

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

Federal Complaint 2000:545
Adams County School District 50

Decision

INTRODUCTION

This Complaint letter was dated November 17, 2000, and received by the Federal Complaints Officer on November 21, 2000. The school's response was dated and received on December 6, 2000. The complainant's response to the school's response to her Complaint was dated and received by fax on December 14, 2000, with the original received by regular mail on December 19, 2000. The Federal Complaints Officer subsequently obtained from the school the starting time and ending time for the school day at complainant's son's elementary school, as well as how school day time was divided according to activity. The Federal Complaints Officer also obtained a copy of the school's 2000-2001 calendar, from the school's web page, and, in addition, from the school, the Federal Complaints Officer obtained the starting hourly pay for an instructional assistant employed by the school.

COMPLAINANT'S ALLEGATION

The complainant alleged that her son's individualized education program (IEP) required that he be in the general education classroom "to the fullest extent that he is able", and that he have 28.25 hours of direct support in the general education classroom, and 2.00 hours of support outside of the general education classroom. The complainant alleged that these were IEP required provisions that were to begin on August 23, 2000, but that the 28.25 hours in the general education classroom had not been implemented. The complainant alleged that, at most, the amount of time her son spent each day in the general education classroom was two (2) hours, and that on some days it could be as little as fifteen (15) minutes. As a result of these circumstances, the complainant alleged that her son was not being educated in the least restrictive environment (LRE). The specific provisions for LRE in the Individuals with Disabilities in Education Act (IDEA) regulations are found in the regulations beginning at 34 CFR 300.550. LRE is a necessary component of a free appropriate public education (FAPE). See generally 34 CFR 300.550; 34 CFR 300.13, 34 CFR 300.121, 34 CFR 300.300, and the IEP provisions beginning at 34 CFR 300.340. See also 1 CCR 1-308 – R- 5.00/PROVISION OF SERVICES.

SCHOOL'S RESPONSE

The school denied the complainant's allegation.

FINDINGS AND DISCUSSION

The Federal Complaints Officer's investigation determined, as confirmed by a telephone call to the principal of complainant's son's elementary school, that the school day at complainant's son's elementary school begins at 8:15 AM, and ends at 2:45 PM. According to the arithmetic of the Federal Complaints Officer, this is six (6) and one half (1/2) hours per day, for a total of thirty-two (thirty-two) and one half (1/2) hours per five day school week. The principal of complainant's son's elementary school also stated to the Federal Complaints Officer that on every normal school day there is a fifteen (15) minute recess in the morning, a forty (40) minute combined luncheon and recess, and another forty (40) minutes each day devoted to either physical education or music, depending on the particular student's schedule.

Nonacademic settings, as defined by 34 CFR 300.553, include meals and recess. 34 CFR 300.306 also provides examples of nonacademic services. Music is not one of those examples. Physical education is given separate regulatory provision at 34 CFR 300.307. Physical education is not defined as either academic or nonacademic by this regulation. Absent binding authority to the contrary, and neither the complainant or the school has cited the Federal Complaints Officer to any such authority, the Federal Complaints Officer finds that music and physical education are not nonacademic subjects as defined by the IDEA regulations. Having made this finding, the arithmetic of the Federal Complaints Officer leads him to conclude that there are five (5) hours and thirty-five (35) minutes available in each school day at complainant's son's elementary school, at a minimum, for the purpose of academic activity, and music and physical education. This result is reached by subtracting fifty-five (55) minutes (fifteen daily morning recess minutes plus forty daily luncheon and recess minutes), from six (6) and one half (1/2) hours, which is the total amount of time in the school day at complainant's son's elementary school. Five (5) hours and thirty-five (35) school day minutes, taken times five school week days, equals, according to the arithmetic of the Federal Complaints Officer, twenty-seven (27) hours and fifty-five (55) minutes. This is twenty (20) minutes short of the 28.25 hours listed on the complainant's son's IEP, dated March 21, 2000. The Federal Complaints Officer cannot explain this discrepancy, but he is proceeding with the use of the 28.25 figure, since that is the figure used by the IEP team. This figure, 28.25, divided by five (5) school week days, yields a slightly higher figure of five (five) hours and thirty-nine (39) minutes available for academic activity, music and physical education, each school day.

Nowhere on the complainant's son's IEP does it indicate that these 28.25 hours were to include recess or lunch. The complainant's son's IEP does indicate that music and physical education were contemplated to be part of the general education curriculum for complainant's son. Absent specific language in the IEP to the contrary, the Federal Complaint Officer finds that the complainant's son was supposed to be in the general education classroom for 28.25 hours per five (5) day school week, and that this computation included music and physical education, but that it did not include recess or lunch. It is unclear to the Federal Complaints Officer when, where, and how the two (2) hours of direct outside general classroom services were intended to be provided to complainant's son, as required by complainant's son's IEP. However, these hours are treated separately from the 28.25 hours of direct in general classroom hours on the complainant's son's IEP, and the Federal Complaints Officer therefore treats them as separate for the purpose of deciding this Complaint.

In its response to the complainant's Complaint, the school cites the general statement on the complainant's son's IEP that the primary institutional setting is to be outside the general classroom greater than sixty (60) per cent of the time. In her response to the school's response

to her Complaint, to which the school was not provided an opportunity to respond, the complainant states that this greater than sixty (60) per cent statement was a mistake, a carry over from the previous year's IEP which was supposed to be changed, but wasn't. In any case, the Federal Complaints Officer finds the more specific information, most specifically the 28.25 hours required for direct in general classroom services, on the special education and related services page of complainant's son's IEP, to be controlling. If the drafters of the IEP wanted a computation result which indicated greater than sixty (60) per cent of the time outside of the general education classroom, they should have taken greater care with their computing. The Federal Complaints Officer does not find it credible that the drafters of the IEP intended for complainant's son to be out of the general education curriculum greater than sixty (60) per cent of the time, given the information on the special education and related services page of complainant's son's IEP.

The school states in its response to the complainant's Complaint, regarding the complainant's son's IEP, that:

This plan provides substantial time in the regular classroom so that, as (complainant's son's) time is increased, there will not be a need to adjust the IEP. As specified in the service delivery statement, the intent is to have him out in the general classroom "to the fullest extent that he is able".

The Federal Complaints Officer reads the complainant's son's IEP to have defined the "to the fullest extent that he is able" as 28.25 hours per five (5) day school week. There is no language that the Federal Complaints Officer finds in complainant's son's IEP that leads the Federal Complaints Officer to conclude that it was the intent of the drafters that this 28.25 hours was put in complainant's son's IEP as a goal to be achieved at some later date, as the school's response implies to the Federal Complaints Officer, so that there would not later be a need to "adjust the IEP". Services stated on an IEP are to be provided in the present, not prospectively. Subsequent IEP meetings are available to make any necessary adjustments. In the case of complainant's son, subsequent IEP meetings on October 17, 2000, and December 5, 2000, evidently did not result in substantive change to the LRE requirements for complainant's son.

In its response to the complainant's Complaint, the school provided a chart and a graph to demonstrate the increase in minutes of time the complainant's son has spent with general education peers. The chart and the graph indicate minutes of time between August 23, 2000 and November 28, 2000, although general education time, other than music, physical education, and what the school identified as library, and book buddies, was not included until after the October 17, 2000 IEP meeting. The time this graph and chart purports to record includes recess and luncheon time. The Federal Complaints Officer does not dispute that it is probably good for the complainant's son to spend time with his non-disabled peers during recess and lunch. However, as analyzed by the Federal Complaints Officer, time spent by complainant's son with non-disabled peers during recess and lunch is not a part of the general education time that is at dispute in this Complaint. Therefore, to the extent that the chart and graph includes recess and lunchtime, such time is irrelevant to this investigation of the Federal Complaints Officer and to this Decision. The extent to which the school's chart and graph may otherwise be relevant, and accurate, as to the issue of how much of the 28.25 hours per week of direct in general classroom instruction complainant's son has been receiving, will be addressed by the Federal Complaints Officer in the Remedies section of this Decision.

The Federal Complaints Officer finds that the school has violated the complainant's son's right to a free appropriate public education in the least restrictive environment. Specifically, the Federal Complaints Officer finds that the school has violated 34 CFR 300.13, which references the IEP provisions in the regulations; 1 CCR-301-8-R-5.00, 5.02, and 5.04; 34 CFR 550; 34 CFR 300.551; and, 34 CFR 300.552, by failing to provide the complainant's son with the full 28.25 hours per week of direct in general classroom instruction that complainant's son's IEP requires. This finding is more fully explained in the Remedies section of this Decision.

REMEDIES

COMPENSATORY EDUCATION

The Federal Complaints Officer has reviewed the chart and graph information supplied by the school. He has totaled all the minutes, exclusive of lunch and recess, and divided that number, 3,035 minutes, by the total number of school days covered by the chart and graph, 54 school days, which produces a division result, rounded to the nearest tenth, of 56.2 minutes per day. This number of minutes, times five school week days, results in a product of 281 minutes, rounded off to the nearest whole number. This number of minutes, divided by 60, the number of minutes in an hour, produces a result of 4.68 hours, rounded to the nearest hundredth. For purposes of determining the number of direct in general classroom hours for which complainant's son is entitled to compensatory education, the Federal Complaints Officer is using the school's chart and graph as a sufficient representative sample of the amount of actual time that complainant's son has been spending in the general education program during the fall semester of 2000. For ease of computation, the Federal Complaints Officer is rounding these computations off to the next highest whole number. In other words, the Federal Complaints Officer finds that, during the fall semester of 2000, the complainant's son received an average of one (1) hour of direct in general classroom instruction per school day, or five (5) hours of direct in general classroom instruction per five day school week. Thus, the Federal Complaints Officer is also finding that the complainant's son did not receive 23.25 hours per five (5) day school week of the 28.25 hours which his IEP required, or, computed daily, out of the five (5) hours and thirty-nine (39) minutes per school day of direct in general classroom instruction that he was supposed to be receiving, the complainant's son did not receive four (4) hours and thirty-nine (39) minutes of the instruction he was supposed to receive.

The Federal Complaints Officer has also reviewed the complainant's son's elementary school calendar for the fall of 2000. Having done so, the Federal Complaints Officer arrived at a total of eighty-two (82) days, plus three and one half hours, that complainant's son's elementary school was open for instruction during the fall of 2000. For ease of computation, the Federal Complaints Officer has dropped the three and one half hours, and, multiplying eighty-two (82) times five (5) hours and thirty-nine (39) minutes, the amount of direct in general classroom instruction which the complainant's son was entitled to receive every school day during the fall semester of 2000, the Federal Complaints Officer arrives at a total 463.3 hours, rounded to the nearest tenth of an hour. This is the total number of hours of direct in general classroom instruction that the complainant's son was entitled to receive during the fall semester 2000. Using the school's chart and graph, and rounding computations off to the next highest number, the Federal Complaints Officer has found that the actual number of hours per school day of direct in general classroom instruction which complainant's son received during the fall semester 2000, was one (1) hour per day. One (1) hour per day, times the eighty-two (82) school days in the fall semester 2000 at complainant's son's elementary school, is eighty-two

(82) hours. Thus, eighty-two (82) hours is the actual number of hours of direct in general classroom instruction which the Federal Complaints Officer finds that complainant's son received during the fall semester 2000. When these eighty-two (82) hours are subtracted from 463.3 hours of direct in general classroom instruction that complainant's son was entitled to receive, the result is 381.3 hours. Thus, 381.3 hours of direct in general classroom instruction is the number of hours of this instruction which the Federal Complaints Officer finds complainant's son was entitled to receive during the fall semester 2000, but did not receive. Three hundred and eighty-one (381) point three tenth hours (381.3) of direct in general classroom instruction is therefore the number of hours for which complainant's son is entitled to receive compensation.

Having done the math, the problem confronting the Federal Complaints Officer is how to compensate complainant's son for the IEP required services that he did not receive. Its not like 381.3 required hours of say, speech therapy, which, if not received, could be compensated by ordering the school to provide 381.3 hours of speech therapy, or by requiring the school to provide the complainant with the resources to obtain such services. The Federal Complaints Officer cannot now order the school to provide the 381.3 hours of direct in general classroom instruction that it has not provided. This is because, presumably, the complainant's son would not experience attending direct in general classroom instruction for 381.3 hours, on top of the 28.25 hours per week which he is already supposed to be receiving, as compensation, even if it were possible to round up all his classmates to help him achieve this goal. Also, unlike an IEP required, but not provided, service, like speech therapy, the complainant cannot purchase direct in general classroom instruction, unless her son enrolls in a private school, in which case her son would not be entitled to a free appropriate public education, unless the private school placement were legally ordered or agreed upon for the purpose of meeting her son's disability needs. If the latter were the case, the placement, while it might be appropriate for a particular student, would not provide an opportunity for the complainant's son to receive direct in general classroom instruction with non-disabled peers. Nor can in classroom instructional services be purchased by the complainant, or any other parent, to be used in the public school with a student, absent the school's agreement, and this would be true even if the parent were willing to pay for these services, and therefore was not seeking reimbursement for the services, because the school has the right, and the responsibility, to control who it employs to work with, and associate with, the public school students whom it serves in public school settings. This is an instance where, to the best of the Federal Complaints Officer's knowledge, if there is to be any compensatory relief, it can only be in the form of a monetary reimbursement, which the complainant could then decide how to best use to compensate her son for the IEP required direct in general classroom instruction which he did not receive from the school. The Federal Complaints Officer does not see how, on the facts of this Complaint, there can be appropriate relief for complainant's son, for that to which he was legally entitled, but not adequately provided by the school, unless this relief includes compensatory relief in the form of monetary reimbursement. The IDEA regulations at 34 CFR 300.660(b)(1) gives the Federal Complaints Officer the authority to award monetary reimbursement as a compensatory relief remedy.

The complainant's son's IEP states that he will receive "special education support 100% of his day." The conclusion that the Federal Complaints Officer has reached from the evidence in the record before him is that the complainant's son did not receive the full number of hours of direct in general classroom instruction to which he was entitled, because there was not enough special education support available to achieve this goal. If this were not the correct conclusion, the Federal Complaints Officer presumes that the complainant's son would have received all of the direct in general classroom instruction to which he has been entitled, and there would, therefore, be no disagreement between the complainant and the school and this Complaint

would not have been filed. Since this support is what the school did not provide, which should have been provided in order for the complainant's son to receive the direct in general classroom instruction to which he was entitled by his IEP, it is the monetary value placed upon this support by the school, which the Federal Complaints Officer has determined, at a minimum, it is appropriate to use to determine the compensatory reimbursement to which the complainant's son is entitled. The most economical way in which this support could have been sufficiently provided, to the best of the Federal Complaints Officer's knowledge, is through the use of an instructional assistant. The evidentiary record before the Federal Complaints Officer indicates to him that the use of such an assistant has been discussed between the complainant and the school. An instructional assistant is currently paid by the school at the beginning rate of \$9.20 per hour, according to the school. This amount, times 381.3, the number of IEP required hours of direct in general classroom instruction to which the complainant's son was entitled, but did not receive, during the fall of 2000, equals \$3,507.96 . This is the amount of compensatory reimbursement that the Federal Complaints Officer determines the complainant, on behalf of her son, is entitled to receive, for the fall semester 2000. This is the amount of compensatory reimbursement that the Federal Complaints Officer orders the school to pay the complainant, on behalf of her son, for the fall semester 2000. The school shall pay this amount to the complainant within thirty (30) days of the date of this Decision. Ongoing or future allegations of violations by the complainant are entitled to be made by the complainant in future Complaint(s).

The Federal Complaints Officer recognizes that complainant's son was probably receiving some instruction from the school during the time when he was not in the general classroom. However, whatever the nature and extent of this instruction, it was not the instruction required by complainant's son's IEP. Therefore, the Federal Complaints Officer does not believe the compensatory reimbursement to which the complainant is entitled, on behalf of her son, should be reduced because of any educational services the school was providing during the time it was supposed to be providing IEP required services. The Federal Complaints Officer also recognizes that there may have been some school days missed by complainant's son, due to illness or for other reasons, which might slightly affect the Federal Complaints Officer's computation of the amount of compensatory reimbursement. However, nothing in the record before him indicates that any such periods of time were extensive. Also, the Federal Complaints Officer believes that any skewing of the computation in the complainant's favor as a result of not taking into account such time periods, if any, is at least somewhat offset by the rounding off in favor of the school which was done by the Federal Complaints Officer when he computed the time of direct in classroom general instruction which the school did provide. Finally, the Federal Complaints Officer is also aware that it might be possible that the school wanted to provide complainant's son an instructional assistant, but that it could not do so because it could not hire anyone to perform the job. Even if this were found to be true, it would not change the fact that IEP required services to which the complainant's son was entitled were not provided to him by the school. The IDEA statute and implementing regulations make no provision for the school to avoid providing IEP required services because adequate staff is not available, whether the reason for this lack is how the school utilizes the staff available to it, or because necessary staff cannot be hired at the prescribed amount set by the school. The school agreed to provide services as stated in complainant's son's IEP. If the school wants to change that agreement, it has the authority to convene an IEP meeting to do so. The complainant would, of course, have the right to a hearing to contest any outcome of such an IEP meeting to which she did not agree.

RECOGNITION OF VIOLATIONS AND STATEMENT OF ASSURANCE

Within thirty (30) days of the date of this Decision, the Director of Special Education shall submit to the Federal Complaints Officer a statement recognizing that the school has violated complainant's son's right to a free appropriate education in the least restrictive environment, which includes violating the regulatory provisions as referenced by the Federal Complaints Officer in this Decision. The Director of Special Education shall also submit, within thirty (30) days of the date of this Decision, a statement of assurance satisfactory to demonstrate the school's intent and ability to avoid further violations.

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, January _____, 2001.

Charles M. Masner, Esq.
Federal Complaints Officer