

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

Federal Complaint 2002:526

Pueblo SD # 60

Decision

INTRODUCTION

This Complaint, undated, was received and filed on October 15, 2002. The school district's response was dated October 29, 2002, and received on October 31, 2002. The complainant's response to the school district's response to her Complaint was dated November 13, 2002, and received on November 14, 2002. The Federal Complaints Officer then closed the record.

COMPLAINANT'S ALLEGATIONS

The Federal Complaints Officer is reproducing, in relevant parts, the Complaint letter received on October 15, 2002, and the complainant's response letter dated November 13, 2002, and received on November 14, 2002. Personally identifiable information has been deleted by the Federal Complaints Officer.

This letter is in regards to my son [proper name], who is a student in full-day kindergarten class at [proper name] in [proper name]. My son [proper name] is five years and 10 months old. He was diagnosed with autism at the age of four at [proper name] in [proper name]. The services that were supposed to be provided for the 2002-2003 school year have not been in place since August 26, 2002. There are 30 kids in his classroom, and there is one teacher. Occasionally an educational assistant comes in the room to help out.

Last year school district #60 trained an educational assistant (Applied Behavioral Analysis), which is a teaching method that is used with autistic children. The educational aide taught [my son] using this method. She taught him inside the regular education classroom and one-on-one in a quiet area outside the classroom. [My son] made a lot of progress working with her. School District #60 cut her position at the beginning of the school year. In my son's I.E.P., dated January 22, 2002, it states, "Beginning February 5, 2001, [student] will have trained support in room to give strategies to help [student] meet I.E.P. goals". There has not been an (applied behavioral analysis) trained aide in [my son's] classroom to provide support this year.

I met with [proper name], the special education director, in July and August of 2002. The purpose of the meetings was to make sure that an applied behavioral analysis trained aide would be in the classroom at the beginning of the school year. [The special education director] agreed with me that my son needed to have the extra support in the classroom. I met with [the special education director] again on September 4, 2002. She assured me that she would hire an aide and have her trained in applied behavioral analysis. She sent in the position to be posted at the administration building. The position remained on hold until September 27, 2002 because of lack of funding.

I called school superintendent, [proper name] on September 11, 2002 to discuss the large class size in [my son's] kindergarten class at [proper name] [e]lementary school. At the time the "issue" was no longer considered a "special education issue". My phone call was returned by [proper name] who is the director of elementary education. He set up a staff meeting for September 19, 2002. At this meeting which [the director of elementary education] attended, I was told they could not hire an educational assistant to teach [my son] due to lack of funding.

On September 27, 2002, I was told by [proper name], principal at [proper name] [e]lementary that they were going to train two different Educational Aides in Applied Behavioral Analysis. On October 7th, I was told by [the special education director] that there were two educational aides working in the classroom with [my son]. On that same day I spoke with [the director of elementary education] who told me that there will be an educational assistant in the room with [my son] at all times.

On October 3, 2002, [my son's] grandmother arrived at [my son's] classroom at [proper name] [e]lementary. She stayed there and observed from 10:15 until 3:00 p.m. When she arrived, [my son] was crying in "time out". I told the teacher to use time out with [my son] when he is misbehaving. On October 9, 2002 [my son's] grandmother arrived at [my son's] classroom to find him crying again. His grandmother was there from 10:45 until 3:00 p.m. There was no educational aide or paraprofessional or special education teacher in the room during this time. There ...[was] however, a substitute teacher in the room and [my son's] teacher was outside of the room testing students. I have concerns that there is only the teacher in the room on many days.

[My son's] teacher, [proper name] is an excellent teacher and she does the best with him that she can. My son resists going with one of the special education teachers. [My son] would do better with the special education teacher if he was accompanied by a person he has bonded with. My son needs visual supports in the classroom. The educational aide needs to be trained in Applied Behavioral Analysis and using visual aids for children with autism. This person needs to be in the classroom with him at all times to provide the support he needs.

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Complainant's Complaint letter received on October 15, 2002. Personally identifiable information deleted by the Federal Complaints Officer. Quotation marks in the original.

...

On November 6, 2002, I had a meeting at [proper name] [e]lementary to discuss [my son's] I.E.P. This meeting was an annual review and we wrote another I.E.P. This one looks a lot like the previous one that you have a copy of. At this meeting, [the special education director], told me that they could not hire a full-time educational aide, because of lack of funding. I was also told that they could not write the term "applied behavioral analysis" in the I.E.P. because it was illegal. They also refused to put the names of the ABA forms used to document discrete trials, meaning that they are not going to document the work they are doing with [my son].

District 60 did agree to train 11 people in Applied Behavioral Analysis. They are willing to train the employees in ABA, but not willing to assign an aide to the classroom. The teacher aides they have now are like "floating aides" that go from room to room. They are willing to train the aides but not willing to provide the services that are a part of applied behavioral analysis and discrete trials. Because of the constant changes in help in the room, unpredictable hours, large class size (30 kids), and District 60's refusal to put a FT aide in the room, we feel that he is not going to get a free and appropriate education at [proper name] [e]lementary.

...

Complainant's response letter dated November 13, 2002. Personally identifiable information deleted by the Federal Complaints Officer. Quotation marks in original.

SCHOOL DISTRICT'S RESPONSE

The Federal Complaints Officer treats the school district's response as a denial that the school district has committed any violation(s) of relevant law.

FINDINGS AND DISCUSSION

Decisions about what are the appropriate services and placement for a student with special needs are to be made by the student's individualized education program (IEP) team. If parents and school districts cannot reach consensus about appropriate services and placements, with or without negotiation or mediation, then the parents have a right to request a due process hearing to make their case to an independent hearing officer (IHO) that the services or placement for which the parent argues are appropriate and should be provided. The IHO's decision on such issues is final, unless overturned on appeal.

The Federal Complaints Officer does have authority, however, to determine whether procedural violations have been committed and, if so, to order appropriate remedies. In this case, the

Federal Complaints Officer finds that the integrity of the procedural requirements of the Individuals with Disabilities Education Act (IDEA) regulations found at 34 CFR 300.13 (Free Appropriate Public Education/FAPE), 34 CFR 300.340-350 (IEPs), and 34 CFR 300.550-556 (Least Restrictive Environment/LRE), have been abrogated by the school district due to financial restrictions either implemented by the school district, or perceived to have been implemented by relevant school district staff, that have circumscribed this student's, and other similarly situated students', rights under the IDEA.

In a meeting document for this student dated September 19, 2002, described at the top of the document as a "planning conference" document, submitted by the school district with its response to this Complaint, it states, at item number four (4) – **"All Special Ed postings are on hold right now due to lack of funding."** Id. Emphasis added by the Federal Complaints Officer. This document indicates that the persons present at this meeting, in addition to the parent-complainant, were: the student's building principal, the director of elementary education, the student's special education teacher, the speech/language specialist, and two other individuals whose titles are not made clear in the record.

In a letter dated October 7, 2002, from the student's building principal to the director of special education, submitted by the school district in its response, the building principal states as follows:

Attached you will find a copy of a memo I received from [parent-complainant], parent of [student]. We have had several conversations about this student and his program.

As you read the memo, you will find that [student] is having difficulties functioning in our full day kindergarten program. The request to have an assistant with college training and the assumption that [student] will have full time one to one assistance is unrealistic to say the least. [Student] receives 45 minutes of 1 to 1 daily with the sped teacher and 4 hours per day with assistance in the classroom from various resources within the building. The IEP indicates 7 1/2 hours weekly from Special Education. In reality he receives 23 hours and 45 minutes of assistance per week. [Parent] assumes that there is or will be full time, individual help for [student]. (The second to last sentence in the letter[.])

At this time, I believe the full day program is overwhelming to [student], since all previous instruction has been in small group or one to one. Furthermore, the regular program teacher spends most of her time with [student] to assist him as needed. The students in the class deserve as much attention to their learning as [student].

I suggest a combination of half-day kindergarten and half-day Pre School. This has not been shared with her yet. [Parent] has already indicated to me that she wishes [student] to spend another year in kindergarten.

It would be the ultimate goal to serve all students with as individual an education as possible however; at this point the resources are not available. I also remind you that on October 15, [the elementary school] will be adding another very severe student, again without the resources that she needs.

The mission of our school is to provide a quality education for all students. I must be realistic and admit that without increased funding and staffing, our goal for [student] and the new student may not be realized at our site.

[Parent] is very frustrated. I understand her right to be the champion for her child, but I must be the keeper of the same flame for the other 515 students at my school.

If you have any realistic, doable suggestions for the school and the parent, please let me know.

Id. Personally identifiable information deleted by the Federal Complaints Officer. Emphases supplied by the Federal Complaints Officer.

The IDEA does not permit FAPE and LRE considerations by IEP teams to be determined by financial restrictions imposed by school districts. The Federal Complaints Officer finds that the authority of this student's IEP team to make lawful FAPE and LRE determinations was abrogated by at least the perception of relevant school district staff that the school district had placed determinative financial restrictions on the IEP team's decision making authority. In so finding, however, the Federal Complaints Officer is not finding that the actions of the school district have necessarily resulted in a denial of FAPE for this student. Ultimately, if the parents and the school district cannot agree on FAPE in the LRE for this student, then the parents' relief is to request a due process hearing, if they wish to pursue their disagreement with the school district in a forum that can provide determinative relief. The Federal Complaints Officer's Decision, and remedies, are limited to insuring the integrity of the IEP process, which is designed to determine FAPE in the LRE for all students with special needs covered by the IDEA.

REMEDIES

- 1) Within thirty (30) days of the date of the school district's certified receipt of this Decision, the director of special education shall submit a written statement of assurance to the Federal Complaints Officer that there are no financial restrictions in place that abrogate the FAPE and LRE decision making authority for this student's IEP team, or for any other IEP team of any other student that the school district is legally obligated to serve under the IDEA.
- 2) At the request of this student's parents, the school district shall provide the parents with further IEP meeting(s) sufficient to either reach consensus, or to demonstrate that, after adequately conducting such IEP meeting(s), consensus has not been reached, and that the parents have been adequately informed of their right to a due process hearing. For the purpose of complying with this remedy, the school district shall only be required to provide the parents with such IEP meeting(s), if the parent(s) request such meeting(s) within thirty (30) days of the complainant's certified receipt of this Decision, unless otherwise agreed to by the parties. If such IEP meeting(s) are requested by the parents,

the meeting(s) shall be commenced and completed no later than thirty (30) days from the date of expiration of the appeal time of this Decision, unless otherwise agreed to by the parties.

- 3) If an IEP meeting is requested and held as provided for in this Decision, a verbatim record of such IEP meeting(s) shall be made by the school district. This record may be electronically recorded, or recorded by court reporter – at the option of the school district. In either case, the school district shall take all necessary steps to insure that an intelligible record is created, and that the parents are timely provided, at no expense to them, a copy of this record.

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, December 13, 2002.

Charles M. Masner, Esq.
Federal Complaints Officer