

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

Federal Complaint 2001:528

Denver Public Schools

Decision

INTRODUCTION

This Complaint letter was dated August 20, 2001, and was received by the Federal Complaints Officer on August 23, 2001. The school's response was dated September 14, 2001, and received by the Federal Complaints Officer on September 14, 2001. The complainant's response to the school's response to her Complaint was dated September 25, 2001, and received by the Federal Complaints Officer, by regular mail, on September 28, 2001. The Federal Complaints Officer then closed the record.

COMPLAINANT'S ALLEGATIONS

The Federal Complaints Officer is stating the complainant's factual allegations, in support of her allegations of legal violations, as stated by the complainant. The student's name has been removed from the statements of factual allegations. The regulatory violations alleged are to the implementing regulations for the Individuals with Disabilities Education Act (IDEA). The title number "34" has been added to the regulatory citations, and the section abbreviations have been deleted. DPS stands for Denver Public Schools. PS1 is a charter school within DPS. IEP stands for individualized education program. DVR stands for Division of Vocational Rehabilitation. FAPE stands for free appropriate public education.

"34 CFR 300.342(a) and (b) - WHEN IEPS MUST BE IN EFFECT: DPS failed to ensure that PS1 had an IEP in effect for the beginning of the school year 2000-2001 for (student). PS1 never implemented an IEP for (student) the entire school year of 2000-2001.

"34 CFR 300.343(c) - REVIEW AND REVISION OF IEPS: PS1 failed to review (student's) IEP in December 2000 and did not until June 2001, the end of the school year. There was no IEP review to determine whether the annual goals for (student) were being achieved or any revisions to be made to address the new school environment.

"34 CFR 300.344 - IEP TEAM: On June 12, 2001, PS1 did not meet the requirements for the IEP team. There were general education teachers who were present briefly, but they did not talk about (student's) progress or her participation in the general curriculum. One teacher discussed that (student) should participate in their mentor program, the other only came to the meeting after he was asked to explain the course credit system and how it would translate to DPS course credit system. After trying to figure out how many credits (student) has towards graduation, it was apparent that there was no one knowledgeable about the curriculum at this meeting.

"34 CFR 300.346(d) - REQUIREMENT WITH RESPECT TO REGULAR EDUCATION TEACHER: There was no participation by a regular education teacher in the development, review, and revision of (student's) IEP.

"34 CFR 300.347 - CONTENT OF IEP: There was no IEP for (student) for the entire school year of 2000-2001. Although PS1 has an education plan for all its students, it does not meet the requirements of an IEP. The IEP developed in June 2001, does not contain goals and objectives which are related to the general curriculum. The goals are "activities" which are something (student) performs once, and she has an entire year to do the activity. Observation is one of the measurements, but it is not clear who is doing the observation (goal and objective #1).

"34 CFR 300.347(b) - TRANSITION SERVICES: The goals address (student) having a vocational assessment, but did not state who was responsible for providing the service. There was no one present from DVR to address the services they could provide (student). (Student) had stated that she wanted to go to college, but (sic) not sure what her major focus would be. DPS and PS1 included a budgeting goal and objective for (student). The team did not discuss (student's) needs for budgeting, because (sic) is not a need for (student) at this time.

"34 CFR 300.350 – IEP - ACCOUNTABILITY: DPS and PS1 failed to provide special education and related services to (student) in accordance with her IEP. PS1 failed to implement the IEP developed by Golden High School, and failed to revise that IEP to meet her needs at PS1.

"34 CFR 300.300 - FAPE: As a result of the above violations, DPS and PS1 failed to provide (student) with a free appropriate public education. By failing to implement and revising (sic) (student's) IEP, she did not receive any special education and related services for the school year 2000-2001."

SCHOOL'S RESPONSE

The Federal Complaints Officer has determined that the school's response does not include specific denials of the complainant's specific allegations.

FINDINGS AND DISCUSSION

The Federal Complaints Officer finds that the school has violated 34 CFR 300.342(a) and (b), 34 CFR 300.343(c), 34 CFR 300.344, 34 CFR 300.346(d), 34 CFR 300.347, 34 CFR 300.347(b), 34 CFR 300.350, and 34 CFR 300.300. The Federal Complaints Officer also finds that the school violated the provisions of 1 CCR 301-8-2220-R-4.03 - Procedures for Transfer Students -of the Colorado rules implementing the Colorado Exceptional Children's Educational Act (ECEA).

Procedural violation(s) alone do not automatically constitute a denial of FAPE. However, in this case, the school failed to appropriately adopt or create an IEP for this student. The appropriate adoption or creation of an IEP is a fundamental procedural, and substantive, requirement for the provision of FAPE. Had the school appropriately followed the requirements of Colorado Rule 4.03 - Procedures for Transfer Students - which provides the procedures for IDEA IEP implementation in Colorado for transfer student - the resulting controversy between this family and the school might have either been avoided or diminished, and more timely resolved.

Included in its response to the Complaint, the school stated:

"Although (student) did not receive special education services labeled as such, the essence of services including individualized instruction, accommodations, goals, activities and the specialized curriculum at PS1 met or exceeded those established in the December 14, 1999 Annual Review IEP from Jefferson County Public Schools (Attachment A). The staff at PS1 provided (student) with a range of accommodations on a consistent basis which addressed her individual and special needs. Some examples include: preferential seating, a peer tutor (as appropriate), additional time to complete assignments -specifically, the student, in collaboration with the parent and teachers, established the timeline to complete assignments/projects. In fact, said timelines were frequently extended. Individual instruction/support included an assigned adult mentor, tutoring/consultation support (as needed) and supervised community volunteer work experiences. Additionally, because students spend a fairly significant amount of time participating in community experiences, they are taught to access and in fact come to rely on the public transportation system. Accordingly, (student) surpassed the Transition goals defined in the 1999 IEP; the goals developed in Jefferson County were met and exceeded in an integrated, real world setting. (Student) did not simply practice staged work experiences in a segregated special education setting, rather, she had practical experience in an 'elder care center' and received recognition for her work (Attachment B) as well as academic credit. This experience appeared to expand (student's) interest in exploring different career opportunities. In the past, her career interests focused on fashion/cosmetology. By the second trimester of school, (student) had identified a specific goal in relation to employment in her Personal Learning Plan (Attachment C). [Please note, the Personal Learning Plan consistently identified (student) as an 11th grade student.] (Student) subsequently secured a position with a childcare agency, and further expressed an interest in studying child development.

"The December 14, 1999, IEP from Jefferson County Public Schools identifies 'not timed test' as an accommodation for norm referenced/standardized assessments. As an 11th grade student (student) participated in the ACT and PS1 provided her additional time to complete this assessment. However, (student) did not avail herself of this accommodation.

"(Parent) was provided with a report of (student's) progress in the school activities and her learning plan via trimester Progress reports, End of Term Assessments (Attachment D) and parent conferences. Although the team provided information to (parent), her attendance at parent teacher conferences was inconsistent (Attachment E)." School's response at pages three (3) and four (4). Student and parent's name deleted.

While the Federal Complaints Officer does not find that these facts, as alleged by the school, constitute sufficient evidence to demonstrate the provision of FAPE - since the educational services provided were not provided in sufficient accordance with the necessary relevant legal requirements of IDEA - he does find the facts as alleged by the school to be sufficiently valid to demonstrate that the student was receiving some educational benefit while a student at PS1 charter school. Moreover, this is a conclusion with which the complainant, logically, must be in agreement, even if she does not totally agree with the facts as stated by the school, since she is asking as a part of her relief that the school graduate this student.

REMEDIES

1) The Federal Complaints Officer has no authority to make findings - and hence no authority to order any remedies based on such findings - that a student has or has not met the requirements for graduation from high school with a regular high school diploma. It is up to school boards, through their adopted policies and procedures, which they employ administrators and other staff to implement, to determine whether a student has or has not met the requirements for graduation from high school with a regular high school diploma. Whatever the understanding, or lack of understanding, between the parent and the school about whether this student was an eleventh grader or a twelfth grader, and about this student's ability to graduate "on time" from PS1 charter school, or any other DPS public school, the fact remains that it is up to DPS to determine graduation requirements for this student. If the parent believes her daughter has met the school's graduation requirements, and DPS disagrees, the parent is entitled to a due process hearing to resolve the disagreement. The issue is not appropriate for resolution in the Federal Complaint process since, fundamentally, it is an issue not only about whether certain services have been delivered, but whether, and, if so, what, if any, should be the appropriate continuing services and or placement - in order to meet the school system's standards required for graduation. This is a due process hearing issue, which, unlike the Federal Complaint process, provides for an evidentiary hearing.

However, it is unclear to the Federal Complaints Officer from the information supplied to him by the complainant and the school, what the position is of DPS regarding what would be required, and whether there are options to meet what is required, for this student to graduate from DPS, whether through PS1 charter school, or another DPS attendance center - assuming the latter is an option, which is also unclear to the Federal Complaints Officer. Therefore, the Federal Complaints Officer orders DPS to provide the complainant, the parent, the student, and the Federal Complaints Officer, with a definitive statement of what further action(s) will be required of this student, in order for this student to graduate from DPS with regular high school diploma. This should be done in a way that is not unlawfully discriminatory. If more than one option is available to other similarly situated students for meeting the school's graduation requirements, then more than one option, as appropriate, should be made available to this student. Whatever the graduation requirements are, this student will have to meet them in order to graduate from DPS with a regular high school diploma.

2) Compensatory education is not a fine or damages. It is only to be awarded to the extent it is an appropriate remedy for the denial of FAPE. The Federal Complaints Officer has found that this student was denied FAPE. The Federal Complaints Officer has also found that he has no authority to order a high school graduation for this student. In addition, he has ordered DPS to provide a definitive statement of what further action is required for this student to graduate from DPS with a regular high school diploma. Whatever these requirements are, DPS shall provide this student with an opportunity to meet them. If there is more than one option for meeting these requirements, the parent, on behalf of this student, shall be entitled to choose the option to be employed. Any costs incurred to meet graduation requirements for this student, which are the responsibility of DPS to pay for other similarly situated students, shall be paid for this student.

Had this disagreement over graduation not arisen, which would have been the case if this student had been graduated with a regular high school diploma from DPS in the spring of 2001 - whatever the attendance center - the school's legal obligation to this student would have ended at that time. The student would not have been entitled to compensatory education because graduation with a regular high school diploma would have constituted the provision of FAPE. There would have been no denial of FAPE to compensate. The parent, and the student's, relief, in such a circumstance, if they thought that the proposed graduation was not appropriate - because, in the parent's view, the student had not met the graduation requirements and therefore was still entitled to FAPE - would be to request a due process hearing to challenge the school's determination that the student had met the necessary requirements for graduation. If the hearing officer agreed with the parent, the compensatory education necessary to constitute the FAPE that had been denied would be the education necessary in order to allow the student to either graduate with a regular high school diploma, or the provision of otherwise appropriate special education services, as determined by the IEP team, until the student reached age twenty-one (21) - whichever came first. The compensatory education relief ordered by the Federal Complaints Officer in this Complaint is rightfully consistent with such a potential outcome. This student is entitled, as long as she remains a student covered by IDEA, and as long as she remains enrolled in DPS, to receive educational service from DPS until she either graduates with a regular high school diploma, or reaches age twenty-one (21) (which will occur on August 15, 2002) - whichever comes first. The Federal Complaints Officer cannot order the school to provide more than it is legally obligated to provide. The parent is entitled, through the IEP process, or due process hearing if she and the school cannot agree, to seek whatever services she believes are appropriate for her daughter -including transition services. However, the parent is not entitled to have such services provided post-graduation or post age twenty-one (21) - absent a hearing officer's timely finding to the contrary, or the school's voluntary agreement to do so. That said, the school should make certain it meets the notice requirements of 34 CFR 300.503 and 300.504 prior to discontinuing service offerings to the student, so that the parent is lawfully informed of her right to seek due process hearing relief in order to challenge such a change in placement proposed by the school.

To the extent the complainant's argument is that this student was denied FAPE because the school did not appropriately provide IEP services during the 2000-2001 school year - this is an argument that weighs against high school graduation, not in favor of such graduation, as the complainant conversely argues should be the case. The parent of this student is entitled to argue, in a due process hearing, at least up until this student reaches age twenty-one (21), that the student either has or has not met the requirements for graduation from DPS with a regular high school diploma. However, if the determination were to be that the student had not met these requirements, the school would be legally obligated to provide the student with FAPE until the student either met the requirements and therefore graduated, or reached the age of twenty-

one (21) - whichever came first. It is up to DPS to determine whether graduation requirements have been met - subject to challenge by the parent in a due process hearing.

Accepting the facts in this Complaint in the light most favorable to the complainant, it might be that this parent and this student suffered harm that would not have occurred had DPS acted more appropriately. However, even if that were determined to be the case - and the Federal Complaints Officer makes no such determination as a part of this Complaint - compensatory education can only compensate for educational loss, and this can only occur for denial of FAPE that occurs prior to high school graduation or the student turning age twenty-one. The parent of the student subject to this Complaint is going to have to decide whether to insure her daughter's enrollment in DPS, or another school system, so her daughter can be provided with FAPE, or otherwise seek due process hearing relief. Either this student has met the requirements for graduation or she hasn't. If she hasn't, the school continues to be required to provide FAPE as determined by an IEP team.

3) The Director of Special Education shall submit to the Federal Complaints Officer a statement of assurance sufficient to demonstrate that PS1 charter school employees sufficiently understand relevant IEP legal requirements in order to promote avoidance of further violations of those requirements. If the Director of Special Education determines that training for PS1 employees is necessary in order to achieve this goal, the Director of Special Education shall provide the specifics of that proposed training as a part of her statement of assurance.

Remedies 1) and 3) shall be completed within thirty (30) days of the date of this Decision. Remedy number 2) shall commence no later than thirty (30) days from the date of this Decision, or earlier upon agreement of the parties - if the parent meets DPS enrollment requirements within thirty (30) days of the date of this Decision. Any enrollment by the parent of her daughter in the DPS school system after the thirtieth day from the date of this Decision, shall subject the school to all relevant legal requirements constituent to that enrollment. The Federal Complaints Officer makes no findings about those requirements beyond those that he has made in this Decision.

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, October ____, 2001.

Charles M. Masner, Esq.
Federal Complaints Officer