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

Federal Complaint 2000:540

Douglas County School District RE-1, Castle Rock

Decision

INTRODUCTION

This Complaint letter was dated October 18, 2000, and received by the Federal Complaints Officer on October 20, 2000. The school's response was dated and received November 9, 2000. The complainants submitted a response to the school's response, dated and received December 1, 2000. The Federal Complaints Officer then closed the record.

COMPLAINANTS' ALLEGATIONS

The complainants allege the following violations:

- 20 USC 1415(K)(1)(B)(i) and 34 CFR 300.520(b)/and 34 CFR 520 (a)(ii) and 34 CFR 121(d)/DISCIPLINE PROCEDURES AND FAPE

- The complainants also allege that the school refused to consider certain information presented by the complainant parents at their son's manifestation determination review. While specific statutory or regulatory provisions are not cited by the complainants, the Federal Complaints Officer has identified 34 CFR 300.345/PARENT PARTICIPATION, and 34 CFR 300.346/DEVELOPMENT, REVISION, AND REVIEW OF IEP, as relevant regulatory sections which are implicated. These regulatory provisions, as well as 34 CFR 300.344/IEP TEAM, are also implicated in complainants' allegation that an August 4, 2000 IEP meeting was held without adequately considering the rights of the complainants, and individuals they wished to bring with them, to attend.

SCHOOL'S RESPONSES

- The school admits to technical non-compliance with 20 U.S.C. 1415(K)(1)(B) and 34 CFR 300.520(b), but argues that this did not result in prejudice to complainants' son, and therefore was not a violation of these provisions.

- The school admits to a violation of 34 CFR 300.121(d)(2)(i)(B), but argues that deprivation of services to complainants' son was "de minimis", and therefore that no compensatory education is warranted.

- The school denies a violation of 34 CFR 300.520(a)(ii) on grounds that although the complainants have alleged the school was required to provide complainants' son with an interim alternative educational placement, the complainants' son was never entitled to be considered for such a placement because there was no drug, weapon, or injury to self or others issue involved in complainants' son's disciplinary incident. The Federal Complaints Officer notes for the record that there is no 34 CFR 300.520(a)(ii), as cited by both the complainants and the school. There is a 34 CFR 300(a)(1)(ii) and a 34 CFR 300.520(a)(2)(ii). 34 CFR 300.520(a)(2)(ii) addresses forty-five (45) day alternative placements for illegal drug use or possession, and the Federal Complaints Officer finds this regulatory provision is not applicable to this Complaint. 34 CFR 300.520(a)(1)(ii) addresses the need to provide services to a student when a disciplinary removal goes beyond ten (10) school days in the same school year, in accordance with the provisions of 34 CFR 300.121(d). It is this post ten (10) day disciplinary removal service provision to which the Federal Complaints Officer understands the complainants to be referring, and the lack of such to be included in what the school has called de minimis.

- The school denies that complainants' views, and the views of those that complainants made a part of the IEP process for their son, were not appropriately considered. The Federal Complaints Officer treats the school's general denial as a specific denial of any violations of 34 CFR 300.344,345, and 346, which the Federal Complaints Officer has found are implicated by complainants' general allegation.

FINDINGS AND DISCUSSION

- The complainants have alleged a violation of 20 USC 1415(K)(1)(B), (which includes (i)), and 34 CFR 300.520(b). The school admits technical non-compliance, but denies any violation on grounds that no prejudice resulted to complainants' son. The Federal Complaints Officer finds that, having admitted non-compliance, the school has not sufficiently demonstrated that there was no prejudice to complainants' son. The Federal Complaints Officer finds that the school violated these statutory and regulatory provisions with regard to complainants' son.

- The complainants have alleged a violation of 34 CFR 300.121(d). The school has admitted a violation of 34 CFR 300.121(d)(2)(i)(B), but argues that no compensatory education is warranted because the deprivation to complainants' son was de minimis. The Federal Complaints Officer finds that the school, having admitted a violation of this regulatory provision, has not sufficiently demonstrated that the effect on complainants' son was de minimis. However, the Federal Complaints however makes no finding as to whether compensatory education is warranted. The Federal Complaints Officer finds that the school has violated 34 CFR 300.121(d)(2)(i) B, with regard to complainants' son. The Federal Complaints Officer also finds that the school has violated 34 CFR 300.520(a)(1)(ii), with regard to complainants' son.

- The Federal Complaints Officer finds insufficient evidence to demonstrate that the school has violated 34 CFR 300.344, 345, and 346, with regard to complainants' son.

A subsidiary issue in this Complaint is whether the complainants' request for an IEP meeting, made on April 21, 2000, which was a Friday, was inappropriately denied by the school. This

request and denial were made prior to the manifestation determination review which began on April 26, 2000, which was a Wednesday. Normally, if a school denies a parental request for an IEP meeting, the notice requirements of 34 CFR 300.503 and 504, which include reference to the due process hearing requirements of 34 CFR 300.507, should be followed by the school. See the comments to 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 sect. 4.02(1)(d). However, a manifestation determination review is a particular kind of IEP meeting. Nothing prevents IEP meetings from accomplishing multiple goals. The Federal Complaints Officer finds, on the facts of this Complaint, that the complainants were not denied an IEP meeting, because on April 26, 2000, six (6) calendar days and three (3) school days after their April 21, 2000 IEP meeting request, an IEP meeting was held, and the January 18, 2000 IEP issues which the complainants wanted to raise were raised by the complainants. Moreover, this meeting date and time was one of the dates and times suggested by the complainants in their letter of April 21, 2000 to a school employee. On the facts of this Complaint, the fact that the April 26, 2000 IEP meeting was also a manifestation determination review, did not prevent the participants, at that IEP meeting, from addressing the other concerns that the complainants wanted addressed.

- 20 USC 1415(K)(1)(B)(i) AND 34 CFR 300.520(b)

The manifestation determination review which began on April 26, 2000, was continued until May 12, 2000, a Friday, and the result was a determination that the behavior for which the school sought disciplinary removal of complainants' son from school, beyond the federal regulatory allowance of ten (10) days, was not a manifestation of his disability. It is undisputed that the complainants did not agree with this determination. To the best of the Federal Complaints Officer's knowledge, the complainants did not appeal this determination. The complainants' son's suspension was continued by the school for ten (10) days beginning May 26, 2000, and subsequently became an expulsion. It is undisputed that the complainants' son did not receive educational services to which he was entitled, for the period of time between May 15, 2000, and May 31, 2000, a period of twelve (12) school days. It is also undisputed that throughout these events, the school failed to conduct a functional behavioral assessment (FBA), and a behavioral intervention plan (BIP), as required by federal law. The school later scheduled an FBA for December 6, 2000.

The school argues, having admitted it did not comply with the law, that – "Although … not in technical compliance with IDEA's prescribed timeline, the delay has not resulted in any prejudice to (complainants' son) because he has not engaged in any further behavior of the type which would be addressed by a behavioral intervention plan. It is well established in the Tenth Circuit that any deficiency in the IEP process must result in prejudice to the student or his parents in order for an IDEA violation to be found." School's response at page seven (7). By "any further behavior", the school presumably means theft, which is the behavior for which complainants' son was disciplined.

The complainants argue that, as admitted by the school, the complainants' son got no education from May 15 to May 31, 2000, during which an adequately prepared FBA could have been used to begin to provide a BIP for complainants' son. Thus, as argued by the complainants, the failure to perform an FBA, and to implement a BIP, is a part of a denial of FAPE for complainants' son. To the school's argument that the complainants' son "…has not engaged in any further behavior of the type which would be addressed by a behavior intervention plan…", the complainants respond by asking – "How would we know this? Without the functional

assessment the District hasn't adequately identified the specific behavior. Without adequately identifying the behavior, how can the District determine if the behavior has reoccurred? Additionally, since (complainants' son) was out of school for 37 days (12 days in May, 2000, and 25 days in the fall of 2000), the school district personnel haven't had any opportunity to observe his behavior." Complainants' response to the school's response to their Complaint, at page two (2), parenthetical added. The complainants, therefore, presumably, see their son's behavioral problems as potentially something more involved than can be described by observing that he has, or has not, committed the act of theft.

The complainants go on to argue that:

> Conducting a functional assessment on December 6, 2000 is not an adequate remedy for failing to conduct an assessment in April, seven months ago. The results of the assessment were needed at the time (complainants' son) was being considered for expulsion. If the functional assessment had been done, timely and appropriately, its results would have been available for the second manifestation meeting. Those results, which would have specifically identified his behavior, may have influenced the outcome of that meeting. The District's failure to conduct the assessment clearly violates the IDEA and warrants providing (complainants' son) with compensatory services. Otherwise, school districts are free to disregard the specific timelines provided in the IDEA for completing the functional assessment; knowing their only penalty is conducting the assessment at an untimely later date. Id. at page 2 and 3.

The Federal Complaints Officer has found that the school, having admitted non-compliance with the relevant legal provisions, has not sufficiently demonstrated that there was no prejudice to complainants' son as a result of this non-compliance. However, the remedy of compensatory education, which the complainants seek, cannot be awarded to complainants as a "penalty" against the school as the complainants request. Whatever else may be the merits of complainants' argument, the Federal Complaints Officer cannot award compensatory education as a fine or punitive damages against the school – which is what the complainants are requesting when they ask the Federal Complaints Officer to impose a penalty against the school. If compensatory relief is to be ordered, it must be for the purpose of either reimbursing complainants for services they obtained for their son, to which he was entitled from the school, but the school did not provide – or, for the purpose of providing the complainants' son with services or resources now, in order to help him make up for what he has been unlawfully denied by the school. This requires not only that there have been a deprivation, but that the deprivation be amenable to the remedy of compensatory education.

- 34 CFR 300.121(d) AND 34 CFR 300.520(a)(1)(ii)

The argument between the complainants and the school, interdependent with the school's failure to timely conduct an FBA and create a BIP, is whether the complainants' son was denied the FAPE required by 34 CFR 300.121(d), for the period of time he was out of school and did not receive educational services. The school agrees that this was a violation of 34 CFR 300.121(d), for the twelve (12) days of school missed by complainants' son from May 15

through may 31, 2000. However, the school also argues that "… the failure to make services available for such a short period is a 'de minimis' violation of the IDEA for which compensatory education is not required." School's response at page seven (7). The complainants argue that the school's violation was not de minimis, whether that violation caused the complainants son to miss twelve (12) days of school services, or thirty-seven (37) days of school services as the complainants contend was the case. The complainants ask – "How many days can a district deprive a child of services before it really violates, rather that minimally violates, the IDEA? State Education Agencies have order compensatory services to make up for as few as 3 and 4 days." Complainants' response to the school's response at page 3. Footnote omitted.

The difference between the school and the complainants on the total number of days is due to the school's claim that on August 4, 2000, an IEP meeting was held, to which the complainants were invited, but which they did not attend, and that services to complainants son were made available beginning on August 14, 2000, but that the complainants did not make their son available to receive services until after twenty-five (25) more school days, and two more IEP meetings. The IEP meetings were held on September 8 and September 14, 2000. The complainants argue that they wanted the August 4, 2000 IEP meeting rescheduled so that their advocate and an expert could attend, but that the school refused to reschedule. The complainants further argue that the school did not provide them with sufficient assistance to find appropriate educational programs for their son, and that the school did not do what it needed to do to enable their son to use the services decided upon for their son at the August 4, 2000 IEP meeting, which the complainants did not attend.

There were evidently communications between the complainants and school representatives prior to the August 4, 2000 IEP meeting regarding rescheduling. However, whatever the number, and nature, and timing of those communications, it is also true that the first date the complainants proposed for the fall 2000 IEP meeting was Tuesday, August 22, which was six (6) days after the beginning of school on August 14, 2000. Thus, independent of the school's actions, scheduling problems of the complainants, and/or those they wanted to attend the IEP meeting, would have caused complainants' son to miss, at a minimum, six (6) out of the twenty-five (25) fall semester 2000 education days which complainants' son evidently did miss. However, that said, whether it is twelve (12) days, or thirty-seven (37) days, or thirty-one (31) days – they are all school days for which complainants' son did not receive educational services – no matter how the blame between the complainants and the school is allocated. However, additional factors, other than the amount of school time missed, for the purpose of making decisions about compensatory education, are what was the nature of the services that were not received during this school time, and what is the ability to compensate the complainants' son for services which were not received. Included in this decision must be a determination of the ability of complainants' son to now benefit, and, if so, to what extent, from any educational services that would now be offered, beyond those he is currently receiving, for the purpose of compensation.

On the facts of this Complaint, the Federal Complaints Officer has found that the school's violation was not de minimis. However, the Federal Complaints Officer is not making a finding as to whether compensatory education is an appropriate remedy.

- 34 CFR 300.344,345,346

The Federal Complaints Officer has found that there is insufficient evidence to conclude that the school violated 34 CFR 300.344, with regard to the disagreement between the complainants and the school over the scheduling of the August 4, 2000 IEP meeting. The Federal Complaints Officer also finds insufficient evidence to conclude that the school violated any of these regulatory provisions by refusing to consider information provided by the complainants' advocate(s) or expert(s), whether provided at IEP meetings or otherwise. The Federal Complaints Officer has no transcript or recording of the meetings between the complainants and the school. Even if he did, so long as the complainants and their advocates and/or experts were allowed to attend and speak at IEP meetings, and to present any documents they wanted to present, the threshold requirements of 34 CFR 300.344,345, and 346 were met. The Federal Complaints Officer finds that this was the case. Therefore, absent some specific ability by the complainants to demonstrate that what they or their attendees said, or otherwise presented through documents, was not listened to or read by the school, the school cannot be said to have violated these regulatory provisions. The Federal Complaints Officer finds that the complainants have made no such demonstration. The Federal Complaints Officer cannot enter the minds of IEP participants, in order to determine the degree to which those participants are considering the information presented to them. The duty of the school to consider all information presented at the IEP meeting does not mean, of course, that the school has to agree with all the information presented. Ultimately, when there is a disagreement between parents and a school over identification, evaluation, and placement issues, that the parents and the school cannot otherwise resolve, the due process hearing is the forum for resolving such issues. The complainants evidently chose not to appeal the manifestation determination review, and therefore not to bring their disagreement with the school over their son's problems, which resulted in his expulsion, which they also evidently did not challenge, before a due process hearing officer. If the complainants have continuing disagreements with the school over appropriate services and placement for their son, they will also continue to be entitled to a due process hearing to resolve those issues. The Federal Complaints Officer finds no violation by the school of 34 CFR 300.344, 345, and 346.

REMEDIES

Whether the total number of school days the complainants' son missed, for which compensatory education is an issue, is limited to twelve (12) days, as the school argues, or extends to thirty-seven (37) days, as the complainants argue, or is somewhere in between, the Federal Complaints Officer has no authority to order compensatory education as a penalty. For the Federal Complaints Officer to order compensatory education he must either order that the school reimburse complainants for special education services which were obtained by the complainants due to the school's failure to provide such services, or order that services be provided now which could compensate the complainants' son for any services he did not receive from the school, to which he was legally entitled, and which the school failed to provide. Reimbursement has not been requested in this Complaint, and the Federal Complaints Officer has insufficient information with which to determine whether there are any services which he could order the school to provide which could compensate complainants' son for any educational loss he experienced during the school days he missed. The complainants, however, are not precluded from requesting a due process hearing and requesting that the hearing officer, based upon appropriate findings, order the school to provide compensatory education for their son. Moreover, the Federal Complaints Officer can order the school to

provide the complainants with the opportunity for an IEP meeting for the specific purpose of addressing the issue of compensatory education.

1) If the complainants desire, the school, within thirty (30) days of the date of this Decision, or at such other time as is mutually agreeable to the complainants, shall convene an IEP meeting to determine whether the complainants' son needs compensatory education, and, if so, what form that compensatory education shall take. If the complainants are dissatisfied with the decision of the IEP team, they have a right to bring their disagreement with the school into a due process hearing. Moreover, nothing in this remedy provided by the Federal Complaints Officer precludes the complainants and the school from reaching an agreement about compensatory education without convening an IEP meeting, if the complainants and the school are able to do so.

2) The Director of Special Education, within thirty (30) days of the date of this Decision, shall submit a written statement to the Federal Complaints Officer that recognizes that the school violated 20 USC 1415(K)(1)(B)(ii), 34 CFR 300.520(b), 34 CFR 520(a)(1)(ii), and 34 CFR 300.121(d) with regard to complainants' son. The Federal Complaints Officer reserves the right to determine the sufficiency of this statement for the purpose of meeting the school's compliance with this remedy.

3) The Director of Special Education, within thirty (30) days of the date of this Decision, shall submit a written statement of assurance to the Federal Complaints Officer, sufficient to demonstrate the school's ability and intent to avoid future violations of the provisions which the Federal Complaints Officer has found the school to have violated in this Complaint. The Federal Complaints Officer reserves the right to determine the sufficiency of this statement of assurance for the purpose of the school's compliance with this remedy.

Should either party appeal this Decision, the remedies ordered by the Federal Complaints Officer shall nonetheless be implemented as he has ordered them, unless and until a stay is granted by the appellate tribunal.

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, December _____, 2000.

_____

Charles M. Masner, Esq.
Federal Complaints Officer