer to a copy of the document the complainants were required to sign in order for their son to receive day treatment services. However, the Federal Complaints Officer finds that the document described by both the complainants and the school does not constitute a document obligating the complainants to seek or obtain the public insurance contemplated by this regulatory section. If the complainants possess evidence to the contrary, or believe the school has such evidence, or that it can otherwise be obtained – they can file a separate Complaint directing the Federal Complaints Officer to such evidence and he will consider it. Based upon the evidence of record, the Federal Complaints Officer finds no violation of this regulatory provision by the school.

4) ALLEGATION OF VIOLATION OF 34 CFR 300.300(a)(3)(ii)/PROVISION OF FAPE/BASED ON NEEDS, NOT DISABILITY. Nothing argued by the complainants is persuasive that the May 18, 2000 IEP meeting was not a valid IEP meeting. The Federal Complaints Officer does not understand the basis for the complainants' claim that the IEP team based its decision making on the complainants' son's disability rather than his needs, no matter to what extent day treatment was or was not discussed at the May 18, 2000 IEP meeting. The Federal Complaints Officer finds that complainants' son's unique needs were considered at the May 18, 2000 IEP meeting. If the complainants believed that the subsequent day treatment recommended placement for their son was inappropriate, they were entitled to request a due process hearing to contest that placement decision. They are still entitled to request a due process hearing to contest a placement decision.

5) ALLEGATION OF VIOLATION OF 34 CFR 300.305, 300.306, 300.307/PROGRAM OPTIONS, NONACADEMIC SERVICES/PHYSICAL EDUCATION. Services not provided and services denied are not synonymous. The complainants do not dispute that their allegation of violations occurred during and eight (8) day end of the school year homebound placement. In their Complaint, the complainants did not specify what services of this type, beyond, presumably, physical education, were not provided that they believe should have been provided. In any case, if the complainants deemed these types of services to be appropriate for inclusion in the May 18, 2000 IEP, for the end of the year

eight (8) day homebound placement, they had the right to request those services at the time. If they did so, and the IEP team determination was otherwise, they had a right to request a due process hearing to challenge that determination. The Federal Complaints Officer recognizes that within such a short time period, this approach would probably have been too time consuming to get any timely help. However, the option to request a hearing is still available to the complainants on this issue. Should a hearing officer agree that their son was inappropriately denied service during this eight (8) day period, the complainants could then request compensatory education. On the facts of this Complaint, the Federal Complaints Officer finds no such denial and no violation of these regulatory provisions by the school.

6) ALLEGATION OF VIOLATION OF 34 CFR 300.342(a)/WHEN IEPS MUST BE IN EFFECT. The May 18, 2000 IEP, with resulting homebound placement, was in effect when complainants' son began school on August 21, 2000. Whether the complainants' son continued to receive services in a homebound setting as of that date is uncertain based upon the information provided to the Federal Complaints Officer. However, the complainants do not dispute that their son started at (attendance center) on August 29, 2000. August 21, 2000 was a Monday. August 29, 2000 was a Tuesday. Taking the complainants' argument at its best – meaning determining that their son received no services during this period – this was six (6) school days. The complainants make no argument that their son was educationally deprived in such a way during these six (6) days such that compensatory education is warranted, and the Federal Complaints Officer makes no such finding. The complainants are, however, still entitled to make this argument to a due process hearing officer.

In the complainants' response to the school's response, they do not dispute that they agreed to the placement at (attendance center) which began on August 29, 2000. What they do dispute is the validity of the notice the school sent them. They also claim, apparently, that the IEP meeting which took place on September 20, occurred later, rather than sooner, through no fault of their own. There is no problem with the notice given. 34 CFR 300.345(a)(1) requires notice sufficient enough to "…ensure that (the parents) will have an opportunity to attend." Id. The complainants received this notice. The regulation does not require written notice, although the Federal Complaints Officer does not dispute that written notice is a good idea. The complainants emphasize that the notice they say they received subsequent to a September 11, 2000 telephone call to the Director of Special Education was handwritten, while the notice submitted by the school in its response to their Complaint, which the school claims it sent, was typed. Perhaps the school sent both notices, and the complainants didn't get the first one. Perhaps the school didn't make a copy of the handwritten notice it sent the complainants, and therefore typed in a copy of the notice they did send. It doesn't matter. The complainants received valid notice of the September 20, 2000 IEP meeting. Whether that meeting had to wait until September 20 because of conflicts of all the participants, including the complainants – as the school contends – or whether the complainants had no conflicts prior to that meeting date – as they claim in their response to the school's response to their Complaint – is also irrelevant to this Complaint Decision. The Federal Complaints Officer finds no violation by the school.

7) ALLEGATION OF VIOLATION OF 34 CFR 300.342(b)(3)/WHEN IEPS MUST BE IN EFFECT (SPECIFIC PROVISION ABOUT INFORMING SERVICE PROVIDERS OF IEP RESPONSIBILITIES). The Federal Complaints Officer finds that individuals who needed IEP information in order to provide services to complainants' son for eight (8) days in May of 2000, had sufficient information to do so. The Federal Complaints Officer finds no violation of this regulatory provision by the school.

8) ALLEGATION OF VIOLATION OF 34 CFR 300.343(c)(iii), (iv)/IEP MEETINGS (SPECIFIC PROVISIONS ABOUT IEP REVIEW INFORMATION PROVIDED TO OR BY THE PARENTS, AND ABOUT ANTICIPATED NEEDS OF THE STUDENT). The essence of the complainants' allegation is that the school did not hold an IEP meeting at the request of the complainants to address complainants' son's behavior – and that they should have – and that if the school had held such a meeting, the complainants' son's behavior might have gotten better, not worse. The complainants also contend that sufficient revisions were not made to their son's IEP after the May 18, 2000 meeting. Also, the complainants seem to contend that the school contended, in its response to their Complaint, that the school included in the May 18, 2000 document that day treatment was to be the placement for their son. The Federal Complaints Officer reads the school's response to only be that day treatment was considered at the May 18, 2000 meeting. As for whether there should have been a special meeting in the spring of 2000, prior to the May 18, 2000 meeting, which was a manifestation determination review, and thus prior to the May 12, 2000 disciplinary incident which preceded the manifestation determination review which was held, the Federal Complaints Officer finds insufficient evidence that the complainants' son's behavior was such that the school was required to provide such a meeting as requested by the complainants. Had the complainants made their Complaint to the Federal Complaints Officer at the time the school denied their request for an IEP meeting, he would have, at a minimum, cited to the complainants and the school relevant Colorado and federal guidance regarding the convening of IEP meetings, as previously cited in Colorado Federal IDEA Complaint Decision 2000:517. The Colorado rules state: "Additional meetings may be held at any time throughout the school year at a mutually convenient time at the request of the parent(s), the child and/or the administrative unit or eligible facility, and the IEP may be revised so long as the planning is done in accordance with these Rules." 1 CCR 301-8 §4.02(1)(d). The federal regulations provide no specifics as to requests for IEP meetings. The comments to 34 CFR 300.343 at page 12581 of the Federal Register, Vol. 64, No. 48/Friday March 12, 1999 do state, in relevant part:

A provision is not necessary to clarify that public agencies will honor "reasonable" requests by parents for a meeting to review their child's IEP. Public agencies are required under the statute and these final regulations to be responsive to parental requests for such reviews. If a public agency believes the frequency or nature of the parents' requests for such reviews is unreasonable, the agency may (consistent with the prior notice requirements in §300.503) refuse to conduct such a review, and inform the parents of their right to request a due process hearing under §300.507. It should be noted, however, that as a general matter, when a

child is not making meaningful progress toward attaining goals and standards applicable to all children, it would be appropriate to reconvene the IEP team to review the progress. Id.

Based on the facts of the investigation of this Complaint, the Federal Complaints Officer does not find that the school ignored the behavior of the complainants' son in a way that constituted a violation of complainants' son's rights under special education law, subject to the Federal Complaint process. On the other hand, the complainants were, and are, entitled to make their argument to a due process hearing officer, and, if they are successful, to request any compensatory education to which they believe their son is entitled. They are entitled to do the same if they believe sufficient revisions did not take place as a result of the May 18, 2000 meeting. The Federal Complaints Officer finds insufficient evidence to conclude that the information supplied by the complainants at the May 18, 2000 meeting was not adequately considered by the school. Therefore, the Federal Complaints officer finds no violation by the school of 34 CFR 300.343(c)(iii),(iv). The Federal Complaints Officer does find that the school did violate the requirements of 34 CFR 300.503, by not giving the complainants adequate notice of their hearing rights under 34 CFR 300.507, at the time the school denied the complainants' request for an IEP meeting, and by not otherwise meeting the notice requirements of 34 CFR 300.503 at that time. The Federal Complaints Officer interprets the burden of notice in this instance upon the school to be greater than simply providing the complainants a copy of their rights, which, according to the complainants' response numbered seventeen (17), to the school's response to their Complaint, they obtained sometime prior to a February 8, 2000 IEP meeting, when they called the school to obtain a copy of their rights which had been referenced, but not included, in a letter the complainants received from the school. The Federal Complaints Officer understands this rights document to be the school's Exhibit Number Five (5). The notice from the school must be such that the school can document that parents have been informed that they are entitled to a due process hearing to challenge any denial of the school to a parental request for an IEP meeting, and to challenge any other aspect(s) of the required 34 CFR 300.503 notice.

9) ALLEGATION OF VIOLATION OF 34 CFR 300.345(a)(b)/PARENT PARTICIPATION. The Federal Complaints Officer considers a manifestation determination review to be a particular type of IEP meeting. As such, it is subject not only to the procedural notice requirements of 34 CFR 300.523(a)(1), which by reference to 34 CFR 300.504 must be in writing, but also to the procedural notice requirements of 34 CFR 300.345(a)(b), which need not be in writing. The written letter of notice of May 16, 2000, from the building principal to the complainants, of the May 18, 2000 manifestation determination review, does not meet the requirements of 34 CFR 300.345(b), section (ii), because it did not inform the complainants of their right to bring other individuals to the May 18, 2000 meeting, as specified in 34 CFR 300.344(a)(6)(c). Since there is no evidence that the complainants were otherwise notified of their rights in this regard, the Federal Complaints Officer finds that the school violated these regulatory provisions with regard to the May 18, 2000 meeting.

The complainants imply that meetings held on March 23, 2000, and April 17, 2000 were IEP meetings. The school admits meetings were held, but states they were "additional" meetings "for transition purposes" and not IEP meetings. If they were IEP meetings, they were subject to all the notice requirements for IEP meetings. The Federal Complaints Officer is persuaded that whatever the intent of the school, the meetings of March 23 and April 17, 2000 were of such substance as to qualify as IEP meetings. Indeed, contained in the school's exhibit number six (6) is a letter to the complainants from the school, dated February 24, 2000, in which it states in the first sentence that the purpose of the March 23, 2000 "transition" meeting was to "…review the IEP strengths and needs and to plan appropriate classes for next year." If the school had given the notice specified in 34 CFR 300.345 for the March 23 and April 17, 2000 meetings, it would not have been subject to a successful allegation of violation of this regulatory provision by the complainants, no matter how these meetings were characterized. The Federal Complaints Officer finds the school violated the complainants' notice rights with regard to the meetings held on March 23 and April 17, 2000.

10) ALLEGATION OF VIOLATION OF 34 CFR 300.346(a)(2)(i)/DEVELOPMENT, REVIEW, AND REVISION OF IEP. The Federal Complaints Officer has found that the meeting of March 23, 2000 was an IEP meeting. In their response to the school's response the complainants indicate that they were at this meeting and that they raised concerns about their son's behavior at this meeting. The complainants state that they were unaware any behavior support plan was created at this meeting and, in any case, they disagree with the plan the school claims was created as a result of that meeting. The Federal Complaints Officer is not persuaded that the complainants would not have understood that the discussion that took place at the meeting on March 23, 2000 was precedent to creating a plan to address their son's behavior. Moreover, however this meeting came about, it undercuts the complainants' claim that no meeting was held which addressed their son's behavioral needs, prior to the May 12, 2000 incident which led to the May 18, 2000 manifestation determination review. In any case, even if the Federal Complaints Officer's judgment is wrong about the complainants' understanding, they had a right at the time, once they became aware of the nature of the behavior support plan, and subsequently, to request a due process hearing to challenge the adequacy of the behavior support plan. The Federal Complaints Officer finds no error in the process used to create that behavior support plan sufficient to warrant any violation of law subject to the Federal Complaint process. The Federal Complaint process, as presently constructed, is not an adequate forum to address the resolution of competing and complex views about what is appropriate educational programming for students. If parents and schools can't reach agreement on such issues, the due process hearing is the appropriate forum for seeking the imposition of a solution. Parents are also entitled to request, at any time, an independent educational evaluation, at public expense, if they believe that the evaluation process being used by the school is inadequate to the task of identifying student needs for the purpose of developing an appropriate educational program, including where appropriate a behavior support plan, for the student. The school can only avoid paying for this evaluation by seeking the order of a hearing officer that it is not necessary and, in any case, such an evaluation must be considered by the school in creating or modifying the student's IEP. See 34 CFR 300.502.

11) ALLEGATION OF VIOLATION OF 34 CFR 300.347(a)(7)/CONTENT OF IEP. The Federal Complaints Officer has reviewed the February 8, March 23, and May 18, 2000 IEPs for complainants' son, submitted by the complainants as a part of their Complaint. These IEPs do contain goals and objectives and do provide criteria as to how the goals and objectives would be measured. The criteria, grades and teacher reports, were not deemed by the complainants to be satisfactory ways of measuring their son's behavior.

The Federal Complaints Officer is not an expert on creating IEP goals and objectives, and related measurement criteria. That said, the goals and objectives, and measurement criteria, on the IEPs for complainants' son, as reviewed by the Federal Complaints Officer, are such that a lot is left open to interpretation by the reader as to what is being measured and the standards the person doing the measuring is applying so as to determine to what extent goals and objectives have been met. Grades and teacher reports can be used in this measuring process, but it is unclear to the Federal Complaints Officer, from his reading of the IEPs, how such measures were to be effectively applied in the case of complainants' son. However, the Federal Complaints Officer cannot say that the statement of goals and objectives, and related statements of progress measures towards those goals and objectives, are not at least minimally adequate to meet the requirements of the law. The Federal Complaints Officer therefore finds no violation of this regulatory provision by the school with regard to complainants' son. The complainants are entitled to seek a due process hearing if they are in disagreement with the school as to what the goals and objectives should be on their son's IEP, and how progress towards those goals and objectives is to be measured.

12) ALLEGATION OF VIOLATION OF 34 CFR 300.347(b)(1)/CONTENT OF IEP/TRANSITION SERVICES. The requirements of the law must be met, but the law does not dictate any particular set of forms that must be used to meet these requirements. However, it is true that the state of Colorado makes model IEP forms available to schools. It is also true that the state had not made all the forms related to transition services readily available to schools when the May 18, 2000 IEP meeting took place, and that the state had not been making clear to schools the necessity that transition information on IEPs include course of study information. The Federal Complaints Officer is unaware of the "severe needs" criteria referenced by the school, which the school indicates would require the use of, according to the school - the Federal Complaints Officer is presuming - the more detailed and sophisticated forms referenced by the complainants and the Federal Complaints Officer. Certainly, the more disabling a student's disability is, the more s/he may need transition assistance. However, as argued by the complainants, the school was seriously considering their son for day treatment – which to the Federal Complaints Officer is indicative of a student with fairly severe needs. In any case, it is the understanding of the Federal Complaints Officer that course of study information would be appropriate independent of the severity of the disability. The Federal Complaints Officer makes no judgment as to what are the transition needs of the complainants' son. He does find the educational program planning statements about transition, as stated on the IEPs he reviewed,

to be incomplete, given that course of study information was not included with the other transition information which was included in complainants' son's IEP. He does not find, however, on the facts of this Complaint, that the lack of this information on complainants' son's IEP is such that it constitutes a violation by the school of 34 CFR 300.347(b)(1) with regard to complainants' son.

13) ALLEGATION OF VIOLATION OF 34 CFR 300.349(a)/PRIVATE SCHOOL PLACEMENTS BY PUBLIC AGENCIES. The Federal Complaints Officer sees the issue here as being whether the May 18, 2000 IEP is sufficient for purposes of beginning the day treatment placement which began August 29, 2000. The Federal Complaints Officer does not interpret CFR 34 300.349(a) to require the development of a new IEP, if there is an existing one that is sufficient so that any necessary changes can be made within a reasonable time after the beginning of the new placement. It seems reasonable to assume that a new placement might warrant modifications in an IEP that could not be appropriately determined until after the student had begun the new placement and had made some adjustment to it. This seems to be the school's position. However, the complainants, in their response to the school's response to their Complaint – to which the school was not given an opportunity to respond – state that they made repeated attempts after the May 18, 2000 IEP meeting, which was a manifestation determination review, to get an IEP meeting scheduled before the next school year began. The complainants have consistently claimed, both in their original Complaint letter and in their response to the school's response to their Complaint, that the school has not been sufficiently responsive to their requests for IEP meetings. The Federal Complaints Officer finds it credible that they made such requests of the school between May 18, 2000 and the beginning of the fall semester 2000. Given that the May 18, 2000 IEP meeting was a manifestation determination review, and that the determination was that complainants' son's behavior which occurred on May 12, 2000 was a manifestation of his disability, and that a significant out of school change of placement was contemplated – the complainants' request for an IEP meeting before school began the following year seems reasonable, notwithstanding that a further IEP meeting might have been appropriate after the school year began to make further modifications in complainants' son's IEP. The Federal Complaints Officer is aware that meetings took place between the complainants and a variety of school staff on May 30, June 9, and August 17, 2000. However, neither the complainants nor the school has characterized any of these meetings as IEP meetings. Neither does the Federal Complaints Officer. There is not evidence in the record sufficient to demonstrate that the school gave the notice required by 34 CFR 300.345, which is required for all IEP meetings. By not granting the complainants an IEP meeting between the May 18, 2000 manifestation determination review IEP meeting and the beginning of the fall semester 2000, the school left itself open to a successful allegation by the complainants that sufficient planning was not done for their son prior to the beginning of the fall semester 2000. The services needed should dictate the placement needed, not the other way around. The Federal Complaints Officer finds that the school violated 34 CFR 300.349(a) with regard to the complainants' son, for the fall semester 2000.

14) ALLEGATION OF VIOLATION OF 34 CFR 300.501/OPPORTUNITY TO EXAMINE RECORDS/PARENT PARTICIPATION IN MEETINGS. This regulatory

section does not require that the school agree with the concerns expressed by parents in an IEP meeting, or that the outcome of such meetings where such concerns are expressed be agreeable to parents. Whatever else the complainants and the school may disagree about, there should be, now at least, agreement that the meetings of March 23, 2000 and May 18, 2000 did not produce agreement sufficient to constitute consensus on all issues which needed to be resolved. Ultimately, no matter how many IEP meetings are held, if the IEP team cannot reach consensus, it is up to the school to propose what it believes to be necessary in order to provide a free appropriate public education (FAPE) for a student. If the parents disagree, they can request a due process hearing to challenge what the school proposes. The Federal Complaints Officer does not find that the complainants' rights to participate in meetings which they attended with the school, under this regulatory provision, were violated.

15) ALLEGATION OF VIOLATION OF 34 CFR 300.503/PRIOR NOTICE BY THE PUBLIC AGENCY/CONTENT OF NOTICE. The written notice contemplated by this regulatory section is required any time the school proposes or refuses to initiate or change the "…identification, evaluation, or educational placement of the child or the provision of FAPE to the child." Id. According to 34 CFR 300.503(a), this notice must be given within a "reasonable time" before such proposals or refusals by the school. The Federal Complaints Officer does not interpret this provision to require the school to issue a written notice to a parent for every communication from a parent to which the school may take exception, where these communications are part of a continuous and ongoing disagreement with the school. The intent of this notice, as the Federal Complaints Officer sees it, is that parents be notified of their right to contest the position of the school, or other public agency service provider, over service provision for their student sons and daughters.

Under ALLEGATION NUMBER EIGHT the Federal Complaints Officer has already found that the school violated the rights of the complainants under 34 CFR 300.503, with regard to not notifying the complainants of their procedural safeguard rights, most specifically their right to a due process hearing under 34 CFR 300.507, when the school denied the complainants' request for an IEP meeting. It was noted that the complainants obtained, through their own effort, a copy of their rights sometime prior to a February 8, 2000 IEP meeting. The emphasis under ALLEGATION NUMBER EIGHT was on making sure the complainants were adequately notified of their right to request a due process hearing under 34 CFR 300.507, a specific procedural safeguard, among one of many given general reference in 34 CFR 300.503, to contest a school's decision to deny their request for an IEP meeting. 34 CFR 300.503 also contains other notice provisions requiring the school to describe and explain to parents, in writing, actions taken or not taken with regard to their student sons and daughters. In their response to the school's response to their Complaint, the complainants contend that they were entitled to these descriptions and explanations in response to their communications to the school made on May 25, June 1, June 1, June 1 (three separate requests by the complainants made on the same day), June 5, June 9, August 15, and August 23, 2000. The Federal Complaints Officer does not find that it was the intent of 34 CFR 300.503 that the school necessarily respond in separate written communications to each of these communications by the

complainants with the specifics listed in 34 CFR 300.503. However, that said, the complainants were entitled to have the school meet the requirements of 34 CFR 300.503 in a way that explained the school's response to all of the complainants' requests, as specified in 34 CFR 300.503. If appropriate, this response could have been consolidated by the school in one written communication, or more than one communication, depending upon the requests made, and the responses necessary. A critical notice provision is that which makes the parents aware of their right to request a due process hearing, to contest any of the actions or inactions of the school as otherwise set out in 34 CFR 300.503. Such actions or inactions should be provided in this notice, as required by 34 CFR 300.503. As a part of such a hearing the school can be required to describe and explain their actions in accordance with the provisions of 34 CFR 300.503. On the facts of this Complaint, the Federal Complaints Officer finds that the complainants should have been given this notice when they requested, and were denied, an IEP meeting, on May 25, 2000. Additional notice(s) would then also have been required as specified in 34 CFR 300.503. The Federal Complaints Officer finds that the school violated 34 CFR 300.503, with regard to the complainants. SEE ALSO ALLEGATIONS NUMBER EIGHT (8) AND NINE (9).

16) ALLEGATION OF VIOLATION OF 34 CFR 300.504/PROCEDURAL SAFEGUARDS NOTICE. The notice requirement here is critically important to parents, since it explains rights to parents at critical junctures in the special education process for their student sons and daughters. This regulatory provision requires the school to give the copy of the procedural safeguards notice to the parents, at a minimum, upon initial referral for evaluation, upon each notification of an IEP meeting, upon reevaluation of the child, and upon receipt of a request for a due process hearing. Independent of any dispute between the complainants and the school about the nature of other meetings that they had, and any determination the Federal Complaints Officer has made about those meetings, the May 18, 2000 meeting was an IEP meeting, and a very critical one since it was a manifestation determination review. The school has not denied that the complainants did not get a copy of the procedural safeguards notice as a part of the specific notice of this meeting. Whether or not the complainants had previously obtained a copy of this procedural safeguards notice, prior to the notice being given of the May 18, 2000 IEP meeting, the school was not relieved of its obligation to give such notice to the complainants again, as a part of the notice of the May 18, 2000 IEP meeting. The Federal Complaints Officer finds that the school violated this regulatory provision with regard to the complainants.

17) ALLEGATION OF VIOLATION OF 34 CFR 300.520/AUTHORITY OF SCHOOL PERSONNEL. Prior to the May 12, 2000 incident, which resulted in the May 18, 2000 manifestation determination review, which determined that the behavior of the complainants' son in the May 12 incident was a manifestation of his disability, a behavior support plan was in place for complainants' son. The Federal Complaints Officer makes no judgment as to the quality of that behavior support plan, or whether it needed to be modified as a result of the May 12, 2000 incident. The determination of whether and what further assessment was necessary, and whether and what modification was necessary, was a determination to be made by the IEP team. If agreement was not reached, the due process hearing was available to resolve the disagreement. In their response to the school's response,

the complainants' quote 34 CFR 300.520(c)(2) – "If one or more of the (IEP) team members believe that modifications are needed, the team shall meet to modify the plan and its implementation to the extent the team deems necessary." The Federal Complaints Officer sees the issue as whether the meeting contemplated by 34 CFR 300.520(c)(2) can take place at the same time as the manifestation determination review IEP meeting. The Federal Complaints Officer finds that this meeting can be used to accomplish multiple goals. Whether this was a good idea or not in the case of complainants' son, is not a question upon which the Federal Complaints Officer passes judgment. In any case, the placement determination made by the IEP team at the May 18, 2000 manifestation determination review IEP meeting was, according to the school, based upon adequate assessment data to make whatever modifications were deemed necessary. If the complainants, as members of the IEP team, disagreed with that determination, they had a right to request a due process hearing to contest that determination. Moreover, no matter how one interprets 34 CFR 300.520(2)(c)(2), and any other related regulatory provisions, the complainants also have a right to additional IEP meetings upon reasonable request, as previously explained by the Federal Complaints Officer under ALLEGATION NUMBER EIGHT (8). The Federal Complaints Officer finds no violation of 34 CFR 300.520(b), (c).

18) ALLEGATION OF VIOLATION OF 34 CFR 300.523(a)(1)/MANIFESTATION DETERMINATION REVIEW. As previously stated under ALLEGATION NUMBER SIXTEEN (16), the school has not denied the complainants' claim that they were not provided the procedural safeguards notice (referencing 34 CFR 300.504) contemplated by this regulatory provision, as a part of the notice the complainants otherwise received prior to the May 18, 2000 manifestation determination review. The school violated this regulatory provision with regard to the complainants.

19) ALLEGATION OF VIOLATION OF 34 CFR 300.523(c)(1)(iii)/MANIFESTATION DETERMINATION REVIEW. The regulatory provision cited by the complainants provides that the IEP team cannot find that the behavior of a student was not a manifestation of his disability without considering the student's IEP and placement. But the IEP team did find that the complainants' son's behavior was a manifestation of his disability. As the Federal Complaints Officer understands it, the complainants' did not disagree with that finding. The complainants' essential disagreement with the school, as the Federal Complaints Officer understands it, is about their belief that the school is not adequately addressing their son's behavioral needs. Whatever the validity of this belief, it does not constitute a violation of this regulatory provision by the school.

20) ALLEGATION OF VIOLATION OF 34 CFR 300.523(c)(2)(i)/MANIFESTATION DETERMINATION REVIEW. Again, this regulatory provision is a part of the definition of the process the manifestation determination review IEP team must go through in determining whether a student's behavior was a manifestation of his disability. Since the IEP team determined that the May 12, 2000 behavior of complainants' son was a manifestation of his disability, then, by implication, it also had to determine that some, or all, of the subcategories under 34 CFR 300.523(c)(2) (i.e. (i), (ii), and (iii)) did not represent true statements about the circumstances of complainants' son. Once again, the essential disagreement between the complainants and the school, as the Federal Complaints Officer

understands it, is about whether the school is doing everything the complainants believe should be done to address their son's special education needs – not whether 34 CFR 300.523(c)(2)(i) was violated by the school. The Federal Complaints Officer finds there was no violation of 34 CFR 300.523(c)(2)(i) by the school.

21) ALLEGATION OF VIOLATION OF 34 CFR 300.523(f)/MANIFESTATION DETERMINATION REVIEW. The school contends that a review of the IEP took place at the end of the May 18, 2000 manifestation determination review IEP meeting, which resulted in placement changes and recommendations for complainants' son, including a consideration of day treatment. The complainants argue that a decision that day treatment was the appropriate placement for their son was not reached at the May 18, 2000 meeting. Moreover, 34 CFR 300.523(f) says that not only placement deficiencies, but also IEP deficiencies, must be addressed by the IEP team. The Federal Complaints Officer has already stated that one IEP meeting can address multiple goals. However, whatever the result of the placement discussion that took place at the May 18, 2000 IEP meeting, there is insufficient indication that deficiencies in complainants' son's IEP were sufficiently addressed. Its hard to see how such deficiencies could not have existed, given that the manifestation determination review IEP team determined that the behavior of the complainants' son on May 12, 2000 was a manifestation of his disability. And, services needed should dictate the placement needed, not vice versa. Thus, when the school responds – "Once finalized, an IEP review would be held to accurately reflect the placement into the identified facility with appropriate services provided in accordance with the student's needs" – the school has it backwards. Certainly, as the Federal Complaints Officer has previously stated under ALLEGATION NUMBER THIRTEEN (13), an IEP meeting might need to be held after a placement in order to make modifications based upon the student's adjustment to the placement. However, a placement should not be finalized until an adequate IEP review has been done to determine what are the needs of the student, in order to determine what is the appropriate placement to meet those needs. The Federal Complaints Officer finds that this did not happen here. The Federal Complaints Officer finds that the school violated 34 CFR 300.523(f) with regard to complainants' son.

22) ALLEGATION OF VIOLATION OF 34 CFR 300.529(b)(1)/REFERRAL TO AND ACTION BY LAW ENFORCEMENT AND JUDICIAL AUTHORITIES. The regulatory provisions in IDEA, including this one, must be read to be consistent with the Family Educational Rights and Privacy Act (FERPA), with regulations codified at 34 CFR 99.1 et seq. The comment to IDEA regulation 34 CFR 300.529(b)(1), found at page 12631 of Vol. 64, No. 48, of the Federal Register dated March 12, 1999, states, in relevant part – "FERPA would permit disclosure of the special education and disciplinary records mentioned in §300.529(b) only with the written prior consent of the parent or a student aged 18 or older, or where one of the exceptions to FERPA's consent requirements apply (See also, §300.571). For example, disclosure of special education and disciplinary records would be permitted when the disclosure is made in compliance with a lawfully issued subpoena or court order if the school makes a reasonable attempt to notify the parent of the student of the order or subpoena in advance of compliance. (34 CFR 99.31(a)(9))." Id. The school did not have prior written parental consent, a

subpoena, or a court order. If the school had released complainants' son's records under these circumstances it would have been in violation of IDEA and FERPA. The Federal Complaints Officer can understand the complainants being upset that appropriate law enforcement and judicial system personnel did not have information about their son to help explain his behavior. It is regrettable that the relationship between the complainants and the school was such that the forwarding of these records to law enforcement and judicial system personnel did not take place at the time and in the manner that the complainants evidently wanted it to take place. However, the school did not violate 34 CFR 300.529(b)(1).

23) ALLEGATION OF VIOLATION of 34 CFR 300.550(b)(2)/GENERAL LRE REQUIREMENTS. The issue of least restrictive environment (LRE) is a placement issue which should be resolved by a due process hearing officer, if the complainants and the school cannot otherwise resolve the issue through negotiation and/or mediation. However, the Federal Complaints Officer does have authority to determine whether the process used to make this determination was adequate. The Federal Complaints Officer has already determined that the school violated 34 CFR 300.523(f) with regard to complainants' son, by not sufficiently addressing IEP deficiencies as a result of a manifestation determination review finding that the behavior of complainants' son, for which he was subject to school discipline, was a manifestation of his disability. Until the IEP appropriately addressed those deficiencies, it was missing important information upon which to make a placement decision based upon an adequate consideration of LRE. Therefore, the Federal Complaints Officer finds that the school violated 34 CFR 550(b)(2) with regard to complainants' son. In so finding, the Federal Complaints Officer passes no judgment upon whether placements subject to the May 18, 2000 IEP have been sufficient to meet the LRE requirement. He does find that the May 18, 2000 IEP process used by the school was insufficient to "ensure" this result, as required by 34 CFR 300.550(b)(2).

24) ALLEGATION OF VIOLATION OF 34 CFR 300.551/CONTINUUM OF ALTERNATIVE PLACEMENTS. This regulatory provision requires that a school ensure that a continuum of alternative placements is available for special education students. The disagreement between the complainants and the school is whether a sufficient continuum of placements existed to enable the choice of the least restrictive environment (LRE) alternative (as required by 34 CFR 300.550) for complainants' son. The Federal Complaints Officer finds that there is insufficient evidence to find that the school does not maintain a continuum of placements sufficient to meet complainants' son's needs. If the complainants believe that none of the placement alternatives offered by the school are sufficient to meet their son's needs, they are entitled to propose their own placement and to seek the authority of a hearing officer to order that placement, if the school and the complainants cannot agree.

25) ALLEGATION OF VIOLATION OF 34 CFR 300.552(a)(1)/PLACEMENTS. The Federal Complaints Officer finds insufficient evidence that the knowledge of the IEP staffing team was legally deficient. However, the complainants do have a right to bring their own experts to IEP meetings, and to seek a due process hearing if they are dissatisfied with any placement decision made by an IEP team.

26) ALLEGATION OF VIOLATION OF 34 CFR 300.552(b)(2)/PLACEMENTS. The issue here is not so much whether placement decisions were being based upon the May 18, 2000 IEP, but whether the May 18, 2000 IEP was, or is, a good document upon which to base placement decisions. The Federal Complaints Officer has already found that in one instance the latter was not true, having found that the school violated 34 CFR 300.523(f). SEE ALLEGATION NUMBER TWENTY ONE (21). However, the Federal Complaints Officer makes a distinction between the use of the May 18, 2000 IEP for the eight (8) day end of the year temporary homebound placement, as opposed to its further use for educational program planning beyond homebound placement. Whatever its shortcomings, the Federal Complaints Officer does not find that the May 18, 2000 IEP was legally deficient for the purpose of a homebound placement. To the extent that the May 18, 2000 IEP addressed, or did not address, educational program planning for complainants' son beyond that placement, it was not legally sufficient - for the reasons given under ALLEGATION NUMBER TWENTY ONE (21). Whether this has since been remedied is unknown to the Federal Complaints Officer at the time of this Decision. The most recent IEP supplied to him by either the complainants or the school, for the purpose of deciding this Complaint, is the May 18, 2000 IEP. It is the understanding of the Federal Complaints Officer that, no matter what meetings and other activities took place before the complainants' son began his new educational placement in the fall semester 2000, the May 18, 2000 IEP was the most recent IEP in place at that time. The Federal Complaints Officer finds that this IEP was not sufficient to meet the requirements of 34 CFR 300.552(b)(2) for the purpose of the August 29, 2000 placement for complainants' son. However, in so finding, the Federal Complaints Officer is making no finding as to whether this placement for complainants' son, or any subsequent placement(s), was, or was not, appropriate. Flawed processes, or failure to sufficiently document processes, do not necessarily result in inappropriate placements.

27) ALLEGATION OF VIOLATION OF 34 CFR 300.553/NONACADEMIC SETTINGS. As for the eight (8) day end of the school year homebound placement for complainants' son – The Federal Complainants Officer agrees with the school that such a short term temporary homebound end of the year placement, on the facts of this Complaint, did not necessitate the services provision contemplated by this regulatory section. The Federal Complaints Officer thus finds that the school met the "to the maximum extent appropriate" requirement of this regulatory provision for this student, for this time period and placement. The Federal Complaints Officer finds no violation by the school of this regulatory provision.

28) ALLEGATION OF VIOLATION OF 34 CFR 300.562/ACCESS RIGHTS. In preparing this Decision, the Federal Complaints Officer noticed that what the school labeled Exhibit 10, was actually the document the school identified in its response as Exhibit 11 – Morrison Letter to Complainant Regarding May 30th Meeting and Records Access Dated June 14, 2000. To the best of the Federal Complaints Officer's knowledge, he did not receive the document that the school identified in its response as Exhibit 10 – District Policy JRC, and neither did the complainants. However, he has also found this document unnecessary in order to make a finding and reach a conclusion about this allegation. The Federal Complaints Officer finds sufficient evidence to conclude that the school violated 34

CFR 300.562, by not providing to the complainants all the records to which they were entitled by request within the regulatory required forty-five (45) days.

29) ALLEGATION OF VIOLATION 0F 34 CFR.300.13/FAPE. A free appropriate public education (FAPE) is the legally required special education to be provided as defined by a student's IEP. A perfect definition, and perfect implementation of what is defined, is not required in order to meet the requirements of the law. Flaws in IEP definition and implementation do not automatically equal a denial of FAPE. If this were true, no student would ever receive FAPE, since no IEP, and no implementation of any IEP, is ever perfect. A flaw is an imperfection, and flaws can be found in all IEPs and their implementation. The question is what standard short of perfection is to be applied, and how is it to be interpreted in a given set of facts. In addressing the issue of FAPE, the U.S. Supreme Court in Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982) asked – "First, has the (school) complied with the procedures of the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" Id. at 206-207. The Court did not tell us exactly which procedures and how many had to be violated by the school, nor how exactly to assess "reasonably calculated" in order to reach a determination about whether a particular student had been denied FAPE. The Federal Complaints Officer finds that the procedural violations by the school, on the facts of this Complaint, have not been such as to deny the complainants' son FAPE. The Federal Complaints Officer also finds, on the facts of this Complaint, that the IEP for complainants' son was not so deficient as to deny the complainants' son an educational program "reasonably calculated" to allow complainants' son to receive educational benefits, and thus FAPE. However, with the exception of his finding that nonacademic services were not required for complainants' son for the end of the spring semester school year 2000 eight (8) day temporary homebound placement, the Federal Complaints Officer has made no finding about what an appropriate placement and services were, are, or should be, for complainants' son. Independent of the findings of the Federal Complaints Officer, the complainants are entitled to present an argument that their son has been inappropriately placed and served, both in the spring of 2000 and subsequently, and thus denied FAPE, to a due process hearing officer, and, if successful, to request any compensatory education for their son to which they believe he is entitled.

REMEDY

(1) If the complainants so desire, the school shall provide the complainants with a an IEP meeting, which meets all the requirements of the law, including notice requirements, within thirty (30) days of the date of this Decision.

(2) The Director of Special Education, within thirty (30) days of the date of this Decision, shall submit to the Federal Complaints Officer a written statement that the school recognizes and accepts as valid every violation found by the Federal Complaints Officer. This statement shall also include a statement of assurances explaining how the violations found will be addressed to prevent their re-occurrence.

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, November _____, 2000.

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Charles M. Masner, Esq.
Federal Complaints Officer