

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

Federal Complaint 2001:517

MOUNTAIN BOCES

Decision

INTRODUCTION

This Complaint letter was dated April 6, 2001, and received by the Federal Complaints Officer, by fax, on April 13, 2001. However, this Complaint letter was not signed, contrary to the requirement of the Colorado Federal Complaint Procedure. A signed copy, dated April 20, 2001, was subsequently received by the Federal Complaints Officer on April 26, 2001. April 26, 2001, is therefore the date of filing of this Complaint. The school's response was dated April 26, 2001, and received by the Federal Complaints Officer on April 30, 2001. The complainants' response to the school's response to their Complaint was dated May 4, 2001, and received by the Federal Complaints Officer on May 8, 2001. The Federal Complaints Officer then closed the record.

COMPLAINANTS' ALLEGATIONS

- 1) Their daughter's September 29, 2000 Individualized Education Program (IEP) was not fully followed on December 13, and 14 of 2000. In the words of the complainants – "On December 13 and 14, the 2 learn to ski days, the plan was not fully followed by the special education teacher, she chose to go snowboarding instead." Complainants' Complaint letter, dated April 6, 2001, at page one (1). And – "The teacher's log (document #2) indicates she provided 2 hours of service for each of the two days, while the plan developed by the IEP team indicates 3 hours and 15 minutes each day." Id.
- 2) Their daughter's September 29, 2000 IEP was violated on November 2 and 3 of 2000. In the words of the complainants – "On 11/2/00 and 11/3/00 (complainants' daughter) arrived at school at 8:45 for her scheduled hour of service and the special education teacher was not available to deliver the services...". Complainants' Complaint letter, dated April 6, 2001, at page one (1). The complainants also allege that these direct outside class services were not provided on October 5, 16, 19, 26, and 27, 2000; nor,

the complainants allege, were they provided on November 1, 7, and 13 of 2000. The complainants also allege that on October 30, 2000, their daughter only received forty (40) minutes of this service, instead of a full hour. In addition, the complainants allege that one (1) hour of direct inside class service was not provided during the week of December 4, 2000, and December 11, 2000. Furthermore, the complainants allege that forty (40) minutes of this service was not provided during the week of November 27, 2000, and twenty (20) minutes was not provided during the week of October 30, 2000. In sum – the complainants allege that nine (9) hours and twenty (20) minutes of direct outside of classroom service was not provided for their daughter, in violation of their daughter's September 29, 2000 IEP. In sum – the complainants allege that three (3) hours of direct inside class service was not provided for daughter, in violation of their daughter's September 29, 2000 IEP. These sums total twelve (12) hours and twenty (20) minutes of service, covering a time period beginning on September 29, 2000 – the date of the relevant IEP creation – and December 11, 2000 – the date of the complainants last alleged violation of this type. The Federal Complaints Officer is uncertain whether the alleged missed service on October 30, 2000 is for both direct outside and inside class service, or whether the complainants have mistakenly made a duplicative allegation. See complainants' Complaint letter, dated April 6, 2001, at page two (2).

- 3) Their daughter's March 2, 2001 IEP – the most recent IEP which had been created for their daughter at the time of the filing of this Complaint – with a start date of April 2, 2001 – requires four (4) hours per week of special education teacher services and one (1) hour per week of speech therapy services – but the school withheld these services for the first week and applied unacceptable conditions for providing them in the future.
- 4) The school has demanded that the complainants sign or agree to a "Conditions for Special Education Services" agreement, and the complainants allege this is a violation of the Individuals with Disabilities Education Act (IDEA).
- 5) Although not specifically cited by the complainants, they alleged a violation of 34 CFR 300.347 of the IDEA – Content of IEP – specifically, 34 CFR 300.347(a)(7), which states that a portion of the content of a student's IEP must contain information as follows: "(7) A statement of – (i) How the child's progress toward the annual goals described in paragraph (a)(2) of this section will be measured; and (ii) How the child's parents will be regularly informed (through such means as periodic report cards), at least as often as parents are informed of their nondisabled children's progress, of- (A) Their child's progress toward the annual goals; and (B) The extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year." Id. The complainants allege that they have not been provided with sufficient information to determine "... the measured progress for each objective for each quarter" for their daughter. Complainants' Complaint letter, dated April 6, 2001, page three (3).
- 6) The school changed their daughter's March 2, 2001 IEP without contacting or notifying them. In the words of the complainants – "The IEP team did not contact the parents after the meeting to notify they (sic) that there needed to be a change, they simply changed the IEP. We feel this shows that we as parents were not equal partners of the IEP team." Complainants' Complaint letter, dated April 6, 2001, at page three (3).
- 7) Their daughter's September 29, 2000 IEP provisions for homework were not appropriately implemented by the school. According to the complainants, their daughter's September 29, 2000 IEP provides that she will do homework during the last thirty (30) minutes of the school day. In the words of the complainants – "The District failed to implement this accommodation in (complainants' daughter's) IEP on a regular basis." Complainants' Complaint letter, dated April 6, 2001, at page three (3).

SCHOOL'S RESPONSES

- 1) The school responded that one (1) hour and forty-five (45) minutes of special education service was provided on one day (8:45-10:30), and two (2) hours and fifteen (15) minutes was provided on the second day (8:45-11:00) – by the special education teacher. The school further states that – “Additional services from 10:30 and 11:00 to 12:00 were provided by the 4th grade regular education teacher, with materials provided by the special education teacher in the regular education environment e.g. library, computer lab., etc. The IEP only stated one hour of special education teacher service during this time period.” School’s response at page two (2).
- 2) The school responded that on November 2, 2000, the special education teacher and the paraprofessional were sick and therefore they did not provide services to complainants’ daughter. The school did not respond to the complainants’ allegation that no services were provided on November 3, 2000. The school responded that no services were provided to complainants’ daughter on October 5 and 19 of 2000, because she was absent from school. The school responded that services were provided on October 16, 26, and 27 of 2000, as well as on November 7 and 13 of 2000. The school responded that on November 1 of 2000 the special education teacher was sick, and that services were provided by the paraprofessional. (The complainants disputed this in their response to the school’s response to their Complaint, by claiming that the special education teacher was absent on November 2 and 3, and that the special education teacher, not the paraprofessional, provided services on November 1, 2000. Id. at page one (1).) The school responded that on October 30, 2000, complainants’ daughter was tardy and missed twenty (20) minutes of services. The school responded that as for the complainants’ allegations of no direct in class services of one hour per week – referenced by the complainants as for the weeks of December 4 and December 11, 2000 – that these services were provided
- 3) The school responded that complainants’ daughter has been home schooled since January 24, 2001, as requested by complainants’ letter of the same date. The school responded that dual enrollment was discussed at the March 2, 2001 IEP meeting, and that the provision of four (4) hours per week of special education teacher services and one (1) hour per week of speech therapy services were included in the March 2, 2001 IEP. The school states that these services were to begin on April 3, 2001, and that no services were withheld.
- 4) The school responded that the complainants were not required to sign a “Conditions for Dual Enrollment” agreement in order for their daughter to receive special education services. The school responded that these services were to be provided whether or not the complainants signed this document. The school stated – “These conditions were not part of the IEP but rather stipulations that the principal could make, based on recommendation from the Superintendent.” School’s response at page three (3). The school responded that the complainants chose not to have their daughter come to school. Id.
- 5) The school responded, as excerpted by the Federal Complaints Officer that “...(g)oals do not need to be written in measureable (sic) terms.” School’s response at page four (4). The school also responded, as excerpted by the Federal Complaints Officer, that – “The objectives should, and are, written in measureable (sic) terms.” Id. The school

further responded, as excerpted by the Federal Complaints Officer, that – “The Mountain BOCES, specifically the ...School District, uses the State IEP forms. The forms are designed to state the progress of each objective on a quarterly basis, using the references; not yet evident, not yet proficient, proficient or advanced and the measurement (sic) of progress towards the attainment of each objective ... (Complainants’ daughter’s) IEP followed the State IEP process...In addition, a conference was held around Nov. 1 with the classroom teacher, the special education teacher and (student’s mother/complainant) to discuss (complainants’ daughter’s) IEP progress...The special education teacher offered to review attainment of IEP objectives. (Student’s mother/complainant) stated that additional information regarding IEP progress was not necessary at that time. It is also important to note that parents can request a meeting at any time to schedule a conference to discuss IEP goal/objective progress. No request was ever made by the (complainants). “ Id. The Federal Complaints Officer treats the school’s response as a denial that it violated 34 CFR 300.347 – Content of IEP- specifically, 34 CFR 300.347(a)(7).

- 6) The school denies this allegation by responding that the alleged change – a description of current education functioning as the Six Trait Writing Assessment – was made at the March 2, 2001 IEP meeting which the complainants attended. According to the school – “At the end of the IEP meeting, (the special education director) asked (the complainants) if they would like a copy of the ‘draft’ copy of the IEP from the meeting, pending putting the data on the computerized IEP. They stated that they had their own notes and did not want (a) working draft copy, which had this addition...” School’s response at page four (4).
- 7) The school denies this allegation and responds that – “(Complainants’ daughter) has received 30 minutes at the end of each day, per the Accommodations/Modifications Section of the IEP, to complete homework according to her teachers.” School’s response at page four (4).

FINDINGS AND DISCUSSION

- 1) The September 29, 2000 IEP for complainants’ daughter, which was the governing IEP on December 13 and 14, 2000, indicates one (1) hour per week of direct inside class special education services and five (5) hours per week of direct outside class special education services. Neither the complainants nor the school indicated specifically whether the hours of service in dispute were inside or outside class. However, the Federal Complaints Officer interprets the complainants to be stating that their daughter got two (2) hours of special education services on December 13, 2000, and two (2) hours of special education services on December 14, 2000, while the school states these amounts of time were one (1) hour and forty-five (45) minutes, and two (2) hours and fifteen (15) minutes, respectively - with additional services on these days provided by a general education teacher, with materials provided by the special education teacher. Whether the complainants’ calculation of the amount of time spent by the special education teacher with their daughter on December 13 and 14, 2000 is correct, or the school’s calculation is correct, is irrelevant. Both calculations exceed the one (1) hour per day that is required, if the services are interpreted to be direct outside of class. If the services were direct inside class only, twenty (20) minutes per day would be required, and, obviously, the calculations by either the complainants or the school

exceed this amount. This is also assuming that the direct inside of class and direct outside of class service time would be distributed evenly over a five (5) day week – a distribution not expressly required by the IEP. The Federal Complaints Officer finds no violation by the school. The handwritten note, submitted by the complainants with their original Complaint letter, which they labeled document #1, even to the extent it were to be determined to be inconsistent with the September 29, 2000 IEP, and the Federal Complaints Officer makes no finding that this is the case, is not a part of the September 29, 2000 IEP, and therefore is not controlling and does not supplant the service provision requirements of the September 29, 2000 IEP. The Federal Complaints Officer does not find that the school failed to adequately accommodate the complainants' daughter on December 13 and 14, 2000. If the complainants wish to further dispute the school on this issue, they are entitled to a due process hearing to do so.

- 2) The determination of how much services have to be missed, and under what circumstances, before a school should be held legally obligated to compensate a student for those services, is a determination which must be made on a case-by-case basis. On the facts of this Complaint, the Federal Complaints Officer finds no violation by the school.

On November 1, 2000, services were provided either by the special education teacher or by the paraprofessional. Assuming that no services were provided on November 2 or 3, 2000, in this case due to the illness of staff, or for other reason, the Federal Complaints Officer does not find that this was a deprivation necessitating compensatory education and amounting to a denial of FAPE. If the complainants want to pursue this issue with the school, they can request a due process hearing to do so.

The school claims that complainants' daughter was absent on October 5, and 19 of 2000. The complainants question whether this was true for one, or both, dates. The Federal Complaints Officer finds the school more credible on this issue than the complainants. If the complainants wish to further pursue this issue with the school, they can request a due process hearing to do so.

The school claims that services were provided on October 16, 26, and 27 of 2000, but that this service provision was not documented on the communication log with the complainants. The school also claims that in class direct services were provided on November 7 and 13 of 2000, but that this service provision was not documented on the communication log with the complainants. The Federal Complaints Officer does not have authority to put persons, including school staff, under oath and have them swear that services were provided. Even if he did have such authority, he presumes, given the school's response to this Complaint, that the school staff would swear that the required services were provided. The only way to challenge such sworn testimony would be through cross-examination, which, again, is not within the authority of the Federal Complaints Officer to perform. While the complainants' daughter's IEP does provide for a daily communication log, the Federal Complaints Officer does not find that, on the facts of this Complaint, the lack of entries in such a log should outweigh representations by school staff that services were provided. If the complainants wish to further pursue this issue with the school, they may request a due process hearing to do so.

As for the service dispute on October 30, 2000, the complainants and the school are at least in agreement that complainants' daughter got at least forty (40) minutes of service

on that date. The school says she was tardy the other twenty (20) minutes. The complainants say even if their daughter was tardy, the special education teacher had made other arrangements for the service to be provided at a different time on this date, and that these arrangements were not fulfilled. Whoever has the better of the argument here, the Federal Complaints Officer does not find, on the facts of this Complaint, that the missed service on October 30, 2000, necessitates compensatory education, or amounts to a denial of FAPE for complainants' daughter.

- 3) The Federal Complaints Officer does not find that the school has unlawfully withheld any special education services from complainants' daughter.
- 4) By letter dated January 24, 2001, the complainants informed the school of their intention that their daughter be home schooled. They also indicated an understanding that a determination would be made as to whether their daughter would continue to need and receive special education services from the school. An IEP meeting was held for this purpose, with an IEP created, on March 2, 2001. Pursuant to this IEP, special education services, provided by the school, were to begin, for complainants' daughter, on April 2, 2001. See complainants' daughter's IEP of March 2, 2001. Complainants' daughter was to be part time enrolled with the school for the purpose of receiving these services. On the record before him, the Federal Complaints Officer finds the school was under no obligation to provide complainants' daughter with special education services from January 24, 2001 until April 2, 2001.

Sometime during, or before, the March 2, 2001 IEP meeting, the school provided the complainants with a document entitled – "Conditions for Dual Enrollment Services Upon (Complainants' Daughter's) Return" – School's Attachment D. A copy of this document was also submitted by the complainants – without the hand made alterations on the document copy submitted by the school. The complainants claim that they were required to sign or agree to the conditions in this document, in order to obtain special education services from the school, pursuant to the March 2, 2001 IEP. The school stated that the complainants' signatures were not required, but that the complainants were asked to comply with the conditions – as indicated by handwritten comments on the document copy submitted by the school – "The (Complainants) are asked to comply with these requests – signatures are optional". Id. The conditions on this document are:

1. Service time will be daily Monday to Friday at: _____ to _____. (The school added a handwritten comment that stated – "please see attached, agreed upon, schedule".)
2. Parent will drop (Complainants' Daughter) off at front office and the school secretary will then send (Complainants' Daughter) up to the Resource room at service time. (Complainants' Daughter) will then be sent back to the office at the conclusion of service time for pick up.
3. Progress for hour of service will be reported to parents through daily progress sheets which will be kept in folder.
4. All communication written/verbal with SPED team will be done through school principal, (Principal's Name).
5. If in case of absence from school, (Complainants' Daughter's) parents will need to phone the school between 8:00am and 9:00am. In turn if SPED teacher is absent then the school will phone parents between 8:00am and 9:00am to inform them of the absence and that a T.A. will be the substitute service provider for that day.

There is nothing in the IDEA, of which the Federal Complaints Officer is aware, that prohibits a school from imposing conditions upon parents for special education service provision, so long as those conditions do not violate the IDEA. Nor is there anything in the IDEA, or Colorado law, to the best of the Federal Complaints Officer's knowledge, which requires a public school in Colorado to accept a student for part time enrollment.

However, once a public school agrees to provide special education services, it must do so, obviously, in a way that does not violate IDEA, or any other applicable law. Notwithstanding the Federal Complaints Officer's finding that nothing in the law prohibits a school from imposing conditions not inconsistent with IDEA – it is also true that the authority of the IEP team under IDEA is so broad that, arguably, any condition imposed by the school, which is not a product of an appropriate IEP process, is subject to question as to its validity. And, of course, even conditions that are made a part of an IEP would be subject to question either in a Federal Complaint, or due process hearing, as appropriate. However, the issue before the Federal Complaints Officer to resolve in this Complaint is whether the school can impose the conditions indicated , as requirements for part time public school enrollment in the state of Colorado, within legal circumstances which, to the best of the Federal Complaints Officer's knowledge, grant no legal right to part time enrollment in the state of Colorado. It is the finding of the Federal Complaints Officer that the answer to this question is, as a practical matter, both yes and no.

Condition number four (4) would violate IDEA per se, if it were interpreted and applied so as to restrict the complainants' participation in IEP meetings. The Federal Complaints Officer finds no such interpretation or application by the school. Nor does the Federal Complaints Officer find any such violations in the other conditions which the school has sought to require of the complainants before their daughter can receive special education services, as a dually enrolled part time student, from the school. The question remains as to whether the school can base its decision about whether to provide special education services to complainants' daughter, as a part time dually enrolled student, on whether the complainants comply with the conditions the school seeks to impose. As a practical matter, since to the best of the Federal Complaints Officer's knowledge there is no right to part time school enrollment in Colorado, the answer to this question is yes – so long as the school does not impose conditions which are unlawfully discriminatory in their content or application. (Allegations of unlawful discrimination are not within the jurisdiction of the Federal Complaints Officer to decide.) However, once a school accepts a student for part time enrollment, it is the finding of the Federal Complaints Officer that, for the governing period of the IEP, the IEP team has final authority over conditions for service provision for the student, subject, of course, to any other law that would take precedence. Therefore, the parent would always have the right, through the IEP process, for the governing period of the IEP, to seek to change any conditions for special education service provision for their son or daughter – including filing a Federal Complaint, or requesting a due process hearing, as appropriate, for alleged violations of IDEA and/or failure to reach IEP consensus and agreement with the school. However, it is also true that, to the best of the Federal Complaints Officer's knowledge, there would be no ongoing obligation on the school to continue to provide a student with part time enrollment for special education services, beyond the governing period of the IEP, any more than there was any obligation to begin such services. Therefore, so long as the school did not terminate special education enrollment in a way that was unlawfully discriminatory, or determined to be violative of any rights of the parents or student under IDEA to continue to receive services for the governing period of the IEP, the school could end the part time enrollment of the special education student.

The complainants contend that they have not made their daughter available for special education services since April 2, 2001, the date such services were scheduled to begin, because of their objection to the conditions presented to them by the school. The

school, independent of the issue of the conditions, has taken the position that the complainants need to sign enrollment forms for the purpose of dual enrollment part time special education service provision, and that complainants have refused to do so. The complainants argue that, subsequent to their letter of January 24, 2001, notifying the school about home schooling for their daughter, they sent the school another letter, dated February 5, 2000, which stated their assumption that their daughter continued to be enrolled as a fulltime student. See complainants' Exhibit E, submitted with their response to the school's response to their Complaint.

The Federal Complaints Officer agrees with the school that complainants' daughter must be enrolled before the school is under a legal obligation to provide her with special education services according to the March 2, 2001 IEP. Therefore, if complainants' daughter was not enrolled on April 2, 2001, the date services were scheduled to begin according to the March 2, 2001 IEP, the school was not legally obligated to provide her with services, independent of the issue of the legitimacy of the conditions that the school presented to the complainants. However, for the purpose of resolving this Complaint, including the issue of whether the school has violated IDEA because complainants' daughter did not begin receiving IEP services on April 2, 2001 – the status of complainants' daughter's enrollment does not need to be determined by the Federal Complaints Officer. That's because, even if it were to be determined that complainants' daughter was enrolled on April 2, 2001 – and the Federal Complaints Officer makes no such finding – the complainants failed to make her available to receive special education services. The complainants argue that they have not made their daughter available for services because of their objection to the conditions presented to them by the school. The Federal Complaints Officer finds this argument to lack sufficient merit to now hold the school to be obligated to provide compensatory education to complainants' daughter or to find that complainants' daughter has been denied FAPE. It is the finding of the Federal Complaints Officer that the imposition of the conditions presented to the complainants' by the school, as interpreted by the Federal Complaints Officer, would not have deprived the complainants' daughter of FAPE, even if the conditions had been created by the IEP team. The complainants are entitled, of course, to request a due process hearing for the purpose of making a contrary argument to a due process hearing officer.

- 5) Based on the facts in this Complaint, the Federal Complaints Officer finds the school has at least met the threshold requirements of 34 CFR 300.347(a)(7). Beyond a determination that the threshold requirements have been met, the Federal Complaints Officer is not in an appropriate position to micro manage the IEP process by directing how goals and objectives are to be written and/or measured for complainants' daughter. If complainants want their daughter's progress reported to them in a certain way, they have the right to make such a proposal as a part of the IEP process. If the IEP team cannot reach consensus, the complainants have the right to a due process hearing to make their argument to an independent hearing officer as to why their approach for reporting their daughter's progress should prevail over the school's approach.
- 6) Even if the complainants are correct, and the Federal Complaints Officer makes no finding that they are correct, that changes to their daughter's IEP were made without their appropriate participation – the complainants' subsequent inaction in not making their daughter available for special education services on April 2, 2001, has rendered the complainants' allegation irrelevant to their daughter's education, unless and until such time arrives that their daughter once again begins receiving special education services from the school. Based on the facts in this Complaint, the Federal Complaints Officer

finds no violation by the school of the complainants' rights to appropriately participate in their daughter's IEP process. If complainants' daughter should once again begin receiving special education services from the school, the complainants would be entitled to an IEP meeting to correct any discrepancies which they believe exist in their daughter's IEP – and to file a Federal Complaint, or request a due process hearing, as appropriate, to allege violations of the IEP process and/or to contest determinations made by the IEP team.

- 7) The Federal Complaints Officer finds no violation by the school of this IEP provision for complainants' daughter. In any case, this provision became irrelevant when the complainants notified the school on January 24, 2001 that they were going to home school their daughter. It is not a provision that was included in the March 2, 2001 IEP.

REMEDY

Given the current status of the relationship between the complainants and the school, as the Federal Complaints Officer understands it to be at the time of this Decision, the only remedy the Federal Complaints Officer can order is prospective. If the complainants meet appropriate requirements for enrolling their daughter in school, either by agreement with the school, or by order of lawful authority, and the complainants make their daughter available to the school for provision of special education services, the school shall provide the complainants, at their written request, with an IEP meeting. This IEP meeting shall be held prior to the Fall 2001-2002 school semester, or within thirty (30) days of the date complainants' written request is received by the school, if that request is not received by the school at least thirty (30) days prior to the beginning of the Fall 2001-2002 school year. If such an IEP meeting takes place, the school needs to be able to document that the notice requirements of 34 CFR 300.503 and 34 CFR 300.504 have been fully met for this student and her parents. If the complainants make no such written request for an IEP meeting, before the end of the first quarter of the 2001-2002 school year, the school shall not be required to provide such an IEP meeting, in order to comply with this Remedy.

As he has previously stated, to the best of the Federal Complaints Officer's knowledge, the school is under no legal obligation to accept a part time enrolled student. Moreover, the Federal Complaints Officer has no jurisdiction to order the school to enforce Colorado truancy law, or related child welfare law, with regard to complainants' daughter. However, the Federal Complaints Officer believes other authority may exist imposing such an obligation on the school for complainants' daughter, whether or not she receives special education services from the school. Moreover, the Federal Complaints Officer has seen nothing in the information presented to him by the complainants or the school which indicates any disagreement that complainants' daughter is eligible for special education services, if she is appropriately enrolled in school, and if she is made available to receive such services. The disagreement between the complainants and the school needs to be brought to closure so that complainants' daughter's educational status can be resolved – whether that resolution be full time public school enrollment, full time home school enrollment, part time dual enrollment between home school and public school for the purpose of public school special education services provision, or something else. The law authorizes parents to be spokespersons for their children in relationship to the school in

providing special education services for the children. However, the Federal Complaints Officer does not believe this relieves the school of an obligation to act on a child's behalf in circumstances where agreement cannot otherwise be reached with parents.

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, June ___, 2001.

Charles M. Masner, Esq.
Federal Complaints Officer