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

Federal Complaint 2000:535

El Paso County School District 11

Decision

INTRODUCTION

This Complaint letter was dated October 8, 2000, and received by the Federal Complaints Officer on October 17. The school's response was dated November 8, 2000, and received, by fax, on the same date. An original of the school's response was subsequently received by regular mail on November 14. The complainant's response to the school's response to her Complaint was dated November 29, 2000, and received, by fax, on November 30, with the original received by regular mail on December 4. The Federal Complaints Officer closed the record after receiving the complainant's response to the school's response to her Complaint.

COMPLAINANT'S ALLEGATIONS

The complainant alleges the school violated the following regulatory provisions of the Individuals with Disabilities in Education Act (IDEA), and the Colorado Rules for the administration of the Colorado Exceptional Children's Education Act (ECEA):

- 34 CFR 300.551(b)(1) CONTINUUM OF ALTERNATIVE PLACEMENTS
- 34 CFR 300.503 PRIOR NOTICE BY THE PUBLIC AGENCY/CONTENT OF NOTICE
- 34 CFR 300.309(b)(ii) EXTENDED SCHOOL YEAR SERVICES
- 34 CFR 300.342(b)(1)(i) WHEN IEPS MUST BE IN EFFECT
- 34 CFR 300.527(b)(1)&(2) PROTECTIONS FOR CHILDREN NOT YET ELIGIBLE FOR SPECIAL EDUCATION AND RELATED SERVICES

- 1 CCR 301-8 §4.02(1)(b) TIMELINES FOR MEETINGS
- 1 CCR 301-8 §4.03(1) PROCEDURES FOR TRANSFER STUDENTS
- 1 CCR 301-8 §4.03(2) PROCEDURES FOR TRANSFER STUDENTS
- 1 CCR 301-8 §4.03(3) PROCEDURES FOR TRANSFER STUDENTS
- 1 CCR 301-8 §4.03(4) PROCEDURES FOR TRANSFER STUDENTS

SCHOOL'S RESPONSE

The school denies all allegations.

VIOLATIONS FOUND BY THE FEDERAL COMPLAINTS OFFICER'S INVESTIGATION WHICH WERE NOT MADE SPECIFIC ALLEGATIONS BY THE COMPLAINANT

- 34 CFR 300.13 FREE APPROPRIATE PUBLIC EDUCATION (FAPE)
- 34 CFR 300.300(a) PROVISION OF FAPE
- 34 CFR 300.55O GENERAL LRE REQUIREMENTS
- 1 CCR 301-8 §5.00 PROVISION OF SERVICES

FINDINGS AND DISCUSSION

The school claims that the Federal Complaints Officer does not have the authority to make judgements about the allegations made under Colorado law, and the complainant claims that the procedures for transfer students at 1 CCR 301-8 §4.03 apply to out of state transfer students. The Federal Complaints Office finds that he does have jurisdiction over the allegations made under Colorado law, and that the procedures for transfer students at 1 CCR 301-8 §4.03 do apply, on the facts of this Complaint, to complainant's son.

State Law

In support of its claim that the Federal Complaints Officer does not have jurisdiction over the allegations of violations of Colorado law, the school cites 34 CFR 300.661(a)(3) and 34 CFR 662(b)(1) of IDEA, and rules 1, 2, and 3 of Colorado's Federal Complaint procedure. The federal citations by the school, which are excerpts from the IDEA regulatory provisions for complaint procedures, only specify that "minimum" complaint procedures must include an investigation of allegations of IDEA. These provisions do not preclude investigation of allegations of state law violations. Moreover, in determining whether or not federal law has been violated, it may be necessary to investigate allegations of state law. The school's reference to Colorado's procedure for resolving Federal Complaints is sub-headed – PROCEDURE FOR RESOLVING COMPLAINTS ABOUT PROGRAMS FUNDED UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) ADMINISTERED BY THE COLORADO DEPARTMENT OF EDUCATION (CDE). The federal law is "administered" in large part by the Colorado Department of Education through the use of Colorado's state statute (ECEA), as implemented by rules promulgated by the Colorado State Board of Education, which are designed to help implement ECEA and IDEA in the state of Colorado. Thus, the Federal Complaints Officer would have to have authority to investigate allegations of Colorado law, in a given Complaint, in order to determine whether IDEA had been violated. Rules 1, 2, and 3 of the Colorado Federal Complaints procedure do not, any more than federal law, preclude the Federal Complaints Officer from investigating violations of relevant Colorado law which are alleged in a Complaint. Rules 1, 2, and 3 only state, as do the federal regulatory complaint citations given by the school, that an allegation of a violation of IDEA must be a part of the Complaint. Allegations of violations of IDEA are a part of this complainant's Complaint. The Federal Complaints Officer therefore finds that he does have jurisdiction over the allegations of violations of state law made by the complainant.

Transfer Students

A state can do more, but cannot do less, than the federal law requires. The Federal Complaints Officer has had no historical record, or case law, presented to him which would help determine the intent of the Colorado State Board of Education for addressing the issue of service provision for students transferring into the state of Colorado who have been receiving special education services in another state. The Federal Complaints Officer does have Office of Special Education Programs (OSEP) Policy Memorandum 96-5 (hereinafter cited as OSEP 96-5), which provides OSEP's guidance that states are not required to automatically implement the individualized educational programs (IEPs) of out of state transfer students. Essentially, OSEP 96-5 provides that a state may adopt an out of state evaluation and/or IEP if it chooses. If the receiving state chooses not to adopt an out of state evaluation/IEP, it must proceed "without undue delay" to evaluate the student, in accordance with all relevant legal procedures. In the meantime, the student is served with an interim IEP, unless the parents and the school can't agree, in which case the student is placed in the regular education program. If, after the school completes its evaluation, the parents and school still can't agree on a placement, the school is not required to implement the out of state IEP and may place the student in the regular education program. Both the parents and the school have access to a due process hearing to resolve their disagreement, but pending a hearing officer decision, the student would either stay put in a placement agreed upon between the parents and the school, or stay put in the regular education program, or, presumably, other interim placement, if any, that a hearing officer would have authority to order.

The heart of the supporting rationale of OSEP 96-5 is stated in the second sentence of the memorandum's third paragraph – "Since the State A school district's evaluation and IEP were based in part on the education standards and eligibility requirements of State A, the student's evaluation and IEP developed by the State A school district might not necessarily be consistent with the education standards of State B." Id. However, on the facts of this Complaint, the school, by its own actions, has demonstrated that the out of state standards and Colorado standards are consistent enough to have enabled the school to provide services according to the complainant's son's out of state IEP for the extended school year summer, 2000. Whether the school intended to expressly adopt the out of state IEP, as provided for in OSEP 96-5 and 1 CCR 301-8 §4.03 (1), or intended for the extended school year placement to be an interim placement, as provided for in OSEP 96-5 and 1 CCR 301-8 §4.03 (2), the placement lasted the entire summer, and thus beyond the thirty (30) days specified in 1 CCR 301-8 §4.03 (3) during which the school was required to do an assessment. Moreover, the school did not act "without undue delay", as specified in OSEP 96-5. The school began, with the beginning of summer school 2000, and continuing throughout that summer 2000, to provide the complainant's son services in accordance with his out of state IEP. The Federal Complaints Officer recognizes that there may be differences between what are appropriate extended school year services provided on short notice, and what may be appropriate once the summer is over. The Federal Complaints Officer also recognizes that the complainant has refused to give her consent for the school to evaluate her son in order to determine whether other services are appropriate. However, at a minimum, the school has always had the option to seek a due process hearing to order that the testing be done without the complainant's consent. The school has not yet done so.

The Federal Complaints Officer is not faced with a circumstance where the school, from the outset, claimed that it could not provide the complainant's son the placement the complainant

seeks, since the school has, in part, provided that placement during the summer of 2000, albeit in the complainant's home. Moreover, whatever a placement beyond the summer of 2000 might be, the school has stated in its response that, if further assessment, as considered by the school's IEP team, leads to an eligibility determination that the placement the complainant seeks for her son is the appropriate placement, then that is the placement that the school will provide. The Federal Complaints Officer is not faced with a circumstance where the application of 1 CCR 301-8 §4.03 would require the school to provide special education services according to the laws of another state in a way which could not be done consistent with the laws of Colorado, at least to the extent of the special education services provided by the school to the complainant's son during the summer of 2000. Thus, the Federal Complaints Officer is not faced with the circumstance OSEP 96-5 seeks to avoid, and therefore the Federal Complaints Officer does not have to determine whether, in such a circumstance, 1 CCR 301-8 §4.03 would need to be reconciled with OSEP 96-5. On the facts of this Complaint, the only essential difference between the provisions of 1 CCR 301-8 §4.03 and OSEP 96-5 is what the student's placement is to be pending resolution of any placement disagreement between the parents and the school. OSEP 96-5 provides that the placement shall be the regular education program, if the parents and the school cannot agree on an interim placement. Under 1 CCR 301-8 §4.03, if the school does not adopt the transfer IEP, an agreed upon interim placement is to be made pending an assessment. However, on the facts of this Complaint, whether or not the school intended to adopt the out of state IEP, it can be said to have done so de facto, for the summer of 2000, since it provided essentially the same services that the IEP requires even if that service provision is called an interim placement under Colorado law, or OSEP 96-5, and the school did so without acting timely, and sufficiently, to conduct the assessment required by the Colorado rule, upon making an interim placement. Nor did the school act to do an assessment "without undue delay" as specified by OSEP 96-5. There is no need, even if it were otherwise appropriate to do so, to apply the OSEP 96-5 regular education placement provision in order to avoid putting the school in the position of having to provide special education services which cannot be provided to the complainant's son under Colorado law, since the school has already provided special education services to complainant's son during the summer of 2000. The school has not argued that it was not a legitimate exercise of its authority to provide special education services to complainant's son during the summer of 2000, no matter how that service provision is characterized. Thus, it is hard to see how the school could legitimately argue now that the special education services provided to complainant's son during the summer of 2000 could not legitimately continue until the school completes its evaluation and a Colorado IEP team meets. By providing services, and by not acting timely and sufficiently to assess complainant's son, under either Colorado law or OSEP 96-5, the school has waived any rights to the contrary.

The Federal Complaints Officer also finds, however, that the complainant's son's first Colorado school year began with the summer of 2000, and that therefore the applicable placement to be continued is the summer 2000 placement. The school did not, either expressly or constructively, accept the complainant's son's out of state IEP's non-ESY provisions, or evaluation, for the purpose of service provision beginning with the fall of 2000.

- **34 CFR 300.551(b)(1) CONTINUUM OF ALTERNATIVE PLACEMENTS**

The Federal Complaints Officer finds insufficient evidence to conclude that the school does not offer a continuum of alternative placements, and therefore he finds insufficient evidence to conclude that the school has violated this regulatory provision with regard to complainant's son.

The school states in its response to the complainant's Complaint that- "The District further advised (the complainant) that, notwithstanding its misgivings about restrictive, self-contained settings such as the one she insisted was required by (complainant's son's out of state IEP), the District would provide such a placement if (complainant's son) was determined to be eligible for special education in Colorado and his Colorado IEP team determined he required such a placement." School's response at page five (5). The disagreement in this Complaint is not about whether the school has the capability to offer the complainant's son the placement that complainant wants, but is instead about what the placement for complainant's son should be, and how that decision should be made.

The Federal Complaints Officer also agrees with the school that the Colorado Exceptional Children's Education Act (ECEA), CRS § 22-20-101, et seq., needs to be read consistent with rules promulgated by the Colorado State Board of Education. However, he disagrees with the school's analysis of the applicability of the ECEA, the Colorado Rules, and the IDEA statute and regulations, to the circumstances of complainant's son. Complainant's son is, until a Colorado IEP team, or a Colorado due process hearing officer, or some other appropriate authority, determines otherwise, a student entitled to special education services in Colorado. Nothing in the ECEA prevents the Colorado State Board of Education, and local boards of education, from delegating decision making authority that is not otherwise circumscribed by law. In this Complaint, there is no evidence that the school administration and staff did not appropriately exercise their decision-making authority, when they accepted complainant's son for special education services during the summer of 2000.

The Federal Complaints Officer also rejects the school's argument that OSEP 96-5 is authority that the complainant's son is not entitled to special education services in the state of Colorado. OSEP 96-5 provides OSEP's guidance about how receiving states should make judgments about special education service provision for students transferring in from out of state. If the out of state IEP is not to be implemented, and if another placement based upon the receiving state's new eligibility determination, or an interim placement while such eligibility determination is being made, cannot be agreed upon, OSEP 96-5 indicates that the student should be placed in the regular educational program "…during the pendency of authorized review proceedings." Id. While it is true that OSEP 96-5 only address the parent's right to seek a hearing to resolve such a disagreement, the Federal Complaints Officer does not read this omission in a regulatory guidance memo as relieving the school of its obligation to provide a free appropriate public education (FAPE) to all eligible students within its service area, as required by federal and state statutory, regulatory, and case law. Thus, given that the school in this Complaint knew this student was eligible under IDEA for special education services, albeit as further defined by the laws of another state, the school, even if it hadn't provided ESY special education services to this student, would have needed to act affirmatively to get the student in school and to determine what educational placement was appropriate, using Colorado's compulsory education law if necessary. This is consistent with the school's child find responsibilities under 34 CFR 300.125 and 1 CCR 301-8 §4.00. The regular education program placement indicated in OSEP 96-5, even if it was applicable to this Complaint, is not meant to be a permanent placement. It is a temporary placement until a decision is rendered by a hearing officer. In this case, the complainant parent has refused to give her consent so that the school can do an assessment, which the school believes is necessary in order to determine complainant's son's continuing eligibility for special education services in Colorado and, if so, provide a Colorado IEP team with the information it needs to make an appropriate Colorado placement for complainant's son, beyond the ESY summer 2000. The complainant parent has also refused to take this disagreement to a due process hearing in order to resolve the impasse. In such a

circumstance, it is incumbent upon the school to act, and to take the parent to hearing if necessary, in order to get an order from the hearing officer for authority to conduct an assessment without the parent's consent. "…(I)f state law does not prohibit the agency from overriding a parental refusal to consent to an evaluation or reevaluation, and the agency believes that an evaluation or reevaluation is necessary in order to provide FAPE, the agency would have to take appropriate action." IDEA comments to 34 CFR 300.505(b), at page 12610 of Vol. 64, No. 48, of the Friday March 12, 1999 Federal Register. Colorado law contemplates a hearing for such a purpose. See 1 CCR 301-8 §6.03(1)(c).

- **34 CFR 300.503 PRIOR NOTICE BY THE PUBLIC AGENCY/CONTENT OF NOTICE**

The Federal Complaints Officer finds it credible that early in the summer of 2000, if not before, relevant school employees were well aware that the school and the complainant were going to be in substantial disagreement over future provisions for special education services for complainant's son. The Federal Complainants Officer also finds it credible that the complainant made multiple requests for meetings during the summer of 2000 that the school should have considered as requests for IEP meetings.

The notice required by 34 CFR 300.503 is required any time the school "…Proposes to initiate or change the identification, evaluation, or educational placement of the child; or (ii) Refuses to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child."Id. The school argues that – "As (the complainant) did not attend the August 30, 2000 meeting that the District had scheduled with her for the purpose of getting written consent to evaluate (complainant's son), and she has thus far otherwise refused to allow an evaluation, the District's obligation to provide notice under 34 CFR sec. 300.503 has not yet ripened." School's response at page six (6). The Federal Complaints Officer does not accept the school's argument that the "proposal" requirement of 34 CFR 300.503, in this case a proposal to evaluate, can only be triggered when a parent attends a face to face meeting to receive the school's proposal or, even more nonsensically, can only be triggered when the parent agrees to the school's proposal, face to face or otherwise. Moreover, and more fundamentally, given the school's awareness of the complainant's disagreement with what the school wanted to do, which, the Federal Complaints Officer finds, developed weeks or months prior to August 30, 2000, and which included an awareness that this was not only a disagreement over the evaluation, but also, and more fundamentally, over the complainant's desired placement for her son – and given the complainant's previous requests for, the Federal Complaints Officer finds credible, what were IEP meetings – the school should have long since already given the 34 CFR 300.503 notice prior to the meeting of August 30, 2000. Even if it were to be considered as true, as the school argues, that "…the District has elected not to adopt (complainant's son's) (out of state) evaluations and IEP, (and that therefore) he has no identification or placement that is recognized in Colorado…" it would not save the school from the notice requirements of 34 CFR 300.503. The Federal Complaints Officer queries the school as to how parents similarly situated as the complainant, coming from out of state, would otherwise, if not by means of the notice requirements of 34 CFR 300.503, which reference the procedural safeguards notice requirements of 34 CFR 300.504, ever get legal notice of their right to the hearing specified by 34 CFR 300.507 – the hearing which OSEP 96-5 specifies as the ultimate means to resolve a disagreement between the school and the parents over out of state student transfer evaluation/placement issues.

The school is not saved by any argument, as it footnotes on page six (6) of its response, that any harm resulting from the school's failure to give notice has been "de minimus", since, the school argues, the complainant is "well aware of her rights". Whatever the awareness of the complainant, the school has long since been required to give her the notice specified in 34 CFR 300.503, and to thus to provide her with the opportunity for a hearing as specified in 34 CFR 300.507. If the school had timely given the 34 CFR 300.503 required notice, which includes the 34 CFR 300.504 procedural safeguards notice, which includes notice of the 34 CFR 300.507 hearing rights, it could at a minimum document that it had taken actions which did not add to the delay in reaching a resolution of what further education services are to be provided to complainant's son.

The Federal Complaints Officer finds that the school violated 34 CFR 300.503, and 34 CFR 300.504 – the latter being the procedural safeguards notice which is specifically implicated and referenced by the complainant, although she did not provide the regulatory citation. For specific relevance to IEP meeting request denials, the Federal Complaints Officer refers the parties to the comments for 34 CFR 300.343 at page 12581 of the Federal Register, Vol. 64, No. 48/Friday March 12, 1999. See also 1 CCR 301-8 §4.02(1)(d), which provides for IEP meetings during the "school" year. The Federal Complaints Officer knows of no authority that this school year would not include the extended school year of a special education student.

- **34 CFR 300(b)(ii) EXTENDED SCHOOL YEAR SERVICES (ESY) AND 34 CFR 300.342(b)(1)(i) WHEN IEPS MUST BE IN EFFECT AND 1 CCR 301-8 §4.02(1)(b) TIMELINES FOR MEETINGS**

The complainant claims that the educational services provided to her son during the summer of 2000 were extended school year (ESY) services, and thus they had to be provided in accordance with her son's IEP, in this case an out of state IEP. However, the complainant makes no argument that this service provision did not occur – indeed, her argument is that it did occur. The complainant makes this argument to counter an argument by the school that the summer, 2000 educational services provided to complainant's son were not IEP required ESY services and therefore the school was not required to provide them. The complainant seeks to prevail in order to bind the school to accepting the out of state IEP for the purpose of continuing service provision in the fall of 2000. Thus, the complainant, by also alleging a violation by the school of 34 CFR 300.342(b)(1), is arguing that the school, by implementing the out of state IEP for her son's ESY summer 2000, must continue that IEP for her son for the fall semester 2000, and, presumably, forever thereafter. Failure to have had an IEP in effect for ESY, or otherwise in effect for the beginning of the school year 2000, would be a failure to have had an IEP in effect before "…special education and related services were provided to an eligible child", as required by 34 CFR 300.342(b)(1). However, the Federal Complaints Officer interprets 34 CFR 300.342(b)(1)(i) as being sufficiently broad to encompass a school year that begins anytime during a twelve (12) month calendar year, and, in the case of complainant's son, his first Colorado school year began with the summer of 2000, and there was an IEP in place – the out of state IEP.

The school argues that the services provided to (complainant's son) during the summer of 2000 were not ESY services, but were instead "…services requested by (the complainant), and agreed to by the District under the provisions of OSEP Policy Memorandum 95." School's response at page seven (7). The Federal Complaints Officer is uncertain of the exact date that the complainant became aware of OSEP 96-5, but he is certain enough of the date to find that it

was not until very late in the summer of 2000 and that this was after the school and the Federal Complaints Officer became aware of this memorandum. He also finds, therefore, that there is absolutely no evidence that there was ever any agreement between the school and the complainant that was reached using OSEP 96-5. However, this finding does not prevent the summer 2000 placement and services from being continued pending a resolution of the disagreement between the complainant and the school, any more than a continuation of this placement would be prohibited were it determined to be the interim placement for which the school argues.

The school, in the last sentence of the first paragraph of page seven (7) of its response states "…the District was not prohibited from providing services requested and agreed to by (the complainant) without also adopting (complainant's son's) (out of state) IEP." Then, in the second sentence of the next paragraph on that page the school states – "Although the District could have elected not to adopt (complainant's son's) (out of state) evaluation and IEP at that time, it did not." Id. At that time being the summer of 2000. The school then continues to argue that the special education placement the complainant's son received during the summer of 2000 was for the purpose of allowing the school to effectively assess what the complainant's son's needs would be for the fall 2000. Left out of this argument is an explanation of why the school, in addition to reviewing complainant's son's out of state records, and his performance during the summer of 2000, did not immediately seek the complainant's consent to evaluate her son, instead of waiting, as the school has said it did wait, until August 30, 2000 to obtain this consent from the complainant. Unless the school was sure it was going to accept the validity of the out of state evaluation and placement for the fall of 2000, and thus continue to provide special education services to complainant's son beginning with the fall of 2000, it needed to timely get the complainant parent's consent in place to begin its own evaluation in order to be sure that it could complete its assessment before the beginning of the fall semester school year 2000. Even if the complainant had not given her consent for this evaluation, the issue of what was to be the placement and services delivered to complainant's son beyond the summer of 2000 would have been legally joined much earlier, and thus the resolution of the disagreement between the complainant and the school could have at least had the possibility of being resolved much earlier.

The school also argues on page seven (7) of its response that "…nothing in the IDEA or the OSEP Policy Memorandum 96-5 prevented the District from providing (complainant's son) the services requested by his mother during its deliberations, and, arguably, the District may have been required to do so in order not to compromise (complainant's son's) rights under the IDEA." The Federal Complaints Officer agrees. However, once the school begins providing services under IDEA, it is bound by the requirements of IDEA.

The school's final argument regarding these regulatory provisions is that the school cannot be held to have "constructively adopted" an out of state evaluation or IEP, because OSEP 96-5 requires the school to give the notice specified in 34 CFR 300.504(a)-Procedural Safeguards Notice- before accepting an out of state evaluation or IEP, and the school did not give such notice. The Federal Complainants Officer does not find that any failure by the school to provide written notice to the complainant that it was adopting her son's out of state evaluation and IEP prevents the school from being found to have done so, in circumstances such as exist in this Complaint, which include that the school willingly provided services, for a significant period of time – the summer of 2000. However, this does not mean, whatever notice the school did or did not give to the complainant during the summer of 2000, and whatever other actions it should have taken during the summer of 2000 that it did not take, with regard to educational planning

for complainant's son beyond the summer of 2000, that the school bound itself to the out of state IEP beyond being bound to the services and placement it extended to complainant's son during the summer of 2000. The school has a right, and a duty to complainant's son, to do its own evaluation in order to make its own judgment about how to best meet complainant's son's needs in the state of Colorado, if the school determines, as it states it has determined in this case, that such an evaluation is necessary in order to make that judgment.

The Federal Complaints Officer finds the school did not violate 34 CFR 300.309(b)(ii) with regard to complainant's son. Extended school year services in accordance with an IEP, in this case an out of state IEP, were provided by the school.

The Federal Complainants Officer finds the school did not violate 34 CFR 300.342(b)(1)(i) with regard to complainant's son. The first school year for complainant's son in the state of Colorado began with the summer of 2000, and there was an IEP in place at that time – the out of state IEP, which the school, if not expressly, then constructively, adopted, for the type of services and placement extended to the complainant's son during his summer 2000 schooling. Moreover, even if the Federal Complaints Officer were to find otherwise, and therefore were to accept the school's argument that it never in any way adopted complainant's son's out of state IEP, and that, as the school argues, the summer 2000 placement was the interim placement contemplated by OSEP 96-5 – it would nonetheless be true that the school has failed to meet a critical specification of OSEP 96-5. OSEP 96-5 states that if a receiving state decides not to adopt an out of state evaluation, it must evaluate the out of state student "without undue delay." On the facts of this Complaint, where the school provides ESY services to the student, and does not timely give the parent legal notice of its intent to evaluate her son, and does not timely seek the parent's consent to evaluate her son, and therefore does not timely give the parent notice of her procedural rights, including her right to a due process hearing to challenge the proposed action by the school, and does not seek a hearing itself to resolve the impasse, within a time frame so that such hearing could have been commenced, if not completed, prior to the beginning of the fall semester 2000, the school cannot be said to have acted "without undue delay" as contemplated by OSEP 96-5. Therefore, even to the extent OSEP 96-5 provides authority for resolving this Complaint, the school, having not acted "without undue delay" has left itself open to a successful allegation by the complainant that the school did not appropriately treat the summer 2000 placement for complainant's son as the interim placement contemplated by OSEP 96-5, and for which the school has argued. Moreover, even if the summer 2000 special education services were considered to be interim, the school knew enough about complainant's son to know that the school needed to evaluate him for continuing special education services for the fall 2000 semester.

The Federal Complaints Officer finds that the school did not violate 1 CCR 301-8 §4.02(1), with regard to summer school 2000. The school, however, has not met this timeline requirement for special education services planning and programming for complainant's son beyond the summer of 2000. The complainant argues on the one hand that the school has accepted, and was required to accept, and continues to be required to accept, her son's out of state IEP, and on the other hand argues that the school has failed meet its obligation to her son by not holding a meeting to develop a new IEP within the thirty (30) days specified by the Colorado rule – a new IEP which she does not want and for which she has refused to give the school consent to evaluate her son so that a new IEP can be created. The complainant's son's out of state IEP was implemented for the summer of 2000. The Colorado school did not violate any timeline for its creation, and it is not precluded from seeking an evaluation to create a new IEP by virtue of not having the met the thirty (30) day timeline which is referenced in 1 CCR 301-8 §4.02(1).

- **34 CFR 300.527(b)(1) and (2) PROTECTIONS FOR CHILDREN NOT YET ELIGIBLE FOR SPECIAL EDUCATION AND RELATED SERVICES/BASIS OF KNOWLEDGE**

The disagreement between the complainant and the school is not whether the school had a "basis of knowledge", as specified in this regulatory section, that the complainant's son needed special education services. Clearly, the school had sufficient information to constitute a basis of knowledge, regardless of this section's applicability beyond disciplinary issues. The Federal Complaints Officer makes no finding as to this section's applicability beyond disciplinary issues. He does not need to do so to resolve this Complaint.

The issue between the school and the complainant is not whether the school had a "basis of knowledge" upon which it should have acted, but rather what that action should have been, and should be. This is a placement dispute between the complainant and the school. The school provided special education services to complainant's son during the summer of 2000. Therefore, the school not only had a basis of knowledge upon which to act – it acted to provide complainant's son with special education services. The school is not now precluded by this regulatory provision from seeking an evaluation for complainant's son which might lead to an IEP which is more appropriate for complainant's son, just because the school otherwise provided services for the complainant's son during the summer of 2000 without forcing the evaluation issue with the complainant at that time. Therefore, assuming that this regulatory provision did apply beyond disciplinary issues, the school has committed no violation of it.

- **1 CCR 301-8 §4.03(1), (2), (3) and (4)**

The Federal Complaints Officer finds that the school proceeded to provide services to complainant's son, for the summer of 2000, in accordance with 1 CCR 301-8 §4.03(1), and (4) which specifies that the school has the option of providing services in accordance with the transfer student's IEP. This is also consistent with OSEP 96-5. However, the school did not meet the time, assessment, and planning requirements of 1 CCR 301-8 §4.03(2) and (3), or the "without undue delay" requirement of OSEP 96-5, for the purpose of educational planning and programming for complainant's son beyond the summer of 2000. Nonetheless, the Federal Complaints Officer is not finding that the school's provision of special education services to the complainant's son during the summer of 2000 bound the school to the out of state IEP's service requirements beyond that time period, even though the school failed to timely and sufficiently act to prepare for services to complainant's son during the fall of 2000. The school has the right to seek to evaluate complainant's son and to convene a Colorado IEP team to determine whether the complainant's son continues to be eligible for special education services in Colorado, and, if so, whether changes need to be made to the complainant's son's IEP.

- **34 CFR 300.13 FAPE AND 34 CFR 300.300(a)(1) PROVISION OF FAPE AND 34 CFR 300.550 GENERAL LRE REQUIREMENTS AND 1 CCR 301-8 §5.00 PROVISION OF SERVICES**

The Federal Complaints Officer finds that the school is currently violating these regulatory provisions with regard to complainant's son, and that it has been doing so since September 7, 2000. The complainant's son is not in school and he has not received special education services, at least from the school, since September 7, 2000. The school claims that it needs to evaluate complainant's son before providing him with appropriate special education services beyond those provided to him during the summer of 2000. This being so, the school needs to act to complete such an evaluation, notwithstanding the complainant parent's refusal to give her consent. In the meantime, or until the complainant and the school agree otherwise, or until a due process hearing officer or other appropriate authority orders to the contrary, the school should be providing complainant's son with services which are in accord with the services of his current IEP, as were provided to complainant's son during the summer of 2000. In so stating, the Federal Complainants Officer is making no judgment about what the appropriate IEP services and placement for this student should be, beyond the time period necessary to resolve the placement disagreement between the complainant parent and the school. Neither is the Federal Complaints Officer authorizing the implementation of "stay put" provisions. He has no authority to do so. Only a hearing officer has authority to do so, after a request for hearing is made by a parent or a school. See the comment to 34 CFR 300.514(a) at page 12615 of the Federal Register/Vol. 64, No. 48/Friday, March 12, 1999. However, the Federal Complainants Officer does have the authority to see to it that a student's IEP is appropriately implemented, and that is the authority he is exercising here. The Federal Complaints Officer recognizes that the school has been seeking to evaluate complainant's son and the complainant has refused to give her permission for such an evaluation. However, that does not relieve the school of the obligation to seek an evaluation without the complainant parent's consent, if the school has determined that such an evaluation is necessary in order to determine a student's continuing eligibility and insure that a student has an appropriate IEP. It is the understanding of the Federal Complaints Officer that the school has made a determination that the complainant's son needs further evaluation. Having made this determination, the school needs to timely act upon it, notwithstanding the complainant parent's failure to give her consent, and to provide the complainant's son with the IEP services the school was willingly providing during the summer of 2000, before the impasse was reached, unless an agreement is otherwise reached with the complainant, or a due process hearing officer, or some other appropriate authority, orders to the contrary, until such time as the evaluation is completed and appropriate eligibility and placement decisions are made for complainant's son.

The school can seek the order of a due process hearing officer to obtain the evaluation without the complainant parent's consent, as the Federal Complaints Officer has previously indicated is the school's duty according to the IDEA comment to 34 CFR 300.505(b), found at page 12610 of the Federal Register/Vol. 64, No. 48/Friday, March 12, 1999, and as is contemplated by 1 CCR 301-8 §6.03(1)(c). See also, referring to this regulatory provision section, 1 CCR 301-8 §6.03(2), where it states – "A parent, administrative unit, or a local school board that is a member of an administrative unit may request a due process hearing on any matter set forth above." Id. The complainant, of course, would have a right at the hearing to contest any evaluation sought by the school.

The Federal Complaints Officer recognizes the complainant might nevertheless attempt to prevent an evaluation from taking place, notwithstanding the order of a hearing officer, by not

making her son available for the evaluation. Should this occur, the school should seek appropriate legal relief. While it is beyond the authority of the Federal Complaints Officer to address, the complainant's son is subject to the compulsory education law in the state of Colorado.

If further evaluation and consideration by a Colorado IEP team leads to a different placement recommendation, or a determination of ineligibility, the complainant would be able to challenge that determination in a due process hearing. However, the complainant, if she wishes to have her son's special education needs served by the state of Colorado, will have to allow the Colorado school to evaluate her son, and she will have to recognize the legitimacy of the IEP process in the state of Colorado.

In making these findings of violations by the school, the Federal Complaints Officer is making no finding that the complainant's son is entitled to compensatory education. The Federal Complaints Officer has determined that the evidentiary record he has for resolving this Complaint is not sufficient for making this determination, and that the more appropriate forum for developing the record in order to make such a determination is, in this case, the due process hearing. Therefore, if the complainant wishes to seek compensatory education for her son, she will need to do so in a due process hearing. In the view of the Federal Complaints Officer, no determination about whether, and if so what, compensatory education might be appropriate, should be made until the school has been able to complete its evaluation, and a subsequent eligibility and appropriate placement decision has been made.

REMEDIES

1) Within thirty (30) calendar days of the date of the school's certified receipt of this Decision, it shall submit to the complainant, even if it has already done so, the notice required by 34 CFR 300.503, and 34 CFR 300.504, which in this case is being given because the school proposes to initiate an evaluation of the complainant's son. The school shall send the Federal Complaints Officer a copy of that notice. This notice shall be sent to the complainant prior to the school's filing of any request for a due process hearing, and prior to any further efforts by the school to evaluate complainant's son.
2) If the complainant continues to refuse to give her consent for her son to be evaluated, the school shall file a request for a hearing to obtain an order to complete an evaluation of complainant's son within thirty (30) calendar days of the date of the school's certified receipt of this Decision, unless the complainant earlier brings the dispute into a hearing. At the time the school or the complainant files a request for a due process hearing, the decision about what should be the complainant's son's special education services, during the time the hearing officer has jurisdiction of the dispute between the complainant and the school, will be made by the hearing officer assigned.
3) If neither the school nor the complainant has requested a due process hearing prior to the school 2000-2001 semester break, and neither does so during that break, the school shall begin providing special education services to complainant's son, on the first day of school after the break, consistent with the special education services and placement provided to complainant's son during the summer of 2000, and that service provision shall continue until the complainant and the school agree otherwise, or any placement recommendations of a Colorado IEP team are implemented, or a due process hearing officer, or some other appropriate authority, orders otherwise. If the complainant will not

accept her home as the appropriate placement for this service delivery, the school may deliver the services in whatever other setting it deems appropriate, should the complainant and the school be unable to agree on another setting. If the complainant should refuse to make her son available for such services, the school should seek to enforce Colorado's compulsory education law in order to provide complainant's son with these services. The Federal Complaints Officer recognizes that he has no authority to require the school to invoke the compulsory attendance law. However, the Federal Complaints Officer does have authority to determine whether or not the school is providing complainant's son with FAPE.

4) If either party appeals this Decision, the remedies ordered by the Federal Complaints Officer shall nonetheless be implemented as he has ordered them, unless and until an order is obtained from the appellate tribunal staying the remedies ordered by the Federal Complaints Officer.

CONCLUSION

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

Dated today, December _____, 2000.

_____
Charles M. Masner, Esq.
Federal Complaints Officer