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

Federal Complaint 2002:516

Denver Public Schools

Decision

INTRODUCTION

This Complaint was dated June 14, 2002, and filed June 18, 2002. The school district's response was dated July 24, 2002, and received by the Federal Complaints Officer on July 25, 2002. The complainants' response to the school district's response to the Complaint, was dated August 2, 2002, and received by the Federal Complaints Officer on August 5, 2002. The Federal Complaints Officer then closed the record.

COMPLAINANTS' ALLEGATIONS

The Federal Complaints Officer is stating the complainants' allegations as stated by the complainants. Personally identifiable information has been deleted.

1. DPS removed [student] from his educational placement for more than 10 days without proper authority, in violation of 20 U.S.C. sec. 1415(k) (1) (A) (i). DPS failed to request a due process hearing that would have given it the authority to keep [student] in a more restrictive placement beyond the 10 day period, in violation of 20 U.S.C. sec. 1415(k)(2).
2. DPS provided inadequate notice of its intent to move [student] to a more restrictive placement. DPS also failed to provide [student's] parents with the reasons upon which it based its request for a more restrictive placement, in violation of 20 U.S.C. sec. 1415(b)(3) and 34 C.F.R. sec. 300.503 (a) (1)(i).
3. DPS failed to inform [student's] parents of their right to request a hearing to dispute the change of placement, in violation of 20 U.S.C. sec. 1415(k) (6).
4. DPS failed to provide FAPE to [student] in an interim placement, and continues to deny FAPE in his current homebound placement, in violation of 20 U.S.C. sec. 1401 (8) and Board of Education v. Rowley, 458 U.S. 176 (1982).

SCHOOL DISTRICT'S RESPONSE

The school district denies all allegations.

FINDINGS AND DISCUSSION

1. The statutory provisions cited as violated by the complainants – 20 U.S.C. sec. 1415 (k)(1)(A)(i), and 20 U.S.C. sec. 1415 (k)(2) – state, in relevant part, as excerpted by the Federal Complaints Officer:

> School personnel under this section may order a change in the placement of a child with a disability – (i) to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives would be applied to children without disabilities) …
>
> Id. 20 U.S.C. sec. 1415 (k) (1) (A) (i).
>
> A hearing officer under this section may order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer – (A) determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of such child is substantially likely to result in injury to the child or to others; (B) considers the appropriateness of the child's current placement; (C) considers whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and (D) determines that the interim alternative educational setting meets the requirements of paragraph (3) (B).
>
> Id. 20 U.S.C. sec. 1415 (k) (2).
>
> The comparable IDEA regulatory provisions are found in 34 C.F.R. 300.520 and 34 C.F.R. 300.521.

The Federal Complaints Officer finds no violation by the school district of any of these legal provisions. There is a difference between the complainants and the school district over the number of days of suspensions. The complainants say eight (8). The school district says seven (7). However, in either case, these days, alone, are within the ten (10) day limit allowed by law. The critical issue is the complainants' claim that, prior to the IEP meeting concluding on December 5, 2001, the student spent eleven (11) school days in a "more restrictive placement", which, by itself, would be beyond the ten (10) day limit, no matter how you counted the days of suspension.

The crux of the complainants' argument is that for this eleven (11) day period the student was not fully able to participate in "…PE, music, art, computers and lunch –recess" in violation of his January 4, 2001 IEP, because the school district had placed him in "all-day instruction in [a] resource room." The school district does not deny that the student spent time in a resource room, but states that he continued to participate in all IEP required activities, including "…physical education, music, computer lab, lunch and recess" and that this was done with "…

typical 5th grade peers with paraprofessional support." The complainants' challenge not only that the student participated in these activities, but that he had paraprofessional support.

The school district's Attachment T, which it submitted in support to show that this student did participate in all IEP required activities is not dispositive. The Federal Complaints Officer has no idea what Attachment T demonstrates. Nevertheless, the Federal Complaints Officer finds for the school district on this issue – at least to the extent that the student was able to continue in the disputed IEP activities to at least some extent, with at least some paraprofessional support, whether or not it was one to one full time support. Moreover, and more fundamentally, even if it could be demonstrated that this student didn't continue to participate in the disputed activities during this eleven (11) day period, at least not as had previously been the case, it would not necessarily follow that he had experienced an invalid change in placement in light of the fact that he was nonetheless evidently in school and otherwise receiving academic instruction to which he was entitled, and, most fundamentally, as conceded by the complainants, the parents, at the October 31 manifestation determination review IEP meeting, agreed to what they describe as a more restrictive resource room placement for their son – albeit that as a part of this Complaint they claim they were "blindsided" into this decision because of a failure of the school district to give them adequate notice. Finally, at the December 5, 2001 IEP meeting, subsequent to this eleven (11) day period, the parents, represented by an advocate, agreed to an even more restrictive placement – homebound, although, again, as a part of this Complaint, they argue that their agreement to the homebound placement occurred in an IEP meeting for which they were given inadequate notice.

Every change in service does not automatically constitute a change in placement. Each case must be decided on its own facts. On the facts of this Complaint, the Federal Complaints Officer does not find that this student experienced any change in placement that was not sufficiently agreed to by the parents, and not sufficiently implemented by the school district. Therefore, the issue of whether the school district should have convened a due process hearing is not relevant, and therefore the Federal Complaints Officer finds no violation by the school district for not having convened such a hearing. School districts are not required, to the best of the Federal Complaints Officer's knowledge, to invoke 20 U.S.C. sec. 1415 (k) (2) under any circumstance, because school districts, as a result of a valid IEP process, can always offer more restrictive placements, to which the parents can then either agree, or not, and dispute, or not, in a due process hearing.

2. The statutory and regulatory provisions cited as violated by the complainants – 20 U.S.C. sec. 1415(b)(3), and 34 C.F.R. 300.503 (a) (1) (i) – state, in relevant part, as excerpted by the Federal Complaints Officer:

   > The procedures required by this section shall include – (3) written prior notice to the parents of the child whenever such agency – (A) proposes to initiate or change; or (B) refuses to initiate or change; the identification, evaluation, or educational placement of the child, in accordance with subsection (c), or the provision of a free appropriate public education to the child …
   >
   > Id. 20 U.S.C. sec. 1415 (b) (3).

> Prior notice by the public agency … (1) Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency – (i) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child …
>
> Id. 34 C.F.R. 300.503 (a) (1) (i).
>
> See also 20 U.S.C. sec. 1415 (c), referenced by the complainants, which specifies the content of the written notice as follows:
>
> 1) a description of the action proposed or refused by the agency;
> 2) an explanation of why the agency proposes or refuses to take the action;
> 3) a description of any other options that the agency considered and the reasons why those options were rejected;
> 4) a description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action;
> 5) a description of any other factors that are relevant to the agency's proposal or refusal;
> 6) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and
> 7) sources for parents to contact to obtain assistance in understanding the provisions of this part. Id. See also 34 C.F.R. 300.503 (b).

The complainants argue that the notice required by these legal provisions should have been given prior to the IEP meeting of October 31, 2001 (manifestation determination review), and prior to the IEP meeting concluding on December 5, 2001 . The essence of the complainants' argument is that the school district staff had pre-determined that they were going to make more restrictive placement recommendations on these dates, and that by failing to notify the parents ahead of time that this was the case, the parents were not able to meaningfully participate in these IEP meetings.

Whatever was in the minds of school district staff members prior to the October 31 and December 5 IEP meetings (the December 5th meeting began on November 29, 2001) , had the school district given the disputed statutory and regulatory notice to the parents, prior to these meetings, that the school district was going to recommend a given placement, the parents would have had an argument, as the school district indicated in its response, that the school district was subverting the right of parents to meaningfully participate in IEP team decisions, by pre-determining placement decisions without the parents participation, and without appropriate participation of all IEP team members. This is not to say that it could not be argued that the school district might have done a better job of communicating with the parents prior to these meetings about the possible placement options – thus promoting better IEP participation by the parents. To do so might limit the need for further IEP meetings, prior to due process hearings, if parents disagree with school district proposals made at IEP meetings. Nor is it to say that an argument could not be made that school district staff might have been more open minded prior to these meetings. The Federal Complaints Officer is not in a position to pass judgment on any such arguments. However, in any case, the parents were given notice of these meetings. They

did attend. They were represented, at least at the November 29 and December 5, 2001 meetings, by an advocate. They have not argued that they were not given the opportunity to speak at these meetings and to express their views about any IEP issues under consideration, including placement options. The Federal Complaints Officer therefore finds that the school district did not act inappropriately by not giving the notice required by 20 U.S.C. sec. 1415 (b) (3) and 34 C.F.R. 300.503 (a) (1) (i), as specified in 20 U.S.C, sec 1415 (c) and 34 C.F.R. 300.503 (b), prior to the IEP meetings of October 31, November 29, and December 5, 2001.

In the case of Community Consolidated School District # 93, Plaintiff v. John F., by his parents James F. and Mary F., and Illinois State Board of Education, Defendants, 33 IDELR 210 (hereinafter cited as James F.), cited by the complainants – although not specifically to support this allegation of notice violation by the school district – a federal district court in Illinois found a violation of the 20 U.S.C. sec. 1415(b)(3) and 34 C.F.R. 300.503 (a)(1)(i) notice provisions in circumstances with some similarity to this Complaint. The court found this notice should have been given prior to an IEP meeting because, the court found, the school district had determined it was going to recommend a change in placement prior to an IEP meeting. However, the court in James F. was upholding the decision of an independent hearing officer (IHO), which was rendered after a three day hearing of sworn testimony. Moreover, the facts in James F. were egregious, not the least of which was that the school district conducted a suspension hearing without timely and adequately informing the parents of their right to a due process hearing under IDEA, which was subsequently held at a later date. In any case, a Federal Complaints Officer under IDEA is not bound by a decision of any tribunal, including a federal district court, which occurs in another jurisdiction.

The Federal Complaints Officer disagrees with the finding of the court in James F. regarding the timing of notice. A school district may have many staff members who are participating as a part of an IEP team. They may have differing views on a variety of issues affecting the student, including placement. However, it is only at the point that whoever is designated to speak for the school district as a whole makes the official offer of placement, that the "propos[al]" or "refus[al]" of action notice of 20 U.S.C. 1415(b)(3) and 34 C.F.R. 300.503 (a)(1)(i) is required. 34 C.F.R. 300.345, requiring parent participation in IEP meetings, does require that as a part of the notice for IEP meetings that the school district informs the parents of the "purpose" of the meeting. Also, Colorado Rule 4.02 (5), of the Exceptional Children's Educational Act (ECEA) rules, requires this notice, and requires that it be in writing. This written notice was evidently given, at least prior to the October 31, 2001 meeting, but it did not make explicit that a part of the purpose of the meeting might be placement. However, the effect(s) of procedural violations must be determined on a case by case basis, and the Federal Complaints Officer does not find, on the facts of this Complaint, that the parents would not have understood that a part of the purpose of the October 31, 2001 manifestation determination review IEP meeting, and the subsequent IEP meetings held on November 29 and December 5, 2001 – at which the parents were represented by an advocate - could have been to discuss potential placement options for the student. Moreover, and more fundamentally, there was no requirement that the parents agree to these placements at these meetings. (The placement subsequent to the October 31, 2001meeting, while more restrictive, was not to a different attendance center.) The parents could have refused to consent and could have requested further IEP meetings. If the school district had refused to convene further IEP meetings, the parents could have requested a due process hearing, which would have invoked stay put and therefore the student's placement would not have changed pending outcome of the hearing, unless by agreement between the parents and the school district, or appropriate order of the hearing officer. In James F., the parents did request a due process hearing, which included their argument that their consent to a placement was invalid,

because they had been given inadequate notice of the IEP meeting at which this consent had been given. The parents hearing request in James F. was not given an appropriate response by the school district. However, the parents in the Complaint now before the Federal Complaints Officer did not request a due process hearing, and therefore the school district did not have an opportunity to appropriately respond to such a request, nor has a hearing officer had an opportunity to adjudicate the parents' claims. It would be inappropriate for the Federal Complaints Officer to try to remedy, in a Complaint Decision, the failure of the parents to exercise their right to refuse consent, or, in any case, to request a due process hearing to adjudicate a placement dispute, at which the issue of consent could be raised.

The parents claim – in their response to the school district's response to their Complaint – to which the school district was not given an opportunity to respond – that they were "blackmailed" into agreeing with the placement recommendation of the school district at the October 31, 2001 IEP meeting – which determined that their son's behavior was a result of his disability - because the school district told them that their only other alternative was for their son to be "expelled". If this is what the parents were told, it was incorrect, but the parents' advocate did not argue this in the original Complaint letter, but instead stated that the school district staff said the student could no longer attend that attendance center. In any case, the student continued, in a more restrictive placement, at that attendance center, and, by the time of the November 29, 2001 IEP meeting, concluding on December 5, 2001, the parents had an advocate and were therefore well informed enough to understand that the school district, given the result of the manifestation determination, could not expel their son, and were also well enough informed to challenge, in a due process hearing, any placement agreement based upon such misinformation.

The school district did, however, violate 20 U.S.C. sec. 1415(b)(3) and 34 C.F.R. 300.503(a)(1)(i) by failing to document that such notice was given to the parents after the IEP meetings of October 31 and December 5, 2001. Changes of placement took place after both of these meetings, and the school district is not relieved of its obligation to give the required notices notwithstanding that the parents agreed to both changes of placement. The school district's Attachment O is not sufficient for the purpose of documenting that this notice was given.

3. The statutory provision cited as violated by the complainants – 20 U.S.C. 1415 (k)(6) – states, in relevant part, as excerpted by the Federal Complaints Officer:

> **(A)** … (i) If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement, the parent may request a hearing. (ii) The state or local education agency shall arrange for an expedited hearing in any case described in this subsection when requested by a parent … **(B)** … (i) In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of such child's disability consistent with the requirements of paragraph (4) (C). (ii) In reviewing a decision under paragraph (1) (A) (ii) to place the child in an interim alternative educational setting, the hearing officer shall apply the standards set out in paragraph (2). Id. See also 34 C.F.R. 300.525.

The complainants argue that they were deprived of their hearing rights because the school district failed to give them notice of their right to a hearing. Notice of such hearing rights is required by 20 U.S.C. 1415 (k) and 34 C.F.R. 300.504. Thus, the complainants are also arguing that these legal notice provisions were violated by the school district.

The Federal Complaints Officer finds no violation by the school district of the notice provisions required by 20 U.S.C. 1415 (k) or 34 C.F.R. 300.504, and no violation by the school district of any hearing rights of the parents specified by 20 U.S.C. 1415 (k)(6) or 34 C.F.R. 300.525. The Federal Complaints Officer finds that the school district's Attachment FF was sufficient to meet the minimum legal requirements to inform the parents of their right to a hearing. The Federal Complaints Officer also finds that this notice was either given or offered either before or during the disputed IEP meetings with the parents.

The Federal Complaints Officer makes this finding notwithstanding that he has also found that the 20 U.S.C. 1415(b) (3) and 34 C.F.R. (a) (1) (i) notice was not properly given. The Federal Complaints Officer finds that despite this procedural failure, the parents were made sufficiently aware of their right to request a due process hearing. Had they done so, any negative effects of the failure to give the 20 U.S.C. 1415(b) (3) and 34 C.F.R. 300.503(a) (1) (i) notice could have been addressed by the hearing officer.

4. The statutory and case law provisions stated as violated by the complainants are: 20 U.S.C. sec. 1401(8) and Board of Education v. Rowley, 458 U.S. 176 (1982).

   20 U.S.C. sec. 1401(8) states, in relevant part, as excerpted by the Federal Complaints Officer:

   The term "free appropriate public education" means special education and related services that – **(A)** have been provided at public expense, under public supervision and direction, and without charge; (**B)** meet the standards of the State educational agency; (**C)** include an appropriate preschool, elementary, or secondary school education in the State involved; and **(D)** are provided in conformity with the individualized education program required under section 1414(d). . . Id.

   The complainants discuss the Rowley decision as follows:

   FAPE is defined as a free and appropriate public education. FAPE consists of "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." Board of Education v. Rowley, 458 U.S. 176 (1982). In the Rowley decision, the U.S. Supreme Court has clarified that " 'basic floor' of opportunity provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Id. Id. Complainants' Complaint letter dated June 14, 2002.

The Federal Complaints Officer finds no denial of FAPE for this student. The Federal Complaints Officer finds that the school district acted to respond to this student's needs – at least sufficiently to meet minimum requirements necessary for FAPE. The parents, represented by an advocate, at least since November 29, 2001, agreed to placements subsequent to the October 31, 2001 manifestation determination review IEP meeting, and subsequent to the IEP meeting concluding on December 5, 2001. The December 5, 2001 IEP meeting resulted in a homebound placement, with restricted hours, to which the parents, represented by an advocate, agreed, and in which the parents and their advocate agree that the student has made progress.

The thrust of the complainants' argument seems to be that if the school district were doing a better job the student would never have been placed in either resource room or homebound placements, and would not have had to remain in homebound placement for as long as he did, or to be otherwise subject to placements that the complainants view as too restrictive. But the parents participated in all IEP meetings. The parents agreed to all placements – the most recent of which, at the time of this Complaint – homebound – with the representation of an advocate. A functional behavior assessment (FBA) was done. A behavioral intervention plan (BIP) was created. The Federal Complaints Officer finds no basis for rewriting IEP history for this student based upon allegations by the parents and their advocate that he interprets as allegations that they did not have adequate ability to agree or disagree with IEP team decision making – including whether or not this student should have had a one to one full time paraprofessional, or should have attended school only half days. These are IEP team decisions. The parents were a part of the IEP team. If parents object to IEP team decisions, and agreement cannot otherwise be reached, parents, if they are to remain in the school district, must either accept what the school district is offering as FAPE, or exercise their due process hearing rights. The Federal Complaints Officer cannot substitute his judgment for the judgment of the IEP team. The Federal Complaints Officer recognizes that the parents, and their advocate, have expressed strong feelings about what they perceive to be inadequacies of the local school district staff that have worked with them, and with this student, during the time period covering this Complaint. However, the Federal Complaints Officer is not in a position to resolve these personal, and personnel, issues – as framed by the complainants - between the complainants and the school district.

Notwithstanding his finding of procedural notice violations by the school district, the Federal Complaints Officer does not find, on the facts of this Complaint, that these procedural violations warrant a finding that this student was denied FAPE – or that any inadequacies of school district staff were sufficient to deny this student FAPE. The parents are entitled to request a due process hearing on this determination of the Federal Complaints Officer, and any other issues he has addressed in this Complaint, should they choose to do so.

REMEDY

Within thirty (30) days of the date of the school district's certified receipt of this Decision, the school district's Director of Special Education shall either: (1) submit to the Federal Complaints Officer documents sufficient to demonstrate that the school district has in place policies and procedures, including a necessary form, to address the notice violations found by the Federal Complaints Officer, with a statement of assurance that the school district staff involved in this Complaint understand these notice requirements; or (2) develop such policies and procedures,

with an appropriate form, and submit a statement of assurance that the school district staff involved in this Complaint understand the requisite notice requirements. These actions by the Director shall include, as necessary, addressing the written notice that Colorado requires school districts to give parents prior to IEP meetings.

The Director of Special Education shall also include a statement of assurance that the school district staff at this student's attendance center during the time period of this Complaint has otherwise been sufficiently instructed about their obligations to special needs students. The school district's Director of Special Education shall contact the Federal Complaints Officer before meeting the requirements of these remedies, in order to assure adequate compliance with these remedies.

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, August _____, 2002.

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Charles M. Masner, Esq.
Federal Complaints Officer